

**COMMITTEE ON MANDATORY FEE ARBITRATION  
THE STATE BAR OF CALIFORNIA**

**AGENDA**

**Friday, May 20, 2016  
10:00 a.m. – 3:00 p.m.**

The State Bar of California  
180 Howard Street, 2<sup>nd</sup> Floor  
San Francisco, CA 94105  
(415) 538-2000

- I. Call for Public Comment (Halper)
- II. Approval of Minutes of March 25, 2016 meeting (Attachment A, pp. 1-2) (All)
- III. Chair's Report (Halper)
- IV. Report from Presiding Arbitrator (Bacon)
  - A. Sheppard, Mullin, Richter and Hampton v. J-M Manufacturing
- V. Report from the Office of Mandatory Fee Arbitration (Hull)
  - A. Office statistics (Attachment B, pp. 3-6)
  - B. Schedule of Events (Attachment C, pp. 7-8)
  - C. Appointments
  - D. Status of Presiding Arbitrator as a committee member
- VI. Action Items
- VII. Discussion/Information Items
  - A. Bagley-Keene follow ups
  - B. Agreements to Binding Arbitration (Halper)
  - C. Non-conforming agreements (Halper)
  - D. Bankruptcy in Fee Arbitration and Arbitration Enforcement proceedings
    - i. *In Re: Marilyn Scheer* (Attachment D, pp. 9-19)
  - E. *Purcell v. Schweitzer* (Attachment E, pp. 20-29)
  - F. *Safarian Choi & Bolstad, LLP v. Minassian* (Attachment F, pp 30-54)
  - G. Case summaries
  - H. Minimum Standards

- I. Cost standards for local bar programs
  - J. ABA rules v. State Bar Rules
- VIII. Arbitration Advisories for Future Review
- A. 2005-01("Jurisdiction of the Mandatory Fee Arbitration Program to Determine the Existence of an Attorney-Client Relationship") (Blank)

Next committee meeting:

DATE: Friday, August 5, 2016  
TIME: 10:00 a.m. – 3:00 p.m.  
LOCATION: The State Bar of California  
845 South Figueroa Street, 2<sup>nd</sup> Floor  
Los Angeles, CA 90017

**COMMITTEE ON MANDATORY FEE ARBITRATION  
THE STATE BAR OF CALIFORNIA**

**MINUTES**

**Friday, March 25, 2016**

**10:00 a.m. – 3:00 p.m.**

ADR Services, Inc.  
225 Broadway, Suite 1400  
San Diego, CA 92101

Members Present: Jobi Halper (Chair), Ken Bacon (Presiding Arbitrator), Nick Migliaccio (Vice Chair), Lorraine Walsh (Vice Chair), Mary Best, Chris Blank, Carole Buckner, Michelle Chavez, Michael Fish, Brandon Krueger, Joel Mark, Dave Parker, Mark Schreiber, Clark Stone, Lee Straus, and Sally Williams.

Staff Present: Doug Hull

The meeting was called to order at 10:00 a.m. by Chair Jobi Halper

- I. Approval of Minutes of January 23, 2016 meeting  
The minutes were approved as attached to the agenda.
- II. Chair's Report  
No report was given.
- III. Report from Presiding Arbitrator  
Ken mentioned that 2 enforcement matters had been filed since the last meeting and those attorneys paid the award in light of the filing.
- IV. Report from the Office of Mandatory Fee Arbitration
  - A. Program requests
    - i. Riverside—Advanced
    - ii. Desert Bar—Basic Coachella Valley September/October
    - iii. Ventura—Advanced
    - iv. Sonoma—Basic
- V. Action Items
  - A. Sacramento County Bar Association Fee Arbitration Rules  
This item was approved with typographical corrections
  - B. Modification to training materials  
This item was approved with some corrections.
  - C. Arbitration Advisory re Bill Padding

Minutes March 25, 2016

Page 1

This item was approved, subject to some language modifications

D. Arbitration Advisory re: Statute of Limitations

This item was approved

E. Case summary for *Lee v. Hanley*

Two versions of this item was provided. The shorter one was approved for inclusion.

VI. Discussion/Information Items

A. Bagley-Keene Open Meeting Act

Jobi and Doug discussed issues related to this topic. Materials were attached to the agenda. Implementation will commence April 1.

B. *Sheppard, Mullin v. J-M Mfg. Co., Inc.*, Case No. B256314 (2d Dist., Div. 4 Jan. 29, 2016)

This matter is being appealed. At present, members will monitor this case for its potential impact on MFA.

C. Agreements to Binding Arbitration

This matter was not discussed.

VII. Arbitration Advisories for Future Review

A. 2005-01 ("Jurisdiction of the Mandatory Fee Arbitration Program to Determine the Existence of an Attorney-Client Relationship")

B. 1997-02 ("Handling a Request for Arbitration When a Party Files for Bankruptcy")

VIII. Program Advisories for Future Review

A. Program Advisory XXIII ("Procedures Where a Party Has filed for Bankruptcy")

This item will be discussed at a future meeting.

The meeting adjourned at 2:25 p.m.

Next committee meeting:

DATE: Friday, May 20, 2016  
TIME: 10:00 a.m. – 3:00 p.m.  
LOCATION: The State Bar of California  
180 Howard Street, 4<sup>th</sup> Floor  
San Francisco, CA 94105  
(415) 538-2000

# STATE BAR MANDATORY FEE ARBITRATION PROGRAM STATISTICS 2016

## INTAKE ACTIVITY 2016

	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	YTD	Year End 2015
Fee Arbitration Requests	12	3	10										25	88
Requests with Jurisdiction Challenges or Removal Requests	1	1	1										3	6
Enforcement Requests	0	3	4										7	44
Phone Intake	331	324	361										1016	3900

## ENFORCEMENT ACTIVITY (All cases, all years)

	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	YTD	Year End 2015
Orders Filed Assessing Administrative Penalties	0	0	0										0	14
Motions Filed To Enroll Attorney Inactive	2	0	1										3	5
Attorney Placed on Inactive Status	0	0	2										2	2
Prepare Motion	0	0	0										0	6
Impose Penalty	0	0	0										0	10
ExParte App. Inactive/Default	0	0	0										0	0
Attorney on Payment Plan	0	1	1										2	12
Cases Abated	0	1	1										1	7
Cases Paid and Closed	5	4	4										14	31
Cases Closed: Other	0	3	3										3	14

## ARBITRATION CASES: CLOSED STATUS (All Cases, all years)

	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	YTD	Year End 2015
Findings & Award Served	2	6	14										22	57
Cases Closed, No Award	0	4	5										9	45
Total Cases Closed	2	10	19										31	102

**STATE BAR MANDATORY FEE ARBITRATION PROGRAM STATISTICS  
2016**

ARBITRATION CASE STATUS REPORT  
(All Cases, all years)

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	Year End 2016	Year End 2015
Case Forwarded to PA for Jurisdiction Decision	2	6	2											0
Fee Waiver/Filing Fee Due	1	0	0											1
Request Received/Not Served	4	1	1											2
Request Served/Reply Due	11	3	9											9
Ready to Assign	2	6	0											1
Assigned/No Hearing Set	8	7	14											11
Notice of Hearing Date Served	11	7	7											23
Findings & Award Due	19	22	10											2
Total Cases Currently Open	58	52	43											49
Cases Currently in Abeyance	0	0	0											0

**STATE BAR MANDATORY FEE ARBITRATION PROGRAM STATISTICS  
MARCH 31, 2016**

INTAKE ACTIVITY	Through MAR. 31, 2016	Through MAR. 31, 2015	At year end <b>2015</b>
Fee Arbitration Requests	25	13	88
Requests with Jurisdiction Challenges or Removal Requests	3	0	6
Enforcement Requests	7	13	44
Phone Intake	1016	944	3900

ENFORCEMENT ACTIVITY	Through MAR. 31, 2016	Through MAR. 31, 2015	At year end <b>2015</b>
Payment Plan	2	4	12
Orders Filed Assessing Administrative Penalties	0	3	14
Ex Parte App. To Enroll Inactive/Default	0	0	0
Prepare Motion	0	0	6
Motions Filed To Enroll Attorney Inactive	3	0	5
Attorney Placed on Inactive Status	2	0	2

