SUPREME COURT COPY

Case Number S165906

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

SUSAN OSSAKOW,

Real Party in Interest.

After a Previously Published Decision by the Court of Appeal,
Second Appellate District, Division Five
Case Number B204354

ANSWER BRIEF ON THE MERITS

BOSTWICK PETERSON & MITCHELL LLP
Jeffrey S. Mitchell [SBN 188751]
email:jmitchell@bostwickfirm.com
4 Embarcadero Center, Suite 750
San Francisco, California 94111
Telephone: (415) 421-8300
Facsimile: (415) 421-8301

BROWN SHENOI KOES LLP
Daniel J. Koes [SBN 192513]
email: dkoes@bsklegal.com
Michael R. Brown [SBN 65234]
email: mbrown@bsklegal.com
Allan A. Shenoi [SBN 122566]
email: ashenoi@bsklegal.com
175 So. Lake Avenue, Suite 202
Pasadena, CA 91101
Telephone: (626) 792-2300
Facsimile: (626) 792-2311

Attorneys for *Real Party in Interest*
Susan Ossakow

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Michael R. Brown [SBN 65234]
email: mbrown@bsklegal.com
Allan A. Shenoi [SBN 122566]
email: ashenoi@bsklegal.com
175 So. Lake Avenue, Suite 202
Pasadena, CA 91101
Telephone: (626) 792-2300
Facsimile: (626) 792-2311

Attorneys for *Real Party in Interest*
Susan Ossakow

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes

TABLE OF AUTHORITIES (continued)

Page(s)

Rules

Treatises

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES (continued)

Page(s)

INTRODUCTION

Through California's Arbitration Act, our Legislature sought to balance California's public policies favoring a fair, stream-lined procedure to permanently resolve legal disputes short of litigation. To support arbitration finality, the narrow grounds to vacate an arbitration award were restricted by statute. To support the appearance of arbitration fairness, a neutral arbitrator's broad disclosure duties were increased by statute.

On one scale, narrow statutory grounds to vacate an arbitration award support California's strong public policy in favor of alternative dispute resolution by striving for arbitration finality. On the other scale, broad statutory disclosure requirements support California's equally strong public policy in favor of fairness during the arbitration process by striving for the appearance of impartiality.

While much has been written about California's strong public policy in favor of arbitration finality, little guidance has been given about the fairness of the arbitration process. An impartial neutral arbitrator in a private, contractual arbitration is essential to ensuring the integrity of the arbitration process. After all, the neutral arbitrator's powers exceed those of a judicial officer in so far as the merits of the arbitration award are not subject to judicial review or scrutiny.

Petitioners ask this Court to review the trial court's ruling that a retired judicial officer sitting as a neutral arbitrator on a private, contractual

arbitration panel must disclose to a female plaintiff arbitrating a cosmetic surgery battery/malpractice action the fact that--while he was on the bench--he was disciplined by public censure for his degrading, demeaning and derogatory discrimination of women in and around his courtroom because the conduct for which he was disciplined creates an impression of possible bias about the neutral arbitrator's impartiality.

To resolve this issue, this Court must decide which standard of review applies to a trial court's order vacating an arbitration award for potential bias. As the majority and dissenting Court of Appeal opinions exemplify, there is a direct conflict in California law about the correct lens the reviewing court should use to view an order vacating an arbitration award based on the neutral arbitrator's failure to make a disclosure.

Some appellate courts conclude de novo review applies when the duty to make a disclosure involves a pure legal issue and uncontested facts. Other courts conclude the abuse of discretion standard of review governs because resolution of the duty to make a disclosure involves a factual determination. Consequently, it is entirely uncertain who has the ultimate prerogative to resolve disputes involving a neutral arbitrator's disclosure requirements.

Of course, the trial court has that prerogative in the first instance. But do the appellate courts then have the discretion to second guess the trial

court's ruling anew or must they defer to the lower court's decision absent an abuse of discretion?

Given the conflict in California law, Real Party in Interest urges this Court to draw a uniform rule for the bench and the bar by concluding that the abuse of discretion standard of review applies. Under the abuse of discretion standard, appellate courts defer to the trial court's resolution of the issue unless the lower court's ruling results in a miscarriage of justice (e.g., the trial court's conclusion is not supported by sufficient evidence or is wrong as a matter of law).

Under the abuse of discretion standard, arbitration finality will be protected: If there is no evidentiary or legal basis for the trial court's decision to vacate an arbitration award, the lower court's order will be reversed.

The abuse of discretion standard will also further California's public policy in favor of broad disclosure to ensure arbitration fairness by (1) encouraging arbitrators to error on the side of caution and (2) creating a simple, common-sense, rule of thumb: "When in doubt, disclose." Period.

Measured by the abuse of discretion standard, the trial court's order should be affirmed because substantial evidence supports the trial court's conclusion that the neutral arbitrator was required to--and failed to--make a disclosure. Even if reviewed de novo, the trial court's order should be affirmed--as a matter of law. Therefore, the writ should be denied.

STATEMENT OF THE CASE

1. Retired Judge Gordon's Censure for Discriminating, Disparaging Treatment of Women in His Courtroom Environment

Retired Judge Gordon:

- made sexually suggestive remarks and asked sexually explicit questions to female staff members (2 Exh. E at 302-303);
- referred to one staff member using crude and demeaning names and descriptions and an ethnic slur (*Ibid.*);
- referred to a fellow female jurist's physical attributes in a demeaning manner (*Ibid.*); and
- mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse. (*Ibid.*)

As a result of Judge Gordon's conduct, there was an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary. (*Ibid.*)

The Commission on Judicial Performance investigated and recommended that the California Supreme Court censure retired Judge Gordon for engaging in conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (1 Exh. E at 51.)

In 1994, this Court adopted the conclusions of the Commission and issued precisely the order requested. (*Id.* at p. 52.)

2. Ms. Ossakow Consults with Dr. Haworth

Over twenty years ago, plaintiff Susan Ossakow[1] (Ms. Ossakow), a psychiatrist, had three cosmetic surgeries, including a rhinoplasty (nose), a chin implant button type and a lower eye lid blepharoplasty. (1 Exh. E at 88.)

In 2001, Ms. Ossakow had her fourth cosmetic surgery--a lower eyelid canthoplasty. (*Ibid.*)

In May 2003, Ms. Ossakow consulted with defendant Dr. Randal D. Haworth (a plastic surgeon) because she wanted a lip enhancement. (*Id.* at p. 84.) During her lip enhancement consultation, Dr. Haworth discussed an upper lip lift and lower lip V-Y enhancement procedure. (*Ibid.*)

After agreeing to the lip procedure, Ms. Ossakow signed an informed consent form for an upper lip lift and lower V-Y lip enhancement. (*Id.* at pp. 55, 86.)

Ms. Ossakow also signed an arbitration agreement. (*Id.* at p. 76.) In that agreement, the parties agreed to arbitrate any dispute as to medical

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[1] In earlier proceedings, plaintiff has been inadvertently identified with her middle name or middle-name initial (i.e., Amy or A). Plaintiff respectfully requests this Court to refer to her as simply Susan Ossakow.

malpractice--"whether any medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered." (*Ibid.*) Under the agreement, the arbitrators were "governed by the California Code of Civil Procedure provisions relating to arbitration." (*Ibid.*)

3. Ms. Ossakow's Surgery

On September 11, 2003, Ms. Ossakow had surgery. (*Id.* at p. 84.) In addition to the upper lip lift and lower lip V-Y enhancement, Dr. Haworth did other procedures to Ms. Ossakow's nose and underlying musculature without her knowledge or consent. (*Ibid.*)

Specifically, Dr. Haworth did a new procedure he developed called a lower lip lift. (*Id.* at p. 96.) The procedure involved plication of the mentalis muscle. (*Ibid.*)

Dr. Haworth also operated on Ms. Ossakow's nose. (*Id.* at pp. 87, 119.) As a result, in the area of the base of her nose the right nostril was "more open and wider than the left. The nostril sill appears to be absent on both sides. This create[d] a very flat abnormal look to the base of the nose. There [were] telangiectases around the area where she would have a nostril sill and the base of the nose.

There was no written evidence that Ms. Ossakow consented to the surgery of the mentalis muscle or the nose. (*Id.* at p. 88.) To the contrary, Ms. Ossakow's consent form and Dr. Haworth's operative report are

inconsistent. (*Id.* at p. 54.) Although Ms. Ossakow's consent form stated she was to have V-Y lip advancement, it did not mention the underlying muscle surgery that the operative report described. (*Id.* at pp. 54, 88.)

4. Ms. Ossakow's Problems Following Surgery

Immediately after the surgery, Ms. Ossakow had agonizing pain and blown up swelling of the chin area. (*Id.* at p. 119.) One month after the surgery, Ms. Ossakow called Dr. Haworth to complain about "having a lot of pain." (*Id.* at p. 58.) Almost two months after surgery, Ms. Ossakow called Dr. Haworth to complain about her chin and "problems eating." (*Id.* at p. 56.)

As a result of the surgery:

- She could not eat or speak normally and had constant pain (*Id.* at pp. 96, 98.);
- Her lips were constantly being pulled together and to the left side (*Id.* at p. 96);
- She appeared to be constantly pouting because the muscle was being pulled up from underneath her chin (*Ibid.*); and
- She had tethering from the plication that left a big pouch on the outside of her chin. (*Ibid.*)

As a result of concerns about her lips' appearance, Ms. Ossakow was unable to work as a psychiatrist. (*Id.* at p. 85.) And the pain in her lips prevented her from normal talking, eating and other activities. (*Ibid.*)

Ms. Ossakow's earlier surgeries were not related to her upper and lower lip problems caused by Dr. Haworth. (*Id.* at p. 88.)

