Disclosing Conflict of Interest in the California Arbitration System: *Banwait v. Hernandez* and the Erosion of Duty

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I. INTRODUCTION

Arbitration as a mode of dispute resolution, out of necessity, is increasingly utilized by the California practitioner, and is encouraged by an already overburdened civil court system.[1] Indeed, the number of cases resolved, directly or indirectly,[2] by arbitration is increasing at a staggering rate.[3] It is not surprising that California decisional law has embraced the "strong public policy in favor of arbitration, of settling arbitrations speedily and with a minimum of court interference and of making the awards of arbitrators final and conclusive."[4] As such, " '[n]either the merits of the controversy . . . nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review.'. . . [The court] may not substitute its judgment for that of the arbitrators."[5]

In the vast majority of cases, the arbitration hearing is becoming the trial of the action.[6] Consequently, the forum should be as impartial, substantive, and final as possible. Such a conclusive proceeding is not feasible, however, if the specter of arbitrator bias is raised, thereby tainting the entire proceedings. Indeed, unless all parties involved perceive that

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1. The California legislature has declared that "litigation involving small civil claims has become so costly and complex as to make more difficult the efficient resolution of such civil claims that courts are unable to efficiently resolve the increased number of cases filed each year, and that the resulting delays and expenses deny parties their right to a timely resolution of minor civil disputes." CAL. CIV. PROC. CODE § 1141.10(a) (West 1982).

As a result, arbitration hearings are utilized to provide "a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes." CAL. CIV. PROC. CODE § 1141.10(b)(1) (West 1982).

2. Generally, the award will be accepted within the statutory time (CAL. RULES OF CT. 1615(c)), or the award serves as a meaningful starting point in settlement discussions.

3. In most California counties, these numbers have risen, in large measure because of local "fast track" rules, which mandate an acceleration of the litigation process for the vast majority of civil cases. *See, e.g.*, SAN DIEGO CO. SUPERIOR CT. RULES 10.1-10.15.

4. Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co., 271 Cal. App. 2d 675, 702, 77 Cal. Rptr. 100, 117 (1969).

5. Morris v. Zuckerman, 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880, 884 (1968).

6. A 1988 amendment to the pertinent statute, for example, raised the "amount in controversy" limit from $25,000.00 to $50,000.00. CAL. RULES OF CT. 1600(c).

the arbitration has been conducted by an essentially impartial observer, much of the power of this dispute resolution mechanism will be lost.[7]

While the procedures vary among California's numerous county courts, selecting a "neutral" arbitrator or umpire is generally left in the hands of the individual attorneys involved in the action.[8] This procedure, however, is far from fool-proof, and unavoidable conflicts can, and do, arise. Unfortunately, a recent appellate decision blurs the already nebulous "guidelines" used to determine whether conflict or bias is present.

II. Duty to Disclose Conflict

A number of appellate cases clearly illustrate circumstances mandating a duty of the arbitrator to disclose potential bias. In *Johnston v. Security Ins. Co. of Hartford*,[9] plaintiffs made a claim for the payment of a fire loss under a policy issued by defendant Security Insurance Company ("Security"). When a dispute arose as to the amount payable, and pursuant to the terms of the policy, the parties resorted to arbitration for resolution of their dispute.[10] Claimants selected an attorney as their "competent and disinterested appraiser," and Security chose its own disinterested appraiser. These two individuals, pursuant to the terms of the arbitration agreement, selected attorney Walsh as the "competent and disinterested umpire."

At the arbitration proceedings, Walsh made an award in favor of claimants for $10,600. Only the appraiser for claimants concurred in this award. Upon cross-petitions by both parties, the Superior Court vacated the arbitration award.[11]

The petition to vacate the award was based on the neutral umpire's alleged failure "to disclose his acquaintanceship with the claimants'

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7. When, for example, in a "binding" arbitration context, a motion to vacate is made, the potential exists for rearbitration or other costly dispute resolution mechanisms. In a "nonbinding" context, a subsequent claim of bias will generally result in a request for trial de novo, CAL. RULES OF CT. 1616, a de novo settlement conference, potential further discovery and, eventually, a trial of the action.

8. That is, pursuant to the pertinent insurance policy or agreement setting forth the nature of binding arbitration, the parties, through their respective attorneys, will generally select their own arbitrator, and have these hand-chosen arbitrators choose, in turn, a master arbitrator or "umpire."

In a nonbinding context, the attorneys will generally appear at a court-mandated status conference, and will thereupon choose a mutually agreeable arbitrator and alternate.

9. 6 Cal. App. 3d 839, 86 Cal. Rptr. 133 (1970).