OPEN ARBITRATION CASES CURRENT DISPOSITION	Month of MAR. 2016	Month of MAR. 2015	At year end <b>2015</b>
Jurisdiction Challenges & Removal Requests	2	0	0
Fee Waiver/Filing Fee Due	0	1	1
Request Received/Not Served	1	4	2
Request Served/Reply Due	9	9	9
Ready to Assign	0	2	1
Assigned/No Hearing Set	14	11	11
Notice of Hearing Date Served	7	8	23
Findings & Award Due	10	9	2
Total Cases Currently Open	43	43	49

Closed Status (Arbitration cases, all years)	Through MAR. 31, 2016	Through MAR. 31, 2015	Year end <b>2015</b>
Findings & Award Served	22	7	57
Cases Closed With No Award	9	10	45
Total Cases Closed	31	17	102
Cases Currently in Abeyance	0	0	0

## Mandatory Fee Arbitration Requests Filed By Local Bar Programs\*

	2010	2011	2012	2013	2014	2015
1 <sup>st</sup> Quarter	418	379	365	271	287	304
2 <sup>nd</sup> Quarter	409	373	454	323	280	273
3 <sup>rd</sup> Quarter	449	341	368	295	301	295
4 <sup>th</sup> Quarter	392	392	329	255	256	267
Total	1668	1485	1516	1144	1124	1139

\* This number is based on the number of reimbursement requests from local bars. The State Bar pays to participating local bar programs a flat \$50 fee per MFA case assigned to a mediator or arbitrator.

Committee on Mandatory Fee Arbitration  
Schedule of Events

Date	Event	Type	Location	Participants
Friday, May 20, 2016 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 4 AB San Francisco, CA 94105	All members
June 16-18, 2016 (tentative)	Solo and Small Firm Summit(?)	MCLE	Newport Beach	Migliaccio, Buckner
Friday, August 5, 2016 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 845 South Figueroa Street Room 2AB Los Angeles, CA 90017	All members
September? Tuesdays	Training	Advanced	Ventura County Bar Association 4475 Market St., Suite B Ventura, CA 93303	Mark, Straus(?)
Thursday, September 29, 2016 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	San Diego County Bar Association 401 West A St., Room 120 San Diego, CA 92101	All members
Friday, September 30- Sunday, October 2, 2016	State Bar Annual Meeting Program:  Mandatory Fee Arbitration: The Good, the Bad, there is No Ugly	MCLE	State Bar Annual Meeting San Diego Marriott Marquis & Marina	Mark, Bacon <i>Program submitted. Not sure if accepted, and if so, date/time.</i>
Friday, September 30- Sunday, October 2, 2017	State Bar Annual Meeting Program:  Protecting and Collecting Fees	MCLE	State Bar Annual Meeting San Diego Marriott Marquis & Marina	Fish, Buckner <i>Program submitted. Not sure if accepted, and if so, date/time.</i>
Friday, September 30- Sunday, October 2, 2018	State Bar Annual Meeting Program:  Getting Paid: The relationship between your billings and fee agreements	MCLE	State Bar Annual Meeting San Diego Marriott Marquis & Marina	Migliaccio, Walsh <i>Program submitted. Not sure if accepted, and if so, date/time.</i>

Date	Event	Type	Location	Participants
Friday, September 30- Sunday, October 2, 2019	State Bar Annual Meeting Program:  Updates on Enforceable and Ethical Fee Agreements, including Alternative Fee Agreements	MCLE	State Bar Annual Meeting San Diego Marriott Marquis & Marina	Halper, Bacon <i>Program submitted. Not sure if accepted, and if so, date/time.</i>
September or October?	Training	Basic	Desert Bar Association	Mark
Wednesday, November 2 4:00 – 7:00 pm	Training	Basic	Sonoma County Bar Association 37 Old Courthouse Square, Suite 100 Santa Rosa, CA 95404	Fish, (Bacon?)
2017?	Training	Basic	Riverside County Bar Association	

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN RE MARILYN S. SCHEER,  
*Debtor,*

MARILYN S. SCHEER,  
*Appellant,*

v.

THE STATE BAR OF CALIFORNIA;  
LUIS J. RODRIGUEZ, individually and  
in his official capacity as President  
of the Board of Trustees of the State  
Bar of California; JOSEPH DUNN,  
individually and in his official  
capacity as Executive Director of the  
State Bar of California; JOANN  
REMKE, in her official capacity as  
Presiding Judge of the State Bar of  
California; KENNETH E. BACON,  
individually and in his official  
capacity as Presiding Arbitrator of  
the State Bar of California,  
*Appellees.*

No. 14-56622

D.C. No.  
2:14-cv-04829-  
JFW

OPINION

Appeal from the United States District Court  
for the Central District of California  
John F. Walter, District Judge, Presiding

Argued and Submitted  
February 11, 2016—Pasadena, California

Filed April 14, 2016

Before: Marsha S. Berzon and John B. Owens, Circuit  
Judges and Algenon L. Marbley,\* District Judge.

Opinion by Judge Owens

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**SUMMARY\*\***

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**Bankruptcy**

The panel reversed the district court’s affirmance of the bankruptcy court’s decision that a suspended attorney’s debt was nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(7).

The state bar suspended the attorney for failure to pay a debt under an arbitration award concerning improperly collected client fees. She sought reinstatement of her law license under 11 U.S.C. § 525(a), which prohibits the government from revoking or refusing to renew a license “solely because” an individual has not paid a debt that is dischargeable in bankruptcy.

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\* The Honorable Algenon L. Marbley, District Judge for the U.S. District Court for the Southern District of Ohio, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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IN RE SCHEER

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The panel held that the debt did not fall within the scope of § 523(a)(7), which excepts from bankruptcy discharge a debt that “is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.” The panel remanded the case to the district court.

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**COUNSEL**

Marilyn S. Scheer (argued), Woodland Hills, California, pro se Appellant.

Michael von Loewenfeldt (argued), Kerr & Wagstaffe LLP, San Francisco, California; Kevin W. Coleman and Todd B. Holvick, Schnader Harrison Segal & Lewis LLP, San Francisco, California, for Appellees.

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## OPINION

OWENS, Circuit Judge:

Pro se appellant Marilyn Scheer, an attorney with a suspended California law license, contends that the district court erred when it held that her debt to a former client was nondischargeable under 11 U.S.C. § 523(a)(7). We agree with Scheer that this particular type of debt does not fall within the scope of section 523(a)(7), so we reverse the district court and remand for further proceedings.

### I. BACKGROUND

#### A. The Client Dispute and State Bar Proceedings

In September 2010, a client named Clark retained Scheer to help modify his home mortgage loan, and paid her \$5500 before any modification occurred. Clark then fired Scheer and sought return of the \$5500 under California's mandatory attorney fee arbitration program. In August 2011, the arbitrator concluded that although Scheer performed competently, she violated California Civil Code Section 2944.7(a) by receiving advanced fees for residential mortgage modification services. Although the arbitrator believed that Scheer's violations were neither willful nor malicious, he concluded that California law required a full refund of the improperly collected fees and the arbitration filing fee of \$275, for a total of \$5775.

Scheer made a few payments against the arbitration award, but claimed a lack of funds and failed to pay the outstanding balance. At Clark's request, the Presiding Arbitrator brought an action against Scheer in state bar court

for failure to pay the award. In February 2013, the state bar court found that she could pay the award and had failed to propose a satisfactory payment plan, so it placed her on involuntary inactive enrollment status. This order suspended Scheer's right to practice law until (1) she paid back the remaining portion of Clark's funds, and (2) the court granted a motion to terminate her inactive enrollment. Scheer unsuccessfully sought relief from the State Bar Court Review Department and the California Supreme Court.

### **B. Bankruptcy and District Court Proceedings**

In July 2013, Scheer filed for Chapter 7 bankruptcy, naming both Clark and the State Bar as creditors. Although notified, neither the State Bar nor Clark objected to the debt being discharged.<sup>1</sup> Scheer then demanded reinstatement of her law license under 11 U.S.C. § 525(a), which prohibits the government from revoking or refusing to renew a license "solely because" an individual has not paid a debt that is dischargeable or was discharged in bankruptcy. After the State Bar ignored her demand, she filed suit in the Bankruptcy Court against the State Bar and certain bar officials (individually and in their official capacities), arguing that her suspension violated sections 525(a) and 362. The bankruptcy court (and later the district court) rejected that argument, reasoning that the debt was nondischargeable under section 523(a)(7). Scheer then appealed to our court.