5. Dr. Haworth's Experimental Surgical Procedure

After surgery, Ms. Ossakow found out that Dr. Haworth performed a new "innovative procedure" called a "lower lip lift" or "mentalis plication." (*Id.* at p. 45.) In January 2004, Ms. Ossakow discovered Dr. Haworth's experimental surgical procedure. (*Ibid.*)

Dr. Haworth's lower lip lift "tightens the muscles inside the lip" "by moving the inside skin of the lip upwards and outwards." (*Id.* at pp. 60, 62.) Dr. Haworth claimed to be the pioneer of the lower lip lift procedure and "the only plastic surgeon in the country that performs it." (*Ibid.*)

By February 2004, Ms. Ossakow was actively seeking help for reconstructive surgery. (*Id.* at p. 96.) The plastic surgeons Ms. Ossakow saw "were shocked that any plastic surgeon would get involved with the mentalis muscle." (*Id.* at p. 99.)

On March 18, 2004, Ms. Ossakow wrote a letter to Dr. Haworth stating that she was "having multiple problems from the surgery . . . on [her] mentalis muscle." (*Id.* at p. 64.) Ms. Ossakow asked "how far subperiostally [Dr. Haworth] undermined the mentalis muscle" and "how much of the mentalis muscle [he] plicated." (*Ibid.*)

6. Ms. Ossakow Sues Dr. Haworth

On July 30, 2004, Ms. Ossakow sued Dr. Haworth and the Beverly Hills Surgical Center (petitioners or defendants) for medical malpractice and battery. (*Id.* at p. 66.) The complaint alleged that Dr. Haworth negligently performed Ms. Ossakow's surgery and intentionally surgically changed her face without her consent. (*Id.* at pp. 66-70.)

7. The Parties Stipulate To Arbitrate

The parties stipulated to submit the lawsuit to binding arbitration under the terms of the arbitration agreement. (*Id.* at pp. 72-73.) Dr. Haworth designated Theodore Hammond as his party appointed arbitrator and recommended four neutral arbitrators, including retired Judge Gordon. (*Id.* at pp. 185, 187.) Ms. Ossakow selected Marshall Silberberg as her party appointed arbitrator and agreed to retired Judge Gordon as the neutral arbitrator. (*Id.* at pp. 189, 191.) Retired Judge Gordon agreed to serve as the neutral arbitrator and stated that there was no "disclosure information to report." (*Id.* at pp. 193, 195.)

8. Ms. Ossakow's Independent Medical Examination

On October 27, 2004, Ms. Ossakow's expert, Dr. Iverson, examined her. (*Id.* at p. 84.) At that time, Ms. Ossakow still had problems with her upper and lower lip. (*Ibid.*) Specifically, Ms. Ossakow stated the following problems:

- Dr. Haworth did a mentopilcation without her consent;

- Ms. Ossakow had a very stiff upper lip that was numb; she cannot use a straw and she felt as though her upper lip does not move and was very abnormal in appearance and function;
- When Dr. Haworth did the upper lip lift, he left Ms. Ossakow with scars across the base of her nose and removed part of the normal nasal sill, distorting the appearance of her nose;
- Ms. Ossakow could not move her lower lip and stated it felt cold as ice and looked abnormal;
- She had numbness in the lower lip in the central area;
- She had unusual fullness in the lower lip area;
- She had an inequality to her smile; and
- She had a loss of definition to her upper lip. (*Id.* at p. 85.)

Dr. Iverson noted that:

"[t]he filtral columns of the lip appear very flattened and have minimal definition or no definition at all. There is basically no Cupid's bow remaining. The patient has a central band across the mid vermilion of the upper lip when she smiles. It is also visible but not as obvious when she is not smiling. . . . When she attempts to pucker or use her lip this cannot be done. It tends to pull flat and not have a normal appearance. This is what she states prevents her from using a straw or talking normally. When the patient smiles or speaks

the lip pulls differently in that the left corner of the mouth moves down and out and the right corner appears to have some weakness and does not move in the same fashion as the left side. This does create a very asymmetrical smile due to the difference in muscle pull on the left and the right side. The scar on the lower lip from the V-Y advancement is inside the lip and is well healed. She states this is a painful area. It is tender and she has discomfort almost at all times in the lower lip when she attempts to move her lips or to talk. This also creates difficulty with eating. There is a palpable mass in the lip in the central portion. There is a bulge that is visible externally below the mental crease which is unusual fullness. This appears to be related to the Mentalis muscle plication."

(1 Exh. E at 87-88.)

Dr. Iverson concluded that he was unaware of procedures available to improve her present situation and problems. (*Id.* at p. 89.) To the contrary, Dr. Iverson believed "further surgery could potentially make [Ms. Ossakow's] problems worse. (*Ibid.*)

9. The Battery Motion for Summary Adjudication And Arbitration Award

Dr. Haworth brought a motion to summarily adjudicate the battery claim. (*Id.* at p. 197.) Dr. Haworth took the position that he did not need consent to operate on the nose because it was part of the upper lip surgery,

not nose surgery. Dr. Haworth also claimed that he did not need consent for the underlying muscle surgery because it was part of the lower lip surgery. (*Id.* at p. 200; 2 Exh. E at 205.)

In opposition, Ms. Ossakow stated that she never consented to the mentalis plication and that that procedure substantially deviated from her surgical consent. (*Id.* at p. 232.) In her declaration, Ms. Ossakow stated that she was never informed that Dr. Haworth planned to plicate the mentalis muscle as part of her lower lip surgery. (*Id.* at p. 251.)

Retired Judge Gordon held "that no battery was committed by [Dr. Haworth]; rather, [Ms. Ossakow's] action [was] one for professional negligence only." (*Id.* at p. 258.) In doing so, retired Judge Gordon incorrectly stated that the evidence establishing no battery was "not contradicted by other evidence or inferences." (*Ibid.*)

10. Ms. Ossakow Discovers Retired Judge Gordon's Bias against Women

After the arbitration award, Ms. Ossakow discovered articles about Judge Gordon's bias against women, minorities and physical attributes and his conduct affected the "overall courtroom environment" by permitting "a courtroom atmosphere" that demeaned and disparaged women. (1 Exh. at 47; 2 Exh. E at 302-307.) For example, she learned that retired Judge Gordon called "a Hispanic court clerk the little Mexican and peon, a Japanese-American stenographer little Buddhahead, a female judge sow

and a female stenographer who was known to be attempting to start a family with her husband as the little copulator." (2 Exh. E at 304.)

Had Ms. Ossakow known that retired Judge Gordon was disciplined and censured by the California Supreme Court for his bias against women and minorities based on physical and ethnic attributes, she would have never agreed to allow him to serve as a neutral arbitrator. (1 Exh. E at 47.)

11. Ms. Ossakow Files a Timely Motion to Vacate the Arbitration Award

On June 4, 2007, Ms. Ossakow filed a motion to vacate the arbitration award. (1 Exh. at 24.) She explained that the neutral arbitrator, a retired superior court judge, "failed to disclose the fact that he had been censured by the California Supreme Court at the request of the Commission on Judicial Performance." (*Id.* at p. 29.) Ms. Ossakow pointed out that the grounds for Judge Gordon's discipline were that he was biased, sexist and racist in his treatment of women in his courtroom environment. (*Ibid.*)

Ms. Ossakow pointed out, for example, that "Judge Gordon repeatedly asked a female reporter, "Did you get any last night" and referred to her publicly as a "little copulator." (2 Exh. E at 303.) The court reporter later sued Judge Gordon "for sexual harassment and won $85,000 which was paid by the California Superior Court." (*Ibid.*) In short, Judge Gordon was censured by this Court for his irrepressible ethnic, racial and sexual comments. (1 Exh. E at 50-52.)

12. Defendants Oppose the Motion to Vacate

Defendants opposed the motion. (2 Exh. F at p. 308.) Essentially, defendants argued that since Judge Gordon was publicly censured, he did not have to disclose that fact. (*Id.* at pp. 308-316.)

13. The Trial Court Vacates the Arbitration Award

At the hearing, the trial court granted the motion to vacate the award. (1 Exh. A at 2-4.) When defendants objected to Ms. Ossakow's proposed order, the Court had a second hearing. (1 Exh. B.)

The signed order was filed on October 29, 2007. (2 Exh. N at 380.) In it, the trial court rejected defendants' claim that a matter of public record need not be disclosed. (*Id.* at pp. 381-385.) The court ruled that Ms. Ossakow established that "a reasonable person" would "entertain doubt whether the arbitrator was impartial." (*Id.* at p. 384.)

14. Defendants Seek Writ Relief And Review Is Granted

On December 14, 2007, defendants filed a writ petition which the Second District Court of Appeal, Division Five summarily denied with a 2-1 vote. This Court then granted defendants' petition for review and transferred the case back to the Court of Appeal to issue an alternative writ. After issuing an alternative writ and entertaining oral argument, the Court of Appeal issued a 2-1 previously published opinion denying writ relief.

On September 17, 2008, this Court granted defendants' petition for review.

MEMORANDUM OF POINTS AND AUTHORITIES

1. The Scope Of California's Disclosure Laws Governing Neutral Arbitrators Encompasses Each Aspect Of Impartiality

Due process of law requires that trial proceedings be fair. (*Haas v. San Bernardino* (2002) 27 Cal.4th 1017, 1025.) The touchstone of the right to a fair trial is an impartial trier of fact. (*Ibid.*) Conversely, the risk of judicial bias or prejudice jeopardizes "the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party." (*Id.* at p. 1033.) Therefore, "courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled." (*Id.* at pp. 1024-1025.)

