III. Labor Arbitration and Failure to Disclose[1]

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In the outpouring of e-mails in memory of Dave Feller, one of our members wrote how she had an important arbitration decision vacated and that she had told Dave about it. Dave surprised her by giving her a big kiss on the cheek. Another member piped up and said that he had a decision vacated and Dave Feller never kissed him. If Dave Feller had known about my case he would have given me one swift kick in the behind!

First, the Bad News

California Code of Civil Procedure §1281.9(a)(4) provides that an arbitrator, on being appointed to hear a case, must, within 10 days, among other things, disclose past arbitration decisions where a party or a lawyer for a party, which includes the lawyer's firm and maybe any former firms, is involved in the current case. A party to the case then has 15 days during which it can disqualify the arbitrator.[2]

To remove the suspense, in *IATSE Local 16 v. Laughon*[3] (a non-labor arbitration case), there is no search for an appearance of bias, let alone actual bias, on the part of the arbitrator if that disclosure is not made. If the disclosure is made late, or not made properly, there can be no waiver of the arbitrator's failure to disclose. Now, I would like to stop there but my colleagues on this panel know that you all want the gritty details, so as much as I am chagrined to recite them, here they are.

It started when I was mediating a dispute between a local union, not an IATSE local, and a former officer. The union was in trouble because its long-time secretary-treasurer had ducked depositions. The court, as a result, ordered that he could not testify at trial. A large settlement to the plaintiff resulted, as well as a requirement that the union newspaper print an apology. Any breach of the

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[1]The first part of this paper is adapted in part from an address at "The Ultimate Arbitration Update" (Labor and Employment Law Section and Dispute Resolution Section, American Bar Association, Atlanta, Georgia, Aug. 8, 2004).

[2]Cal. Civ. Proc. Code §1281.9(a)

[3]*International Alliance of Theatrical Stage Employees Local 16 v. Laughon*, 118 Cal. App. 4th 1380 (2004).

settlement would result in an arbitration with me as the arbitrator (a clause I did not propose during the mediation).

The union did not apologize—quite the contrary. There was an arbitration, held without a hearing but on letter briefs and stipulations only, resulting in a $10,000 award that included attorneys' fees *against* the union, and a 3-page written award listing counsel, including the union-side firm (which eventually represented IATSE), immediately below the caption. (That award is hereafter referred to as the "apology arbitration".)

In the meantime, there was a discrimination action brought by a member named Charlotte Laughon against an IATSE local. That case settled, as I understand it, after multiple mediation tries. The settlement included a provision that Laughon would keep the terms of the settlement private, and another provision that if there were any breach of the settlement, it would be heard in arbitration by one of four named arbitrators, including myself. I, of course, had no knowledge of that settlement. Laughon was represented by two lawyers in the drafting of the settlement.

Shortly thereafter there was a claim that Laughon breached the settlement by discussing the settlement at a general union meeting. The union demanded arbitration for the alleged breach. Laughon, no longer represented, told the union's counsel that she did not care which of the four arbitrators heard the case and I was selected. Thereafter a lull occurred because Laughon was searching for new counsel to represent her.

The union's firm has represented unions in collective bargaining arbitration cases before me as neutral arbitrator for at least 30 years. In fact it appeared in the first case I ever heard. Laughon's lawyer had picked me in several collective bargaining cases, all of which had settled so I had never formally met him. I did not disclose the apology arbitration—the only non-collective bargaining arbitration award I had with the union's law firm. I had duly listed the apology arbitration in my database of such cases. I can only point to the long lapse of time before counsel was selected and my familiarity with counsel in collective bargaining matters, which is no excuse at all, for my failure to disclose.

During the course of the Laughon arbitration the union's lawyer introduced the apology arbitration award for persuasive purposes to show there can be damages awarded for breaches of settlement agreements, which, of course, I already knew because I wrote it. Full copies of the decision with union counsel's firm name on the

front were provided to me and to Laughon's lawyer. No issue was raised by anyone at that time concerning nondisclosure.

