Avoiding Evident Partiality in Arbitration

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By Angela Zambrano and Natali Wyson

One advantage of binding arbitration is that decisions are subject to only limited grounds for judicial review and thus a greater degree of finality. However, in recent years, Texas courts have demonstrated that they will not shy away from vacating arbitration awards for "evident partiality" if attorneys and arbitrators do not take the requisite care to disclose all "facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." Although arbitrators are not required to disclose relationships or connections that are trivial, arbitrators should err in favor of disclosure. Likewise, counsel should carefully scrutinize for accuracy and completeness each arbitrator's disclosures related to them, their firms, and their clients to protect favorable awards and avoid vacatur after the time and expense of arbitration. To that end, this article discusses some of the facts and connections that Texas attorneys and arbitrators should consider when making disclosures in arbitration.

In 2011, the Texas legal community received a strong reminder of the costs of arbitration disclosure failures when a Texas Appeals Court famously vacated a $22 million arbitration award for "evident partiality" due to an undisclosed social relationship between the arbitrator and a party's attorney. *Karlseng v. Cooke*, 346 S.W.3d 85 (Tex. App.—Dallas 2011, no pet.). The *Karlseng* opinion drew widespread attention not just for its result but for the court's in-depth and comprehensive examination of the arbitrator and attorney's various social and business interactions. Among the interactions included in the court's analysis were a chance encounter at a fundraiser, the attorney's attendance at the arbitrator's judicial retirement dinner several years prior (which the arbitrator testified he did not remember until the post-award vacatur proceedings), and emails between them regarding restaurant and winery recommendations. The court concluded that these and other facts demonstrated a significant relationship between the attorney and arbitrator and should have been disclosed.

Although the *Karlseng* decision was based on the significant relationship established by the totality of evidence, the court's attention to seemingly insignificant encounters justifiably led to a heightened degree of attention in disclosures to social and personal interactions with arbitrators. A review of the caselaw since *Karlseng* suggests a number of additional facts attorneys and arbitrators should consider when making arbitration disclosures.

For example, recent cases underscore the importance of examining the arbitrator's relationships, not just with the parties and attorneys involved in the arbitration, but also with non-parties that may have relevant connections to those parties or attorneys. In 2018, the Southern District of Texas found evident partiality based on the arbitrator's failure to disclose a longstanding relationship with the Chairman of the Board for an alleged affiliate of one of the parties. Likewise, the Texas Supreme Court has found evident partiality where an arbitrator disclosed *some* connections to a party's law firm and an e-discovery company seeking to do business with that firm but did not disclose the full depth of his financial interests in and involvement with the e-discovery company.

Other recent Texas cases related to evident partiality include examination of undisclosed previous appearances by parties or party representatives before the arbitrator and undisclosed political interactions (such as Political Action Committees and associated events).

By contrast, other Texas courts have found the following to be insufficient *on their own* to show evident partiality: undisclosed Facebook friendships, an undisclosed campaign contribution of $1000.00,

undisclosed “serendipitous” encounters at university alumni events, and an undisclosed business relationship between a testifying expert and the mediation firm who contracted the arbitrator (where there was no evidence the arbitrator was aware of the relationship). Thus, courts continue to closely scrutinize claims of evident partiality, and parties seeking to vacate arbitration awards on this basis continue to bear a high burden.

As the *Karlseng* court explained, an arbitrator need not conduct a “full investigation” into her past to avoid evident partiality, but adequate due diligence is necessary to identify potential interests, contacts, or relationships that need to be disclosed. Further, although the arbitrator has the obligation to make these disclosures, it is in the best interests of the parties to likewise perform their own due diligence into the relevant connections between them, their clients, and the arbitrators in order to preserve the validity of their arbitrations and protect potential awards from vacatur.

Angela Zambrano is a partner at Sidley Austin and can be reached at angela.zambrano@sidley.com. Natali Wyson is an associate at the firm and can be reached at nwyson@sidley.com.

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