II. Careful Where You Step

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One aspect of the work that we do that I find particularly fascinating is that we are never quite sure what we are walking into when we accept a case. I was introduced to the matters here under discussion rather routinely—selected from Federal Mediation & Conciliation Service (FMCS) panels. No signs or portents accompanied the letters notifying me of the selections. If I had known then what I know now, I would have demurred. As someone once said about being ridden out of town on a rail, if it weren't for the honor, I'd just as soon walk.

It would be unwise and perhaps self-serving to discuss the facts of these cases in all of their boundless intricacies. After all, a lawyer who presses his own suit has a fool for a dry-cleaner. Some background is needed, however. The FMCS selections were preceded by extensive litigation—motions to compel arbitration, duty of fair representation (DFR) suits, appeals to state and federal courts—until the parties finally agreed to proceed to arbitration. The grievants, Officer A and Officer T, were no strangers to civil process. Several years before, they were both terminated. The terminations were duly grieved. When each decided to retain private counsel, the union, which had represented the two in the prior steps of their grievances, withdrew. Motions to compel arbitration led to their cases being heard before two separate arbitrators, each of whom overturned the respective discharges. This litany of litigiousness should have alerted me to the train wreck ahead.

Following their reinstatement, both grievants became very vocal in their opposition to the union. They argued before the Mayor and City Council that a recently negotiated labor contract should not be approved. The grievants filed additional DFR claims to recoup the moneys that they had expended in defending the earlier terminations. They tried to encourage others to join their campaign against the union. Discussions with fellow officers about the union became increasingly confrontational. Friction at headquar-

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ters developed to the point where the Chief of Police ordered officers not to discuss the controversial issues involved. He coupled the order with a warning that inappropriate behavior and conduct impairing operational efficiency would be thoroughly investigated.

Officer T became subject to a spate of charges, some of which were tied to violations of the Chief's above noted "gag order" and subsequent orders from the Chief about making public statements and the release of department information. Other charges involved Officer T's conduct during internal affairs investigations into these alleged violations. Matters continued to escalate. Officer T accused the union of corruption, namely building a slush fund with excess moneys it had collected from the city to pay for health insurance. Meanwhile, Officer T filed a number of charges of his own, including one alleging harassment because of his views. Following a fracas during an internal affairs investigation, Officer T was placed on administrative leave. After his termination, the grievant continued to make public statements about corruption in the department and in the union. Parenthetically, none of his allegations was proven.

When finally issued, Officer T's Termination Notice listed 13 separate allegations of misconduct. Briefly summarized, they alleged instances of unprofessional behavior, insubordination, and the unauthorized release of department information. At the arbitration, the grievant argued that the discharge was the result of a vendetta against him by the department, the union, and certain individual officers; and that he was a "whistle blower" who shed light on union, city, and department corruption and underhanded or improper activities. Although not all of the charges against Officer T were sustained, I found clear and convincing evidence that there was just cause for his discharge.

The other officer, Officer A, was accused of male-on-male sexual harassment. He also was vocal in his opposition to the union, although apparently less so than Officer T. Nonetheless, Officer A was ultimately disciplined for creating a hostile work environment resulting from inappropriate, sex-based behavior toward certain of his fellow officers. Officer A raised a number of procedural and evidentiary defenses, none of which were sufficient to overturn the credible evidence in support of the charges against him.

Every facet of both cases was examined and debated and challenged in minute detail, starting with pre-hearing discovery through the filing of voluminous briefs. The records consumed

thousands of pages of documents and transcript. No bit of gravel was left unturned. These cases were literally litigated to death—or so it would appear. After mounting opposition on every conceivable level, it now seems naive to the point of absurdity to expect that these grievants would consider my awards to be "final and binding."

Both filed motions to overturn my awards based on a number of grounds. Argument focused, however, on "nondisclosure" of appointments to the Las Vegas Police Protective Association (PPA) and Las Vegas Metro Police Managers and Supervisors' Association (PMSA) contract panels for a neighboring law enforcement agency, the Las Vegas Metro Police Department (Metro). According to the grievants, the nondisclosures were violative of the FMCS and Academy Codes of Professional Responsibility, and demonstrated "evident partiality," one of the statutory grounds for vacating an arbitrator's award.[1]

Metro's connection to the arbitrations was infinitesimal. Remember the slush fund? The union bought health insurance from a group plan whose membership was drawn from a number of law enforcement agencies in the area. Metro's PPA and PMSA were also participants in the plan. This fact was not even worthy of a footnote in either award. The award in Officer T's case was 98 pages. The word "Metro" appears only twice: Reference was made to the fact that Officer T had been represented by a Metro sergeant in one of many internal affairs investigations; and, in a footnote, it was stated that Metro might have conducted an investigation into the conduct of a city council member, one of the instances cited by Officer T as evidence of corruption. Metro was not mentioned at all in Officer A's case.

