SUPREME COURT COPY

Case No. S165906

IN THE

SUPREME COURT OF CALIFORNIA

RANDAL D. HAWORTH, M.D., F.A.C.S.,
THE BEVERLY HILLS SURGICAL CENTER, INC.,
Petitioners

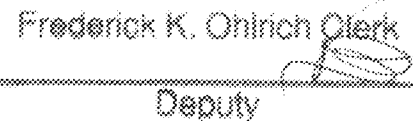
SUPREME COURT
FILED

vs.

OCT 14 2008

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent,

Frederick K. Ohlrich Clerk



Deputy

SUSAN AMY OSSAKOW
Real Party in Interest.

After a Decision By the Court of Appeal,
Second Appellate District, Division Five
Case No. B204354

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

FACTUAL BACKGROUND 2

PROCEDURAL BACKGROUND 5

LEGAL DISCUSSION

I. A VACATUR ORDER UNDER SECTION 1281.9 REQUIRES RESOLUTION OF A PREDOMINATELY LEGAL QUESTION OF MIXED LAW AND FACT SUBJECT TO INDEPENDENT REVIEW 8

II. FACTS WHICH ARE REMOTE AND UNRELATED TO THE PARTIES AND/OR THE ARBITRAL ISSUES DO NOT REQUIRE DISCLOSURE UNDER SECTION 1281.9 16

CONCLUSION 36

CERTIFICATE OF WORD COUNT 38

TABLE OF AUTHORITIES

Page

Cases

Briggs v. Superior Court (2001)
87 Cal.App.4th 312 15

Catchpole v. Brannon (1995)
36 Cal.App.4th 237 .... 29, 31, 33

Crocker National Bank v. City and County of San Francisco
(1989) 49 Cal.3d 881 .... 9-10, 36

Evans v. Superior Court (1930)
107 Cal.App. 372 15

Flier v. Superior Court (1994)
23 Cal.App.4th 165 .... 15-16, 25, 27-28

Ghirardo v. Antonioli (1994)
8 Cal.4th 791 .... 14, 15

Guseinov v. Burns (2006)
145 Cal.App.4th 944 8-9

Haworth v. Superior Court (Ossakow) (2008)
164 Cal.App.4th 930 [79 Cal.Rptr.3d 800] .... *passim*

In Re Gordon (1996)
13 Cal.4th 472 .... 3-4, 26, 30-31

Iverson v. Iverson (1992)
11 Cal.App.4th 1495 .... 29-30, 33

Leland Stanford Junior University v. Superior Court
(1985) 173 Cal.App. 3d 403 22-24

Mann v. Thalacker (8th Circ. 2001)
246 F.3d 1092........19-20

McCartney v. Superior Court (1990)
223 Cal.App.3d 1334........24-25

McGhan Medical Corp. v. Superior Court (1992)
11 Cal.App.4th 804........10, 11, 12

Moncharsh v. Heily & Blasé (1992)
3 Cal.4th 1........12, 35

People v. Chatman (2006)
38 Cal.4th 344........13, 17-19, 35

People v. Cromer (2001)
24 Cal.4th 889........9, 11

People v. Louis (1986)
42 Cal.3d 969........11, 14

United Farm Workers of America v. Superior Court (1985)
170 Cal.App.3d 97........19, 20-21

Statutes

Code of Civil Procedure

section 1701., subd.(a)(6)(A)(iii)........16, 17-18, 28
section 1281.9........*passim*
section 1281.9, subd.(a)(1)........4, fn 1
section 1286.2........12

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OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

1. "What is the proper standard of review of an order vacating an arbitration award based on an arbitrator's purported failure to disclose grounds for disqualification?"

2. What is the scope of a neutral arbitrator's required disclosures under Code of Civil Procedure section 1281.9?

FACTUAL BACKGROUND

In September 2003, real party in interest Susan Ossakow underwent elective lip enhancement surgery performed by petitioner Randal D. Haworth, M.D., F.A.C.S. at The Beverly Hills Surgical Center, Inc. (BHSC). [Exhibits to Petition for Writ of Mandate (Exhibits) Volume II, Exhibit E, p. 212:1-17.]

At the time of her 2003 surgery, Ms. Ossakow had previously undergone several elective cosmetic facial procedures described by her medical expert as: "a rhinoplasty, chin implant button type. . .a lower lid blepharoplasty. . .and lower canthoplasty". [Vol. I, Ex. E, pp. 84, 88, 89.]

On July 30, 2004, Ms. Ossakow filed the underlying action alleging medical malpractice by Dr. Haworth/BHSC in the performance of the 2003 cosmetic surgery. [Vol. I, Ex. E, pp. 66-70.]

In October 2004, based on an enforceable medical malpractice arbitration agreement (Agreement), the parties stipulated to binding arbitration of Ms. Ossakow's medical malpractice claim. [Vol. 1, Ex. E, pp. 72-77.]

Article 3 of the Agreement expressly provided for a tripartite arbitration panel composed of two party arbitrators and a neutral arbitrator chosen by the party arbitrators. [Vol. I, Ex. E, p. 76.] The parties chose retired Judge Gordon as their designated neutral arbitrator. [Vol. I, Ex. E, pp. 185, 187, 189, 191.]

By way of background, Norman Gordon was appointed to the bench in 1983. In 1984-1985, Judge Gordon was elected supervising judge of the Los Angeles County Superior Court. [Vol. II, Ex.E, pp. 302-303.]

On June 20, 1996, this court publicly censored Judge Gordon, adopting the recommendation of the Commission on Judicial Performance that Judge Gordon had engaged in " 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' " (*In re Gordon* (1996) 13 Cal.4th 472 at 473.) [Vol. I, Ex. E, pp. 50-52.]