In due course the award issued in favor of the union, including attorneys' fees to it as the prevailing party in accordance with the settlement. Laughon moved to vacate the award on the basis of bias on my part for not disclosing the collective bargaining arbitrations I had decided involving the union's firm, for not disclosing the apology award, as well as claimed misconduct by my patently favoring the union in the conduct of the hearing.

The trial court denied the petition to vacate, after an evidentiary hearing, finding the following facts, among others:

1. The transcript of the hearing did not disclose bias in the hearing itself, but showed that I was even-handed in the conduct of the proceedings, including giving Laughon a continuance in the face of union opposition.
2. There was no actual bias to Laughon from the collective bargaining cases because, among other things, the union's counsel had lost all six of the cases his firm's database showed he had presented to me.
3. There was no bias from the nondisclosure of the apology award because Laughon's lawyer had it in full and made no objection, it was an award against the union's firm's client, and Laughon's lawyer had made a tactical decision not to protest the nondisclosure before the award.

Incidentally, during that litigation Laughon subpoenaed any records I had of collective bargaining cases with the union's firm, of which I had none except old billing records that I was loath to make public. I and my errors and omissions carrier objected on the basis that there was no disclosure requirement concerning those types of cases under California law. More on that later. Laughon dropped that request after the union agreed to make its database statistics available, but I don't think the union's database was complete. I think the union's counsel, who is very able, did not have that many lousy cases. In fact I think I remember a decision of which I was quite proud where social workers were admittedly being required to visit more foster children than was physically possible and I held that even a management rights clause had elements of good faith and fair dealing underlying it so it did not shield the employer in that case—but I digress.

On appeal in *Laughon*, the last of the trial court's findings were rejected, the appellate court determining, in a convoluted fashion, that it could find the facts for itself and was not bound by the trial court's findings.[4]

On appeal, as I've already told you, based on the *Code of Civil Procedure* (now added to by the state's Judicial Council[5]) the court held, among other things, that there can be no waiver of the strict disclosure requirements of the statutes requiring disclosure of prior awards that allow for disqualification of the arbitrator by notice given within 15 days of the disclosure. This was in spite of the court:

1. Noting that Laughon's lawyer stated in a deposition that when he was given the apology award he only glanced at it and did not think it was important.
2. Noting that neither myself nor the union's lawyer, at the time of the introduction of the apology award, had *affirmatively* informed Laughon's counsel, a lawyer, of what the law was and that he then had 15 days to disqualify me; the court finding that his possession of the award alone was insufficient to factually show there was the required disclosure even though that was self-evident from its face.
3. Stating that Laughon had no opportunity to move to disqualify the arbitrator after the award was handed to her counsel (even though there was an 8-day continuance in the case before it concluded, as the trial court had emphasized, not to mention the periods for briefing and writing the award).
4. Apparently choosing to intentionally not disclose that the apology award was against the union's firm's client, thereby negating any potential bias.
5. After relying on *Commonwealth Coatings,*[6] not taking into account that that decision did require at least a factual conclusion that whatever was not disclosed created the potential for bias. The court determined that the California statutes allowed for no such thing, thereby essentially im-

[4] *See* Laughon, *supra* note 3 at 1387.

[5] California Rules of Court, Appendix, Division VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[6] *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U. S. 145 (1968).

posing strict liability in the form of automatic *vacateur* for failure to disclose no matter what the failure amounted to in terms of perception of bias.

The California disclosure laws and the newer regulations were enacted in reaction to imposed arbitration after the *Gilmer*[7] decision ostensibly to protect lay consumers and employees who found themselves up arbitration without a paddle by having arbitration imposed upon them, and where there was the fear of "repeat player" bias because the arbitrator would seek repeat business from the entity imposing the clause by issuing awards in its or its counsel's favor. Incidentally, of course, being required to arbitrate deprives the consumer or employees of the right to a jury trial. These considerations should not have applied in *Laughon* where the agreement to arbitrate was the result of bilateral negotiations and where she was represented by counsel.