10. It should be noted that, while this particular arbitration was mandated by the insurance policy governing the loss, the principles regarding the duty to advise of bias remain consistent whether the proceedings are conducted by agreement or are ordered by the court.

11. 6 Cal. App. 3d 839, 841, 86 Cal. Rptr. 133, 134.

counsel and the attorney appointed by claimants as an appraiser and of the business dealings past and projected with that attorney-appraiser."[12] Further, Security asserted that had this situation been disclosed at the outset of the proceedings, it would have objected to the appointment of Walsh.[13]

The court, in deciding whether there was a legal ground for vacating the arbitration award, adopted the rule enunciated by the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[14] To support its decision, the court referred to the similarity between the federal[15] and the California statutory provision addressing the grounds for vacation.[16]

In *Commonwealth Coatings*, despite the express language in the federal statute, the United States Supreme Court held that even in the absence of any showing of actual fraud, corruption, or partiality on the part of the neutral arbitrator, the failure to disclose a substantial business relationship with a party to the arbitration constitutes legal cause for vacating the award.

The court acknowledged that

> arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but 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. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of posssible bias.[17]

The United States Supreme Court clearly understood, as well, that the arbitration process

> functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party. But if the law requires the disclosure, no such imputation can arise. *And it is far better that the*

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12. *Id.* at 842, 86 Cal. Rptr. at 135.
13. *Id.* at 842-43, 86 Cal. Rptr. at 135.
14. 393 U.S. 145, *reh'g denied*, 393 U.S. 1112 (1968).
15. 9 U.S.C. § 10(a)-(b) (1982).
16. The court shall vacate the arbitration award if it determines that the award was "procured by corruption, fraud or other undue means," or if there was "corruption in any of the arbitrators." CAL. CIV. PROC. CODE § 1286.2(a)-(b) (West 1982).
17. 393 U.S. 145, 148-49 (1968).

relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.[18]

In *Johnston*, the alleged "conflict" involved claimants' appraiser's familiarity with umpire Walsh from a civil action in which they were opposing counsel. During the six to eight years following that civil action, claimants' appraiser associated with the umpire on various cases and was referred cases by the umpire. In fact, on the date of the arbitration hearing at issue, claimants' appraiser represented a client referred to him by the umpire. Lastly, the court recognized that the amount of the arbitration award resulted from umpire Walsh adopting the claimants' appraisal rather than that of the appraiser retained by Security.[19] The Court of Appeals decided that it would look at the facts of the alleged conflict, rather than the relationship between the parties, in determining whether a vacation of the arbitration award was appropriate.[20]

The court held, in affirming the vacation of the arbitration award, that the neutral umpire should have disclosed his acquaintance with claimants' counsel and appraiser, and his past and prospective business dealings with claimants' appraiser. "The fact that no actual fraud or bias was charged or proved against the neutral umpire is immaterial."[21] The court made it clear that while it was not implying any actual wrong dealing by the appraiser, umpire, or claimants' counsel, the umpire was nonetheless "under a legal duty to 'disclose to the parties any dealings that might create an impression of possible bias' at the outset of the hearings."[22]

Another California appellate decision, *Wheeler v. St. Joseph Hospital*,[23] involved a medical malpractice, court-ordered arbitration. After reviewing the order compelling arbitration, the court considered the possible bias of one of the arbitration panel members. Comprising the panel was a physician, a lawyer, and a businessperson. Following the proceedings, an award was made in favor of defendants. Plaintiffs filed a petition to vacate the award on several grounds, including the failure of the med-

18. *Id.* at 151 (emphasis added).

19. 6 Cal. App. 3d 839, 843, 86 Cal. Rptr. 133, 135-36 (1970).

20. In *Commonwealth Coatings*, the neutral umpire was involved in a business relationship with one of the claimants directly. In *Johnston*, the relationship was between the claimant's *attorney* and appraiser.

21. 6 Cal. App. 3d 839, 843, 86 Cal. Rptr. 133, 136 (1970).

22. *Id.* at 843-44, 86 Cal. Rptr. at 136.

23. 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1976).

ical member of the panel to disclose facts which "created an impression of possible bias."[24]

Specifically, plaintiffs alleged that the medical member of the arbitration panel failed to "disclose an employment relationship with the firm of attorneys representing the principal doctor defendant."[25] Apparently, the medical arbitrator had rendered professional services for the law firm of Ruston & Nance (the firm representing the doctor in the arbitration proceedings), in connection with the defense of a personal injury action. The medical arbitrator, in fact, testified for Ruston & Nance with respect to his medical evaluation and opinions in the personal injury matter.