Judge Gordon did "not challeng[e] the commission's findings or recommendation", namely:

> The Commission found that between April of 1990 and October 27, 1992, Judge Gordon on several occasions made sexually suggestive remarks to and asked sexually explicit questions of female staff members; referred to a staff member using rude and demeaning names and descriptions and an ethnic slur; referred to a fellow jurist's physical attributes in a demeaning manner; and mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse. None of the conduct occurred while court was in session or while the judge was on the bench conducting the business of the court. (*In re Gordon, supra,* 13 Cal.4th 472 at 473-474.) [Vol. I, Ex. E, p. 51.]

After he retired in 1997, Judge Gordon became "active in the private sector as a Mediator, Arbitrator and Private Judge." [Vol. II, Ex. E, pp. 303-304.]

These were the circumstances existing on May 8, 2006, when Judge Gordon agreed to act as the parties' neutral arbitrator and served them with his 1281.9 disclosure statement.[1]

---

[1] Code of Civil Procedure section 1281.9, subdivision (a), requires that a neutral arbitrator "shall 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, including all of the following: (1) The existence of any ground specified in [CCP] Section 170.1 for disqualification of a judge." All further references are to the Code of Civil Procedure unless otherwise indicated.

Judge Gordon's 1281.9 disclosure represented that he had "had legal proceedings with other members of defense counsel's firm; however, a search of [his] records d[id] not indicate any disclosure information to report." [Vol. I, Ex. E, pp. 193, 195.] No statutory notice to disqualify Judge Gordon was made by the parties. (§ 1281.91, subd.(b)(1).) [Vol. II, Ex. F, p. 313:5-16.]

On January 25-26, 2007, the arbitrators heard the evidence with respect to Ms. Ossakow's malpractice claim. A 2-1 defense award (Award) was served on February 22, 2007. [Vol. II, Ex.E, pp. 294-300.]

On April 18, 2007, Ms. Ossakow searched the Internet and learned of Judge Gordon's 1996 public censure. [Vol. I, Ex. E, p. 47:10-24; Vol. II, Ex. E, pp. 302-305.]

PROCEDURAL BACKGROUND

On June 4, 2007, Ms. Ossakow filed a motion in the respondent superior court to vacate the Award. [Vol. I, Ex. D, pp. 24-43.] She argued that "a reasonable plaintiff in a cosmetic medical malpractice case would want to know that the arbitrator was censured for degrading women"; "that

a reasonable party to arbitration (who sustained facial damage) would want to know that the arbitrator was censured for demeaning a fellow judge's physical attributes." [Vol. I, Ex. D, p. 38:24-39:1.]

Dr. Haworth/BCSC rejoined that section 1281.9 did not impose a statutory duty on Judge Gordon to disclose his public censure as it was already a matter of public record pursuant to California public policy. [Vol. II, Ex. F, p. 308-311:13.]

Respondent disagreed. It concluded that the "reasonable inference" of Judge Gordon's failure to disclose his public censure was that he sought "to secrete his censure by the California Supreme Court. That it was public does not absolve him of his duty of disclosure in a case of this nature." [Vol. II, Ex. N, p. 384:1-3.]

Respondent found that Judge Gordon's public censure was "based on his bias against women (and others)", thus imposing a duty on him to "disclose his previous public censure" to the arbitrating parties. [Vol. II, Ex. N, p. 385:8-10.] Respondent concluded:

> The failure by Judge Gordon to disclose his severe discipline by the California Supreme Court is sufficient grounds to vacate the award (Code of Civil Procedure, section 1286.2(a)(6)) on the bases of corruption, fraud or other undue means (section 1286.2(a)(2)), and misconduct by a [supposedly] neutral arbitrator (section 1286.2(a)(3)).

> [¶] Thus, the Court concludes that under these specific facts, petitioner has carried her burden of establishing facts that would cause a reasonable person to entertain a doubt whether the arbitrator was impartial. Based on removed [sic] Judge Gordon's censure, a reasonable person would question whether he could be impartial in this case, the fact of censure was required to have been disclosed, and the failure to do so compels the granting of the present motion. [Vol. II, Ex. N, p. 383: 20-22, p. 384:11-20.]

On October 29, 2007, respondent entered its order vacating the Award. A new arbitration before a reconstituted panel was ordered. [Vol. II, Ex.N, pp. 378-387.]

On December 14, 2007, Dr. Haworth/BHSC filed a petition for writ of mandamus in the Second Appellate District. Division Five denied relief in a 2-1 summary order filed on January 22, 2008. (*Haworth v. Superior Court* (2008) 164 Cal.App.4th 930, 936 (*Haworth*).)

On February 1, 2008, Dr. Haworth/BHSC filed a petition for review in this court. Review was granted on March 19. The matter was transferred back to the appeal court with directions to vacate its denial and issue an alternative writ of mandate. Respondent was ordered to vacate its order, or show cause why the appeal court should not direct it to do so. Respondent declined to vacate its order resulting in the published decision, *Haworth, supra.* (164 Cal.App.4th 930 at 936.)

The *Haworth* majority held:

> Because a person aware of Judge Gordon's censure might reasonably entertain a doubt as to his ability to be impartial in [sic] case involving a woman's cosmetic surgery, it was necessary for him to disclose that censure before the matter proceeded to arbitration.
>
> [¶] In sum, the facts of this case are such that a reasonable person aware of the circumstances would harbor a doubt as to Judge Gordon's ability to be impartial, and so disclosure was required. Accordingly, respondent court properly vacated the arbitration award at issue. (§ 1282.6, subd. (a).) (*Haworth, supra,* 164 Cal.App.4th 930 at 943-944.)

On August 13, 2008, Dr. Haworth/BHSC filed a second petition for review in this court. Review was granted on September 17.

LEGAL DISCUSSION

I.

A VACATUR ORDER UNDER SECTION 1281.9 REQUIRES RESOLUTION OF A PREDOMINATELY LEGAL QUESTION OF MIXED LAW AND FACT SUBJECT TO INDEPENDENT REVIEW.