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<sup>1</sup> Unlike certain debts that fall under § 523(a)(2), (4), or (6), a creditor is not required to object in bankruptcy court to preserve the right to payment of a nondischargeable debt under § 523(a)(7). *See* § 523(c)(1); 4 *Collier on Bankruptcy* ¶¶ 523.02–03, 523.29 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

## II. STANDARD OF REVIEW

We review de novo a district court's decision on an appeal from a bankruptcy court. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011). Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, "exceptions to discharge should be strictly construed against an objecting creditor and in favor of the debtor." *Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992).

## III. ANALYSIS

Under the usual canons of statutory interpretation, this would be an easy case. Section 523(a)(7) provides in relevant part that a debt is excepted from discharge in bankruptcy "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

On its face, section 523(a)(7) does not apply to Scheer's debt, as it is neither "a fine, penalty, or forfeiture" nor "payable to and for the benefit of a governmental unit." Rather, it is an arbitration award for a debt between two private parties, payable to one of them—the familiar chicken piccata of the bankruptcy petition buffet. Ordinarily, that would be the end of the story.

Yet *Kelly v. Robinson*, 479 U.S. 36 (1986), complicates our inquiry. The Supreme Court in *Kelly* addressed whether restitution obligations, imposed as conditions of probation in state criminal proceedings, were dischargeable. While acknowledging that the "starting point in every case involving construction of a statute is the language itself," the

Court then pivoted and reasoned that it must interpret the language of 523(a)(7) “in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems.” *Id.* at 43–44 (quoting in part *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

With the “deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings” in mind, the Court then addressed whether the state court criminal restitution was in fact nondischargeable under section 523(a)(7). *Id.* at 47. The Court reasoned that permitting discharge “would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems,” and that it was unlikely that Congress “would limit the rehabilitative and deterrent options available to state criminal judges.” *Id.* at 49. While restitution resembled a judgment “for the benefit of” the victim, the Court concluded that the overall role of restitution in “the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation,” meant that the criminal restitution actually operated “for the benefit of” the state as far as section 523(a)(7) was concerned. *Id.* at 52–53. The Court concluded: “The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State. Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).” *Id.* at 53.

The Court’s approach in *Kelly*—to untether statutory interpretation from the statutory language—has gone the way of *NutraSweet* and other relics of the 1980s and led to

considerable confusion among federal courts and practitioners about section 523(a)(7)'s scope. For example, some courts have held that civil restitution payable to the government and then distributed to fraud victims is dischargeable. *See, e.g., In re Towers*, 162 F.3d 952, 956 (7th Cir. 1998); *Hawaii v. Parsons (In re Parsons)*, 505 B.R. 540, 544 (Bankr. D. Haw. 2014), *recons. denied*, No. 09-02937, 2014 WL 1329541 (Bankr. D. Haw. Mar. 19, 2014). And some courts treat Rule 11 sanctions and a default judgment from a legal malpractice action payable to a private litigant the same way. *See Hughes v. Sanders*, 469 F.3d 475, 476–79 (6th Cir. 2006); *Wash v. Moebius (In re Wood)*, 167 B.R. 83, 88–89 (Bankr. W.D. Tex. 1994). But other courts hold that the costs of an attorney disciplinary proceeding, payable to the government, are nondischargeable, as are funds owed to the State Bar's Client Security Fund. *See Disciplinary Bd. of the Supreme Court of Pa. v. Feingold (In re Feingold)*, 730 F.3d 1268, 1274–76 (11th Cir. 2013); *State Bar of Cal. v. Findley (In re Findley)*, 593 F.3d 1048, 1054 (9th Cir. 2010); *Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct*, 542 F.3d 913, 920 (1st Cir. 2008); *In re Phillips*, No. CV 09-2138 AHM, 2010 WL 4916633 at \*5 (C.D. Cal. Dec. 1, 2010). And while *Kelly* holds that state criminal restitution is nondischargeable, a fellow appellate court holds that *federal* criminal restitution is dischargeable. *Rashid v. Powel (In re Rashid)*, 210 F.3d 201, 208 (3d Cir. 2000). It is fair to say that the “I know it when I see it approach” of *Kelly* has led to predictably unpredictable results.

To answer the question in this case, we look to *Findley*, our court's latest attempt to apply *Kelly* to debts incurred by an attorney. In *Findley*, the state bar court initiated disciplinary proceedings against Findley. 593 F.3d at 1049. In addition to a suspension and probationary period, the State

Bar assessed a \$14,054 fee for the cost of those proceedings. *Id.* at 1049–50. Findley, like Scheer, refused to pay the award, which blocked his reinstatement. *Id.* at 1050. Findley, like Scheer, then declared bankruptcy and demanded reinstatement. *Id.* The State Bar then filed suit in bankruptcy court, arguing that the \$14,054 fee was nondischargeable. *Id.*

We sided with the State Bar. While the parties in *Findley* agreed that the costs were “payable to and for the benefit of a governmental unit,” they disagreed over whether they constituted a fine or penalty, or compensation for actual pecuniary loss. *Id.* We reviewed California law, which expressly provided that the costs were intended to “promote rehabilitation and to protect the public,” rather than compensate someone, so they were nondischargeable under section 523(a)(7). *Id.* at 1052–54 (quoting Cal. Bus. & Prof. Code § 6086.10(e)).

When viewed through the *Findley* lens, our answer to the question before us is clear. For Scheer, there were no costs or fees assessed for disciplinary reasons.<sup>2</sup> Rather, the debt at issue was effectively the amount that Scheer improperly received from a client, but did not pay back. At its core, the \$5775 is not a fine or penalty, but compensation for actual loss. Try as we might, we cannot stretch the language of section 523(a)(7) to cover the fee dispute at issue here, even

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<sup>2</sup> While the underlying arbitration award includes reimbursement of the \$275 arbitration filing fee paid by Clark in addition to the \$5500 that he paid Scheer for legal services, this filing fee does not affect the question of whether the § 523(a)(7) exception applies to Scheer’s debt. Scheer was suspended for the wrongful non-payment of the arbitration award, without inquiry as to why it was imposed or how it was calculated. *See generally* Cal. Bus. & Prof. Code § 6203(a) (providing that in a fee arbitration “the filing fee paid may be allocated between the parties by the arbitrators”).

though we may disapprove of Scheer's conduct. The concerns permitting flexibility in *Kelly* are absent here. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 244–45 (1989) (emphasizing how *Kelly*'s deviation from the statutory language “had been animated” by the unique concerns of state criminal proceedings and informed by related pre-Bankruptcy Code practices that “reflected policy considerations of great longevity and importance”).

“States traditionally have exercised extensive control over the professional conduct of attorneys,” *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 434 (1982); *see also Findley*, 593 F.3d at 1053, and the State Bar contends that ruling in Scheer's favor undermines its power to regulate lawyers who violate state law. We of course agree that the State Bar must keep a close eye on attorneys and sanction those who misbehave. But the debt in this case was purely compensatory—an arbitration fee award between Scheer and her former client. It was not disciplinary. To categorize the fee dispute in this case as nondischargeable simply because the State expresses a strong regulatory interest in a particular industry would render any attorney-client fee dispute nondischargeable. Moreover, the State's logic would extend to fee disputes in any closely regulated industry—doctors, dentists, chiropractors, barbers, locksmiths, real estate agents, acupuncturists, tattoo artists, and so on. We require clearer language in section 523(a)(7) before we can endorse such an incremental yet horizonless approach—otherwise, we will end up boiling a frog that Congress never intended to leave the lily pad.

Consistent with *Kelly*, *Findley*, and the statute's plain language, we hold that the debt at issue in this case was

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dischargeable, and does not qualify under section 523(a)(7)'s nondischargeability exception.<sup>3</sup>

#### IV. CONCLUSION

Scheer's performance as an attorney leaves much to be desired, and it is unsettling that she can use bankruptcy to avoid refunding her client's improperly collected fees. But our moral take on Scheer's conduct does not control—the statutory language and policies underlying section 523(a)(7) do. And under the current state of the law, the debt to her client does not fall within the section 523(a)(7) nondischargeability exception.<sup>4</sup>

#### REVERSED AND REMANDED.

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<sup>3</sup> In light of our holding, we remand to the district court to determine whether Scheer has stated a claim that defendants violated sections 525(a) and 362. We leave it to the district court to decide whether it will take judicial notice of separate State Bar disciplinary proceedings against Scheer. As we do not reach the question of whether Scheer's claims survive the State Bar's motion to dismiss, we deny without prejudice the State Bar's request for judicial notice of those proceedings.