Some chronology is in order. I was appointed to the Metro PPA panel in July 2001. I updated my resume July 31 to include reference to the appointment, but it is unclear whether I sent the update to the FMCS at that point, or whether this was the bio that the FMCS provided with the panel list. I was selected to hear the grievants' cases in October. In a November 2001 teleconference to discuss scheduling, the parties requested that I furnish awards I had rendered in police cases. I sent one from the previous year in which I sustained the discharge of a Metro police officer. I was appointed to the PMSA panel in January 2002. During a prehearing discovery conference and at later points in the hearing, I

[1]Nev. Rev. Stat., §38.145.

mentioned that I was familiar with Metro, and had performed work for it.

The grievants argued that my conduct violated Section 2B of the Code.[2] The Code requires disclosure of a consultative, managerial, or representational relationship with, or a pecuniary interest in, a company or union "involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve." I had no consultative, representational, or managerial relationship with Metro, its PPA, or its PMSA, nor any pecuniary interest in these entities. Nor were they parties "involved in a proceeding" with the city and the two individual grievants.

Rule 2B(2) requires disclosure when the 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." My work with Metro was strictly as a neutral. Finally, an arbitrator must disclose "any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality." There are no such relationships or circumstances here. To the contrary, the appointment to another law enforcement permanent arbitration panel would seem to provide strong evidence of impartiality and acceptability by both employers and employee representatives in the field.

Astonishingly enough, lower court judges granted the motions to vacate.[3] One neglected to state the grounds for granting the motion; the other erroneously declared that I was a member of the PPA. Be that as it may, the Academy graciously accepted the task of writing an *amicus* brief when the cases were appealed.[4] The brief argued that no disclosure was required under the Code or under Nevada Law, and there was no showing of evident partiality. The *amicus* brief framed the issue narrowly: Whether previous or current service as a neutral arbitrator for a particular employer or union is a relationship requiring disclosure under the Code, absent some personal relationship or other special circumstance mandating disclosure.

Because I was selected through the FMCS, their disclosure rules applied. Their rules incorporate the Code. Recognizing that the

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[2] *See* www.naarb.org.
[3] *See* Clark County (Nevada) District Court Case nos. A412710 & A412546.
[4] *See* Nevada Supreme Court Case nos. 42148 & 42641.

Code does not have any bright line rules for disclosure, the brief declares that it looks to the facts and circumstances of each case to determine the gravity of the misconduct and the extent to which the standards had been violated.

The Code reflects a labor-management context. Unlike commercial arbitration where parties and representatives often engage in a single transaction, "labor arbitration involves a community of players who can readily learn whatever they wish to learn about the other participants."[5] Thus, disclosure is not necessary unless some feature of a relationship "might reasonably appear to impair impartiality."[6]

The brief then quoted from the Academy's Formal Advisory Opinion No. 22,[7] which answered the issue presented in the negative. The timing of panel appointments drew similarities to the facts in Opinion 22. There were also some significant differences, however. I was appointed by each of the parties to the Metro panels and so I was not an employee of either party. The appointment reflected the parties' mutual recognition of my impartiality. Finally, there were no common parties to the city's two arbitration cases. Accordingly, my service on the Metro panel, it was argued, did not reasonably raise a question about my impartiality. Without a duty to disclose, there could be no failure to disclose, and hence no violation of the statute.

The *amicus* brief then examined the variety of "evident partiality standards" in the event the Code was determined not to apply. Some courts use "appearance of bias"; others, a demonstration of actual bias; while others rely on a "reasonable impression of partiality" test. The Academy brief urged the applicability of the last of these, which emanated from Justice White's concurring opinion in *Commonwealth Coatings v. Continental Casualty Company*.[8] White wrote that the relationship must be more than a trivial one for an award to be overturned for nondisclosure.[9] This "middle ground" test has been widely adopted in state and federal courts, including the Ninth Circuit.[10]

Viewed through the eyes of a reasonable person, the Academy brief asserted that the facts of these arbitrations did not create

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[5] Quoted from the National Academy brief.
[6] *Id.*
[7] *See* www.naarb.org.
[8] 393 U.S. 145 (1968).
[9] *Id.* at 150.
[10] *See Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994).

an impression of possible bias. There was no employment relationship with Metro; the appointment reflected impartiality and integrity; there was no guarantee that any work would result from the appointments; and there were no common parties. A survey of pertinent case law shows that arbitration awards are vacated under the evident partiality test because the arbitrator failed to disclose a direct financial or personal relationship, or some other connection to a party involved in the arbitration. Even under a "mere appearance of bias" standard, as used in only 1 of 36 jurisdictions adopting the Uniform Arbitration Act, the arbitrator must have more than a trivial connection with a party.