A neutral arbitrator's failure to make required disclosures of potential bias under section 1281.9 requires vacation of any resulting arbitration award. (§ 1286.2.) However, the trial court must first conclude that disclosure was statutorily required. (*Guseinov v. Burns* (2006) 145

Cal.App.4th 944, 957.) That determination, in turn, requires an analysis of the parties' evidence bearing on the issue of bias.

Thus, a vacation order involves mixed questions of law and fact. "Mixed questions of law and fact concern the application of the rule [duty of disclosure required under § 1281.9] to the facts [would a person aware of the facts reasonably entertain a doubt as to the proposed neutral arbitrator's impartiality] and the consequent determination whether the rule is satisfied [does the evidence mandate a duty of disclosure under § 1281.9]." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 (*Crocker National Bank*).)

In *People v. Cromer* (2001) 24 Cal.4th 889, 894 (*Cromer*), it was observed that "[s]electing the proper standard of appellate review becomes more difficult when the trial court determination under review resolves a mixed question of law and fact."

> Mixed questions are those in which the " 'historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " ["mixed questions of fact and law. . . require the application of a legal standard to the historical-fact determinations"].) (all citations omitted.)

"If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is

reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Crocker National Bank, supra,* 49 Cal.3d 881 at 888.)

To illustrate, in *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 811 (*McGhan*)), "[t]he specific discretionary call. . ."was the [trial court's] ultimate conclusion that the benefit to be derived by coordination was outweighed by complications and problems the judge anticipated would result from attempted coordination."

The *McGhan* court concluded that the trial court's denial of plaintiffs' petition to coordinate hundreds of personal injury complaints by women who utilized silicone breast implants was a "decision . . . not necessarily made better by a trial court judge than by an appellate tribunal." (*McGhan,, supra,* 11 Cal..App.4th 804 at 811.) The panel reasoned:

> Not only will the labors of other trial courts be influenced, but work of the Courts of Appeal will also be programmed by this order. The continued administration of these hundreds of cases throughout our system can reasonably be predicated to result in petitions for extraordinary relief pertaining to discovery and other pretrial matters, which at present will be brought in all of our six districts of Courts of Appeal and several divisions of the divisional districts. The prospect of alleviating this vision of appellate firestorm of paperwork indeed motivates us to view this trial court's order as one demanding full review. (*Ibid.*)

In *Cromer*, *supra*, it was explained why "appellate courts are more competent to resolve questions of law." (24 Cal.4th 889 at 894.)

> By "more competent," we do not mean that appellate court justices possess legal talents or skills greater than those of trial court judges. Rather, we mean that *as an institution* an appellate court is better suited to the task of deciding difficult legal questions because the time pressures for both counsel and the court are generally less intense in the appellate arena, and also because appellate courts, sitting in panels of three or more, employ collegial and deliberative procedures not available to trial courts, over each of which a single judge presides. In addition, appellate courts, by virtue of their position at or near the top of the judicial hierarchy, are better able to ensure that the law is construed and applied in the same way regardless of the specific case or the parties involved. (*Ibid*, fn. 1, italics in opinion.)

"The pivotal question is do the concerns of judicial administration favor the [trial] court or do they favor the appellate court." (*People v. Louis* (1986) 42 Cal.3d 969, 987 (*Louis*).) In *McGhan*, it was concluded that judicial administration was of overriding concern. "[T]his is a decision which requires the "exercise [of] judgment about the values that animate legal principles," and hence " ' the concerns of judicial administration . . . favor the appellate court, and the question should be classified as one of law and reviewed de novo.' " (11 Cal.App.4th 804 at 811.)

Here, respondent's "specific discretionary call" was the "ultimate conclusion" that "a reasonable person might doubt Judge Gordon's ability to be impartial" based on the facts underlying his undisclosed censure. (*Haworth, supra,* 164 Cal.App.4th 930 at 937.) As a result of respondent's determination, the Award was required to be vacated. (§ 1286.2.)

The impact of such a ruling by a trial court is evident: the losing party must seek redress through appellate review. The other party must convince the reviewing court that the lower court was correct. Should the trial court's order be affirmed, the arbitrating parties will then be required to duplicate their prior efforts to once more attempt resolution of their differences through a process that was supposed to be a less expensive, efficacious and expeditious alternative to civil litigation. (*Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 9.)

It follows that when a trial court vacates an otherwise binding arbitration award on the ground that the neutral arbitrator failed his/her duty under section 1281.9 to disclose to the arbitrating parties matters of potential bias, that "decision will affect in a very substantial way the administration of justice throughout our judicial system." (*McGhan, supra,* 11 Cal.App.4th 804 at 811.)

Justice Mosk bluntly stated the substantial negative ramifications of respondent's vacation order on both the "institution of arbitration" *and* the judiciary.

> Vacating an arbitration award for nondisclosure by the chair of an arbitral panel in this case greatly increases the scope of the disclosures required of arbitrators by Code of Civil Procedure section 1281.9 and undermines the institution of arbitration. This is so because here the loser of a "binding" arbitration is able to nullify the result by ferreting out some fact about an arbitrator that a hypothetical "average person on the street" might deem to indicate bias – even if that fact is entirely unrelated to the issue or parties before the arbitrator and was a matter of public knowledge *before* the arbitration began.
>
> [¶] Worse, vacating the award based in part on section 170.1 subdivision (a)(6)(A)(iii), also significantly expands the circumstances in which California judges must be disqualified from hearing cases. (*Haworth, supra,* 164 Cal.App.4th 930 at 944, dis. opn. of Mosk, J., italics in opinion.)

Justice Mosk continued: "To approve vacating the award in this case is therefore contrary to the California Supreme Court's mandate that section 170.1 is to be 'appl[ied] with restraint' (*People v. Chatman* (2006) 38 Cal.4th 344, 363. . .), and is unjustified by any articulated benefit to the administration of justice." (*Haworth, supra,* 164 Cal.App.4th 930 at 944, dis. opn. of Mosk, J.)