The Court of Appeal pointed out that it had no hesitancy accepting defense counsel's explanation that the choice of this particular doctor as a member of the arbitration panel was the result of "one member of a large firm not being aware of what another member was doing in an unrelated case."[26] Nonetheless, for the reasons set forth below, the Court of Appeal reversed the judgment with directions to vacate the arbitration award.

The *Wheeler* court set forth the *Commonwealth Coatings* "rule" and noted its adoption in California via *Johnston.*[27] "If arbitration of medical malpractice claims is to be encouraged, as we believe it should, any appearance of possible bias on the part of an arbitrator should be fully disclosed to the parties."[28] The court did not imply that the arbitrator was guilty of any wrongdoing or that the arbitrator was in fact biased or influenced by reason of the prior relationship. Nonetheless, "such relationships must be disclosed to the parties if the integrity and effectiveness of the arbitration process is to be preserved."[29]

A further illustration of an arbitrator's duty to disclose potential conflict or bias is provided by *Figi v. New Hampshire Ins. Co.*[30] The *Figi* case involved an arbitration proceeding between an insured and fire insurer. The Superior Court entered judgment confirming the arbitrator's award, and the insured appealed.

Akin to the procedure utilized in *Johnston*, both the claimant and insurer selected their independent appraisers. These two individuals selected as the neutral arbitrator Milton Stern, a Certified Public Accountant. Arbitrator Stern initially resisted appointment because of a long-standing personal friendship with claimant's arbitrator, but both sepa-

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24. *Id.* at 352, 133 Cal. Rptr. at 780.
25. *Id.* at 369, 133 Cal. Rptr. at 791-92.
26. *Id.* at 370, 133 Cal. Rptr. at 792.
27. *Id.* at 372, 133 Cal. Rptr. at 793.
28. *Id.* at 372, 133 Cal. Rptr. at 793.
29. *Id.* at 372, 133 Cal. Rptr. at 793.
30. 108 Cal. App. 3d 772, 166 Cal. Rptr. 774 (1980).

rately-selected appraisers persuaded Stern to serve. The arbitration hearing resulted in an award of $11,929, but the claimant felt the award should have been in the $40,000 range. Shortly after the award was issued, the claimant demanded disclosure of the alleged relationship between the insured's appraiser and the neutral umpire.

The facts showed that during the time Stern had agreed to act as neutral arbitrator, and the time of the award (several weeks later), Stern was working as an accountant for the insurer's appraiser, determining business interruption losses (none of which involved New Hampshire Insurance Company). For his work with the insurer's appraiser, he was paid a total of $847.15. Lastly, all three individuals (the neutral umpire and both appraisers) were well-acquainted and had worked together previously; the umpire and the insurer's appraiser were personal friends as well.

The court, citing *Commonwealth Coatings* and the progeny of California cases adopting its rationale, noted that "[i]n general, significant or substantial business relationships between the neutral arbitrator and a party or his representative must be disclosed to the other party, to avoid the appearance of impropriety, but ordinary and insubstantial business dealings do not necessarily require disclosure."[31] Instead, "[w]hether a particular relationship requires disclosure is a factual question to be determined by the trier of fact in each case."[32]

Individuals who act as arbitrators do not, and cannot, live in a vacuum. Often they are active members of the legal community, and, as such, meet other members of the profession. The court in *Figi* similarly stated:

> Because arbitrators are selected for their familiarity with the type of business dispute involved, they are not expected to be entirely without business contacts in the particular field, but they should disclose any repeated or significant contact which they may have with a party to the dispute, his attorney, or his chosen arbitrator. . . . The court in *Commonwealth Coatings Corp.* required not severance from the business world, but disclosure.[33]

The facts established, to the satisfaction of the court, that the neutral umpire did business with the insurer's appraiser while the appraisal procedure was pending. While it was true that there was no showing as to how significant the business was nor that it involved New Hampshire Insurance Company, the court recognized that "[n]one of the arbitration cases which we have examined . . . approved arbitration awards where

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31. *Id.* at 775, 166 Cal. Rptr. at 774 (1980).

32. *Id.* at 776, 166 Cal. Rptr. at 777 (citing *San Luis Obispo Bay Properties, Inc.*, 28 Cal. App. 3d 556, 104 Cal. Rptr. 733 (1972)).