<sup>4</sup> The Eleventh Amendment does not bar us from determining that Scheer's debt was discharged. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 373–78 (2006) (“In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.”).

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LENNOX A. PURCELL,

Plaintiff and Appellant,

v.

MICHAEL SCHWEITZER,

Defendant and Respondent.

D063435

(Super. Ct. No. 37-2009-00059423-  
CU-BC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Soden & Steinberger, Robert J. Steinberger, Jason W. Cobberly; Boudreau Williams and Jon R. Williams for Plaintiff and Appellant.

The Perry Law Firm, Michael R. Perry, Larry M. Roberts and Michelle A. Hoskinson for Defendant and Respondent.

This action arises out of a promissory note in the amount of \$85,000 given by defendant Michael Schweitzer to plaintiff Lennox A. Purcell. After Schweitzer defaulted on the promissory note, Purcell brought a lawsuit seeking to recover the monies he had

loaned him. The parties settled the action, with Schweitzer agreeing to pay the sum of \$38,000, along with interest at the rate of 8.5 percent, in installments over 24 months. The settlement agreement also provided that payments were due on the first day of each month. To be considered timely, payment had to be received no later than the fifth day of the month. Of relevance to this appeal, the agreement provided that if a payment was not made on time, it was considered a breach of the entire settlement agreement, making the entire original liability of \$85,000 due. The agreement also specified that that provision did not constitute an unlawful "penalty" or "forfeiture."

When Schweitzer was late on a payment, Purcell sought and was granted a default judgment in the amount of \$58,829.35. Schweitzer thereafter brought a motion to set aside the default judgment, asserting the default judgment was the result of an unlawful penalty. The court set aside the default judgment, finding that it constituted an unenforceable penalty because the amount of the judgment bore no reasonable relationship to the amount of damages Purcell would actually suffer as a result of Schweitzer's breach.

Purcell appeals, asserting the court erred in setting aside the judgment because (1) Schweitzer waived his right to challenge the judgment on any grounds; and (2) the judgment did not constitute an unenforceable penalty because it fairly represented the amount of his damages. We affirm.<sup>1</sup>

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<sup>1</sup> Schweitzer asserts that the appeal should be dismissed because Purcell failed to comply with California Rules of Court, rule 8.204(a)(2)(B) by failing to explain why the appealed from order is appealable. However, Purcell has cured that defect in his reply

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. The Original Lawsuit and Settlement*

In September 2009 Purcell brought a lawsuit against Schweitzer and others to recover the money he loaned them. In March 2010 Schweitzer signed a settlement agreement with Purcell. Pursuant to that agreement, Schweitzer agreed to pay Purcell the sum of \$38,000, along with interest on the unpaid principal at the rate of 8.5 percent in installments over 24 months. Monthly payments by Schweitzer then began on April 1, 2010, with a balloon payment of all remaining principal and accrued interest due on April 1, 2012. Schweitzer was to make an initial payment of \$20,000, with the monthly payments of \$750 occurring thereafter. The payments Schweitzer made under the payment plan ranged from \$750 to \$1,332.58.

The settlement agreement also provided that all payments by Schweitzer were due on the first day of each month and considered late if not actually received by the fifth calendar day of the month. Moreover, the settlement agreement provided that in the event of such a breach, a judgment for the full amount of Schweitzer's original liability of \$85,000 could be entered against him. The stipulation for entry of judgment attached to the settlement agreement further provided that the \$85,000 "is an agreed upon amount of monies actually owed, jointly and severally, by the Defendant [Schweitzer] to the Plaintiff [Purcell] and *is neither a penalty nor is it a forfeiture.*" (Italics added.) That section also provided that the \$85,000 took into consideration "the economics associated

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brief explaining that an order setting aside a judgment is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2).

with proceeding further with this matter, including but not limited to: [¶] (1) A fully performed settlement; [¶] (2) Limiting the continuing attorneys' fees and costs relating to litigation; [¶] (3) Limiting attorneys' fees and costs relating to post-judgment procedures, including without limitation debtor examinations, debtor and asset searches, levies, writs, assignments and sister-state judgments; [¶] (4) Elimination of uncertainties relating to collection of a Judgment in contrast to a full, voluntary payment and performance by Defendant; and [¶] (5) Support for the public policy of judicial economy."

Finally, the agreement provided that Schweitzer waived any right to an appeal and any right to contest or otherwise set aside the judgment whether pursuant to Civil Code<sup>2</sup> section 3275 "or otherwise."

#### *B. The Second Default Judgment*

In October 2011 Schweitzer failed for the first time to make a monthly payment on time, paying it on October 11 instead of October 5. Purcell accepted that payment, even though it was late.

Nevertheless, Purcell applied for entry of judgment, and judgment was thereafter entered on October 17, 2011, in the amount of \$58,829.35, with \$58,101.85 of that amount identified as consisting of "punitive damages."

Thereafter, Schweitzer continued to make payments pursuant to the stipulated payment plan, making monthly payments in November and December 2011. The December payment was the last payment due.

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<sup>2</sup> All further undesignated statutory references are to the Civil Code.

According to Schweitzer, he was informed by Purcell's attorney in August 2012 that there was a balance remaining on the payment plan of \$67.42. Purcell denies that he or his attorney ever said the balance due was \$67.42. Rather, Purcell states that the balance was \$1,776.58 and supports this contention by pointing out that Schweitzer paid that amount in August 2012. Payment of that balance was accepted by Purcell. Thus, as of August 2012, the settlement had been paid in full.

*C. Motion To Set Aside Default Judgment*

Schweitzer thereafter brought a motion to set aside the second default judgment. In that motion Schweitzer asserted that the stipulation and subsequently entered judgment represented an unlawful penalty for his breach of the settlement agreement.

Purcell opposed that motion, arguing the parties' agreement anticipated strict compliance by Schweitzer and materially differed from other installment agreements inasmuch as Schweitzer had expressly agreed that if he defaulted, the full amount would be due and was not a penalty or a forfeiture. Purcell further asserted that the parties also agreed that the full amount of the judgment was the actual amount of Purcell's damages, that Schweitzer expressly waived his right to challenge that amount by moving to set aside or appealing the judgment, and that such a waiver was fully enforceable and should be enforced by the court.

*D. Court's Order*

The court granted the motion to set aside the default judgment, finding the damages sought by Purcell bore no rational relationship to the damages Purcell would

actually suffer as a result of Schweitzer's breach. The court further found Schweitzer's waiver was unenforceable as against public policy.

## DISCUSSION

### I. STANDARD OF REVIEW

Because we are presented with a question of law on undisputed facts, our review is de novo. (*Harbor Island Holdings v. Kim* (2003) 107 Cal.App.4th 790, 794.)

### II. ANALYSIS

"[A] provision in a contract liquidating the damages for the breach of the contract is valid *unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.*" (§ 1671, subd. (b), italics added.)

However, a liquidated damages clause becomes an unenforceable penalty "if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.) "The amount set as liquidated damages 'must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.'" (*Ibid.*) "Absent a relationship between the liquidated damages and the damages the parties anticipated would result from a breach, a liquidated damages clause will be construed as an unenforceable penalty." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1314.)

*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495 (*Greentree*), is instructive. The plaintiff brought an action for breach of contract

against the defendant, alleging the defendant failed to pay \$45,000 due under the contract. The parties settled the action, which was memorialized in a stipulation for entry of judgment. The stipulation provided defendant would pay a total of \$20,000 in two installments, but if defendant defaulted, plaintiff was entitled to have judgment entered against defendant for the full amount prayed for in the complaint. After defendant defaulted on the first installment payment of \$15,000, plaintiff succeeded in having a judgment entered for \$61,232, consisting of \$45,000 in damages, \$13,912 in prejudgment interest, \$2,000 in attorney fees, and \$320 in costs. (*Id.* at p. 498.)