Clearly then, whether the facts compel a duty of disclosure under section 1281.9 due to a chosen neutral arbitrator's alleged bias is a question of law because it is a question of "practical significance far beyond the confines of the case before the court." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 (*Ghirardo*) [holding that whether a type of transaction is subject to the usury law is a question of law having practical significance on important issues affecting commerce.].)

In *Louis, supra,* it was explained that "de novo review of questions of law" is compelled by the "doctrine of stare decisis," namely, "appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants. [] From the standpoint of sound judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law." (42 Cal.3d 969 at 986, cit. omit.)

In addition to "the concerns of judicial administration – efficiency, accuracy, and precedential weight – mak[ing] it more appropriate" for this court "to subject the [trial] judge's finding to de novo review" (*Louis, supra,* 42 Cal.3d 969 at 986-987), respondent's vacation order is based on undisputed facts. (*Haworth, supra,* 164 Cal.App.4th 930 at 937 [". . .the facts underlying respondent court's determination that a reasonable person might doubt Judge Gordon's ability to be impartial are undisputed."].)

"When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court." (*Ghirardo, supra,* 8 Cal.4th 791 at 799.) As particularly pertinent to appellate review of trial court orders concerning jural bias, the standard of review is de novo where the factual record is undisputed. (*Evans v. Superior Court* (1930) 107 Cal.App.372, 376; *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319.)

Regardless, a trial court's finding of bias requires the application of a legal standard to the facts, disputed or undisputed, and thus turns on an issue of law subject to de novo review. For instance, in *Flier v. Superior Court* (1994) 23 Cal.App.4th 165 (*Flier*), the appeal court concluded that the trial court's disqualification of the trial judge for bias was a finding subject to independent review.

The criminal defendant had contended that "the question whether 'a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial' ([former] § 170.1 (a)(6)(C)) is one of fact, decided adversely to Judge Flier by respondent superior court." (23 Cal.App.4th 165 at 171.) The appeal court disagreed, noting that "our Supreme Court in *People v. Brown* [(1993) 6 Cal.4th 322] at pages 336-337, has treated the ultimate conclusion as a question of law." (*Ibid.*)

Accordingly, the *Flier* court granted the People's petition for writ relief. It directed the superior court to set aside its order disqualifying the judge for bias and prejudice under section 170.1, subd. (a)(6)(C) [now subd.(a)(6)(A)(iii)] from sitting on a criminal case involving an African-American defendant. (23 Cal.App.4th 165 at 168-170.)

In sum, "the concerns of judicial administration – efficiency, accuracy, and precedential weight", compel the conclusion that a trial court's determination of arbitral bias under section 1281.9 is subject to plenary review.

LEGAL DISCUSSION

II.

FACTS WHICH ARE REMOTE AND UNRELATED TO THE PARTIES AND/OR THE ARBITRAL ISSUES DO NOT REQUIRE DISCLOSURE UNDER SECTION 1281.9.

Section 170.1, subdivision (a)(6)(A)(iii), provides that a sitting judge is automatically disqualified if " '[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.' " (*Haworth, supra,* 164 Cal.App.4th 930 at 938.)

Likewise, under section 1281.9, subdivision (a), a chosen neutral arbitrator is required 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. . ." (164 Cal.App.4th 930 at 938.) Failure to do so, requires vacation of the arbitration award. (*Ibid.*, citing § 1286.2, subdivision (a).)

"Accordingly, the same standard governs an arbitrator's duty of disclosure under section 1281.9 *and* a sitting judge's mandatory disqualification under section 170.1." (164 Cal.App.4th 930 at 947, dis. opn. of Mosk, J., italics in opinion.)

The *Haworth* majority agreed. It noted "the repeated statements of the Legislature and the courts that neutral arbitrators must be held under the same standard of impartiality as the judiciary in order to promote public confidence in the arbitration system." (164 Cal.App.4th 930 at 942.)

By parity of reasoning, if the factual matter constituting the alleged bias of a sitting jurist does not require disqualification, those same facts will not trigger a duty of disclosure by a neutral arbitrator under section 1281.9.

People v. Chatman (2006) 38 Cal.4th 344 (*Chatman*) illuminates the evidentiary burden a party claiming bias must meet in order to disqualify a jurist for bias. In *Chatman,* this court turned aside the defendant's

challenge, under section 170.1, subdivision (a)(6)(A)(iii), to the trial judge who presided over his criminal trial. Defendant was tried for murder after stabbing a woman 51 times during a robbery at knifepoint in a drive-up photo shop. (*Id.* at 353.)

The trial judge disclosed to the parties that 15 years earlier, his own daughter had been the victim of a robbery at knifepoint in a photo shop. And the defendant proffered evidence that during the penalty phase, "the trial judge openly commiserated with the victim's father". (38 Cal.4th 344 at 361.)

Chatman found the facts did not establish bias; that a person aware of these facts could not reasonably entertain a doubt regarding the trial judge's impartiality.

> Potential bias and prejudice must clearly be established by an objective standard. "Courts must apply with restraint statutes authorizing disqualification of a judge due to bias."
>
> [¶] Under this standard, there was no error. Defendant's allegations in support of his disqualification motions "simply do not support a doubt regarding [the trial judge's] ability to remain impartial." The mere fact that Judge Ball's daughter had been the victim of a knifepoint robbery at a photograph store *many years before* does not disqualify him. Judges, like all human beings, have widely varying experiences and backgrounds. ***Except perhaps in extreme circumstances, those not directly related to the case or the parties do not disqualify them.*** In this case, the judge stated unequivocally

> that he made no connection between the earlier robbery and the present case. " '[W]e of course presume the honesty and integrity of those serving as judges.' " (*Chatman, supra,* 38 Cal.4th 344 at 363-364, all emphasis added, cit. omit.)