In the arbitration context, "a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Id.* at pp. 1031-1032; see Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts* (1981) 94 Harvard L. Rev. 1592, 1608 [explaining adjudicators "give steady customers the benefit of the doubt more often than not" because "[s]teady customers represent an important asset to any

seller"].) As a result, private arbitrators have a built-in direct financial interest. Unlike judges, it is not a disqualifying financial interest for neutral arbitrators. Therefore, neutral arbitrators must be held to a high standard of disclosure.

The viability of arbitration as an effective means of alternative dispute resolution is contingent upon the fairness of the arbitration process which requires an impartial neutral arbitrator (neutral). To be impartial, a neutral arbitrator must be unbiased which--like beauty--is in the eye of the beholder; perception is everything. Consequently, the neutral arbitrator's appearance of impartiality gives the perception of fairness.

"Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator. It provides the parties with the necessary information to make an informed selection of an arbitrator by disqualifying or ratifying the proposed arbitrator following disclosure." (Cal. Rules of Court, Ethics Standards for Neutral Arbitrator's In Contractual Arbitration, Comment to Standard 7 (Ethics Standard 7.)

Accordingly, a neutral arbitrator must disclose any potential bias. When an undisclosed bias is subsequently discovered, bias or prejudice is perceived. Recognizing the importance of the public's trust in the arbitration process, California law broadened the standards for disclosure, specifically for neutral arbitrators (neutrals).

In addition to the inherent financial interest and appearance--or risk--of arbitrator bias, it makes sense that neutral arbitrators have a broad duty to disclose any potential bias because "arbitrators serve in a quasi-judicial capacity. (*Coopers & Lybrand v. Superior Court, supra*, 212 Cal.App.3d at p. 534, citing *Burchell v. Marsh* (1854) 58 U.S. 344, 349.) "Arbitrators, like judges, have the power to decide cases." (Code of Ethics for Arbitrators in Commercial Disputes (preamble).)[2] Therefore, neutral arbitrators undertake serious responsibilities to the public as well as to the parties, including "important ethical obligations." (*Ibid.*)

More importantly, participation in contractual arbitration precludes the parties from having their day in court because the decision is binding, with only limited rights to court review. In *Commonwealth Coatings Corp. v. Continental Casualty Company* (1968) 393 U.S. 145, 147, the United States Supreme Court acknowledged that arbitrators "have completely free rein to decide . . . the facts and are not subject to appellate review." Therefore, the U.S. Supreme Court cautioned that lower courts should scrupulously safeguard the impartiality of arbitrators. (*Ibid.*)

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[2] A copy of this Code of Ethics may be found on the Internet. (Code of Ethics for Arbitrators in Commercial Disputes (visited March 13, 2009) <http://www.abanet.org/dispute/commercial_disputes.pdf>.)

In response, California law created broad disclosure requirements for neutral arbitrators.

A. Summary Of California's Arbitration Act

Arbitration is the most common form of alternative dispute resolution. (George L. Blum, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators* (1997) 63 A.L.R.5th 675, 692.) The use of "arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights." (Code of Ethics for Commercial Arbitrators (preamble).) This is so because arbitration "does not depend on courts, except for enforcement." (*Setting Aside Arbitration Award, supra, supra*, 63 ALR 5th at p. 692.) "In contractual arbitration, the parties agree to submit disputes to a nonjudicial resolution by an independent third person or persons." (6 Witkin, Cal. Procedure (4th ed. 1997, *Proceedings without Trial,* sec. 484 at p. 912, citation omitted.)

"California's first arbitration statute was enacted in 1851." (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 530.) That arbitration statute "became part of the Code of Civil Procedure in 1872." (6 Witkin, Cal. Procedure (4th ed. 1997) *Proceedings Without Trial*, sec. 485, p. 914.)

In 1961, the current version of California's Arbitration Act (CAA) was enacted.[3] (Code Civ. Proc., sec. 1280 et seq.) As this Court noted, the CAA "represents a comprehensive statutory scheme regulating private arbitration in this state." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830, quotation and citation omitted.)

B. California's Legislature Requires Neutral Arbitrators To Comply With Judicial Disclosure Law

In 1993, the Legislature added subdivision (e) to former Code of Civil Procedure, section 1282. (Stats.1993, ch. 768 (Sen. Bill No. 252), sec. 4, subd. (e).)[4] Initially, subdivision (e) required all arbitrators (e.g., party

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[3] California's Arbitration Act consists of five chapters:

- Chapter 1: General Provisions (Code Civ. Proc., sec. 1280 et seq.);
- Chapter 2: Enforcement of Arbitration Agreements (Code Civ. Proc., sec. 1281 et seq.);
- Chapter 3: Conduct of Arbitration Proceedings (Code Civ. Proc., sec. 1282 et seq.);
- Chapter 4: Enforcement of the Award (Code Civ. Proc., sec. 1285 et seq.); and
- Chapter 5: General Provisions Relating to Judicial Proceedings (Code Civ. Proc., sec. 1290 et seq.).

[4] Former section 1282, added by amendment in 1993, stated in relevant part: "(e) An arbitrator shall disqualify himself or herself, upon demand of any party to the arbitration agreement made before the conclusion of the arbitration proceedings, on any of the grounds specified in Section 170.1 for disqualification of a judge." (Stats. 1993, ch. 768 (Sen. Bill No. 252), sec. 4, subd. (e).) In 1997, subdivision (e) of section 1282 was deleted by amendment (Stats. 1997, ch. 445 (Assem. Bill No. 1093), sec. 3) and subdivision (e) of section 1281.9 was added. (Stats. 1997, ch.

(cont. on next page)

appoint and neutral arbitrators) to disclose any of the information specified in Code of Civil Procedure, section 170.1. (*Ibid.*)

Subdivision (e) clarified that private arbitrators are subject to disqualification from hearing a case on the same grounds that apply to a judge. The extension of such grounds to arbitrators was meant to enhance the litigants' ability to receive a fair and impartial arbitration. By extending the same protections and guarantees provided by the judicial system to arbitration, our Legislature sought to boost public confidence in--and encourage use of--the arbitration process as an alternative method of dispute resolution.

In 1997, the legislature eliminated subdivision (e) of Code of Civil Procedure section 1286.2 which required any arbitrator (e.g., a neutral or party arbitrator) to disqualify himself or herself and--at the same time--limiting former subdivision (f) of Code of Civil Procedure section 1286.2 to

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445 (Assem. Bill No. 1093), sec. 2.) In relevant part, former section 1281.9, subdivision (e) stated: "An arbitrator shall disclose to all parties the existence of any grounds specified in Section 170.1 for disqualification of a judge; and, if any such ground exists, shall disqualify himself or herself upon demand of any party made before the conclusion of the arbitration proceeding." (*Ibid.*)

instances where the neutral arbitrator should have disqualified himself or herself.[5] (Stats. 1997, ch. 445 (Assem. Bill No. 1093).)

C. 2001 Legislation Broadens Neutral Arbitrators' Disclosure Requirements

In 2001, the legislature amended Code of Civil Procedure, section 1286.2 to provide that an award must be vacated if the neutral arbitrator was subject to disqualification upon grounds specified in section 1281.91, but failed to disqualify himself or herself. The 2001 legislation "significantly revised the disclosure requirements and procedures for disqualifying arbitrators pursuant to private or contractual arbitration."

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[5] Before 1997, the arbitrator's failure to disclose was a common ground for vacating an arbitration award. (*See, e.g., Ceriale v. Amco Ins. Co.* (1996) 48 Cal.App.4th 500 [vacating arbitration award because arbitrator in arbitration #1 failed to disclose that she represented party in arbitration #2; the arbitrator in #2 was a named partner of the law firm representing one of the parties in arbitration #1]; *Kaiser Foundation Hospitals, Inc. v Superior Court* (1993) 19 Cal.App.4th 515, 517 [vacating arbitration award because arbitrator failed to disclose he had served as Kaiser's arbitrator on multiple other occasions]; *Neaman v. Kaiser Foundation Hospital* (1992) 9 Cal.App.4th 1170, 1177 [vacating arbitration award because arbitrator failed to disclose that on five previous occasions he was Kaiser's party arbitrator and that he had a substantial business relationship with Kaiser]; *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 370 [vacating arbitration award because physician arbitrator failed to disclose that he served as an expert witness for law firm representing one of the parties to the arbitration]; *Johnston v. Security Ins. Co. of Hartford* (1970) 6 Cal.App.3d 839, 843 [vacating appraisal award because neutral failed to disclose substantial past and current business relationships with the insured's counsel and the insured's appraiser].)

(*Azteca Construction Inc. v. ADR Consulting Inc.*, *supra*, 121 Cal.App.4th at p. 1162.)

The Legislature's attention was focused on the disclosure issue in part because there "has been a 'rapid expansion' of private or contractual arbitration as a mechanism for dispute resolution." (*Azteca Construction Inc. v. ADR Consulting Inc.*, *supra*, 121 Cal.App.4th at p 1164, citing *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 985.) As this Court explained, the disclosure rules were strengthened because "the growing use of private arbitrators" has led to a "largely unregulated private justice industry." (*Jevne v. Superior Court*, *supra*, 35 Cal.4th at p. 948, citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001-2002 Reg. Sess.).)

The Assembly Committee on the Judiciary noted that the proposed new standards for disclosure "seek[] to provide basic measures of consumer protection with respect to private arbitration, such as minimum ethical standards and remedies for the arbitrator's failure to comply with existing disclosure requirements." (*Ibid.*, citation omitted.)

Similarly, a "Senate floor analysis stated that this legislation would apply to "an appointed arbitrator in non-judicial (private or contractual) arbitrations," that it would "address concerns of fairness by requiring private arbitrators to comply with ethical guidelines to be established by the Judicial Council," and that proponents of the legislation argued that strict ethical guidelines "should apply to private arbitrators to ensure that parties

to the arbitration can have confidence in the integrity and fairness of the private arbitrator." (*Jevne v. Superior Court*, *supra*, 35 Cal.4th at p. 948, citations omitted.)

