Daily Journal
LOS ANGELES
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THURSDAY, OCTOBER 21, 2010

A Profound Blow Against Arbitration

By Timothy D. Reuben

The 1st District Court of Appeal has concluded that an arbitrator ruling on a dispute over legal fees had the appearance of bias simply because he was a lawyer at a big firm whose practice sometimes included representing lawyers in fee disputes. In *Benjamin, Weill & Mazur v. Kors*, 2010 DJDAR 15482, Justice J. Anthony Kline, writing for a unanimous panel (Justices Paul Haerle and James Richman concurring), reversed the confirmation of a $102,287 fee award because attorney Sean M. SeLegue, the chief arbitrator of a three arbitrator panel, did not disclose that he was counsel on another unrelated case representing lawyers in a fee dispute. Frankly, this conclusion is somewhat denigrating to the professional character of lawyers and would-be arbitrators. Moreover, if lawyers who represent other lawyers from time-to-time are all arguably biased against clients who contend no fees are due, some of the most qualified people are going to be eliminated from arbitrating the claim. And where on this slippery slope does the logic of this opinion stop? Why aren't all lawyers biased against any client who disputes a fee? Presumably all lawyers have experienced a client challenging a fee — and may not have appreciated the experience. Based on this appellate court's analysis, an arbitrator's ruling can always be challenged — if you don't like the ruling, you can always find some undisclosed fact in any experienced lawyer's or retired judge's background that raises some arguable "doubt" about impartiality.

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Particularly galling is that the case involves a fee dispute administered not by one of the private associations, but by none other than the esteemed Bar Association of San Francisco (BASF). The underlying facts are simple: Nancy Kors, a psychologist, was sued and retained Benjamin, Weil & Mazur to defend her. The firm ultimately forced a dismissal of the claim and then sought an award of legal fees for Kors as the prevailing party. The court denied the fees motion and Kors appealed but that ruling was affirmed. Kors then did not want to pay the firm's unpaid fees of about $70,000, so the fee dispute ultimately went to the BASF for binding arbitration pursuant to the fee agreement. The BASF appointed three arbitrators, including SeLegue as chief plus two others including a layperson, each member having one vote. The panel ultimately awarded all the fees plus interest and Kors opposed a petition to confirm, claiming various defects including non-disclosure pursuant to Code of Civil Procedure Sections 1281.9 and 1286.2. Kors contended that SeLegue failed to disclose "matters 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."

Turns out that during the same period he was acting as an arbitrator, SeLegue was also representing other lawyers in a case before the state Supreme Court (*Schatz v. Allen Matkins et al.* (2009) 45 Cal 4th 557). Kors also attached a description of SeLegue's legal practice from his firm's Web page, which states: "[a]ttorneys who face charges of misconduct...often turn to Mr. SeLegue..." and that his "business litigation background and extensive experience with the unique issues and dynamics involved in claims against lawyers allow him to provide effective representation of his clients, which include some of the nation's largest law firms." So while there is no debate that SeLegue had no relationship to the parties or any other connection with the arbitrated dispute, Kors argued that the fact that he represented lawyers and law firms — something that was publicly known and which made SeLegue extremely qualified to be a fee arbitrator — had to be formally disclosed. Judge Thomas Maddock of the Contra Costa County Superior Court rejected this argument and confirmed the fee award.

On appeal, Benjamin, Weil & Mazur argued that SeLegue's failure to disclose that he was representing lawyers in a fee dispute could not "under any stretch of the imagination be considered a matter for disclosure" and that Kors' "claim reduces to nothing more than an argument that any attorney who represents law firms should be considered biased in favor of law firms...nothing in reason or law supports this argument." But the firm clearly underestimated the appellate court's imagination, because it reversed and vacated the award, holding that "SeLegue had a duty to timely disclose to the parties the nature of his legal practice, including the fact that he was then representing a law firm engaged in a fee dispute with a former client." While acknowledging that "SeLegue is a distinguished lawyer in a highly regarded law firm" and that there was no assumption of "actual bias," the opinion contends that the issue is "whether the nature of his legal practice... 'could' cause a person 'to reasonably entertain a doubt' that he would be able to impartially arbitrate the instant controversy." Based on this court's analysis, one would expect virtually every layperson to entertain a doubt that any lawyer could impartially rule on any attorney/client fee dispute!

The opinion notes the long recognized and unremarkable fact that "[p]rivate arbitration...is a commercial enterprise" and that "arbitrators' impartiality might be undermined by their economic interest." The court goes on to conclude that "a person [could] entertain reasonable doubt whether SeLegue's dependence on business from lawyers and law firms sued by former clients would prevent him from taking the side of a client in a fee dispute with a former law firm, because doing so might 'put at risk' his ability to secure business from the lawyers and law firms whose business he solicits."

The issue of economic bias has long been a topic of concern in connection with the impartiality of neutrals; indeed, this author described the arbitration process as *"a system fraught with injustice"* 14 years ago. See *"Binding Arbitration: A System Fraught With Injustice,"* ADR Newsletter, Volume 6, Issue 11, (October 1996). Consciously or unconsciously, arbitrators may be swayed by the fact that some lawyers before them are potentially or actually "repeat customers." Indeed, today even sitting jurists could arguably be biased if ever considering leaving the bench for the more economically lucrative career as a paid neutral. Nonetheless, the arbitration system — that parallel adjudicatory process — has thrived with a number of reputable organizations competing for the business and many members of our bench retiring to become full time neutrals. And our jurisprudence has progressively developed some exceptions and legal protections against potential risks of unfairness in certain contexts such as the arbitration of employment claims where employers are required to pay for the cost of the process.

But here of course, no one was a repeat customer and presumably SeLegue was sitting through the BASF pro bono. And but for this opinion, few likely would ever have heard of, much less cared about, the panel's otherwise unremarkable $100,000 ruling, nor could any lawyer likely have been economically affected by it — least of all SeLegue, who certainly did not need to rule for Benjamin, Weil & Mazur to secure more business! And to insult the good efforts of one lawyer based on an illogical presumption that he could arguably appear to have an economic bias because of his practice is just not good law. Do prosecutors necessarily have a bias against criminal defendants when they take the bench? Do experienced corporate attorneys automatically have a bias against consumers? Do defense lawyers hate all plaintiffs and vice versa? Of course not! Frankly, prosecutors may hold other prosecutors to higher standards and business lawyers may be justifiably distrustful of business tactics, which they understand better due to their experience. Lawyers have independent minds and when they take on pro bono activities such as fee arbitration, that represents a commitment to fairness and recognition of the importance of the integrity of the process. Certainly we do not enjoy a perfect reputation amongst the public - William Shakespeare said: "Let's kill all the lawyers." But as opposed to protecting litigants, this opinion sadly reinforces the age-old public bias that lawyers do what they do without regard to justice and only for economic gain.

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