33. 108 Cal. App. 3d 772, 776, 166 Cal. Rptr. at 777.

there was current business going on between the neutral arbitrators and the nonneutral arbitrators or their appointers."[34]

The court made it clear, once again, that the issue was not whether there was any evidence of wrongdoing by New Hampshire Insurance Company, but "whether the appearance is one of impartial justice having been done."[35] The issue of specific conflict aside, the court addressed the potential waiver of claimant, finding that had the potential conflict been disclosed directly to claimant Figi,[36] "then perhaps Figi could have waived his right to have a disinterested appraiser. . . . Proof of disclosure is absolutely required before Figi loses his right to challenge the award."[37]

III. No Duty to Disclose Conflict

Some California appellate courts have held that an arbitrator has no duty to disclose potential bias to the arbitration participants. In *San Luis Obispo Bay Properties, Inc. v. Pacific Gas and Electric Co.*,[38] for example, after an arbitration award determining a sublessor's interest in leased land, the court noted that a person who served on the Board of Directors and was Chairman of the Executive Committee for the corporate sublessee was a prominent figure in that corporation and a nonprofit corporation for which the arbitrator's law firm had performed considerable appraisal work. The Court of Appeal, utilizing the *Commonwealth Coatings* "rule," nevertheless found that the relationship between the neutral arbitrator and the respondent (for whom the arbitration award was favorable) did not require a vacation of the award rendered.

As part of his argument, appellant complained of the nondisclosure of two separate relationships. The first relationship was between the neutral arbitrator and the respondent's appointed appraiser. More specifically, the arbitrator and appraiser belonged to the same M.A.I. Chapter, though "membership in the same professional organization is in itself

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34. *Id.* at 777-78, 166 Cal. Rptr. at 778.

35. *Id.* at 778, 166 Cal. Rptr. at 778.

36. The fact that claimant's appraiser knew of the business relationship between the insurer's appraiser and the neutral umpire was irrelevant with respect to claimant's waiver. It is clear that disclosure to the persons affected by the conflict must be made directly. While, ordinarily, such disclosure to a claimant's attorney would be sufficient, the *Figi* court held that the claimant's appraiser was not his agent such that the knowledge of potential conflict would be imputed to the claimant himself. *Id.* at 778, 166 Cal. Rptr. at 778.

37. *Id.*, 166 Cal. Rptr. at 778.

38. 28 Cal. App. 3d 556, 104 Cal. Rptr. 733 (1972).

hardly a credible basis for inferring even an impression of bias."[39] The appraiser and arbitrator also referred cases to each other, "but only once or twice per year, and never for any kind of consideration."[40]

The court distinguished the "close financial" relationship set forth as a ground for vacation of the award in *Commonwealth Coatings* and, in short, did not find "an impression of possible bias as a matter of law." The court noted that

> If the impression of possible bias rule is not to emasculate the policy of the law in favor of the finality of arbitration, the impression must be a reasonable one. In the final analysis, each case must depend on its own facts. We agree with the trial court's conclusion that the evidence relating to the [subject] relationship was insufficient to create a reasonable impression of possible bias regardless of whether the issue be viewed as one of law or fact or as a mixed question of law and fact.[41]

The second alleged ground of bias centered upon the "relationship" between the arbitrator and respondent through a specific individual, Mr. Gerdes, who had been associated with the respondent for nearly thirty years. During that time, Mr. Gerdes served as general counsel, executive vice president, president and, ultimately, Chairman of the Board of Directors. In addition, Gerdes had a substantial connection with a nonprofit organization for which the arbitrator's firm had performed significant appraisal work. The arbitrator, in fact, personally acted for many years as the nonprofit corporation's land use consultant. Appellant contended that the connection between the arbitrator and the nonprofit corporation, because of the joint role of Mr. Gerdes with both the nonprofit corporation and respondent, created an impression of possible bias in favor of the respondent.

The Court of Appeal, citing *Johnston*, acknowledged that while an indirect relationship between an arbitrator and a party can be sufficient to create an impression of possible bias, such was not the case given the facts presented. While it was true that Gerdes was a prominent figure in both corporations, "each of these corporations is a legal entity distinct from its officers and directors."[42] There was no evidence to suggest that Gerdes "dominated any of the corporations, or that any of them was in any sense his alter ego."[43] Lastly, the arbitrator and Gerdes "did not know one another and . . . no business or social relationship between them had ever existed."[44]

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39. *Id.* at 567, 104 Cal. Rptr. at 741.
40. *Id.*, 104 Cal. Rptr. at 741.
41. *Id.* at 568, 104 Cal. Rptr. at 741-42 (citations omitted).
42. *Id.* at 569, 104 Cal. Rptr. at 742.
43. *Id.*, 104 Cal. Rptr. at 742.
44. *Id.*, 104 Cal. Rptr. at 742.