In reversing and directing the trial court to reduce the judgment to \$20,000, the Court of Appeal concluded the stipulated judgment amount constituted an unenforceable penalty under section 1671. (*Greentree, supra*, 163 Cal.App.4th at pp. 500-501.)

The *Greentree* court further explained that under section 1671, subdivision (b), a liquidated damages clause constitutes an unenforceable penalty "if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained." [Citation.] In the absence of such relationship, a contractual clause purporting to predetermine damages "must be construed as a penalty."" (*Greentree, supra*, 163 Cal.App.4th at p. 499.)

Further, the relevant breach to be analyzed "is the breach of the *stipulation*, not the breach of the *underlying contract*." (*Greentree, supra*, 163 Cal.App.4th at p. 499.) In *Greentree*, the stipulation provided for payment of \$20,000. But rather than attempting

to anticipate the possible damages resulting from breach of the *stipulation*, the parties had designated the full amount claimed as damages in the underlying lawsuit. The Court of Appeal concluded the \$61,232 judgment bore "no reasonable relationship to the range of actual damages the parties could have anticipated from a breach of the stipulation to settle the dispute for \$20,000. '[D]amages for the withholding of money are easily determinable—i.e., interest at prevailing rates . . . .' [Citation.] The amount of the judgment, however, was more than triple the amount for which the parties agreed to settle the case." (*Id.* at p. 500.)

Purcell attempts to distinguish the *Greentree* case on the basis that the Court of Appeal there was not confronted with a situation where the defendant provided an "express waiver" of any challenges to the stipulated judgment "on any basis." He also asserts that the parties agreed that the amount of the stipulated judgment reflected the economics of proceeding further with the matter.

However, "the public policy expressed in Civil Code sections 1670 and 1671 *may not be circumvented by words used in a contract*; that whether or not a particular clause is a penalty or forfeiture or a bona fide provision for liquidated damages depends upon the actual facts existing at the time the contract is executed and whether or not, in fact, it was then impracticable or extremely difficult to fix actual damages and that the parties did in fact then make a good faith and reasonable effort to do so; that a litigant seeking the benefits of a clause purporting to fix liquidated damages must plead and prove that the clause is valid under the facts which then existed. The applicability of Civil Code section 1671 depends upon the actual facts *not the words which may have been used in the*

*contract.*" (*Cook v. King Manor and Convalescent Hospital* (1974) 40 Cal.App.3d 782, 792, italics added.)

Here, the stipulation that allowed for entry of judgment in the amount of almost \$60,000 was likewise an unenforceable penalty because the underlying settlement was for \$38,000. The stipulation bore no reasonable relationship to the damages that it could be expected that Purcell would suffer as a result of a breach by Schweitzer. This is shown by the payment plan itself, which provided that Schweitzer would make payments of \$750 per month. Indeed, Purcell suffered no damages at all because judgment was entered on October 17, *after* payment was accepted on October 11.

Purcell's contention that the \$85,000 amount reflected the economics associated with "proceeding further" with the lawsuit is also unavailing. That provision in the settlement agreement bore no reasonable relationship to damages he would be expected to actually suffer as a result of a breach, such as the late payment that occurred in this case. There is nothing in the record to support the fact that obtaining a judgment and instituting postjudgment procedures would cost \$85,000. Moreover, Purcell entered a default judgment for alleged "punitive damages," not for costs associated with pursuing the lawsuit.

The language in the stipulation seeking to tie the \$85,000 to the economics of proceeding further with the matter was an obvious attempt to circumvent the public policy expressed in section 1761. However, as discussed, *ante*, that public policy may not be circumvented by words used in a contract. (*Cook v. King Manor and Convalescent Hospital, supra*, 40 Cal.App.3d at p. 792.)

Finally, the judgment was improperly entered as "punitive damages." Punitive damages are not recoverable in breach of contract actions. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.)

#### DISPOSITION

The order setting aside the default judgment is affirmed. Respondent shall recover his costs on appeal.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SAFARIAN CHOI & BOLSTAD, LLP,

Plaintiff and Respondent,

v.

SHAHEN MINASSIAN,

Defendant and Appellant.

B262526

(Los Angeles County  
Super. Ct. No. BS150950)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Arthur Minassian for Defendant and Appellant.

Safarian Choi & Bolstad LLC, David C. Bolstad and Jerome M. Jauffret for Plaintiff and Respondent.

This appeal stems from a fee dispute between Shahen Minassian and Safarian Choi & Bolstad, LLP (SC&B). The fee dispute was arbitrated under a program administered by the Los Angeles County Bar Association (LACBA). The panel of arbitrators issued a decision awarding SC&B \$36,508 in fees, which was approximately \$6,000 less than what it sought. The panel's award was confirmed by the trial court. We affirm the judgment.

## FACTS

SC&B represented Minassian in a lawsuit which alleged he misappropriated property owned by the plaintiffs' deceased parents in Iran. SC&B filed a forum non conveniens motion, arguing Iran was a more convenient forum in which to litigate the suit since the properties and evidence were located there. The trial court granted the motion on October 23, 2013.<sup>1</sup> The next month, SC&B presented Minassian with his first bill for their services. The present fee dispute ensued.

When Minassian engaged SC&B to represent him in the underlying matter, he provided them with a \$10,000 retainer. He also signed a written fee agreement on March 30, 2013, which identified the \$10,000 as an advance on fees. The agreement set forth a rate of \$425 per hour for work performed by attorney David Bolstad, which he noted was an agreed upon discount of \$70 per hour, and \$250 per hour for his associate's work. The agreement cautioned, "it is impossible to determine in advance the amount of fees and costs needed to complete this matter."

Despite the terms of the agreement, Minassian contends the parties had a "handshake agreement" that SC&B would handle the initial motions for no more than \$10,000. This was because Minassian's son, Arthur Minassian,<sup>2</sup> was an attorney and

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<sup>1</sup> By opinion dated February 17, 2015, we reversed the trial court's ruling, finding Iran was not a suitable alternative forum for the parties' dispute and remanded the matter for further proceedings. (*Aghaian v. Minassian* (2015) 234 Cal.App.4th 427.) The fee dispute and arbitration occurred prior to our opinion.

<sup>2</sup> For convenience and to conform to the manner in which they refer to themselves, we refer to Minassian by his surname and to his son by his first name.

“would do a lot of the hard work regarding the facts, the documents, the experts and the translations.” Arthur was a witness to the handshake agreement. In his initial meeting with Bolstad, which Arthur also attended, Minassian agreed to pay a \$5,000 retainer. He was surprised to see the retainer increased to \$10,000 in the written fee agreement, but signed it “since I had agreed to pay him that amount anyway.” Minassian believed the handshake agreement trumped the written agreement.

On November 19, 2013, Arthur received an invoice from SC&B for approximately \$43,000. After the retainer was applied, SC&B sought to recover approximately \$33,000 from Minassian. He disputed the bill and the parties submitted the matter to arbitration under a program administered by the LACBA. Minassian argued the handshake agreement trumped the written fee agreement. He also argued the fee agreement was void because SC&B violated the terms of the fee agreement by failing to issue monthly invoices, charging a higher hourly rate than stated, applying the advance fee to the invoice and failing to deposit it into its general trust account, and failing to identify the timekeeper whose work was being charged. Minassian further alleged Bolstad was suspended from the bar for failure to pay membership dues from July 2, 2013 until August 14, 2013, yet continued to bill Minassian for his work during that time. Thus, SC&B was entitled to the agreed-upon \$10,000 at best, or nothing at all for its violation of its ethical and fiduciary duties. SC&B disputed Minassian’s characterization of their agreement and argued it was entitled to the full amount invoiced.

The arbitration hearing was conducted on July 1, 2014. Minassian, still in Iran, testified by declaration. Arthur testified to his knowledge of the agreement. He also served as Minassian’s attorney at the arbitration and presented testimony from Edward McIntyre, an expert witness who opined on attorneys’ duties and ethics. The arbitration panel, which consisted of Terry D. Shaylin, Melinda Gagyor, and Berne Rolston, issued a statement of decision on August 7, 2014. The panel unanimously found the engagement letter to be void because SC&B failed to issue monthly invoices and the invoice it did issue failed to clearly identify who worked on what. Nevertheless, the panel held SC&B was entitled to a reasonable fee for the services it rendered, amounting to \$33,019, or a

15 percent reduction of the fees charged. The panel also allocated \$2,259.84 in arbitration filing fees to Minassian and costs of \$1,229.70 for a total award of \$36,508.54. After applying the \$10,000 retainer, the panel calculated the net amount Minassian was to pay SC&B to be \$26,508.54.

