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# Disqualification of a neutral arbitrator on statutory and judicial grounds

## CODE, STANDARDS, PROCEDURAL VIOLATIONS, AND TIMING

The subject of mandatory arbitration agreements often elicits strong opinions from attorneys. Defense attorneys often contend that arbitration is an efficient and fair process, whereas plaintiffs' attorneys often decry the unfairness of the process, due to often limited discovery, confidentiality, and a more conservative decision maker rather than a jury of peers. Both sides sometimes lament the limited basis on which parties can appeal from an arbitrator's award.

One option sometimes available to a party unhappy with an arbitrator's rulings during the course of an arbitration proceeding or with the results of an arbitration is to seek to have the arbitrator disqualified. In California, an arbitrator can be disqualified on several statutory and judicial grounds.

As discussed below, there are statutory grounds for arbitrator disqualification, as well as case law requiring disqualification due to bias, conflicts of interest, or misconduct. A common ground for arbitrators to be disqualified arises out of the statutory disclosure requirements. Therefore, it is helpful to offer a brief discussion of the disclosure requirements.

### Statutory grounds for disqualification

There are delineated statutory grounds for disqualification. California Code of Civil Procedure section 1281.91 establishes multiple mechanisms for arbitrator disqualification, including: (1) failure to comply with disclosure requirements under section 1281.9; (2) disqualification based on information in a compliant disclosure statement; and (3) disqualification based on grounds specified in Code of Civil Procedure section 170.1.

### Disclosure rules

California law imposes comprehensive disclosure requirements on neutral arbitrators through both statutory mandates and judicial ethics standards. Code of Civil Procedure section 1281.9, subdivision (a) requires a proposed neutral arbitrator to disclose "all 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…"

Pursuant to section 1281.9, arbitrators must disclose within 10 calendar days of nomination all matters that could cause a reasonable person to doubt their impartiality. This includes seven specific categories: judicial disqualification grounds, ethics standards requirements, prior case history with parties or counsel, attorney-client relationships, professional and personal relationships, and, in consumer arbitrations, recent solicitations by arbitration companies.

The California Judicial Council's Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("Ethics Standards") expand these requirements through Ethics Standard 7, which includes several specific categories covering family relationships, financial interests, discriminatory organization membership, professional discipline, and physical impairments. Additionally, Ethics Standard 12 requires the arbitrator to disclose whether they will entertain offers of employment or other professional relationships, including offers to serve as a dispute resolution neutral in another case.

The disclosure duty under Ethics Standard 7(c)(2) is continuing, applying from nomination until the conclusion of the arbitration, with supplemental disclosures required within 10 calendar days after the arbitrator becomes aware of any new matter. Enhanced disclosure obligations apply in consumer arbitrations pursuant to Ethics Standard 8, which requires additional information about provider organization relationships and case statistics.

Further, the arbitrator must also disclose any grounds specified in Code of Civil Procedure section 170.1, which is the general statute that provides for the disqualification of superior court judges.

It is important for arbitrators to abide by these disclosure requirements or risk being disqualified. Similarly, parties and counsel who are not diligent about ensuring disclosure compliance or taking timely action to disqualify an arbitrator where warranted may find they have waived the right to do so.

### Disqualification based on disclosure requirements

If the arbitrator fails to comply with the disclosure requirements entirely, then Code of Civil Procedure section 1281.91, subdivision (b)(1) provides that a party can serve a notice of disqualification within 15 calendar days thereafter, and the arbitrator is automatically disqualified. Moreover, if the arbitrator does provide timely disclosures, a party can also disqualify the arbitrator based on these disclosures.

### Disqualification based on Code of Civil Procedure section 170.1

If any ground specified in section 170.1 exists, then Code of Civil Procedure section 1281.91 provides that a neutral arbitrator shall disqualify themselves upon demand of any party made before the conclusion of the arbitration proceeding.

Section 170.1 provides a list of circumstances requiring the disqualification of judges, which applies to arbitrators as well. These circumstances include: where the arbitrator has personal knowledge of disputed evidentiary facts concerning the proceeding, the arbitrator served as a lawyer in the proceeding or as a lawyer for a party in the proceeding, or the arbitrator has a financial interest in the subject matter of the proceeding.

Further, section 170.1 also requires disqualification if the arbitrator believes his or her recusal would further the interests of justice, if the arbitrator believes there is a substantial doubt as to his or her capacity to be impartial, if a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial, bias or prejudice toward a lawyer in the proceeding, or if by reason of a physical impairment, the arbitrator is unable to perceive the evidence or unable to properly conduct the proceeding.