"Precisely because arbitrators wield such mighty and largely unchecked power, the Legislature has taken an increasingly more active role in protecting the fairness of the process." (*Azteca Construction Inc. v. ADR Consulting Inc.*, *supra*, 121 Cal.App.4th at p. 148.) The recent "legislation arose out of a perceived lack of rigorous ethical standards in the private arbitration industry." (*Ibid.*)

The 2001 legislation was enacted to protect the public's confidence in arbitration. Indeed, the Legislature "has gone out of its way . . . to regulate the area of arbitrator neutrality by revising the procedures relating to the disqualification of private arbitrators and by adding, as a penalty for noncompliance, judicial vacation of the arbitration award." (*Ibid.*)

The statement of purpose recites: "These standards are adopted under the authority of Code of Civil Procedure section 1281.85 and establish the minimum standards of conduct for neutral arbitrators who are subject to these standards. They are intended to guide the conduct of

arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process."[6]

In other words, the neutrality of an arbitrator is "of crucial importance" to maintaining the integrity of the arbitration process. (*Azteca*, *supra*, 121 Cal.App.4th at p. 1168.) This is no small matter.

Indeed, this Court "has termed the requirement of a neutral arbitrator 'essential to ensuring the integrity of the arbitration process.'" (*Azteca*, *supra*, 121 Cal.App.4th at p. 1168, citations omitted.) This is so because "participants who agree to binding arbitration are giving up constitutional rights to a jury trial and appeal. [Statutory] [d]uties of disclosure and disqualification are designed to ensure an arbitrator's impartiality." (*Ibid.*, citations omitted.)

As one court succinctly stated, only by stringent disclosure requirements and ethics standards "can the parties have confidence that neutrality has not taken a back seat to expediency." (*Azteca*, *supra*, 121 Cal.App.4th 1156.)

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[6] *Azteca Construction Inc. v. ADR Consulting Inc.*, *supra*, 121 Cal.App.4th at p. 1167, citing Ethics Standards, std. 1(a) at p. 604.

D. CAA Disclosure Requirements For Neutral Arbitrators

Today, section 1281.9, subdivision (a) of the CAA requires that the neutral disclose in writing numerous factors which denote that he or she is in fact neutral:

- the existence of any ground specified in Code of Civil Procedure, section 170.1 for disqualification of a judge;
- any matters required to be disclosed by the Ethics Standards for neutral arbitrators adopted by the Judicial Council;
- the arbitration results and names of the parties to all prior (or pending) cases in which the neutral served as a party-appointed arbitrator for any party or lawyer for a party to the current arbitration proceeding;
- the arbitration results and names of the parties to all prior (or pending) cases in which the neutral served as a neutral for any party or the lawyer for any party in the current arbitration proceeding;
- any attorney-client relationship the neutral has or had with any party (or lawyer for a party) to the current arbitration proceeding; and
- any professional or significant personal relationship the neutral (or his or her spouse, or minor child living in the household) has or has had with any party or lawyer for a party to the current arbitration proceeding.

(Code Civ. Proc., sec. 1281.9(a).)

E. Code of Civil Procedure Section 170.1 Disclosure Requirements For Neutral Arbitrators

In essence, Code of Civil Procedure, section 170.1 requires neutrals to be impartial. As this Court pointed out long ago, section 170.1 is "based on the eternal verity that disinterest and impartiality are indispensable in the proper administration of justice." (*Austin v. Lambert* (1938) 11 Cal.2d 73, 76; see also *Watts v. Indiana* (1949) 338 U.S. 49, 55 [noting the importance of "the disinterestedness of the judge"]; *Martin v. Nelson* (1933) 217 Cal. 669, 670 [disqualifying judge for not being "disinterested" because he had a direct "pecuniary interest in the suit"].)

Under section 170.1, it must be disclosed that:

- the neutral has any personal knowledge of disputed evidentiary facts concerning the proceeding;
- the neutral served as a lawyer in a proceeding involving the same issues or one of the parties;
- the neutral has a direct financial interest in the subject matter of the proceeding or in a party to the proceeding;
- the neutral, or the neutral's spouse, or relative to either of them is a party to the proceeding or is an officer, director or trustee of a party;
- a lawyer (or a spouse of a lawyer) in the proceeding is the spouse, former spouse, child, sibling, or parent of the neutral

or the neutral's spouse or such person is associated in the private practice of law with a lawyer in the proceeding;

- the neutral believes his or her recusal would further the interests of justice;
- the neutral believes there is a substantial doubt as to his or her capacity to be impartial;
- a person aware of the facts might reasonably entertain a doubt that the neutral would be able to be impartial;
- the neutral has bias or prejudice toward a lawyer in the proceeding; and
- the neutral has (or is seeking) employment or a compensation arrangement from a party.

(Code of Civ. Proc., sec. 170.1, subd. (a).)

F. Judicial Council Ethics Standards Disclosure Requirements For Neutral Arbitrators

Under Code of Civil Procedure, section 1281.85, subdivision (a), the Judicial Council adopted Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Standards) effective July 1, 2002." Section 1281.85 goes on to provide that the standards "shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification

requirements established by [chapter 2 of title 9 of part III, Code of Civil Procedure, sections 1281-1281.95]."

Under those standards, the neutral must disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial."[7] (Ethics Standards

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[7] Specifically, Standard 7, subdivision (d) requires the following disclosures:

- Immediate or extended family relationships with a party, a party's spouse or domestic partner, or an officer, director, or trustee of a party;
- Arbitrator's or arbitrator's spouse's or domestic partner's family relationships (spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator) with lawyer in the arbitration;
- Arbitrator's or arbitrator's immediate family member's significant personal relationship with any party or lawyer for a party;
- Arbitrator's prior service as arbitrator for a party or lawyer for party;
- Arbitrator's compensated service as neutral in case involving party or lawyer for a party;
- Arbitrator's current or prospective arrangement for service as neutral for a party;
- Arbitrator's former or current attorney-client relationship with a party or lawyer for a party;
- Arbitrator's or arbitrator's immediate family member's other professional relationships;
- Arbitrator's or arbitrator's immediate family member's financial interests in party;
- Arbitrator's or arbitrator's immediate family member's financial interests in the subject of arbitration;
- Arbitrator's or arbitrator's immediate family member's interest that could be substantially affected by the outcome of the arbitration;

(cont. on next page)

For Neutral Arbitrators In Contractual Arbitration, Standard 7, subd. (a) (Standard 7).) The Ethics Standards go on to expand the disclosure requirement to include "[*a]ny other matter that [m]ight cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.*" (Standard 7(d)(14)(A), emphasis added.) This subdivision further expanded the neutral's disclosure requirements.

In addition, Standard 7 expanded upon or clarified the existing statutory disclosure requirements in the following ways:

- Requiring arbitrators to disclose to the parties (within ten days) any matter about which they become aware after the time for making an initial disclosure has expired (Standard 7, subd. (f));
- Expanding required disclosures about the relationships or affiliations of an arbitrator's family members to include those of an arbitrator's domestic partner (Standard 7, subds. (d)(1) and (2); see also Standard 2);

- Arbitrator's or arbitrator's immediate or extended family member's knowledge of disputed facts;
- Arbitrator's membership in organizations practicing discrimination;
- Any other matter that might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.

- Requiring arbitrators, in addition to making statutorily required disclosures regarding earlier service as an arbitrator for a party or attorney for a party, to disclose earlier services both as neutral selected by a party arbitrator in the current arbitration and as any other type of dispute resolution neutral for a party or attorney in the arbitration (e.g., temporary judge, mediator, appraisal umpire or referee) (Standard 7, subds. (d)(4)(C) and (5));
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or was an employee, expert witness, or consultant for a party or a lawyer in the arbitration (Standard 7, subds. (d)(8)(A) and (B));
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an interest that could be substantially affected by the outcome of the arbitration (Standard 7, subd. (d)(11));
- Requiring arbitrators to provide a summary of information when a disclosure includes information about five or more cases (Standard 7, subds. (d)(4) and (5));
- Requiring arbitrators to disclose membership in organizations that practice invidious discrimination on the basis of race,

sex, religion, national origin, or sexual orientation (Standard 7, subd. (d)(13));

- Requiring the arbitrator to disclose any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner (Standard 7, subd. (d)); and
- Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of matters that were not known at the time of nomination or appointment but that become known afterward (Standard 7, subd. (e).).

Standard 7 only contains "examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial." (Comment to Standard 7.) Consequently, the "absence of the particular interests, relationships, or affiliations listed . . . does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator's ability to be impartial and that therefore must be disclosed." (*Ibid.*)

G. The Scope Of Judge Gordon's Duty To Disclose

The threshold question in this case is whether Judge Gordon had a duty to make a disclosure of his censure under the facts and circumstances of this case. As explained, Standard 7(d)(14)(A) referenced in section 1281.9, subdivision (a) of the CAA, requires a person who is appointed as a

neutral to disclose any matter even if it is not specifically enumerated in the standard, if it "[*m]ight* cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial." (emphasis added, see also *Guseinov v. Burns* (2006) 145 Cal. App. 4th 944, 945, citing Code Civ. Proc., secs. 170.1, subd. (a) and 1281.9, subd. (c).)

Stated succinctly, Judge Gordon was required to disclose "[a]ny matter" in view of which a "person aware of the facts might reasonably entertain a doubt" that he "would be able to be impartial." (Code Civ. Proc., secs. 1281.9 (a); 1281.91 (d); 170.1 (a)(6)(A)(iii); Standard 7, subd. (d) and Code of Judicial Ethics, canon 3, subd. E.)