As one appeal court put it: "Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased." (*United Farm Workers of America, AFL-CIO v. Superior Court* (1985) 170 Cal.App.3d 97, 100, italics in opinion (*United Farm Workers*).) A case in point is *Mann v. Thalacker* (8th Cir. 2001) 246 F.3d 1092 (*Mann*) cited in *Chatman*. (38 Cal.4th 344 at 364, fn. 11.)

In *Mann*, a criminal defendant was convicted of abduction, sexual abuse and attempted murder of a seven year old girl. Defendant waived his right to a jury trial unaware that the trial judge had been sexually abused in his early teens. (*Mann, supra,* 246 F.3d at 1094-1095.)

The Eight Circuit rejected the defense claim that the trial judge was biased: "[We] think it is not generally true that a judge who was a victim of sexual abuse at some time in the *remote past* would therefore probably be unable to give a fair trial to anyone accused of a sex crime." (246 F.3d at 1097, italics added.)

What *Chatman* and *Mann* teach is that factual and temporal relevancy is crucial in analyzing a claim of jural bias. This is so because the "standard . . . is whether a reasonable person knowing all of the facts and looking at the circumstances *at the present time* would question the impartiality of the Court." (*United Farm Workers of America, supra,* 170 Cal.App.3d 97 at 105, italics in opinion.)

Stated otherwise, the proffered evidence of bias must have a factual and temporal nexus to the issues then pending before the challenged judge. For example, in *United Farms Workers of America, supra,* plaintiff sued defendant for damages arising out of union activity in connection with a 1979 strike. Two months into a bench trial, the trial judge mentioned to defense counsel "that his wife had volunteered for and worked two to three days as a replacement worker in a carrot shed owned by [plaintiff] Maggio. (170 Cal.App.3d 97 at 100.)

Defendant then moved to disqualify the trial judge under section 170.1, subdivision (a)(6)(c) [now (a)(6)(A)(iii)], on the basis " 'that his wife had worked as a strikebreaker for the Plaintiff, during the 1979 strike", and those undisclosed facts " 'would cause a person to reasonably entertain a doubt that [the trial judge] would be able to be impartial in this case.' " (170 Cal.App.3d 97 at 101.)

The judge who heard defendant's disqualification motion found that the trial judge "had forgotten the incident and, after 32 days of trial, then remembered and called it to the attention of counsel." The hearing judge also found "no reason why a person would reasonably entertain a doubt that the [trial] judge would be unable to be impartial because six years ago the judge's wife worked for plaintiff for a period of two days." Defendant then filed a petition for writ of mandate. (170 Cal.App.3d 97 at 102.)

The petition was denied by the appeal court. The reviewing panel concluded that defendant's proffered evidence of bias by the trial judge had no factual connection to any issue involved in the case then being tried.

> Here [defendant] cannot rely on any continuing relationship between [plaintiff] and Mrs. Lehnhardt giving rise to any current personal or financial interest which would disqualify Judge Lehnhard. Rather, it must necessarily suggest that Mrs. Lehnhardt's willingness to work for two days during the strike would cause a reasonable person to infer that Judge Lehnhardt would either favor [plaintiff] or be biased against [defendant]. *This despite the fact that there is no evidence that Mrs. Lehnhardt was in any way involved in any of the events at issue in the underlying lawsuit. We will not belabor the tenuousness of the proffered inference.* (*United Farm Workers of America, supra,* 170 Cal.App.3d 97 at 105-106, italics added.)

Two other cases elucidate the requirement that evidence of bias must not consist of remote matter without factual relevance to the issues then pending before the challenged judge. In *Leland Stanford Junior University v. Superior Court* (1985) 173 Cal.App.3d 403 (*Stanford University*), plaintiff filed three lawsuits against the County of Santa Clara, the City of Palo Alto and Stanford University and its Board of Trustees challenging " 'certain physical developments on the Stanford campus.' " (*Id.* at 404-405.)

Plaintiff subsequently filed a motion to disqualify the trial judge assigned to hear motions in the three cases, alleging bias under former section 170.1, subdivision (a)(6)(C). Plaintiff's declaration of facts stated:

> . . . Judge Thompson had been "President of Stanford Law Society, 1964-1972," that "[o]ne does not achieve and exercise these roles without deep commitments disqualifying in judicial role in controversies involving Stanford University and its trustees," and therefore that third persons "might reasonably question that any person in this relationship with [Stanford] would be able to be impartial in any action in which [Stanford] was involved." (173 Cal.App.3d 403 at 405.)

The judge assigned to hear the disqualification motion found that while Judge Thompson's "impartiality is beyond questions, the standard in question is directed to the sensibilities of a layperson." (173 Cal.App.3d 403 at 406.) Due to Judge Thompson's former affiliation with the Stanford Law

Society and the Stanford Law School Board of Visitors, the assigned judge concluded that a layperson "might reasonably engender the doubt referred to and accordingly, like Caesar's wife, to avoid the appearance of impropriety, Judge Thompson is disqualified." (*Ibid.*)

Stanford petitioned for review by writ of mandate. The writ issued. The appeal court concluded that "reasonable minds could not differ as to the significance of the facts: . . .as a matter of law, Judge Thompson was not, and should not have been declared, disqualified." (173 Cal.App.3d 403 at 407.)

The *Stanford University* decision reasoned that the issue of bias must be analyzed from the point of view of the "average person on the street", which is not " 'the litigants' necessarily partisan views' ", citing *United Farms Workers of America*. (173 Cal.App.3d 403 at 408.) Further, the "facts and circumstances bearing on the judge's possible partiality must be considered as of the time the motion is brought." (*Ibid.*) Based on this criteria, the appeal court concluded:

> When [plaintiff] filed her disqualification statement it had been 13 years since Judge Thompson had last been prominently involved in the two Stanford Law School alumni activities [plaintiff] identified. [] *We conclude as a matter of law that the "average person on the street," aware of the facts, would find Judge Thompson's activities in and before*

> *1972 both so remote and so unrelated to the management of Stanford's land and physical facilities as to raise no doubt as to Judge Thompson's ability to be impartial in this matter.* (*Ibid.*, italics added.)

