The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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When in Doubt, Disclose

In re Marriage of Piske[2]

The Houston 14th Court of Appeals vacated a divorce arbitration award in *In re Marriage of Piske* for evident partiality after the arbitrator failed to disclose his personal and professional connections with an attorney for the husband, Mr. Piske. The arbitrator made his initial disclosures of no "material relationships" with parties or counsel, but failed to supplement his disclosures after a new attorney joined the case as the husband's co-counsel. The arbitrator and the new attorney had known each other for over 30 years, were often featured on the same CLE programs. Both practiced in high wealth/high profile divorces and spent a weekend as separate guests at a mutual friend's ranch. The new attorney had attended three or four Bar Association events that were outdoor cookouts at the arbitrator's home. The arbitrator had served as a mediator for the attorney on five or six previous occasions, and had served as the arbitrator on a previous case in which the new attorney was involved.[3]

Following an award for the husband, the ex-wife filed a motion for a new trial as well as a motion to vacate, modify, correct, or reform the trial court's divorce decree based on evident partiality of the arbitrator. She claimed that there was "bona fide evidence of an undisclosed social relationship" between the arbitrator and the ex-husband's new attorney, and that the ex-wife's rights were prejudiced by the arbitrator's evident partiality.[4] Following the trial court's denial of both motions, the ex-wife appealed.

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Morgan Parker, a recent graduate of Texas A&M University School of Law, for her research and drafting assistance.

[2] In re Marriage of Piske, No. 14-17-00869-CV, 2019 Tex. App. LEXIS 3646 (Tex. App—Houston [14th Dist.] May 7, 2019, no pet.).

[3] Justice Jewell's concurring opinion reported "approximately six or seven cases" mediated by the arbitrator for the new attorney and both the arbitrator and the new attorney had served as arbitrator in which the other appeared as counsel. 2019 Tex. App. LEXIS at *19-20.

[4] *Id.* at *3-6; the ex-wife asked for a continuance of the hearing on entry of the divorce decree that the trial court refused to entertain based on untimeliness.

Under the Texas Arbitration Act, "a trial court shall vacate an award if the rights of a party were prejudiced by the evident partiality of an arbitrator appointed as a neutral arbitrator."[5] A court shall vacate an award for evident partiality when the arbitrator fails to disclose facts of past or present personal or professional relationships that, to an objective observer, could create a reasonable impression of the arbitrator's partiality.[6]

The parties, not the courts, should undertake evaluations of arbitrator partiality.[7] "[I]t is for the parties to determine, after full disclosure, whether a particular relationship is likely to undermine an arbitrator's impartiality."[8] Therefore, evident partiality is established from the **nondisclosure itself**, regardless of the court's opinion as to actual partiality or bias.[9]

Here, though the basic facts of their interactions where undisputed, the level of "friendship" between the attorney and the arbitrator was in controversy. The husband asserted that his attorney and the arbitrator "never shared a deep friendship or anything other than a trivial social relationship."[10] However, the Court rejected this argument because the evident partiality standard must be viewed from an objective observer's point of view, not evaluated in light of the entire relationship.[11] The undisputed evidence of the arbitrator and the new attorney's personal and professional relationship "might give an objective observer a reasonable impression of [the arbitrator's] partiality."[12] Therefore, the award was vacated for evident partiality.

The husband argued that his ex-wife waived her right to argue evident partiality because she knew about the "friendship" prior to the issuance of the award and did not raise an evident partiality or non-disclosure issue until after the arbitrator issued the award against her interests.[13] The husband's argument was based on one email from his new attorney to the arbitrator inquiring about a delay in the arbitrator issuing the award. The email stated: "You know how much I think of you as a friend and a lawyer however I must address the issue with this case and your lack of a ruling . . ."[14] The email went on to further discuss how the parties needed closure and that the lack of a ruling was becoming "beyond anything the litigants should be required to endure."[15] Based on the overall tone of the email, and because the arbitrator failed to disclose information about any relationship that could cause the ex-wife concern, the Court held that this email was not sufficient to establish waiver based on prior knowledge of the relationship.[16]

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[5] *Id.* at *6-7 (internal quotations omitted) (citing Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(2)(A)).
[6] *Id.* at *7 (internal quotations omitted) (citing Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 525 (Tex. 2014)).
[7] See Burlington N. R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 636 (Tex. 1997); *Tenaska Energy*, 437 S.W.3d at 524-25.
[8] 2019 Tex. App. LEXIS 3646, at *13 (quoting *Tenaska Energy*, 437 S.W.3d at 528).
[9] *Id.* at *7.
[10] *Id.* at *11.
[11] *Id.* ("The ultimate question at issue here – whether the undisclosed facts might give an objective observer a reasonable impression of [the arbitrator's] partiality – is a matter of law we review *de novo* as a matter of well-established law.").
[12] *Id.*
[13] *Id.*
[14] *Id.* at *3.
[15] *Id.*
[16] Justice Jewell's concurring opinion provided a more detailed chronology that he thought justified waiver of the ex-wife's complaint but then concluded that additional non-disclosed facts developed in depositions of the arbitrator and the new attorney provided the basis for the Court's decision to vacate the award. 2019 Tex. App. LEXIS at *19-20.

Arbitrators with extensive experience in the field related to the dispute are often the most sought after arbitrators. This creates situations where arbitrators have prior dealings with a party.[17] This highlights why disclosures are vital to the arbitration process: "[D]isclosing the information can help the parties attain the impartiality they seek by evaluating potential bias at the outset of the arbitration."[18]

OBSERVATIONS

1. When in doubt, disclose!

2. The "conscientious arbitrator" will always over-disclose not under-disclose.[19]

3. It is the arbitration parties who do the evaluation of the disclosed facts, not the prospective arbitrator who investigates but does not evaluate potential disclosures.

4. The parties' arbitration agreement did not expressly choose an arbitration law but did choose Texas governing law, which prompted the court to explain that in such circumstances both the Federal Arbitration Act and the Texas Arbitration Act applied.[20]

5. "Evident partiality," as a statutory basis for vacatur, is misleading; it is the fact of non-disclosure, not actual bias or partiality, that constitutes "evident partiality."[21]

[17] *Id.* at *7-8.
[18] *Id.* at *8.
[19] Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 524 (Tex. 2014).
[20] 2019 Tex. App. LEXIS at *1, fn1.
[21] 2019 Tex. App. LEXIS at *7 ("Evident partiality is established from the **nondisclosure itself**, regardless of whether the nondisclosed information shows actual partiality or bias.") (emphasis added).