The test for Judge Norman's partiality is an objective one. "Actual bias is not required: Where a reasonable person would entertain doubt whether the . . . arbitrator was impartial, the appellate courts are not required to speculate whether bias was actual or merely apparent, or whether impartial consideration of the evidence and dispassionate decision of the matter would have led to the same result." (*Guseinov v. Burns, supra,* 145 Cal. App. 4th at p. 960.)

Standard 7(d)(14)(A) extended the burden of disclosure to "[*a]ny . . . matter that [m]ight cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.*" (Standard 7(d)(14)(A), emphasis added.) The "person" referenced in this disclosure requirement concerning partiality is not necessarily an objective,

reasonable person. (*Id.* at p. 960.) For example, in a case decided before the enactment of section 1281.9 or the adoption of Standard 7, one court stated the question was whether an "'average person on the street'" aware of the facts would harbor doubts as to the arbitrator's impartiality. (*United Farm Workers v. Superior Court* (1985) 170 Cal.App.3d 97, 104.)

Standard 7(d)(14)(A) is concerned of anything that *might* cause an average person on the street to doubt the arbitrator's impartiality. Because a person aware of the fact that Judge Norman was censured for disparaging women on account of their physical attributes might reasonably harbor doubts that he could be impartial in a case involving a woman whose physical appearance was damaged by a cosmetic surgeon's malpractice, Judge Norman had a duty to make a disclosure under Code of Civil Procedure, section 1281.9.

H. The Arbitration Award Was Properly Vacated Because Judge Norman Failed To Make A Disclosure

"In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed 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...." (*Jevne v. Superior Court, supra,* 35 Cal.4th at p. 945; *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 96-97 & fn. 7.)

When (as now) a neutral fails to disclose a matter required to be disclosed by section 1281.9 (including Standard 7(d)(14)(A) and a party later discovers disclosure should have been made, that failure to disclose constitutes one form of "corruption" for purposes of section 1286, subdivision (a)(2) and therefore provides a statutory ground for vacating an arbitration award. (*Michael v. Aetna Life & Casualty Ins. Co.* (2001) 88 Cal.App.4th 925, 937.)

Similarly, a neutral's failure to timely disclose a disqualification ground is (per se) a statutory basis for vacating an arbitration award under Code of Civil Procedure, section 1286.2, subdivision (a)(6). (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 162.)

In *Ovitz*, the Los Angles Court of Appeal explained: "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." (*Ovitz v. Schulman, supra*, 133 Cal.App.4th at p. 845, citation omitted; accord, *International Alliance v. Laughon* (2004) 118 Cal.App.4th 1380, 1386.) Because the penalty for not timely making a disclosure is that an arbitration award must be vacated, this Court should affirm the trial court's order and deny defendants' writ petition.

2. Under The Abuse Of Discretion Standard Of Review, Appellate Courts Should Defer To The Trial Court's Sound Discretion When Reviewing An Order Vacating An Arbitration Award That Is Supported By Sufficient Evidence Of A Potential Bias The Neutral Arbitrator Failed To Disclose

A. California Courts of Appeal Are Split Over the Proper Standard Of Review

To date, this Court has been silent as to the appropriate standard of review applicable to a trial court order vacating an arbitration award based on a purported neutral's failure to disclose information that indicates potential bias. While the intermediary appellate courts are split on the issue, the longer line of authority applies the deferential abuse of discretion standard of review. (*Haworth v. Superior Court* (1998) 164 Cal.App.4th 930 (*Haworth*); *see, e.g., Agri-Systems, Inc. v. Foster Poultry Farms* (2008) 168 Cal.App.4th 1128, 1140 [neutral's legal representation of a third party with an adversarial relationship with a party to the arbitration]; *Advantage Medical Services v. Hoffman* (2008) 160 Cal.App.4th 806, 816 [attorney arbitrator represented insurer that provided insurance to party]; *Luce, Forward, Hamilton & Scripps, LLP v. Koch* (2008) 162 Cal.App.4th 720, 734 [arbitrator served with party's lawyer and witness on boards of professional organizations]; *Guseinov, supra*, 145 Cal.App.4th at pp. 951, 957 [arbitrator served as an uncompensated mediator in a prior case in

which plaintiff's attorney represented a party]; *Fininen v. Barlow* (2006) 142 Cal.App.4th 185, 188-189 [arbitrator's prior service as mediator in matter involving party]; *Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1365 [arbitrators previously granted pre-hearing motions to dismiss]; *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1105-1106 [dis. opn. of Grignon, J.] [arbitrator in law firm dissolution was previously represented by the law firm for some parties and had separated from his own law firm in difficult circumstances]; *Reed, supra*, 106 Cal.App.4th at pp. 1370-1371 [arbitrators had a practice of entertaining pre-arbitration motions to limit or dismiss arbitrable claims]; *Michael v. Aetna Life & Cas. Ins. Co.* (2001) 88 Cal.App.4th 925, 931 [arbitrator had prior and ongoing relationship with the defendant]; *Betz v. Pankow* (1995) 31 Cal.App.4th 1503, 1507-1508 [arbitrator's former law firm represented businesses owned by party]; *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 527 [arbitrator's law partner represented party in unrelated litigation]; *Figi v. New Hampshire Ins. Co.* (1980) 108 Cal.App.3d 772, 775-776 [neutral arbitrator's business relationship with party-selected arbitrator].)

In a two-to-one decision, the majority and the dissent opinions acknowledged the conflict in California case law over the correct standard of review applicable to an order vacating an arbitration award based on the neutral's failure to make a disclosure. The majority (Presiding Justice

Turner and Associate Justice Kriegler--who penned the majority's opinion) did "not attempt to resolve the dispute, as [its] decision would be the same under either [a de novo or abuse of discretion] standard." (*Haworth* at p. 803.)

After explaining a deferential standard of review is appropriate for cases in which a determination of duty involved "fact intensive" issues--such as the degree of a relationship and its connection to the case--the dissent opinion (written by Associate Justice Mosk) concluded "[t]his case presents no such issues." (*Id.* at p. 810.) Because "[t]he facts in this case are undisputed" and the "sole question in this case is whether those undisputed facts gave rise to a duty to disclose," Justice Mosk concluded the de novo standard of review applied. (*Id.* at 810.)

As the majority pointed out, "[h]owever, the weight of authority applies the substantial evidence standard of review, even when the underlying facts are undisputed, recognizing that the question of whether the particular circumstances of a case require disclosure is itself a factual determination for the trial court to make." (*Id.* at p. 803, citations omitted.)

Because this Court has been silent as to the proper standard of review applicable to orders vacating arbitration awards for the neutral arbitrators' failure to make a disclosure, the Courts of Appeal have been able to reverse or affirm those orders by employing whichever standard of review best suits their own personal predilections.

B. Application Of The Abuse Of Discretion Standard In The Analogous Attorney Disqualification Context

While this Court has never announced the appropriate standard of review governing an order vacating an arbitration award based on the failure to make a disclosure, it would not necessarily need to write on a clean slate. In the very similar context involving attorney disqualification motions, this Court has affirmed--and reaffirmed--the appropriate standard of review.

The resolution of either a recusal motion or a motion to vacate which is based on the neutral's failure to make a disclosure requires the trial court to make factual determinations and the overall purpose of both motions is to preserve the public's trust and confidence in the fair and ethical administration of justice. To secure uniformity of decisions, the same standard of review should be applied to recusal orders and orders vacating arbitration awards which are based on the neutral's failure to make a disclosure.

Last year, this Court affirmed its "long-standing rule that recusal motions are reviewed under a deferential abuse of discretion standard." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709; see also *People v. Vasquez* (2006) 39 Cal.4th 47, 56; *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 58 Cal.4th 839, 848.) Because a recusal motion is directed to the sound discretion of the trial court, "its decision to

grant or deny the motion is reviewed only for an abuse of discretion." (*Haraguchi, supra*, 43 Cal.4th p. 711.) The same differential abuse of discretion standard of review should apply to orders vacating arbitration awards which are based on the neutral's failure to disclose.

(i) The Trial Court Decides Factual Disputes

Two years after the California Constitution was ratified in 1879,[8] this Court explained the distinctive roles of trial and appellate courts: "The trial court decides as to the facts, the court of review (in this State) as to questions of law only." (*Bauder v. Tyrell* (1881) 208 Cal. 256.)

Recusal motions and motions to vacate (which are based on the neutral's failure to disclose a potential bias) require trial courts to make factual determinations. While recusal motions involve the resolution of factual questions about potential conflicts of interest, a motion to vacate involves the resolution of factual questions about potential biases.

"In ruling on a recusal motion, a trial court's judgment whether the evidence before it is sufficient to demonstrate a 'conflict of interest' resolves a question of fact. If a conflict of interest is demonstrated, the decision whether [the] conflict is so severe as to warrant recusal of the

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[8] California's original Constitution--adopted in November 1849 in advance of California attaining U.S. statehood in 1850--was superseded by the current constitution which was ratified on May 7, 1879. Grodin et al., *The California State Constitution: A Reference Guide* (1993).

conflicted prosecution is particular within the trial court's discretion." (*Hambarian v. Superior Court* (2008) 27 Cal.4th 826.)

Similarly, whether the evidence is sufficient to demonstrate an undisclosed potential bias resolves a question of fact. If a potential bias is demonstrated, the decision whether the undisclosed bias should have been disclosed and requires the arbitration award to be vacated lies within the trial court's sound discretion.