SC&B petitioned the trial court to confirm the arbitration award on August 27, 2014, while Minassian sought to vacate the award. The trial court confirmed the arbitrators' award and judgment against Minassian was entered January 6, 2015. Minassian timely filed a notice of appeal on March 9, 2015.<sup>3</sup>

### **DISCUSSION**

Section 6200 et seq. of the Business and Professions Code establishes a system “for the arbitration . . . of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar . . . .” (Bus. & Prof. Code, § 6200, subd. (a).) In appropriate circumstances, an arbitration award in a matter involving a fee dispute may be confirmed, corrected, or vacated under Code of Civil Procedure<sup>4</sup> section 1285 et seq., the statutory scheme governing arbitrations in general. (Bus. & Prof. Code, § 6203, subd. (b).) Under this provision, a court shall vacate the award if it finds, among other things, that the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause or by the refusal of the arbitrators to hear evidence material to the controversy or by the failure of the arbitrator to disclose a ground for disqualification. (§ 1286.2, subd. (a).)

Minassian challenges the trial court's order confirming the arbitration award on the same grounds he sought to vacate the award below: (1) Rolston, the panel chair, failed to disclose that 50 percent of his practice involves representing lawyers and law

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<sup>3</sup> In a supplemental request filed October 1, 2015, Minassian asked us to take judicial notice of the complaint he filed against Bolstad and SC&B alleging malpractice and of correspondence related to a State Bar investigation of Bolstad initiated by Arthur. We decline to take judicial notice of these documents. (Cal. Rules of Court, rule 8.252.)

<sup>4</sup> All further section references are to the Code of Civil Procedure unless otherwise specified.

firms, thus causing a person to reasonably entertain a doubt as to his impartiality; (2) the panel erroneously refused to compel production of SC&B's trust account records; and (3) the panel refused to continue the arbitration hearing to allow Minassian to testify.

We review de novo the trial court's order confirming the arbitration award. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9; *Glaser, Weil, Fink, Jacobs & Shapiro, LLP v. Goff* (2011) 194 Cal.App.4th 423, 433.) To the extent the trial court's decision to grant the petition to confirm and deny the petition to vacate the award rests on its determination of disputed factual issues, however, we review the court's orders under the substantial evidence standard. (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217; *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892, fn. 7.)

### **I. Appearance of Partiality**

Subsequent to the panel's decision, Minassian discovered that “[s]ince 1982, more than 50% of [Rolston's] practice has involved the representation of lawyers and law firms in connection with the legal problems that arise between law partners or law partners and law firms (and vice versa).” Minassian contends Rolston improperly failed to disclose this material information, which would cause a person to reasonably doubt his impartiality in the matter.

Section 1281.9 imposes on arbitrators a duty to “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” and sets forth six specific facts required to be disclosed.<sup>5</sup> (§ 1281.9, subd. (a).) An arbitrator's failure to disclose facts as required by

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<sup>5</sup> The required disclosures include: “(1) The existence of any ground specified in Section 170.1 for disqualification of a judge . . . . [¶] (2) Any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter. [¶] (3) The names of the parties to all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party and the results of each case arbitrated to conclusion . . . . [¶] (4) The names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is

section 1281.9 warrants vacation of his or her award. (§ 1286.2, subds. (a)(2), (6); *Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 Cal.App.4th 468, 476-477; *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 845.) The California Supreme Court has held the six disclosure requirements under section 1281.9 are not exclusive, however. (*Advantage Medical Services, LLC v. Hoffman* (2008) 160 Cal.App.4th 806, 817 (*AMS*).

Thus, in *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (*Benjamin Weill*), an arbitration award in favor of a law firm in a fee dispute with a client was reversed because the chief arbitrator failed to disclose his representation of large law firms in similar cases, including of a law firm in a fee dispute with a client and of another law firm in a malpractice action against it. The description of the chief arbitrator’s legal practice showed he often represented “[a]ttorneys who face charges of misconduct.” (*Id.* at p. 51.) The court in *Benjamin Weill* held the arbitrator was required to disclose that aspect of his legal practice. (*Id.* at p. 73.)

The law firm argued the disclosure requirements for an arbitrator should not exceed that required of sitting judges under section 170.1.<sup>6</sup> (*Benjamin Weill, supra*, at p. 64.) The court disagreed. It reasoned a judge does not engage in private business relationships comparable to those of an arbitrator and thus does not enjoy or suffer economic consequences as a result of his decisions. (*Ibid.*) On the other hand, an arbitrator’s impartiality might be undermined by his substantial business relationships and economic interests. In particular, “[p]ayments to free market referees raise

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serving as neutral arbitrator, and the results of each case arbitrated to conclusion . . . . [¶] (5) Any attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer for a party to the arbitration proceeding. [¶] (6) Any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party.” (§ 1281.9, subd. (a).)

<sup>6</sup> Section 170.1, subdivision (a)(6)(A)(iii), provides that a judge “shall be disqualified” where “[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial,” which requires the same breadth of disclosure prescribed by section 1281.9.

particular concerns insofar as referees may be influenced to decide cases in favor of the party more likely to bring cases to them in the future.” (*Id.* at p. 68.)

The *Benjamin Weill* court found the *AMS* case illustrative of the dangers involved in an arbitrator’s failure to disclose business relationships. There, the arbitrator served as correspondent counsel to organizations tied to Lloyd’s of London, which was the insurer for one of the parties to the arbitration, AMS. Although the arbitrator denied that Lloyd’s was a client, substantial evidence showed the arbitrator’s involvement with Lloyd’s, including that he represented two syndicates of Lloyd’s, which underwrote 75 percent of AMS’s employment practices liability insurance. (*AMS, supra*, 160 Cal.App.4th at pp. 811-812.) The Court of Appeal found that participants in the industry were all very much aware of each other and of their ties to the syndicates and Lloyd’s. Therefore, it would be incompatible for anyone working for these syndicates to take action contrary to other participants because it would jeopardize their status in the industry. The arbitrator’s award was vacated. (*Id.* at p. 819.)

The *Benjamin Weill* court also found the facts in *Haworth v. Superior Court* (2010) 50 Cal.4th 372 (*Haworth*) to be distinguishable. In *Haworth*, a female patient claimed her physician was negligent in performing cosmetic surgery on her lip. The Supreme Court held the arbitrator, a former judge, was not required to disclose that, “10 years earlier, he received a public censure based upon his conduct toward and statements to court employees, which together created ‘an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary.’ ” (*Id.* at p. 377.)

The high court rejected the argument that the censure would cause a person to reasonably conclude the arbitrator might be biased against a female plaintiff in a medical malpractice case involving cosmetic surgery. (*Haworth, supra*, 50 Cal.4th at p. 389.) Since possible inferences to be drawn from the censured conduct could point either in favor of the female patient or in favor of the male physician, the public censure “simply provides no reasonable basis for a belief that [the former judge] would be inclined to favor one party over the other in the present proceedings.” (*Id.* at p. 391.) As the high

court explained, “ ‘[a]n impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased for or against a party for a particular reason.’ [Citation.]” (*Id.* at p. 389, italics omitted.) The court found important a subject matter link between the current arbitration and the matter subject to disclosure, noting, “the subject matter of this arbitration was not such that the circumstance of gender was material, or that gender stereotyping was likely to enter into the decision made by the arbitrators.” (*Id.* at p. 391.)

Minassian equates Rolston’s perceived bias with the one found in *Benjamin Weill*. We do not agree they are similarly situated. Unlike in *Benjamin Weill*, Rolston represented lawyers against other lawyers, not against clients. In particular, Rolston’s personal website explained that Rolston “represent[s] lawyers and law firms in the organization, management and termination of their professional relationships including law firm partnership disputes, partner withdrawals and dismissals. . . .” We fail to see how this would cause a person to reasonably entertain a doubt that Rolston would be able to be impartial to a client. As in *Haworth*, there does not exist a subject matter link between the current arbitration and the matter subject to disclosure. Possible inferences which may be drawn from Rolston’s legal practice could equally point to an inclination to favor lawyers or an inclination to disfavor lawyers. Thus, an arbitrator who represents lawyers in actions against other lawyers is not inherently biased in favor of lawyers or against their clients. “‘An impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased *for or against a party for a particular reason.*’ [Citation.]” (*Haworth, supra*, 50 Cal.4th at p. 389.)