The court commented that "[n]o reason appears to impose on arbitrators the burden of maintaining and checking the lists of the directors and major officers of each of their past corporate clients against a similar list for the parties to the arbitration."[45] Arbitrators, however, should not be "careless in searching their minds and hearts for relationships that might be suspect."[46] Adopting the reasoning set forth by Mr. Justice White in *Commonwealth Coatings*, the court demanded that the arbitration process "be characterized by an atmosphere of frankness at the outset," leaving arbitrators, if necessary, to "err on the side of disclosure."[47]

Gonzales v. Interinsurance Exchange of the Automobile Club of Southern California[48] also serves to illustrate "permissible relationships" which can exist without requiring disclosure.[49] The claimant in *Gonzales* complained of painful chest injuries including possible fractures of three ribs, and was awarded $9,000 in an uninsured motorist action. Claimant alleged, in his petition for vacation of the arbitration award, that the arbitrator "committed misconduct" by not disclosing that he knew a senior partner of the firm defending the insurer in the subject arbitration, and that this partner "courted and dated said arbitrator's sister-in-law for many years; that the arbitrator and the aforesaid partner of Respondent's law firm are 'good friends,' and maintain to this date a personal relationship which existed at the time of the arbitration."[50]

The Court of Appeal was careful to point out that "no allegation of a business relationship between the arbitrator and respondent's attorneys" was found in the petition. Therefore, the issue remained "whether a pure personal relationship . . . requires that the award be vacated."[51] Upon analysis, the court held that the dealings alleged to exist did not create an impression of bias. The court explained, "it is not unusual in this day and age for attorneys practicing law in the same community to be friendly acquaintances. Absent more, such does not create the 'impression of possible bias' condemned by *Commonwealth* and *Johnston* courts."[52]

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45. *Id.*, 104 Cal. Rptr. at 742.

46. *Id.* at 570, 104 Cal. Rptr. at 743.

47. *Id.*, 104 Cal. Rptr. at 743.

48. 84 Cal. App. 3d 58, 148 Cal. Rptr. 282 (1978).

49. Or, alternatively, where the lack of disclosure would not give rise to the vacation of the arbitration award.

50. 84 Cal. App. 3d 58, 61, 148 Cal. Rptr. 282, 283.

51. *Id.* at 64, 148 Cal. Rptr. at 285.

52. *Id.* at 64-65, 148 Cal. Rptr. at 285. *See also* Ray Wilson Co. v. Anaheim Memorial Hosp. Ass'n, 166 Cal. App. 3d 1081, 213 Cal. Rptr. 62 (1985).

IV. BANWAIT V. HERNANDEZ

The California Court of Appeal has recently taken another look at the duty to disclose conflict in an arbitration proceeding in *Banwait v. Hernandez*.[53] In *Banwait*, the court appointed a neutral arbitrator pursuant to Code of Civil Procedure section 1281.6[54] from a list of three local attorneys provided by plaintiff's counsel. One of the choices was attorney Huckins, who was ultimately appointed by the court. Huckins made an award in plaintiff's favor, but the plaintiff was dissatisfied with the amount and petitioned the Superior Court to vacate.

Plaintiff argued that Huckins' conduct during the arbitration hearing evinced a bias in favor of CSAA, plaintiff's uninsured motorist carrier, and that the arbitrator "improperly failed to disclose both that a partner in the CSAA's law firm was a good friend of his and that he had hired that law firm to defend him in a lawsuit in the year before the arbitration."[55]

CSAA moved to confirm the award, asserting that its law firm, though not the attorney handling the arbitration, had charged Huckins for less than four hours of legal services (amounting to less than four hundred dollars in fees) in the five years preceding the arbitration. The representation ended in July 1986, several months prior to the arbitration hearing. CSAA asserted that "these minimal services did not constitute a business relationship substantial enough to compel vacation of the award."[56]

The trial court nonetheless vacated the award, specifying that " 'the arbitrator's award was not one that was procured by either corruption or by fraud or by other undue means' and that the arbitrator 'in fact, functioned as a neutral and unbiased arbitrator in this matter.' "[57] The court further found that the arbitrator's friendship with the senior partner of CSAA's law firm was "well known" to claimant's counsel before the arbitration hearing so that the failure to disclose this "known relationship" was not a ground upon which to set aside the award.[58]

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53. 205 Cal. App. 3d 823, 252 Cal. Rptr. 647 (1988).

54. The statute provides, in pertinent part, that in the absence of an agreed method of appointing an arbitrator, or if the agreed method fails, "the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." This provision further allows the court, in appropriate circumstances, to appoint an arbitrator from a list compiled by the participants to the proceedings. CAL. CIV. PROC. CODE § 1281.6 (Deering 1989).