Neutrals--like attorneys with potential conflicts of interest--must initially decide whether to recuse oneself, make a disclosure, or do nothing at all. Specifically, California Rule of Court 1606, subd.(a) provides that "[i]t shall be the duty of the arbitrator to determine whether any cause exists for disqualification upon any of the grounds set forth in section 170.1 of the Code of Civil Procedure...." Therefore, the neutral has a duty to "make determinations concerning disclosure on a case-by-case basis." (Comment to Standard 7.)

When an undisclosed bias is subsequently discovered and challenged, the neutral's failure to disclose presents the trial court with an issue of fact to be decided on a case-by-case basis. (*Michael v. Aetna, supra*, 88 Cal.App.4th 925.) In other words, the issue--whether the neutral discharged his or her duty to disclose information because it might indicate bias--is a question of fact. (*Betz v. Pankow, supra*, 16 Cal.App.4th 919; *Reed v. Mutual Service Corp., supra*, 106 Cal.App.4th at p. 1365; *Fininen*

v. Barlow (2006) 142 Cal.App.4th 185, 189-190; *Michael v. Aetna Life & Casualty Co., supra*, 88 Cal.App.4th at p. 933.)

Because resolution of a neutral's duty to disclose involves a factual determination, the trial court's decision should be reviewed under the deferential abuse of discretion standard of review.

(ii) The Appellate Court Defers To The Trial Court's Conclusions Based on Factual Findings Supported By Substantial Evidence

Under the abuse of discretion standard of review, the trial court's factual determination is reviewed for "substantial evidence." (*Haraguchi, supra*, 43 Cal.4th p. 711.) An appellate court must "accept the trial court's findings of fact if substantial evidence supports them," and "draw every reasonable inference to support the award." (*Alexander v. Blue Cross* (2001) 88 Cal.App.4th 1082, 1087.) Therefore, "an appellate court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence." (*People ex rel. Dept. of Corporations v. SpeeDee Oil, supra*, 20 Cal.4th at p. 1143.)

"When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (*SpeeDee Oil Id.* at p. 1144.) Unlike the substantial evidence rule, which measures the quantum of proof adduced in the trial court proceedings, the abuse of discretion standard measures

whether, given the established evidence, the lower court's action "falls within the permissible range of options set by the legal criteria." (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) Accordingly, the trial court's application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi, supra*, 43 Cal.4th p. 711.)

C. Appellate Courts Should Defer To The Trial Court's Sound Discretion Under The Abuse Of Discretion Standard

The abuse of discretion standard of review should apply because a motion to vacate which is based on the neutral's failure to disclose--like recusal motions--preserve the public's trust in the fairness of the adjudicatory process. To ensure uniformity of decisions, the same standard of review should apply.

By extending the judicial system's protections and guarantees to arbitration, our Legislature sought to boost public confidence in the arbitration process as an alternative method of dispute resolution. Similarly, the paramount concern of disqualification motions "must be to preserve public trust in the scrupulous administration of justice." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 11 45.)

Like a conflict in interest in the recusal context, there "is no bright line of demarcation for the existence of an impression of possible bias, and each case must be considered in light of its particular circumstances." (*Betz v. Pankow* (1995) 31 Cal.App.4th 1503, 1508.) Recently, this Court explained that the trial court "has the superior vantage point" to make these types of factual determinations. (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at p. 713.) In addition, as this Court stated eighty years ago, "it is the province of the trial court to decide questions of fact." (*Tupman v. Haberkern* (1929) 208 Cal. 256, 263.)

Under the abuse of discretion standard, the Court of Appeal was required to give due deference to the trial court's decision--that a neutral has a duty to disclose--because sufficient evidence supported the trial court's factual conclusion that the information withheld might indicate bias.

D. Under An Abuse Of Discretion Standard Of Review, Retired Judge Gordon Had A Duty To Disclose To Ms. Ossakow--a Plaintiff in a Cosmetic Surgery Lawsuit--His Discipline and Censure by This Court for His Disparaging and Discriminatory Treatment of Women Based On Their Physical Attributes in His Courtroom Environment

Substantial evidence established that Judge Gordon had a duty to disclose to Ms. Ossakow the fact of his discipline. Under the abuse of discretion standard, the Court of Appeal was required to give due deference

to the trial court's decision--that Judge Gordon had a duty to disclose--because sufficient evidence supported the trial court's factual conclusion that the information withheld might indicate bias.

A neutral arbitrator has an obligation "to disclose to the parties any dealings which might create an impression of possible bias . . . ." (*Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 527.) Put otherwise, under the 'impression of possible bias test' . . . [a]n arbitrator's failure to disclose any matter which **might** create an impression of possible bias is grounds for vacating the award." (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 936, emphasis added.)

This statement is consistent with Standard 7(d)(14)(A). "Any doubt as to whether or not to disclosure is to be made should be resolved in favor of disclosure." (The Code of Ethics for Arbitrators in Commercial Disputes, Canon II, subd. (D).)

Measured by the impression of *possible* bias test, there was substantial evidence supporting the trial court's ruling. Judge Gordon was disciplined--punished by public censure--for his treatment of women, including disparaging comments about their physical characteristics, based on the discriminatory courtroom environment he created by demeaning women as stereotypical objects.

As this Court concluded, Judge Gordon created "an overall courtroom environment where discussion of sex and improper ethnic and

racial comments were customary. (*In Re Gordon* (1996) 13 Cal.4th 472, 474.) Suffice it to say, a person such as Ms. Ossakow *might* reasonably entertain a doubt as to Judge Gordon's ability to be impartial adjudicating a medical malpractice action where she is suing a male doctor for damaging her physical appearance--without consent to do so--during cosmetic surgery.

The evidence established that--after the arbitration award--plaintiff learned (for the first time) that Judge Gordon had been censured by this Court. (1 Exh. E at 47.) The facts were hotly contested in the trial court. In addition to nearly 300 pages of exhibits, Ms. Ossakow's motion to vacate was supported with her declaration stating that she would have never agreed to have Judge Gordon serve as an arbitrator had she know he was censured specifically for his demeaning, degrading treatment of women. (1 Exh. E at 47.)

When the dust settled, the trial court overruled six (and sustained nine) of defendants' evidentiary objections. (1 Exh. G at 319-329; Exh. N at 381.) After reviewing the evidence and conducting two hearings, the trial court concluded "that under these specific facts, [Ms. Ossakow] had carried her burden of establishing facts that would cause a reasonable person to entertain a doubt whether the arbitrator was impartial." (2 Exh. N at 384.)

As if that were not enough, the trial court also found that there was "at least some evidence of [Judge Gordon's actual] bias in the final award." (2 Exh. 385.) At one of the hearings, this evidence was identified as Judge Gordon's comments that Ms. Ossakow "had one too many surgeries." (1 Exh. B at 16.)

Ms. Ossakow's four earlier surgeries were not related to her upper or lower lips. (1 Exh. E at 88.) Yet, when he summarized Ms. Ossakow's medical expert's testimony on causation, Judge Gordon gratuitously offered: "One thing probably everyone can agree upon, after five facial surgeries, she could have done without the sixth one." (2 Exh. E at 296.) Then--when discussing the issue of causation, Judge Gordon stated: "On the issue of causation . . . . this claimant had five prior facial surgeries" when the four (not five) earlier surgeries were unrelated. (2 Exh. E at 297.) For this reason too, the arbitration award should be vacated.[9]

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[9] Defendants misconstrue the record on appeal. Defendants contend Judge Gordon's conclusion--that Ms. Ossakow's damages were caused by her earlier surgeries--was based on "Ms. Ossakow's medical expert and other expert physicians who testified at the two day arbitration." (AOB 33.) The record speaks for itself, only two experts testified. (2 Exh. E at 295.) And, of course, Ms. Ossakow's medical expert's report stated her earlier surgeries "do not appear to be related in any way to her current problems with the upper and lower lip." (1 Exh. E at 88.)

Quite frankly, the fact that Judge Gordon was punished and disciplined for encouraging a hostile, discriminatory environment for women and the fact that plaintiff was a woman prosecuting an action based on unwanted and unconsented[10] cosmetic surgery itself constituted sufficient evidence to support the trial court's determination. These facts alone show--and support--the trial court' ruling that a possible impression of bias against women was raised by Judge Gordon's earlier discipline, particularly to a woman who had four previous plastic surgeries and was physically and emotionally harmed in the last procedure.

The trial court concluded that a reasonable person would think that a woman who sued a male medical doctor for battery and poor medical treatment would believe these facts about Judge Gordon's courtroom environment critical to the integrity of the arbitration process. (2 Exh., Tab N.) Yet, all the law required was a finding it *might* cause suspicion on the arbitrator's impartiality.

In a cosmetic surgery case--where battery is claimed because the doctor failed to obtain consent for what he did--the fact that Judge Gordon was disciplined for calling women names based on their physical

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[10] It is worth noting Judge Gordon granted the motion for summary adjudication on the battery claim, finding no disputed facts as to consent.

characteristics is by itself substantial evidence supporting the trial court's decision that the censure should have been disclosed.

In short, any person in plaintiff's situation might reasonably believe it material that Judge Gordon's attitudes, his views on women, his disparaging nicknames for them based on physical characteristics ought to have been disclosed so that she could have assessed whether this neutral would indeed be neutral.

Thus, there was substantial evidence supporting the trial court's order that Judge Gordon had a duty to disclose the fact he was disciplined for his unthinkable treatment of women in the courtroom environment. The details of his conduct directed at women speak for itself: his discipline creates an impression of possible bias which leads a reasonable person to believe he could not be impartial to a woman plaintiff in a cosmetic medical malpractice case.

There was more than substantial evidence that the basis for the discipline--disparaging women based on gender, their physical characteristics and their race--might or could cause a person to reasonably entertain a doubt whether Judge Gordon was impartial, or whether he had a bias against women in general, or in particular against women with certain physical characteristics. That was enough to trigger Judge Gordon's duty to disclose.