What the court found was that arbitrator bias was as the legislature declared it to be and because a failure to disclose was essentially *per se* bias, that was enough. The decision was vacated notwithstanding the conduct of the losing party and counsel. In discussing cases requiring at least the appearance of bias for *vacateur* the court noted:

> However, none of these cases involves section 1281.9 (a), which defines Kagel's nondisclosure as involving a matter "that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial."[8]

[As an aside, the court in *Laughon* remanded the case to the parties for a second arbitration. In that case, heard by an Academy member who did not read my decision before rendering his, the arbitrator made the same award I did with even greater damages awarded to the union than I awarded.]

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[7] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).
[8] *Laughon, supra* note 3, at n.6. *Contrast Fidelity Federal Bank v. Durga Ma Corp.*, 287 F.3d 1021 (9th Cir. 2004).

Now the Good Parts

What I have not disclosed so far is an issue that the court went out of its way to write about. The foregoing applies only to non-collective bargaining cases. The statute specifically exempts collective bargaining cases from the disclosure rules and the court said that was proper, that I did not have to disclose my cases with the union's firm because the legislature had decided that that kind of past contact was not bias *per se*.

I've talked in the past about the differences between collective bargaining arbitration on one hand and non-collective bargaining arbitration on the other.[9] Here, in my view, collective bargaining arbitration has, so far, dodged a bullet. There had been a concerted effort in the state legislature to keep labor arbitration out of the maw that was coming to make non-collective bargaining arbitration as unattractive as possible, at least when it was not bargained by the parties. Later, in an attempt to avoid preemption, the legislature also required the state courts through their judicial council to make the disclosure requirements even more convoluted for the same purpose.

I was appointed to a so-called "blue ribbon" committee made up of a few arbitrators, legislative staff, consumer advocates, plaintiff and defense lawyers, and others to write these rules. It was sort of like the proverbial sausage factory—you probably should be spared the details.[10] Fortunately nobody had labor arbitration in their gun sights and I was able to keep proposing expanded exemptions for labor arbitration from those rules, ending up with their not applying to: "An arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements."[11]

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[9]Kagel, *Presidential Address: Seeking a Vaccine: Avoiding the Sad Practices of Commercial Arbitration*, in Arbitration 2001: Arbitrating in an Evolving Legal Environment, Proceedings of the 54th Annual Meeting, National Academy of Arbitrators, eds. Grening & Briggs (BNA Books 2002).

[10]California Judicial Council Staff Report, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, March 31, 2002.

[11]Div. VI, Appendix Calif. Rules of Court Standard 3(b)(H), Dec. 13, 2002. Although these rules sought to incorporate existing statutory language, their effectiveness has not yet been tested to the extent that they add prohibitions or expand exemptions beyond that statutory language. They are not applicable to NASD arbitrations, being preempted by the Securities and Exchange Act of 1934. *Credit Suisse First Boston Corp. v. Grunwald,* 400 F.3d 1119 (9th Cir. 2005); *Jevne v. Superior Court* (*JB Oxford Holdings, Inc.*), 35 Cal. 4th 935 (2005). It remains to be seen if preempted by the FAA and/or the NLRA.

The reason for exempting labor arbitration is not because there cannot be bad conduct on the part of an arbitrator in terms of undisclosed relationships, but that the standards of labor arbitration are developed to the point where they are, at least generally, self-policing. That self-policing is not only because of the Academy-FMCS-AAA Code of Professional Responsibility, which does have some disclosure requirements.[12] It is primarily because of the professionalism of labor arbitrators knowing that if they do not call them as they see them they will be doing something else for a living. And the reason for that is the parties themselves, including their lawyers, agents, or representatives. There is plenty of information, however distorted, about labor arbitrators that circulates and keeps the parties well-informed about their potential arbitrators.

My understanding is that in a labor-management advisory committee meeting of the American Arbitration Association recently, full disclosure requirements of past collective bargaining cases was discussed as a precondition for appointment. A prominent

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[12]2. Responsibilities to the Parties ...