Neither are we inclined to conclude that, as in *AMS*, Rolston would favor lawyers over clients because he hopes to receive future business from law firms. By representing lawyers against other lawyers, Rolston has already taken action contrary to any potential clients’ interests. Unlike the arbitrator in *AMS*, his standing in the legal community is not jeopardized by a ruling against a law firm or lawyer. There is no reasonable basis to believe that Rolston could not be fair to a client in a fee dispute simply as a result of the

nature of his legal practice.<sup>7</sup> We decline to extend the holding in *Benjamin Weill* to require disclosure in this instance. Accordingly, we hold Rolston was not required under section 1281.9 to disclose to the parties his representation of lawyers against other lawyers and law firms.

## II. Trust Account Documents

On June 20, 2014, Minassian submitted a request for trust account documents from SC&B. In particular, Minassian sought information relating to when his \$10,000 retainer was deposited or withdrawn from the firm's trust account. The panel denied the request on June 25, 2014. Minassian contends those documents were relevant because "Minassian's claim that the parties had an alternative fee agreement would have been bolstered by the fact that the [SC&B] did not handle his \$10,000 as a so-called 'Advance Payment,' or fees deposit, or other amount to be charged against fees. The trust records, based on Bolstad's admission, apparently show that the Safarian Firm treated the \$10,000 as an earned fee from the time they received it." Alternatively, Minassian argues the trust account documents would have shown that SC&B violated the written fee agreement by failing to deposit the money in its trust account.

Minassian relies on *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524 (*Burlage*) to support his argument. There, the plaintiffs discovered after the close of escrow that their property encroached on the neighboring golf course. They sued the seller, alleging he was aware of the encroachment but failed to disclose it. The arbitrator declined to admit into evidence the fact that the title company paid the country club for a lot line adjustment. Finding error, the appellate court held the title company's action was directly relevant to show the plaintiffs suffered no damages and the evidence should have been admitted. (*Id.* at p. 530.)

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<sup>7</sup> Minassian further challenges the trial court's ruling on the ground it erroneously required him to investigate Rolston's background or establish actual bias. Because we review the matter de novo, we may disregard these arguments challenging the trial court's reasoning. (*Haworth, supra*, 50 Cal.4th 372.)

Even if we accept the evidence related to the trust account was similarly relevant and should have been admitted, Minassian has failed to show how he has been prejudiced by the panel's decision. Unlike in *Burlage*, where the arbitrator failed to consider the title company's settlement with the country club entirely, it is clear that the panel had before it evidence of SC&B's mishandling of Minassian's retainer fee. Minassian's expert identified the improper handling of the retainer as a basis for his conclusion that SC&B violated its written fee agreement and its fiduciary duties to Minassian. Indeed, Minassian's brief to the panel discussed the improper handling of the retainer fee. This issue was identified and considered by the panel, as shown in its decision, where it noted Minassian's contention that SC&B "did not deposit the 'Advance Fee' of \$10,000 into its general trust account." Further, the panel found the written fee agreement to be void. Minassian has shown no prejudice resulted from the panels' decision to deny his request for the trust account documents.

### **III. Continuance**

On May 13, 2014, the LACBA appointed a three person panel to hear the arbitration and required the parties to conduct the arbitration hearing by August 13, 2014.<sup>8</sup> On May 27, 2014, Arthur advised Rolston his father would not be in the country until October 2014 at the earliest. He also stated he and his expert witness would have difficulty attending the hearing prior to October 10, 2014, and asked for a 60 day extension of time to complete the arbitration. Arthur noted, however, that Minassian's declaration could be submitted in lieu of live testimony if necessary. The extension was rejected by the panel. It noted either party could submit evidence by way of declaration "with the understanding that the Panel will consider the evidence appropriately and give it such weight as is deemed reasonable under the circumstances." Both Arthur and the expert testified at the hearing, but Minassian was not able to attend. His declaration was considered by the panel instead.

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<sup>8</sup> Minassian asserts that the panel imposed the deadline, but the record indicates the LACBA designated the arbitration deadline in its initial communication appointing the panel.

Minassian contends he was prejudiced by the panel's refusal to continue the arbitration hearing by two months so he could testify in person. He asserts his testimony would have been critical to the issue of the handshake agreement, particularly since the panel found the written fee agreement to be void. Although his declaration was considered by the panel, he contends the arbitrators regarded it "as a poor substitute for in-person testimony," and discredited his declaration as measured against Bolstad's in-person testimony on the issue. Thus, "Minassian was unfairly prevented from presenting his case because his oral testimony was prevented when the arbitrators refused to postpone the hearing." We disagree.

The LACBA Rules for Conduct of Voluntary Arbitration of Fee Disputes (LACBA Rules) set forth a proposed time schedule which the LACBA encourages arbitrators to "endeavor to adhere to . . . except where emergencies or circumstances beyond the control of the arbitrator(s), or the parties require short extensions." However, "[u]pon request of a party to the arbitration and for good cause, or upon their own determination, the sole arbitrator or panel may postpone or adjourn the hearing from time-to-time (Code Civ. Proc., Section 1282.2(b))." (LACBA Rules, No. 23.)

Minassian provides no support for his supposition that the panel failed to give his declaration the same weight as if he had testified in person. Minassian contends that Rolston's comments provided ample evidence that his declaration was treated as wholly incredible. For example, Minassian interprets Rolston's comment that "the Panel will consider the evidence appropriately and give [the declaration] such weight as is deemed reasonable under the circumstances" to mean that he would grant it less weight than live testimony. This is pure speculation and does not comport with an actual reading of those words. Minassian also takes issue with Rolston's expressed disbelief of the existence of the handshake agreement. That Rolston did not believe Minassian's version of events does not suggest his in-person testimony would have swayed Rolston. In any event, Arthur testified to his knowledge of the existence of the handshake agreement. He was present at each of the meetings with SC&B. Simply put, the panel did not believe the handshake agreement existed. Minassian has failed to show his in-person testimony

would have convinced them when his declaration and Arthur's in-person testimony about it did not.

**DISPOSITION**

The judgment is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

I concur:

GRIMES, J.

**Safarian Choi & Bolstad LLP v. Minassian - B262526**

RUBIN, J. – Dissenting.

Although I agree with much of the majority opinion, I respectfully dissent. In my view and as I explain below, to some extent the court’s opinion has failed to distinguish grounds for *disqualification* from required *disclosure*. This is not surprising because the two concepts are closely interwoven and language contained in California statutes and prior versions of the California Canons of Judicial Ethics has contributed to the confusion. The information about the neutral arbitrator’s law practice in this case, when considered in light of the applicable standard for *disclosure*, compels me to conclude that the information here should have been disclosed. The failure to do so requires vacating the arbitration award.

A. *The Case Law on Which the Majority Relies*

I have no quarrel with the majority’s analysis of the three principal cases on which it relies: *Haworth v. Superior Court* (2010) 50 Cal.4th 372 (*Haworth*), *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (*Benjamin Weill*), and *Advantage Medical Services, LLC v. Hoffman* (2008) 160 Cal.App.4th 806 (*AMS*). I also agree that the facts of two of these cases bear little resemblance to the present case. In *Haworth*, the arbitrated dispute was a medical malpractice case filed by a female plaintiff. The arbitrator, a former superior court judge, had been previously disciplined by the Commission on Judicial Performance for making inappropriate comments to female court employees. The female patient in the pending case claimed that information should have been disclosed. In *AMS*, the arbitrator failed to disclose previous business relationships as an attorney with the insurance underwriter involved in the arbitration dispute. In the former case, our Supreme Court confirmed the award; in the latter, the Court of Appeal vacated it.