Because there was substantial evidence supporting the trial court's order vacating the arbitration award, the trial court's order should be affirmed and the writ should be denied. Even if the order were reviewed de novo, the result would be the same, for all of these reasons, as a matter of law.

E. De Novo Review Does Not Apply

The dissenting opinion took the position the trial court's order vacating the arbitration award is reviewed de novo as a legal issue based on undisputed facts.[11] But de novo review does not apply as a matter of law, policy and fact.

(i) The Facts Were Contested

De novo review does not apply because the facts were in dispute. Evidentiary objections were sustained. Ms. Ossakow's declaration--stating that she would have never agreed to have Judge Gordon serve as an arbitrator had she known he was censured specifically for his demeaning, degrading treatment of women--was before the trial court. (1 Exh. E at 47.) And, separately and apart from the declaration, the arbitration award itself indicated that Judge Gordon was actually biased.

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[11] Unable to end-run around the disputed facts, defendants reach the same result using a different approach--framing the issue as a mixed question of law and fact which is predominantly legal. (AOB 10.)

Ignoring the evidence, the dissenting opinion focused solely on Judge Gordon's censure to conclude the facts were undisputed and therefore de no novo review applied. In the attorney recusal context, the Santa Barbara Court of Appeal conducted a similar interpretation of the facts which was rejected by this Court. (*Haraguchi v. Superior Court, supra,* 43 Cal.4th 706.)

In *Haraguchi*, the facts were dressed up as an "issue of first impression" and then reviewed de novo. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706.) Writing for a unanimous court, Justice Werdegar reasoned that "a court of a mind to reverse may always point to those elements of a case that it views as distinguishing and on that basis assert the issue is a matter of first impression." (*Id.* at p. 584.)

Weaker than the "issue of first impression" interpretation, the dissenting opinion's "undisputed facts" interpretation reached de novo review by simply ignoring the facts in front of the trial court. "The appellate process is complicated enough without the confusion that can arise from inaccurate descriptions of the standard of review." (Meadow, *Summary Judgment Motions: The Abuse-Of-Discretion Standard Of Review Is Just Plain Wrong*, Los Angeles Lawyer (May 1991) at p. 43.)

Under the abuse of discretion standard of review, the amount of deference given to the trial court depends upon the context in which the ruling was made. As this Court explained, "the abuse of discretion standard

is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court, supra,* 43 Cal.4th at pp. 711-712, fns. omitted.)

By way of example, appellate courts review disqualification motions for an abuse of discretion. (*Ibid.*) When the trial court's pure legal conclusion arising out of the disqualification motion is reviewed, however, the trial court is given no deference under de novo review. (*People v. SpeeDee Oil, supra,* 20 Cal.4th at pp. 1153-1154 but see *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263.) Because facts were disputed, the de novo standard of review did not apply.

(ii) Appellate Courts Must Give Due Deference To Trial Courts

De novo review does not apply because the appellate court reviews the trial court's application of law to the facts for an abuse of discretion so long as the trial court's factual findings are supported by sufficient evidence. Over a century ago, this Court described judicial discretion as "the sound judgment of the court, to be exercised according to the rules of law." (*Lent v. Tilson* (1887) 72 Cal. 404, 422.) That is how it ought to be interpreted now.

The abuse of discretion standard is not met simply because the appellate court disagrees with the trial court's decision. To the contrary, discretion is abused only when the trial court "exceeds the bounds of reason," all of the circumstances before it being considered. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) But that is precisely what the dissenting opinion did.

It is not the appellate courts' role to second guess whether an impartial neutral would have viewed the evidence differently, or whether there was actual or merely apparent bias. To the contrary, the trial court order must be upheld when (as now) it is supported by the evidence and shows at least the impression of possible bias.

(iii) De Novo Review Is Not Appropriate

The decision to disqualify a neutral for the failure to make a disclosure ought to be left to the trial court's sound discretion for two reasons. First, the purpose and role of the trial court is to resolve facts and apply the governing law. Second, trial courts are better equipped to make factual determinations and apply the law. On appeal, the trial court's order is reversed only if there is no evidentiary or legal basis for the trial court's decision.

For example, had the dissenting opinion been the trial court's order, it would have been reversed on appeal as arbitrary and capricious because it misapplied the law governing a neutral arbitrator's duty to disclose.

Actual Bias Is Irrelevant

The dissenting opinion concluded "it is objectively unreasonable to infer from the 1996 censure, concerning events that occurred from 1992 to 1994, that years later Judge Gordon is biased against all women with unspecified physical attributes." (*Haworth, supra*, 164 Cal.App.4th p. 812.) But the test is the possible appearance of bias, not actual bias.

It is, of course, "immaterial that the 'neutral' arbitrator was not actually guilty of fraud or bias." (*Banwait v. Hernandez* (1989) 205 Cal.App.3d 823, 827.) This is because "'. . . we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.'" (*Id.* at p. 827, quoting *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145, 149.)

The "appellate courts are not required to speculate whether bias was actual or merely apparent, or whether impartial consideration of the evidence and dispassionate decision of the matter would lead to the same result." (*Guseinov v. Burns*, *supra*, 145 Cal.App.4th at p. 960.)

Of course, here the trial court found actual bias as well.

Neutral Arbitrators Have Higher Disclosure Standards

The dissenting opinion concluded that "the same standard to [judicial] disqualification [applies] to an arbitrator's duty to disclose." (*Haworth, supra*, at p. 813.) However, while a neutral arbitrator has been required to make the same disclosures as a judge since 1993, the neutral arbitrator's duty to disclose does not end there. In 2001, the legislature greatly expanded the neutral arbitrator's disclosure requirements. In addition to Code of Civil Procedure, section 170.1, a neutral arbitrator must also comply with the CAA's and Ethics Standards' disclosure requirements. The dissenting opinion fails to address these higher disclosure standards.

After concluding a neutral arbitrator must make the same disclosure requirements as a judge, the dissenting opinion goes on to rely on three inapposite judicial disqualification cases: *People v. Chatman* (2006) 38 Cal.4th 344, 362 [judge handling case involving stabbing of woman even though judge's daughter had been victim of robbery at knifepoint]; *Mann v. Thalacker* (8th Cir. 2001) 246 F.3d 1092 [judge handling case involving abduction, sexual abuse, and attempted murder of seven-year old girl even though judge had been sexually abused in his early teens]; *United Farm Workers v. Superior Court, supra*, 170 Cal.App.3d 97 [judge handled case involving employee suing a union for damages arising out of strike even though judge's wife had worked for two or three days for employer as a replacement worker during strike].)

In each of those cases, there was no evidence of any possible judicial bias that might cause a person to reasonably doubt any of those judges' impartiality. All three cases dealt with an experience shared with a family member or the judge, not relevant and highly offensive conduct by the judge. Indeed, none of those judges were censured.

Judge Gordon Was Required To Disclose His Censure

The dissenting opinion concluded that Judge Gordon had no duty to disclose his censure by substituting its judgment for the trial court's and concluding any "inference from the Supreme Court's opinion that Judge Gordon harbored attitudes about the female appearance or about females in general such that he would be biased in this matter is not reasonable." (*Haworth, supra*, 164 Cal.App.4th at p. 814.) To reach this conclusion, the dissenting opinion reasoned:

(1) Judge Gordon was not censured for bias against a litigant;

(2) Judge Gordon was censured for making comments that he intended to be humorous;

(3) there was no indication that Judge Gordon's comments related to the staff members' appearance; and

(4) there was no indication the physical attributes to which Judge Gordon referred to were particular to female attributes or similar to those involved in this case (i.e., "nose and its underlying musculature"). (*Haworth, supra*, at pp. 814-815.)

In other words, the dissenting opinion concluded that Judge Gordon did not need to disclose his censure because there was no connection between his conduct and any corruption of the arbitral process. This misapplies the law and defies the facts. Is the dissenting opinion saying that every person would never conclude Judge Gordon's offensive conduct might not have led a plaintiff reasonably to prefer another arbitrator to ensure an impartial result? If so, two appellate court Justices and one trial court have already disagreed.

What is even more unusual here is that Judge Gordon's censure was based on findings of fact and conclusions of law reported by special masters appointed by this Court, and it was found to be justified and warranted. (*In re Gordon, supra*, 13 Cal.4th at pp. 473-474.) In other words, these were not just accusations.

Although Judge Gordon did not dispute the findings of misconduct against him, the general rule is that discipline will not be imposed in the absence of clear and convincing evidence sufficient to sustain a charge to a reasonable certainty. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878.) .

Judicial discipline varies depending on the severity of the misconduct, ranging from advisory letters to outright removal from the bench, and censure is one of the most severe forms of discipline available. (Cal. Const., art. VI, sec. 18; Rothman, *Cal. Judicial Conduct Handbook*

(3d ed. 2007) secs. 12.86-12.88, pp. 663-665.) Censure is not imposed without an investigation, a hearing, and proof sufficient to afford the responding judge with due process protections. (*E.g., Jud. Council of Cal., Comm. on Jud. Performance, Rules of the Comm. on Jud. Performance* (Oct. 2007), rules 106-136.) The level of punishment censure has its place in the balancing of the facts. Yet, the dissent never viewed this punishment as significant in and of itself.

Ms. Ossakow is not the first person to think Judge Gordon's conduct might affect his interactions with women. After all, Judge Gordon's censure has been cited by the Judicial Council as an example of gender bias that is impermissible in the judiciary. In its Guidelines for Judicial Officers, the Judicial Council cites *In re Gordon* (1996) 13 Cal.4th. 472, 473-474 as an example of conduct that must not be tolerated even in informal settings within the court. (Jud. Council of Cal., Advisory Comm. on Access and Fairness, *Gender Bias: Guidelines for Judicial Officers-Avoiding the Appearance of Bias* (Aug. 1996) p. 15.)

