

# ARBITRATION ADVISORY

95-01

## DISCLOSURE REQUIRED OF FEE ARBITRATORS BY CCP § 1281.9

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### INTRODUCTION

California Code of Civil Procedure Section 1281.9, effective January 1, 1995, requires arbitrators "[i]n any arbitration . . . involving a claim for damages, when a person is proposed for nomination by all parties . . . as a neutral arbitrator" to disclose specific relevant details about participation in and decisions rendered in:

1. "any prior or pending cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration agreement, or for a lawyer for a party;" and
2. "any prior or pending cases involving any party to the arbitration agreement or the lawyer for a party for which the proposed neutral arbitrator served or is serving as a neutral arbitrator."

The code defines "lawyer for a party" to include the lawyer's law firm [CCP § 1281.9(e)]. "Neutral arbitrator" is defined by Code of Civil Procedure Section 1280(d) as an arbitrator who is "selected jointly by the parties or by the arbitrators selected by the parties." Section 1281.9 raises three significant questions affecting mandatory fee arbitrations:

1. Does Section 1281.9 require proposed fee arbitrators to make the specified disclosures when nominated for service in a fee arbitration involving the same parties or counsel who were involved in a prior arbitration?
2. Must a fee arbitrator who is proposed as a neutral arbitrator in a subsequent

commercial or other non-fee arbitration involving a party or attorney who had been involved in a fee arbitration proceeding make the disclosures required by Section 1281.9 of the details of the prior fee arbitration proceeding?

3. If such disclosures are required by Section 1281.9 in connection with service in the subsequent commercial arbitration, what disclosures can the proposed arbitrator make about the details of the prior fee arbitration?

## **SUMMARY**

We believe that, read carefully, Section 1281.9 does not apply to arbitrations conducted under Bus. & Prof. Code Section 6200. If the statute is read to apply to such arbitrations, however, it could result in an award being vacated. While this consideration would counsel arbitrators to err on the side of disclosure, disclosure would be contrary to the statutory requirement that fee arbitrations be confidential. Arbitrators should, therefore, decline to serve if parties refuse to allow the arbitrator to maintain confidentiality.

## **DISCUSSION**

A. Code of Civil Procedure Section 1281.9 does not appear to require disclosure in mandatory attorney fee arbitrations conducted under Business and Professions Code Section 6200.

For several reasons, Code of Civil Procedure Section 1281.9 does not appear to apply to fee arbitrations conducted under Bus. & Prof. Code Section 6200. All of the arbitration programs approved by the State Bar, and the State Bar's program, provide for the program, and not the parties, to select the arbitrators, whereas Code of Civil Procedure Section 1281.9 (and Code of Civil Procedure Section 1280(d)) defines a neutral arbitrator as an arbitrator proposed by the parties. Moreover, the statute states that it applies only to "any arbitration agreement involving a claim for damages." Since fee arbitrations do not involve claims for damages [Bus. & Prof. Code Section 6203], and since fee arbitrations do not arise out of an independent arbitration agreement but are creatures of statute, the prerequisites for applying the statute do not appear to be present. Nominated arbitrators and program administrators should remember, however, that other disclosure requirements are applicable to Bus. & Prof. Code Section 6200 et seq. arbitrations. Additional resources regarding requirements may be found in local program rules, the Fee Arbitration handbook, and Code of Civil Procedure Sections 170.1, 1281.6, 1282(e), and 1297.121.

B. The disclosures required of fee arbitrators in subsequent arbitrations will conflict with the requirement of fee arbitration confidentiality.

"Prior cases" are defined as cases in which an arbitration award was rendered within a specified time period and are not limited to cases involving a claim for damages. Rather, the general definition includes arbitration cases in which any award of any kind was rendered, thus apparently including fee arbitrations. On the other hand, the disclosure obligation arises when the person served or is serving as the "neutral arbitrator," and Code of Civil Procedure Section 1280(d) defines a neutral arbitrator as someone "selected jointly by the parties or by the arbitrators selected by the parties." These prerequisites normally do not apply to persons appointed to arbitrate attorney fee disputes under present procedures.

While it is the position of the Committee on Mandatory Fee Arbitration that the statutory definition would not apply to prior fee arbitrations, the risk is that if a court disagrees and holds that disclosure was required, the result may well be an arbitration decision that is vacated by the court. Assuming that disclosure is required in subsequent cases, Section 1281.9 stands in direct conflict with Bus. & Prof. Code Section 6202, and the rules of the programs approved under that statutory scheme, which require that fee arbitrations are confidential proceedings. The rules of the various fee arbitration programs define confidentiality somewhat differently, and therefore what, if anything, can properly be disclosed, may vary depending on the program that conducted the prior arbitration.

The Committee is of the opinion that this conflict between disclosure and confidentiality must be resolved in favor of maintaining the confidentiality of the fee arbitration proceeding. Confidentiality is the cornerstone whereby clients and attorneys are encouraged to choose the mandatory fee arbitration process. Therefore, in order to foster confidence, candor and maximum participation in that process, a very cautious approach must be taken regarding disclosures under Section 1281.9.

Specifically, the Committee recommends that, in the situation where an arbitrator is nominated to serve as an arbitrator in a commercial arbitration involving a party or counsel who also may have been involved in a prior or pending fee arbitration matter on which the nominee also served as a fee arbitrator, that the nominee disclose only the existence of a "prior matter involving a party or attorney in the current arbitration, but as to which confidentiality is required as to the prior matter." The nominee then should request a written limited waiver from the parties to the commercial arbitration of the need to make any further disclosure of any other details of the subject fee arbitration, in a format such as: "The undersigned, having been informed by [arbitrator] of past service as a fee arbitrator under Bus. & Prof. Code Section 6200 et seq. in a matter involving a party or attorney in this arbitration but as to which confidentiality is required, and after having been afforded the opportunity to consult with independent counsel regarding this waiver, does hereby waive any further disclosure under Code of Civil Procedure Section 1281.9 by said arbitrator about said matter.

If such a waiver is not forthcoming, then the Committee recommends that the nominee withdraw from service in the subsequent arbitration and not disclose any information about the fee arbitration which he or she is required to keep confidential.<sup>33</sup>