McCartney v. Superior Court (1990) 223 Cal.App.3d 1334 (*McCartney*) presented a fact pattern similar to *Stanford University, supra.* In *McCartney*, the plaintiff had been a student at defendant University of Southern California (USC). He sued USC on contract and tort claims. It was alleged that the school's transcripts erroneously showed plaintiff had not graduated, resulting in lost jobs due to the discrepancy between his resume and the USC records. (*Id* at 1337.)

The parties stipulated that Commissioner Zakon could hear USC's demurrer. After the ruling went against him, plaintiff filed a reconsideration motion. He challenged the impartiality of Commissioner Zakon who graduated from USC Law School in 1956. The reconsideration motion went off calendar after plaintiff's counsel refused to stipulate to allow Commission Zakon to hear the motion. (223 Cal.App.3d 1334 at 1337-1338.)

Plaintiff then sought a writ commanding the superior court to appoint another judge to hear his reconsideration motion. (223 Cal.App.3d 1334 at 1336.) The appeal court denied the petition. As relevant here, the

McCartney court concluded that "on its face the statement of disqualification discloses no legal ground for disqualification." (*Id.* at 1337.) "The only fact in the record here is that Comr. Zakon graduated from USC over 30 years ago. *That fact is so remote and unrelated to the present controversy that no reasonable person would question the commissioner's impartiality.*" (*Id.* at. 1340, italics added.)

The cited decisions reflect a common thread among them: the facts constituting the alleged bias must have a connection to the issues pending before the challenged jurist and/or to the parties appearing before that judge, and cannot be so remote in time that no reasonable person would find them relevant.

Relative to the criteria of factual relevancy and remoteness of events, the "evaluation of a challenge under section 170.1 (a)(6)(C) [now 170.1 (a)(6)(A)(iii)] must not isolate facts or comments out of context." (*Flier, supra,* 23 Cal.App.4th 165 at 170-171, cits. omit.)

Such is exactly what the respondent court and the *Haworth* majority did here. Unreasonable inferences were formed based on the facts constituting Judge Gordon's censure.

Thus, respondent found that Judge Gordon "did not disclose his previous public censure based on his bias against women". [Vol. II, Ex. N, p. 385:8-9.] The *Haworth* majority, in turn, concluded that Judge Gordon was "censured by the California Supreme Court for his treatment of women, including his making disparaging comments on their physical appearance." (*Haworth, supra,* 164 Cal.App.4th 930 at 939.)

These conclusions are untenable. Nowhere within the four corners of *In re Gordon* does this court imply that Judge Gordon was censured because he is biased against women generally, or against female litigants in particular, or that "Judge Gordon harbor[s] attitudes about the female appearance or about females in general such that he would be biased in this matter". (*Haworth, supra,* 164 Cal.App.4th 930 at 950, dis. opn., Mosk, J.; *In re Gordon, supra,* 13 Cal.4th 472 [Vol. I, Ex. E, pp. 50-52.].)

As this court stated concerning the events underlying Judge Gordon's censure:

> None of the conduct occurred while court was in session or while the judge was on the bench conducting the business of the court.
>
> [¶] While the actions were taken in an ostensibly joking manner and there was no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame, the result was an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary. (*In re Gordon, supra,* 164 Cal.App.4th 472 at 473-474 [Vol. I, Ex. E, pp. 51-52.].)

Moreover, a "challenge [for bias] must be to the effect that the judge would not be able to be impartial toward a particular party." (*Flier, supra,* 23 Cal.App.4th 165 at 171, cits. omit.) Here, respondent concluded that Judge Gordon was "biased against women", thereby effectively precluding him from acting as a neutral arbitrator in a wide variety of cases, as Justice Mosk observed. (*Haworth, supra,* 164 Cal. App.4th 930 at 950-952, dis. opn. of Mosk, J.)

Such a finding has no support in case law. A case in point is *Flier, supra*. The record reflected that the disqualified judge had used the term "good boy" when addressing an adult male of African-American descent during the plea and sentencing proceedings in *another* case. (23 Cal.App.4th 165 at 168-171.)

The appeal court concluded "that on this record no person aware of all the facts would reasonably entertain a doubt that Judge Flier would be able to be impartial in People v. Perkins. (23 Cal.App.4th 165 at 173.) The unanimous panel reasoned:

> The respondent superior court's disqualification order is necessarily premised on the conclusion that words spoken in Mr. Abercrombie's proceeding would cause a person to reasonably entertain a doubt about Judge Flier's impartiality toward any other male of African-American descent. Even if we were to conclude that the words "good boy" taken out of context from the People v. Abercrombie transcript could be

> construed to raise a doubt that Judge Flier would be able to be impartial in that case, to uphold the disqualification order in Mr. Perkins's case two months later, would result in Judge Flier's inability to ever sit on a case involving a party of African-American descent. (*Id.* at 172.)

Applying *Flier's* reasoning here, had Judge Gordon still been sitting on the bench in 2007, and had Ms. Ossakow sought his disqualification for gender bias under section 170.1, subdivision(a)(6)(A)(iii), citing his 1996 censure, and assuming respondent disqualified him, Judge Gordon would have been effectively disqualified from "whole classes of cases, without the constitutional safeguards that protect a judge from removal from office save by impeachment. The Constitution does not contemplate that we dispense with a judge's service on such a grand scale on any but the most compelling showing." (*Flier, supra,* 23 Cal.App.4th 165 at 172.)