Similarly, retired Los Angeles Superior Court Judge David M. Rothman includes Judge Gordon's censure in his discussion of conduct manifesting gender bias. According to Judge Rothman, Judge Gordon exhibited such bias by maintaining a courtroom environment in which "offensive, crude and demeaning name-calling" was practiced, including by

Judge Gordon. (Rothman, *Cal. Judicial Conduct Handbook*, sec. 2.11, p. 51.)

As those two authorities recognize, there was cause to conclude Judge Gordon's inappropriate treatment of women might cause a person to reasonably doubt his impartiality in this case. By the same token, a person might reasonably question whether Judge Gordon could serve as an impartial neutral arbitrator in this case. It was necessary, therefore, for him to disclose that censure before the matter proceeded to arbitration.

A Neutral Must Disclose Public Records

The dissenting opinion suggested that because Judge Gordon's censure was published by the California Supreme Court and information about it is widely available on the Internet, Ms. Ossakow, her attorney, or her chosen arbitrator should have discovered it. But California law squarely places the duty of disclosure on the neutral arbitrator.

As a general proposition, "the duty *to investigate* for conflicts is narrower than [the] duty *to disclose* known conflicts." (*Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal.App.4th 1085, 1097, citing to *Betz v. Pankow*, *supra*, 31 Cal.App.4th at p. 1503 and *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Electric Co.* (1972) 28 Cal.App.3d 556, 559, emphasis added.)

More to the point, Code of Civil Procedure, section 1281.9 requires "the proposed neutral arbitrator" to disclose all matters that might cause a

reasonable person to doubt an ability to be impartial. Section 1286.2, subdivision (a), makes an arbitrator's failure to disclose one of the narrow grounds for vacating any resulting award. (See also *Reed, supra*, 106 Cal.App.4th at p. 1370; *Michael, supra*, 88 Cal.App.4th at pp. 937-938.)

To justify placing the burden on the parties to discover a neutral's bias, the dissenting opinion suggests the parties to arbitration be required to conduct a three-word Web search: "I do not think it is difficult to type the words 'judge norman gordon' into Google and push the search key." (*Haworth, supra*, at p. 817, fn.4.) The problem that the dissenting opinion failed to address is the reliability of any information obtained in this manner.

Given the intentionally misleading and blatantly erroneous information on the Web, reliance on the integrity of online information sources is no solution. (Mintz, *Web of Deception: Misinformation on the Internet* (2002).) The Web fuels more falsehoods than one realizes. (Mackey, *A Grand Conspiracy Theory From Pakistan*, N.Y. Times (May 12, 2009)[12] [explaining that typing three words such as "osama bin laden" or "Pakistan Swat Valley" into the Web site Pakistan Daily will lead to

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[12] http://thelede.blogs.nytimes.com/2009/05/12/a-grand-conspiracy-theory-from-pakistan/?ref=world (last visited May 14, 2009)

"allegations that 'Osama bin Laden may be Jewish' or that Islamist militants in Pakistan's Swat Valley are Indian intelligence agents"].)

Given the unreliability and vulnerability of Web sites, coupled with the ability to upload any false and misleading information onto the Web in general obscurity, a three-word Web search requirement may create--not resolve--disclosure issues. Because it takes out the "guessing game," the best source is the neutral arbitrator. Therefore, disclosure is required.

F. Even If Reviewed De Novo, Judge Gordon Had A Duty To Disclose As A Matter Of Law

The dissenting opinion concluded that affirming the trial court's decision under the de novo standard of review would create the following rule:

> "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*, pp. 815-816.)

According to the dissenting opinion, this rule will open the flood gates from which a river of motions to vacate will flow because this type of disclosure "will encourage losing parties to scour an arbitrator's personal and professional life for any fact however private that might form the basis

for a non-frivolous motion to vacate." (*Haworth, supra*, p. 816, relying on *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1064 [dis. opn. of Grignon, J.].) But this is simply not so.

The disclosure issue before this Court is much more narrow and focused. It involves a matter of public record that is beyond public debate, not a personal or private matter. Judge Gordon's offending conduct was not some stray comment. It was the way he thought or so a person might reasonably conclude.

In any event, the rule should be framed within the confines of the facts of this case. Specifically, the rule could be articulated as follows:

> A retired judicial officer sitting as a neutral arbitrator on a private, contractual arbitration panel choosing on his own volition to act as a neutral must disclose to a female plaintiff arbitrating a cosmetic surgery battery/malpractice action the fact that--while he was on the bench--he was disciplined by public censure for his degrading, demeaning and derogatory discrimination of women in and around his courtroom because his discipline creates an impression of possible bias about the neutral arbitrator's impartiality.

While such a rule may very well require Judge Gordon to disclose his censure in every case as the dissenting opinion suggests, that is not the question before this Court.

Indeed, our Legislature has already written the rule: A neutral arbitrator is required to disclose "[a]ny reason" in view of which a "person aware of the facts might reasonably entertain a doubt" that he "would be able to be impartial." (Code Civ. Proc., secs. 1281.9 (a); 1281.91 (d); 170.1 (a)(6)(A)(iii); Standard 7, subd. (d) and Code of Judicial Ethics, canon 3, subd. E.) One court coined the rule as the "impression of possible bias test."

Because each motion must be decided in light of its particular facts and circumstances, there can be no bright line test for the existence of an impression of possible bias. It is the province of the trial court to make factual determinations and the trial court has the "superior vantage point" to do so. Consequently, the resolution of the existence of an impression of possible bias should rest in the sound discretion of the trial court.

Whether reviewed for an abuse of discretion or anew, the trial court's order should be affirmed because a person aware of the fact that Judge Norman was censured for disparaging women on account of their physical attributes might harbor reasonable doubts that he could be impartial in a case involving a woman whose physical appearance was damaged by a cosmetic surgeon's malpractice. Therefore, Judge Norman had a duty to make a disclosure as a matter of law, fact and policy.

CONCLUSION

It is no secret that a direct, personal, and substantial pecuniary interest exists when income from judging depends upon the volume of cases an adjudicator hears and that frequent litigants who are free to choose among adjudicators, prefer those who render favorable decisions. In addition to this inherent financial interest--as well as the appearance (or risk) of bias, arbitrators serve in a quasi-judicial capacity which is usually not subject to judicial scrutiny. Put differently, neutral arbitrators already have a built-in direct financial interest and often serve as the jury, jury and appellate court.

To counter that appearance (or risk) of bias, our Legislature has mandated broad disclosure requirements, requiring the disclosure of all matters that might cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.

In this case, the trial court held that Judge Gordon had a duty to disclose. Because the law and facts support the trial court's conclusion, this Court should give the trial court its due deference by affirming its order and denying the writ petition.

Respectfully submitted,

Dated: May 18, 2009

BROWN SHENOI KOES LLP

By: _____
DANIEL J. KOES
Attorney for *Real Party in Interest* SUSAN OSSAKOW

CERTIFICATE OF WORD COUNT

I certify that, under California Rules of Court, rule 8.520(c)(1), the Answer Brief on the Merits contains 13,859 words.

Respectfully submitted,

Dated: May 18, 2009

BOSTWICK & ASSOCIATES
Jeffrey S. Mitchell

BROWN SHENOI & KOES LLP
Daniel J. Koes

By: _____
DANIEL J. KOES
Attorneys for *Plaintiff* and *Real Party in Interest* SUSAN OSSAKOW

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 175 S. Lake Ave., Suite 202, Pasadena, CA 91101

On May 18, 2009, I served the foregoing document described as:

ANSWER BRIEF ON THE MERITS

on all interested parties in this action by placing a true copy of the document(s), enclosed in a sealed envelope, addressed as follows:

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(X) **BY MAIL** as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Pasadena, California.

( ) **BY PERSONAL SERVICE:** I caused to be delivered such envelope by hand to the above addressee(s).

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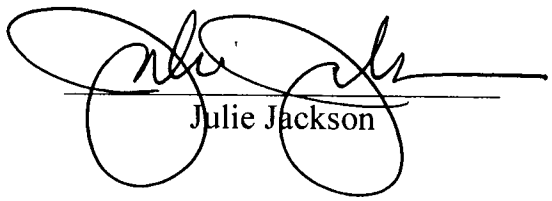
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 18, 2009 at Pasadena, California.



Julie Jackson

SERVICE LIST

Jeffrey S. Mitchell BOSTWICK PETERSON & MITCHELL LLP 4 Embarcadero Center, Suite 750 San Francisco, CA 94111 Telephone: (415) 421-8300 Facsimile: (415) 421-8301	Attorneys for *Real Party in Interest* SUSAN OSSAKOW
Kathleen McColgan Suzanne De Rosa Bradley C. Clark SCHMID & VOILES 333 S. Hope Street, 8th Floor Los Angeles, CA 90071 Telephone: (213) 473-8700 Facsimile: (213) 473-8777	Attorneys for *Petitioners* THE BEVERLY HILLS SURGICAL CENTER INC. and RANDAL D. HAWORTH, M.D., F.A.C.S.
Hon. Allan J. Goodman, Dept. H Los Angeles County Superior Court West Los Angeles Courthouse 1633 Purdue Avenue Los Angeles, CA 90025	
Clerk of the Court of Appeal Second District, Division Five 300 S. Spring St. Fl. 2, N. Tower Los Angeles, CA 90013	
JOSHUA CURT TRAVER Cole Pedroza, LLP 200 South Los Robles Avenue Suite 300 Pasadena, CA 91101	Attorneys for Amici Curiae CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION and CALIFORNIA HOSPITAL ASSOCIATION