### Disqualification based on judicial standards for bias and conflicts of interest

In addition to the statutory basis for disqualification, there is also case law setting forth when arbitrators shall be disqualified. There exists considerable California case law interpreting when arbitrators must be disqualified for bias or conflicts of interest. In *Honeycutt v. JPMorgan Chase Bank, N.A.* (2018) 25 Cal. App.5th 909, 931, the Court of Appeal emphasized that arbitrator disclosure rules are "strict and unforgiving" because "the public deserves and needs to know that the system of private justice that has taken over large portions of California law produces fair and just results from neutral decision makers." The *Honeycutt* court held that an arbitrator's failure to disclose service in other pending arbitrations involving counsel for one party violated ethics standards requiring disclosure of matters that could cause reasonable doubt about the arbitrator's impartiality.

The standard for bias-based disqualification requires an objective assessment of whether circumstances would cause a reasonable person to doubt the arbitrator's impartiality. In *Mahnke v. Superior Court* (2009) 180 Cal.App.4th 565, 579, the court stated that "unless a reasonable member of the public at large, aware of all of the facts, would fairly entertain doubts concerning the [arbitrator's] impartiality, the arbitrator is not subject to disqualification." However, the standard is strict when it comes to actual conflicts of interest or undisclosed relationships.

In *Grabowski v. Kaiser Foundation Health Plan, Inc.* (2021) 64 Cal.App.5th 67, 72, the court found that an arbitrator's ex parte communication with one party's counsel created grounds for disqualification and award vacatur, noting that such communication "certainly qualifies" as a matter that could cause reasonable doubt about the arbitrator's ability to be impartial. The *Grabowski* court emphasized that arbitrators have a continuing duty to disclose all matters that could affect their impartiality throughout the arbitration process.

### Relationship-based disqualification

California courts have established that various types of undisclosed relationships can mandate arbitrator disqualification. In *Neaman v. Kaiser Foundation Hospital* (1992) 9 Cal.App.4th 1170, 1177, the court held that an arbitrator who had previously served as a party arbitrator for one of the parties, rather than as a neutral arbitrator, was required to be disqualified for failing to adequately disclose this prior relationship. The court found that merely disclosing "prior service as an arbitrator in Kaiser matters" was insufficient when the arbitrator had actually served as the respondent's advocate rather than as a neutral.

The case of *Ceriale v. AMCO Insurance Company Co.* (1996) 48 Cal.App.4th 500, 506-507, demonstrates how indirect relationships can create disqualifying conflicts. In *Ceriale*, the court vacated the arbitration award where the arbitrator failed to disclose that she represented a party in another arbitration proceeding in which one of the attorneys from the current case served as arbitrator. The court found that "a reasonable person might have an impression of possible bias under the instant facts."

Financial relationships can also trigger mandatory disclosure and potential disqualification. However, in *Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 Cal.App.4th 468, 478, the court declined to require disqualification where the arbitrator had no personal financial interest in his employer's business relationship with one of the parties. The court emphasized that "a neutral arbitrator who has no pecuniary interest in profits generated by his employer's business relationship with a party or a party's representative has no substantial business relationship with the party" and therefore no duty to disclose.

### Disqualification due to procedural misconduct and exceeding authority

California courts will also require arbitrator disqualification for procedural violations that deny parties fundamental fairness. In *Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, the Court of Appeal found that the arbitrator exceeded his authority by precluding a party from having independent representation present during the arbitration. The court held that such conduct violated the party's common law right to a fair hearing and constituted grounds for vacating the award under Code of Civil Procedure section 1286.2, subdivision (a)(4).

The court in *Azteca Construction, Inc. v. ADR Consulting, Inc.* (2004) 121 Cal. App.4th 1156, 1167-1168 established that parties cannot waive California's arbitrator disqualification provisions in favor of private arbitration organization rules. When the arbitrator refused to disqualify himself despite a timely demand based on disclosed conflicts, the court held this constituted a violation requiring vacation of the award because "there is no doubt that these statutes were enacted primarily for a public purpose" and "the neutrality of the arbitrator is of such crucial importance that the Legislature cannot have intended that its regulation be delegable to the unfettered discretion of a private business."

### Standards for determining if disqualification is required

California courts apply an objective standard when determining whether arbitrator disqualification is required. In *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 936, the Court of Appeal applied the "impression of possible bias test," noting that it is an objective test requiring a reasonable impression. The court emphasized that an arbitrator's failure to disclose any matter that might create an impression of possible bias is grounds for vacating the award.