In its brief to the Nevada Supreme Court, the city also argued that there was no duty to disclose under either the Code or Nevada law. In addition, it urged that the grievants had ignored the disclosures that were made, and waived their claims of evident partiality. It cited a recent Hawaiian Supreme Court case, *Daiichi v. Lichter*,[11] "waiver" was defined, in the arbitration context, as consisting of "knowledge, actual or constructive . . . and the failure to act on that knowledge."[12] The Nevada Supreme Court had issued a similar ruling in a case where a losing party failed to raise issues of bias. It held that a party may not "lie in wait" and raise allegations of bias or impropriety after a court has ruled on the merits.[13] The fact that I had some kind of working relationship with Metro and its unions was clearly known to the grievants. Despite this knowledge, they made no further inquiry or investigation.

After the city filed its appeal, the Ninth Circuit issued its opinion in *Fidelity Federal Bank v. Durga Ma*,[14] decided in October 2004. In that case, the Ninth Circuit determined that a party to an arbitration waived its right to seek *vacatur* because it had constructive notice of an arbitrator's potential connections to the attorneys for one of the parties and failed to make objection either to the appointment or the failure to make disclosure until after an interim award was issued.

The parties in *Durga Ma* had agreed to appoint a three-arbitrator panel. Each side would pick an arbitrator, who, in turn, would select a third, neutral arbitrator. Together with the attorneys for both sides, the three agreed to "act neutrally." Subsequently,

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[11] 82 P.3d 411b (2003).
[12] *Id.* at 432.
[13] *See Ainsworth v. Combined Insurance Cos.*, 105 Nev 237 (1989), *modified on other grounds*, *Powers v. United Services Auto Ass'n*, 114 Nev. 690 (1998).
[14] 386 F.3d 1306 (9th Cir. 2004).

neither party requested a disclosure statement from any of the arbitrators; none was provided; and neither party objected to the failure to provide a disclosure statement. It was only after a unanimous award was issued, and the question of attorneys' fees arose, that it was disclosed that Durga Ma's attorneys had extensive personal, family, and business connections to its party arbitrator.

On appeal, Fidelity asserted that the award should be set aside because of the "evident partiality" of the arbitrator selected by Durga Ma. Under the Federal Arbitration Act, whose procedural rules applied, a court might vacate an arbitration award where there was evident partiality or corruption. "Evident partiality" exists "when facts that are not disclosed" "create a 'reasonable impression of partiality.'"[15] The Ninth Circuit determined that it did not need to decide whether Durga Ma's arbitrator became a "neutral arbitrator" or whether he displayed evident partiality when he failed to disclose his relationship with Durga Ma's attorneys. Fidelity had waived its right to seek *vacatur* because it had constructive notice that such connections existed, but it had failed to object at any stage of the proceedings or to seek information about those connections. The fact that a party and/or its attorneys had selected that arbitrator put Fidelity on notice that there was some personal or professional connection to the individual that they had selected.

The court also noted that there were some federal courts that have held that *actual* rather than *constructive* notice must exist for the waiver to apply. However, the application of the waiver doctrine was "the better approach in light of our policy of favoring the finality of arbitration awards."[16] Absent any charge or evidence of actual bias, or any indication that the award was anything but fair, the holding was consistent with the policy favoring arbitration as a "speedy and cost-effective means of resolving disputes." The waiver principles thus applied by the Ninth Circuit recognized the significance of the final and binding nature of arbitration awards by imposing a burden of expressing a partiality objection before a decision is reached.

Under the circumstance presented by the cases in which I was personally involved, the waiver doctrine, the Code, and the law defining evident partiality may ultimately be sufficient to override the after-the-fact challenges mounted by these parties, who

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[15] *Id.*, slip op. at 15357, *citing Schmitz v. Zilveti*, *supra* note 10 at 1046.
[16] *See Id.*, slip op. at 15359.

were plainly unhappy with the outcome. If there is anything to be learned from this experience, it is that not only must we be careful where we may unknowingly step, we must also be careful what we wish for. As many of us seek to expand our practices into areas traditionally reserved for litigation, both civil and un-, it is only a matter of time before we find ourselves up to our eyeballs in litigators who are unwilling to take "no" for an answer, and have the resources to fuel their intransigence. These individuals, and the judges who come to rule on their motions and appeals, may be either total strangers or unsympathetic to the labor-management process. Court deference to the final and binding nature of labor-management arbitration is the bedrock principle on which our authority is maintained. The more that principle is eroded by cases such as these, the less effective we can be in providing a "speedy and cost-effective means of resolving disputes."