55. 205 Cal. App. 3d 823, 825, 252 Cal. Rptr. 647, 648 (1988).

56. *Id.* at 826, 252 Cal. Rptr. at 648.

57. *Id.*, 252 Cal. Rptr. at 648.

58. *Id.*, 252 Cal. Rptr. at 648.

More importantly, the trial court found that Huckins' representation by CSAA's law firm within the year preceding the commencement of arbitration was a basis for disqualification of the trier of fact, although it did not constitute a substantial business relationship.[59] CSAA challenged the trial court's order, specifically its application to this case of the juror disqualification statute.

The Court of Appeal held that the arbitrator "was not obligated to disclose his past client relationship with CSAA's attorneys."[60] While the court found a pecuniary interest existed in *Commonwealth Coatings* and *Wheeler*, "[h]ere, Huckins has no comparable pecuniary interest. He paid fees, not received them."[61] The court then looked to whether the prior legal representation by CSAA's law firm of the arbitrator would constitute a "substantial business relationship" under *Johnston*. The court stated that the test of a "substantial business relationship" is whether "one can draw an inference of favoritism not because the arbitrator may receive money but because the arbitrator has a business-connected relationship that may lead him or her to place unusual trust or confidence in one side as opposed to the other."[62]

The *Banwait* court distinguished *Johnston* on several grounds. First, in *Johnston*, a witness in the arbitration was working on a case referred by the "neutral arbitrator" at the time of the arbitration hearing. In the instant matter, the court reasoned, "any business relationship between Huckins and CSAA's attorneys had ended many months before the arbitration."[63] Second, in *Johnston* the fatal business relationship was one directly between the arbitrator and a witness to the arbitration.[64] The court emphasized that Huckins had not been represented by the attorney who litigated the case at arbitration on behalf of CSAA. Rather, his prior relationship with the firm was via a partner, who was not at the hearing. "Finally, by any reckoning, the services rendered by the firm to Huckins were insignificant."[65]

In reversing the trial court's vacation of the arbitration award, the Court of Appeal reasoned as follows:

> All things considered, the possibility of bias which Banwait suggests is that Huckins would for some reason reward a law firm because he had previ-

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59. *Id.* at 826, 252 Cal. Rptr. at 648-49. The pertinent code section provides that certain "affinities" and "relations" can render one ineligible for participation on a jury. CAL. CIV. PROC. CODE § 602(3)-(4) (West 1976).
60. 205 Cal. App. 3d 823, 830, 252 Cal. Rptr. 647, 651 (1988).
61. *Id.* at 830, 252 Cal. Rptr. at 652.
62. *Id.* at 831, 252 Cal. Rptr. at 652.
63. *Id.*, 252 Cal. Rptr. at 652.
64. *Id.*, 252 Cal. Rptr. at 652.
65. *Id.*, 252 Cal. Rptr. at 652.

> ously been represented to an insignificant extent by one of its partners and had paid for the representation. We do not think the inference proposed by Banwait rises to a *reasonable* impression of possible bias. . . . Indeed, we see no material distinction between the instant case and *San Luis Obispo Bay Properties* and *Gonzales*, *supra*, where long-standing close personal relationships were found insufficient to create a reasonable possibility of bias.[66]

V. ANALYSIS

The California cases determining whether an arbitrator should disclose potential bias have been fairly consistently decided. There is no doubt that in *Johnston* a disclosure of the substantial, ongoing business relationship (including at the time of arbitration) between the claimants' appraiser and the neutral arbitrator was necessary. Likewise, the medical arbitrator in *Wheeler* had a duty to disclose his employment by the defense firm litigating the arbitration on behalf of one of the principal defendants. In *Figi*, as well, the arbitrator had a clear duty to disclose that he worked as an accountant for the insurer's arbitrator, including during the time in which the arbitration hearing was being conducted.

There was, in short, a reflexive "impression of bias" in all three cases due to the close fiduciary relationship between the arbitrators and their respective interested third parties. Financial interests notwithstanding, however, there was also the bond of confidence and trust that exists between attorneys referring cases for consideration to each other, between a medical expert and the law firm retaining him, and between a financial expert and the appraiser performing services for him. Conversely, the situations presented in *San Luis Obispo Bay Properties* and *Gonzales*, simply do not rise to the level of "potential bias" which should be disclosed.