It was for this very reason that Justice Mosk took issue with Ms. Ossakow's overly broad interpretation of bias. "Restated as a general proposition, the Real Party in Interest's position might be articulated as follows: If one has ever made statements that reasonably imply bias in favor of or against an identifiable group, such statements give rise to a perpetual duty to disclose on the part of an arbitrator (§1289.1, subd.(a)(1)) and to perpetual mandatory disqualification for a sitting judge (§ 170.1, subd.(a)(6)(A)(iii))." (*Haworth, supra,* 164 Cal.App.4th 930 at 952, dis. opn. of Mosk, J.)

Far more than Ms. Ossakow presented to the respondent court is required to demonstrate potential gender bias by a neutral arbitrator requiring vacation of an arbitration award. *Iverson v. Iverson* (1992) 11 Cal. App.4th 1495 (*Iverson*) and *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237 (*Catchpole*) epitomize the kind of evidence required to sustain a finding of gender bias warranting reversal of judgment.

In *Iverson,* the trial judge upheld a premarital agreement against the wife's attack. Her testimony was found incredible. (11 Cal.App.4th 1495 at 1498-1499.) The appeal court reversed and remanded for retrial before a different judge because the trial judge's reasoning was "so replete with gender bias that we are forced to conclude Cheryl [Mrs. Iverson] could not have received a fair trial." (*Id.* at 1497.)

The *Iverson* court recounted the evidence. The judge's characterization of Cheryl as a " 'lovely girl' shows gender bias toward her as a witness. The judge did not use a similar description for Chick [Mr. Iverson]. The resolution of the credibility issues in the case thus may have been based, at root, on Cheryl's gender and physical attributes." (11 Cal.App.4th 1495 at 1499.)

Additionally, "the description of Cheryl – a woman in her 40's – as a 'girl' seriously detracts from the *appearance* of justice." (11 Cal.App.4th 1495 at 1500, italics in opinion.) "Besides the use of language indicating

gender bias, the judge also appears to have employed gender-based stereotypes in his decisionmaking process." (*Ibid.*)

> His reasoning appears to have been that "lovely" women are the ones who ask wealthy men who do not look like "Adonis" to marry, and therefore Cheryl was not credible when she testified Chick asked her to marry him. []
>
> [¶] Next, the reference to not buying the "cow" when the "milk is free" cannot be countenanced. There is, in the reference, an obvious double standard based on stereotypical sex roles. (Both Chick and Cheryl were living together, but only Chick was seen as benefitting from the relationship, simply because he was a man.) And we hardly need elaborate that in the context in which it was used, the reference was plainly demeaning to Cheryl, analogizing her to a cow. Again we find a "predetermined disposition" to rule against her based on her status as a woman. (*Id.* at 1500-1501.)

Judge Gordon's inappropriate and disrespectful workplace comments to female court staff notwithstanding, there is no evidence that Judge Gordon had a predetermined disposition to decide Ms. Ossakow's medical malpractice claim against her because she was a woman, and/or due to her physical attributes. (*Haworth, supra,* 164 Cal.App.4th 930 at 949-952, dis. opn., Mosk, J.)

Again, this court made no such findings in censuring Judge Gordon. Rather, it was specifically noted that Judge Gordon made his comments "in an ostensibly joking manner and there was *no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame..."*

(*In re Gordon, supra,* 13 Cal.4th 472 at 474, italics added [Vol. I, Ex. E, p. 52.]; *Haworth, supra,* 164 Cal.App.4th 930 at 950, dis. opn. of Mosk, J.)

The same cannot be said for the trial judge in *Catchpole v. Brannon, supra*. That case concerned an eight day bench trial of a sexual harassment and assault case. (36 Cal.App.4th 237 at 242-243.) The trial judge rejected the female plaintiff's account as "not credible". (*Id.* at 243.)

> In addition to his findings of no liability, the judge concluded [plaintiff] failed to show damage attributable to her claims. Noting [plaintiff] had been molested as a child, the judge found it "impossible to separate her present condition from the past." (*Id.* at 244.)

Plaintiff appealed the adverse judgment. The appeal court framed the issue as "the unusual question whether the alleged gender bias of the trial judge requires us to set aside the judgment." (36 Cal.App.4th 237 at 241.) Concluding that "the allegations of judicial bias [were] meritorious, the judgment was reversed. (*Ibid.*)

The *Catchpole* decision reviewed "all the comments made over the course of the eight day trial that collectively create[d] the impression of judicial gender bias and cast doubt on the court's impartiality." (36 Cal.App.4th 237 at 249.) The panel concluded that, [a]s in *Iverson*, the judgment seems to have improperly turned on stereotypes about women rather than a realistic evaluation of the facts. . ." (*Id.* at 259.)

In contrast, the Award reflects that *Ms. Ossakow's malpractice claim was rejected because she failed her burden of proof as to medical causation,* not because Judge Gordon prejudged her credibility due to gender bias. In this respect the record contains no statement by the "majority arbitrators . . . that Ossakow was not credible. . ." (*Haworth, supra,* 164 Cal.App.4th 930 at 935.)

In the "Discussion" portion of the Award, following the majority panel's summary of expert witness testimony, Judge Gordon said:

> *There are some credibility problems on both sides*; *none in the blatantly serious vein.* [¶] ***On the issue of causation***, *some of claimant's complaints during her testimony went beyond any complaints mentioned by Drs. Iverson, Wolfe or Kane,* e.g., food actually falls out of the mouth, does not care to go out socially, feels like she looks like she had a stroke. ***This claimant has had five facial surgeries.*** [Vol. II, Ex. E, p. 297:2-11, all emphasis added.]

Thus, Judge Gordon concluded that medical causation could not be proven due, in part, to prior multiple elective cosmetic surgeries which may have contributed to the poor cosmetic outcome that Ms. Ossakow attributed to the lip enhancement procedure performed by petitioner Haworth.

The very opinions of Ms. Ossakow's medical expert, Dr. Iverson, supported Judge Gordon's findings that she could not prove medical causation. Dr. Iverson opined that with respect to Ms. Ossakow's complaints of "stiff upper lip, lower lip feels cold, unusual fullness,

numbness in lower lip, scarring, etc.", he "cannot say they directly relate to the mentalis muscle surgery performed by [Dr. Haworth]." [Vol. II, Ex. E, p. 295:21-25.]