B. Required Disclosures

1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.

a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

2. When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, such activities must be disclosed before accepting appointment as an arbitrator.

An arbitrator must disclose such activities to an administrative agency if on that agency's active roster or seeking placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.

a. It is not necessary to disclose names of clients or other specific details. It is necessary to indicate the general nature of the labor relations advocacy or representational work involved, whether for companies or unions or both, and a reasonable approximation of the extent of such activity.

b. *An arbitrator on an administrative agency's roster has a continuing obligation to notify the agency of any significant changes pertinent to this requirement.*

c. When an administrative agency is not involved, an arbitrator must make such disclosure directly unless the arbitrator is certain that both parties to the case are fully aware of such activities. (Bold face type and italics in original.)

management attorney from Philadelphia was reported as stating, "That's just nuts." The idea went no further.

I don't think, however, that labor arbitrators should blithely ignore disclosures where the situation is more than routine. The appearance of bias standard still has a place in the collective bargaining area where appropriate and arbitrators should be sensitive to that. Maybe I'm now overly sensitive. In one instance I was selected by a statewide teachers' organization and a union of its employees for a case and I thought it best to disclose that one of its locals, represented by counsel from the statewide union, had not paid a bill of mine for several months. The organization's lawyer was concerned that that disclosure was embarrassing to the organization, and I had to explain to her that I was disclosing the information for its benefit so that if it lost the case it had been advised beforehand about the possible appearance of bias because of the nonpayment.

My experience with the consumer advocates and plaintiff attorneys was that they were willing to leave alone how labor and management did their dispute resolution, and it was not that they necessarily found labor arbitrators less venal than other arbitrators. I at least hope I caused them to recognize that how labor arbitration functions made it potentially less venal than how they perceived other forms of arbitration.

Nonetheless, given the Las Vegas situation as Matt Goldberg describes, there has to be a great deal of educational effort by labor, management, neutrals, and public and private provider organizations. They will all have to work very hard to keep labor arbitration free from legislation and court decisions that will impair its usefulness to the parties that jointly own that process. And they will have to work extra hard to keep courts, which will tend to lump all arbitration into the same pot, from mixing labor arbitration into the stew with mandatory employment arbitration.

The vice, of course, is illustrated in *Laughon.* In that case, unlike most other non-collective bargaining cases, strangely enough, there is a continuing relationship between the union and Laughon, who remains an activist member of the local. But that case does show what a lawyer or a party can do to try to pull a rabbit out of a hat if they lose a case, avoiding their own chosen method, in *Laughon* at least, of resolving their disputes on the merits.

So far, outside of *Laughon,* the disclosure rules have had limited impact even on non-collective bargaining arbitration in Califor-

nia.[13] But the lessons to be learned from *Laughon* are that an arbitrator cannot be casual about disclosure requirements, and can never be too careful. To paraphrase real estate agents, the watchwords need to be: Disclosure, disclosure, disclosure.

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[13]One case held that the discretion to disqualify an arbitrator based on disclosures lies with the parties, not, for example, with the American Arbitration Association under its rules even if they are incorporated into a contract. The result was to vacate the award in a construction case where a party had objected to an arbitrator's appointment within 15 days of receiving the disclosure statement and the AAA determined there was no good cause for disqualification. *Azteca Construction, Inc. v. ADR Consulting, Inc.,* 121 Cal. App. 4th 1156 (2004).

In a recent case issued after this paper was presented in May 2005, a California appellate court vacated a $1.8 million award on the basis that the arbitrator, at the time of his initial appointment in the original case, failed to disclose that he would take further arbitration assignments with the law firm for the winning party. He did accept such appointments during the pendency of the original case in violation of Judicial Council Standard 12.b of the Judicial Council rules. *Ovitz v. Schulman,* 133 Cal. App. 4th 830 (2005). The arbitrator did disclose the new appointment, and had conducted a preliminary hearing in the original case before the second case was abandoned, but his failure to disclose that he would take new assignments at the time of his original selection required vacation of the award in the face of the timely objection made by the losing party when the new appointment was disclosed.