In *San Luis Obispo Bay Properties*, for example, the grounds asserted for bias included simultaneous membership in the same professional organization, infrequent referral of cases *without* consideration, and a tenuous link between the arbitrator and the respondent corporation through a disinterested third party. In *Gonzales*, the claim of bias stemmed from the arbitrator's friendship with a partner of the law firm representing defendant and the partner's social relationship with an in-law of the arbitrator.

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66. *Id.*, 252 Cal. Rptr. at 652 (citation omitted). The court also disagreed with the lower tribunal's conclusion that CAL. CIV. PROC. CODE. Section 602 should be applied in an arbitration proceeding.

Clearly, these two situations did nothing to taint the "amicable and trusting atmosphere" outlined in *Commonwealth Coatings*. In order to avoid the incorporation of absurd "reporting requirements" into the arbitration process, the "impermissible relationships" which are based upon fiduciary grounds or have as an essential component of the relationship indispensable trust and confidence must be distinguished from the "permissible relationships" which are exemplified by no more than professional and social acquaintanceship.

The *Banwait v. Hernandez* decision, unfortunately, extends the "line of permissibility" too far. The Court of Appeal, distinguishing the primary cases preceding *Banwait*, concluded that because the prior legal services the law firm rendered to the arbitrator were short-lived and relatively inexpensive, the services were "insignificant". As such, there was not a "*reasonable* impression of possible bias" which would warrant disclosure.

The duration and cost of legal services should not be the litmus test in determing whether the relationship between an attorney and client is of a "substantial nature". In *Banwait*, the arbitrator, within a year of acting as the "fact-finder" and "judge" of the litigation before him, was a client of the law firm defending the action at the arbitration.

Certainly, a "test of bias" just as meaningful as the "substantial fiduciary relationship" analysis is an exploration of the confidence and trust which necessarily forms the basis of the attorney-client relationship. The *Banwait* decision goes astray in its apparent sole reliance on the *quantity* of the relationship instead of the *quality*. Rather than focusing on the amount of fees paid by the arbitrator for the services rendered him, the focus should be on the principles which underlie the lawyer-client relationship.

The Model Code of Professional Responsibility, for example, describes this confidential atmosphere as follows:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of the confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek only legal assistance.[67]

The Model Code also provides that the "attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confi-

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67. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981).

dences and secrets of his client."[68] As such, the ethical bond between lawyer and client "exists without regard to the nature of source of information or the fact that others share the knowledge."[69] Moreover, "[t]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."[70]

While it is not suggested that the A.B.A. Model Code does, or should, control an arbitrator in determining whether a particular activity rises to the level of "reportable bias", the Code does serve as a reminder of the sincerity of the attorney-client relationship, regardless of the fees paid or the time billed. The level of confidence and trust in this relationship is triggered instantly upon retention; these qualities do not lie dormant until a particular point on the attorney's ledger sheet is reached.

The *Banwait* court did not deem the activity involved in that matter sufficiently biased to warrant a duty to disclose on the part of the arbitrator. The court, however, did properly recognize that the existence of bias depends, in part, on whether an affected party can draw an inference of "favoritism", not because the arbitrator may receive compensation, "but because the arbitrator has a business-connected relationship that may lead him or her to place unusual trust or confidence in one side as opposed to the other."[71] This "unusual trust or confidence", indeed, is the foundation upon which the attorney-client relationship is constructed.

The point, of course, is not that the facts in *Banwait* called for an automatic disqualification of the arbitrator to hear the matter at issue. Rather, the parties involved in the arbitration should have been allowed the opportunity to ask for the removal of the arbitrator after consultation between the affected party to the arbitration and his or her attorney. The dilemma presented by the *Banwait* decision is where to draw the line when determining the extent of the attorney-client relationship necessary before a "reportable bias" surfaces.

Clearly, the existing statutory provisions implicitly encompass the attorney-client relationship as a situation which should be reported by a potential arbitrator to the participating litigants in the proceeedings. Code of Civil Procedure sections 170.1 and 170.6, for example, while specifically enumerating grounds for disqualifying judges, apply to arbitrators as well.[72] Among the grounds mandating a jurist's disqualification is when someone close to the judge (specifically, spouses, children, siblings or parents) is "associated in the private practice of law with a

68. *Id.* at EC 4-4.
69. *Id.*
70. *Id.* at EC 4-6
71. 205 Cal. App. 3d 823, 831, 252 Cal. Rptr. 647, 652 (1988).
72. CAL. CIV. PROC. CODE § 1141.18(d) (West 1982).

lawyer in the proceedings".[73] Similarly, if the jurist has served as a lawyer in the proceeding, a ground for disqualification exists. Serving as a lawyer "in the proceeding" occurs if, within the prior two years,

> a party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.[74]

It does not stretch credulity to suggest that the policy underlying these provisions is grounded, in part, on the ethical dilemma created by the potential breach of the privileged relationship between the attorney and his client, and the improper effect such a breach would have upon the litigants to the action. *Banwait*, in fact, illustrates the converse of the situation set forth in C.C.P. section 170.1(a)(2) because the "judge" (arbitrator) in question had been a client of a lawyer in the proceeding.