## Procedural requirements and timing

California imposes strict procedural requirements for seeking to disqualify an arbitrator. Pursuant to Code of Civil Procedure section 1281.91, any party entitled to receive the disclosure must serve notice of disqualification within 15 calendar days after: (1) the proposed arbitrator fails to comply with section 1281.9's disclosure requirements, or (2) service of the disclosure statement if the arbitrator complies with disclosure requirements.

The right of a party to disqualify a proposed neutral arbitrator pursuant to section 1281.91 is waived if the party fails to serve a timely notice, unless the proposed arbitrator makes a material omission or material misrepresentation in their disclosure. However, this waiver does not limit the right to vacate an award pursuant to section 1286.2 or to disqualify an arbitrator pursuant to any other law or statute.

Except as provided in Code of Civil Procedure section 1281.91, subdivision (d) regarding section 170.1 grounds, no notice of disqualification may be given after a hearing on any contested issue of fact relating to the merits or after any ruling by the arbitrator regarding any contested matter. This creates a strict deadline that prevents parties from waiting until after an adverse ruling to challenge the arbitrator's qualifications. Section 1281.91(d) provides that if any ground specified in section 170.1 exists, the arbitrator shall disqualify himself or herself upon the demand of any party made before the conclusion of the arbitration proceeding.

In *Roussos v. Roussos* (2021) 60 Cal.App.5th 962, 973-977, the Court of Appeal clarified that parties cannot contract away California's mandatory disqualification protections, even when they have previously agreed to use a specific arbitrator. The court in *Roussos* held that an arbitrator remains a "proposed neutral arbitrator" subject to disclosure and disqualification requirements for each new arbitration, and parties cannot waive these statutory protections through contractual provisions.

The waiver provisions do contain important exceptions. A party does not forfeit its right to vacate an arbitration award when the arbitrator's initial disclosure contained a material omission regarding its intent to entertain employment offers from parties or their attorneys. (*Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 846.) In *Ovitz*, the court held that the waiver rule applies "only when the proposed arbitrator has made the requisite disclosure," and therefore Schulman did not waive her right to challenge the arbitrator when his initial disclosure contained a material omission.

Under Code of Civil Procedure section 1286.2, subdivision (a)(6)(A), a party may move to vacate an arbitrator's award after its issuance where the arbitrator "failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware."

However, courts have held that a party that learns of a ground for disqualification prior to an arbitration hearing forfeits the right to move to vacate the award after the arbitration. The court in *Cox v. Bonni* (2018) 30 Cal.App.5th 287, 306, concluded that a party may not "passively reserve the issue for consideration after the arbitration has concluded."

## Post-award remedies

Code of Civil Procedure section 1286.2 provides six mandatory grounds for vacating arbitration awards, including grounds based on arbitrator disqualification or misconduct, as well as fraud, corruption, arbitrators exceeding their powers, and substantial prejudice from procedural violations. Courts "shall vacate the award" if they determine that an arbitrator failed to disclose within the required time a ground for disqualification of which the arbitrator was aware or was subject to disqualification but failed to disqualify upon timely demand. The statute also requires vacatur for corruption of any arbitrator or substantial prejudice from neutral arbitrator misconduct.

In *Ovitz v. Schulman*, the court emphasized that "on its face, the statute leaves no room for discretion. If a statutory ground for vacating the award exists, the trial court must vacate the award." However, the actual awareness requirement is strictly construed. In *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 903, the court clarified that section 1286.2 requires actual awareness by the arbitrator of facts that are required to be disclosed, not inquiry or constructive awareness.

Importantly, as discussed in *Ovitz*, when an award is vacated for arbitrator disqualification, the result is not preclusion of arbitration, but rather, a new arbitration proceeding with a properly qualified arbitrator. This ensures that the arbitration process remains viable while maintaining the integrity of the neutral decision-making function.

## Conclusion

California has implemented significant updates to arbitrator disclosure requirements effective January 1, 2025. The amended section 1281.9 adds new disclosure requirements for consumer arbitration solicitations by private arbitration companies within the preceding two years. This addresses concerns about improper marketing practices in the arbitration industry.

As discussed above, there are various statutory and judicial grounds to disqualify an arbitrator. Arbitrators must pay attention to and follow disclosure requirements and avoid situations 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. It is also important for parties and counsel to be diligent about ensuring disclosure compliance and taking timely action to disqualify an arbitrator when warranted in order to avoid waiver of the ability to disqualify an arbitrator.

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