Of further significance, Dr. Iverson's causation opinions were equivocal. He opined that "many of the problems, asymmetrical smile, scar tissue, et al., *could be, maybe, and possibly could have been caused by the mentalis muscle surgery*" performed by Dr. Haworth. [Vol. II, Ex. E, p. 296:12-14, italics added.]

It is unreasonable to conclude that Judge Gordon's reference to Ms. Ossakow's "five facial surgeries" was based on any alleged preconceived bias he held against women generally, or specifically, due to their physical attributes. Rather, Judge Gordon's statement was based on a realistic assessment of the causation opinions of Ms. Ossakow's medical expert and the other expert physicians who testified at the two day arbitration.

The alleged evidence of Judge Gordon's purported gender bias stands in stark contrast to that which confronted the appeal courts in *Iverson* and *Catchpole, supra.* As Justice Mosk caustically notes:

> Judge Gordon was not censured for bias against a litigant, gender related or otherwise. In fact, Judge Gordon was not censured for *any* conduct "while court was in session or while [he] was on the bench conducting the business of the court."

> [¶] Judge Gordon was censured, in effect, for making comments that he intended to be humorous, but that were inappropriate in the workplace and disrespectful toward his staff. There is nothing in the Supreme Court's opinion that states or implies that Judge Gordon engaged in any misconduct or impropriety with respect to any litigant, male or female. There is certainly nothing in the Supreme Court's opinion that states or implies that Judge Gordon was (or is) such a staunch misogynist that he was (or is) incapable of impartial decision making in any case involving a woman or her appearance. (*Haworth, supra,* 164 Cal.App.4th 930 at 950, dis. opn. of Mosk, J., cit. omit., italics in opinion.].)

In short, no reasonable person aware of Judge Gordon's 1996 censure would question his impartiality to adjudicate Ms. Ossakow's medical malpractice claim in 2007, based on events which occurred 15 to 17 years earlier. (*Haworth, supra,* 164 Cal.App.4th 930 at 947-950, dis. opn. of Mosk, J.) As Justice Mosk succinctly states: "[I]t defies logic to conclude that the 1996 censure gives rise to an objectively reasonable doubt that Judge Gordon could be impartial in this case." (*Id.* at 949-950.)

If binding arbitration is to remain a viable option for those desiring an expeditious resolution of their differences, the parameters of neutral arbitrator disclosure under 1281.9 must comport to the criteria developed through case law to analyze claims of jural bias.

As such, matter constituting potential bias of a neutral arbitrator must have a factual connection to the parties and/or the arbitral issues, and must not be so remote in time that no reasonable person would find it relevant. "Except perhaps in extreme circumstances, those not directly related to the case or the parties do not disqualify them." (*Chatman, supra,* 38 Cal.4th 344 at 363-364.)

Neither respondent nor the *Haworth* majority heeded this court's direction. As a result, an arbitration award rendered almost two years ago was vacated. Such a result is inimical to expeditious resolution of disputes through arbitration, an alternative dispute forum long engrained in California public policy. (*Moncharsh, supra,* 3 Cal 4th 1 at 9.)

Here, the losing party profited from a post-arbitration inquiry regarding the neutral arbitrator, albeit that investigation yielded no facts having any connection to the arbitrating parties or the medical malpractice claim at issue. Regardless, the Award was vacated.

Without clear guidelines from this court as to the kind of evidence necessary to support a vacation order under section 1281.9, losing parties will continue to unearth facts to support such an order – regardless of how tenuous those facts are to the parties or the arbitral dispute: just as happened here.

The record reveals no facts or circumstances underlying Judge Gordon's 1996 censure that imposed a duty on him under section 1281.9 to disclose that censure to the arbitrating parties. Consequently, respondent's vacation of the Award is clear legal error.

CONCLUSION

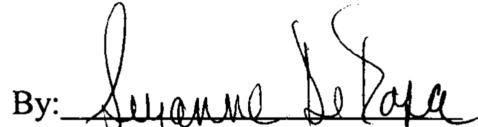
Whether a neutral arbitrator is potentially biased for purposes of imposing a duty of disclosure under section 1281.9 is an inquiry that "requires a critical consideration, in a factual context, of legal principles and their underlying values," subject to independent review. (*Crocker National Bank, supra,* 49 Cal. 3d 881 at 888.) In this manner, legal error by the lower court will be corrected by the reviewing court.

In conjunction with appellate review, trial courts should be required, when presented with a claim of potential bias by a neutral arbitrator, to make findings with respect to whether the proffered evidence is temporally relevant and has a factual connection to the parties and/or the arbitral issues. Requiring such findings will not only provide an analytical framework for the trial court, it will also promote clearer guidelines for application of section 1281.9 and will assist the appellate court's review.

Dated: October 14, 2008

Respectfully submitted,

SCHMID & VOILES

By: 

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CERTIFICATION OF WORD COUNT

I certify, pursuant to California Rules of Court, Appellate Rule 8.520 (c)(1), that this opening brief on the merits of petitioners Randal D. Haworth, M.D. and The Beverly Hills Surgical Center, Inc. has a word count of 7, 868 as calculated by the Microsoft Windows XP Professional word processing program used to generate the brief.

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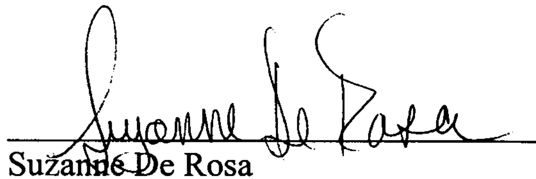

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PROOF OF SERVICE

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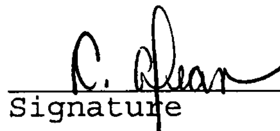

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