Moreover, a broadly based ground of disqualification arises from a jurist's belief that his recusal would further the interests of justice, if there is a "substantial doubt as to his or her capacity to be impartial", or if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial".[75]

Whether an arbitrator has retained a particular lawyer, or his or her law firm, to represent him at any time prior to the subject arbitration proceedings should be a scenario incorporated into C.C.P. section 170 et. seq. (made applicable to arbitration proceedings via C.C.P. section 1141.18) and should be deemed a "reportable potential bias" identified in California Rule of Court 1606(a):

> It 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 of the Code of Civil Procedure governing the disqualification of judges. If any member of the arbitrator's law firm would be disqualified under subdivision 4 of section 170, the arbitrator is disqualified. Unless the ground for disqualification is disclosed to the parties in writing and is expressly waived by all parties in the writing, the arbitrator shall promptly notify the administrator of any known ground for disqualification and another arbitrator shall be selected as provided in rule 1605.[76]

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73. CAL. CIV. PROC. CODE § 170.1(a)(5) (West 1982).

74. CAL. CIV. PROC. CODE § 170.1 (a)(2)(A) (West 1982).

75. CAL. CIIV PROC. CODE § 170.1 (a)(6) (West 1982). Additionally, the code allows for a motion to disqualify if it is believed that a party "cannot have a fair and impartial trial or hearing before such judge." CAL. CIV. PROC. CODE § 170.6(2) (West 1982).

76. A party may, within six months after the entry of judgment, move to vacate "on the ground that the arbitrator was subject to a disqualification not disclosed before the hearing and of which the arbitrator was then aware, or upon one of the grounds set forth in section 473 or subdivisions (a), (b), and (c) of Section 1286.2 of the Code of Civil Procedure . . ." CAL. RULES OF CT. 1615(d).

It may very well result that, based upon the particulars of the "potential conflict" at issue, the majority of litigants would agree to knowingly waive the conflict. The key, of course, is allowing the participants to the arbitration hearing the *opportunity* to analyze the particular lawyer-client relationship presented, exploring, inter alia, the nature of the litigation involved in the prior representation, the length of time the relationship existed, and the length of time between the prior relationship and the arbitration. The *Banwait* decision, unfortunately, provides no guidelines as to when a prior retention should be disclosed, or, in the alternative, when an arbitration award may be vacated due to nondisclosure.

The attorney-client relationship, due to the trust, confidence, reliance, and uninhibited expression involved, clearly transcends the permissible bonds of even a long-standing relationship. Accordingly, there should be a presumption of conflict if a potential arbitrator has been a client of an attorney to the proceedings, and the potentially affected parties should be allowed notification, discussion, and the chance to either waive the conflict or reject the arbitrator.

The arbitration hearing is too significant and too vital to the judicial system to risk vacating an award because of an undisclosed "bias." As the hearing is increasingly becoming the *trial* of the action, the most impartial forum possible must be provided.

Without such a disclosure, there is a dampening of the "amicable and trusting atmosphere" spoken of in *Commonwealth Coatings*. The task of deciding whether disclosure is necessary would be a simple one for the arbitrator if, contrary to *Banwait*'s reasoning, *every* prior relationship in which an arbitrator had been a client of one of the attorneys to the arbitration must be disclosed. That is, the arbitrator turning to *Banwait* for guidance, would be uncertain whether his prior representation transcends the "nature" of the relationship sketched out in that case.

Paraphrasing the United States Supreme Court, it is not anticipated that the arbitration process would in any way be thwarted by the "simple requirement that arbitrators disclose to the parties *any dealings*", including prior attorney-client relationships, "that might create an impression of possible bias".[77] The unfortunate alternative, which would further burden our congested civil court system, is to have the "conflict" ascertained after the time, energy, and money to arbitrate the matter

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It should also be noted that paragraph 4 of the former § 170 (repealed by 1984 Cal. Stat. 5479) cited in Rule 1605 dealt with a judge's prior employment as counsel for one of the parties involved in the subject proceedings.

77. 393 U.S. 145, 148-49 (emphasis added).

have already been expended, "when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award".[78]

78. *Id.* at 151.