The case that comes closest to the present appeal is *Benjamin Weill*. There, an attorney arbitrator in a fee dispute between a client and her lawyer failed to disclose, in the words of the majority, “his representation of large law firms in noteworthy cases,

including of a law firm in a fee dispute with a client and of another law firm in an action against it [for attorney malpractice and related torts].” (Maj. opn., at p. 6.) The arbitrator’s webpage said that he often represented attorneys “who face charges of misconduct.” (*Benjamin Weill, supra*, 195 Cal.App.4th at p. 51.) The Court of Appeal reversed the trial’s court order confirming the award and directed the trial court to vacate the award.

*B. Application of the Cases to the Present Dispute*

I agree that the present case is not as egregious as *Benjamin Weill*, although “not as egregious” arguments rarely take us very far. The record in the current appeal contains no suggestion that the arbitrator represented lawyers in legal malpractice actions filed by clients or in fee disputes between lawyers and clients. His practice was nevertheless heavily skewed toward representing lawyers on other important matters, such as partner expulsions or withdrawals, and providing arbitration services relating to internal law firm disputes. His resume stated that he had significant expertise in the specialty of Law Practice Management, a subject he had also taught at the University of Michigan. In other words, he is a lawyer’s lawyer. To be sure, his clients and the clients of opposing parties all appear to be lawyers, such that one could infer he has seen the pluses and minuses of lawyers’ conduct in his specialized field of practice. Nevertheless, I do not believe the distinction between this case and *Benjamin Weill* supports the majority’s holding: “We fail to see how this would cause a person to reasonably entertain a doubt that Rolston [the arbitrator] would be able to be impartial to a client.” (Maj. opn., at p. 8.)<sup>1</sup> Although I come to the opposite conclusion from the majority using the standard

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<sup>1</sup> In support of its holding, the majority states: “Possible inferences which may be drawn from Rolston’s legal practice *could* equally point to an inclination to favor lawyers or an inclination to disfavor lawyers.” (Maj. opn., at p. 8, italics added.) I do not agree with the reasonableness of the latter inference, but, as I discuss below, the fact the majority acknowledges one could infer “an inclination to favor lawyers,” squarely places the withheld information within the required disclosure of “all matters that *could* cause a person aware of the facts to reasonably entertain doubt that the proposed neutral arbitrator would be able to be impartial.” (Code Civ. Proc., § 1281.9, subd. (a), italics added.)

adopted by the majority (as quoted in the preceding sentence), I believe the majority has not employed the proper test for deciding such cases. As have many other courts, the majority conflates the rules governing disclosure with those requiring disqualification. By applying a different analysis of the disclosure and disqualification rules, I believe the case for disclosure of the arbitrator's law practice is compelling.

*C. A Brief History of the Development of Judicial Disqualification and Disclosure*

The disconnect between disclosure and disqualification has a long history: it starts with the basic notion that judges may be disqualified. None of these earlier cases, of course, deals with the more modern enterprise of arbitration, and the Supreme Court has observed that the standards for disclosure by and disqualification of arbitrators differ from disclosure and disqualification of judges. (*Haworth, supra*, 50 Cal.4th at pp. 393-394 & fn. 14.) But the court has also found similarities between the arbitral and judicial disclosure and disqualification rules, holding in *Haworth* that the judicial standard for appearance of impartiality “is explicitly made applicable to arbitrators. (§ 1281.9, subd. (a)(1) [proposed neutral arbitrator must disclose ‘[t]he existence of any ground specified in Section 170.1 for disqualification of a judge.’].)” (*Id.* at p. 393.) Accordingly, it seems appropriate to review briefly the development of our rules for judicial disclosure and disqualification, and then consider their application to arbitrations.

To put matters in context, it was not until 1984 that the Legislature enacted a version of the current statute that disqualifies a judge if a “person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” (§ 170.1, subd. (a)(6)(A)(iii).) Because the arbitration statute at issue here, section 1289, expressly relies on the substantive provisions for judges under section 170.1 (see § 1281.9, subd. (a)(1)), a brief history of section 170.1 is helpful to our understanding of the principles governing disclosure and disqualification for arbitrators.

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All future section references are to the Code of Civil Procedure.

Many of the early cases from the 19th century mention judicial disqualification only in passing and deal primarily with the transfer of cases from one county to another because a judge had been disqualified. These cases contain no discussion of the legal grounds for disqualification. (See, e.g., *Townsend v. Brooks* (1855) 5 Cal. 52; *People ex rel. Attorney Gen. v. Wells* (1852) 2 Cal. 198.)

An early case that described the limits of judicial disqualification around this time was *McCauley v. Weller* (1859) 12 Cal. 500. There, the trial judge's behavior suggested he could not be impartial, and on appeal it was alleged that he should have been disqualified. The Supreme Court concluded that under then current law the judge was not disqualified, and affirmed the judgment. The court described the conduct and then stated that impartiality was not a ground for disqualification:

“The application for a change of venue was made upon affidavits setting up that defendants could not have a fair and impartial trial in the Court below, on account of the bias of the presiding Judge of the County Court, who was charged with having been present, consulting and advising with the agent and counsel of plaintiff during the trial before the Justice; and having, during the progress of such trial, expressed himself so strongly in favor of plaintiff's right to recover, as to occasion remonstrance from bystanders upon the impropriety of such conduct on the part of a judicial officer. [¶] The statute authorizes a change of venue ‘when, from any cause, the Judge is disqualified from acting.’ The things which *disqualify* a Judge are specified in section 87 of the [Practice] Act ‘concerning the Courts and Judicial officers,’ Wood's Digest, p[age] 157; 1st. When he is a party to, or interested in the action. 2d. When he is related to either party within the third degree; and, 3d. When he has been attorney or counsel for either party. [¶] *These are the only causes which work a disqualification of a judicial officer.* The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the Court and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the Judge is disqualified from setting

(sic).” (*McCauley v. Weller, supra*, 12 Cal. at p. 523, second italics added; see also Stats. 1863, art. II, “Particular Disqualification of Judges,” § 66.)

From this holding, we see that the early disqualification statutes did not contain a provision comparable to present day section 170.1, subdivision (a)(6)(C)(iii) that requires disqualification if a “person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” As I have already observed, it was not until 1984 that this ground for disqualification was incorporated into new section 170.1.<sup>2</sup>

The gestation of the rules for judicial *disclosure* took an entirely different path. To this day, there is nothing in section 170.1 that addresses judicial disclosure. Instead the rules governing judicial disclosure have from the inception been a part of the California Canons of Judicial Ethics (and before that its predecessor, the California Code of Judicial Conduct). The current rule is found in Canon 3E, which provides: [¶] “(2) In all trial court proceedings, a judge shall disclose on the record as follows: [¶] (a) Information relevant to disqualification. A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” (Cal. Code Jud. Ethics, canon 3 (West Cal. Rules of Court, 2016 ed.), p. 1190.)

Before 1993, canon 3 contained no formal requirement that a judge disclose information that might bear on the judge’s disqualification. (Cal. Code Jud. Ethics, canon 3 (West Cal. Rules of Court, 1992 ed.), pp. 811-812.)<sup>3</sup> The 1993 Code contained a

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<sup>2</sup> Before 1984, the disqualification rules were part of former section 170. Former section 170 did not have an equivalent to current section 170.1, subdivision (a)(6)(C)(iii) and was finally repealed and reenacted to provide that judges have an affirmative duty to decide cases unless disqualified. It was in the same series of amendments that the “person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial” language was added, although the subdivision number at the time was (a)(6)(C). (See Stats. 1984, ch. 1555, §§ 1-2, 4-5, pp. 5479-5480.)

<sup>3</sup> The first set of judicial canons was adopted in 1949 by the Conference of California Judges (now the California Judges Association). The canons, then called the Code of Judicial Conduct, were modified from time to time until early 1995. Proposition

commentary to canon 3E that for the first time addressed the question of judicial disclosure. It provided: “A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.” (Com. Cal. Code Jud. Ethics, canon 3 (West Cal. Rules of Court, 1993 rev. ed.), p. 869.)

The disclosure language was originally placed in the commentary, not the canons. The Commentary “provides guidance as to the purpose and meaning of the canons. The Commentary does not constitute additional rules and should not be so construed.” (Cal. Code. Jud. Ethics, Preamble (Cal. Rules of Court (West 1996 ed.), p. 929.) By the time the Supreme Court promulgated the first revision of the Code of Judicial Ethics, the disclosure rule was elevated to Canon status, as part of an amended Canon 3E. The new canon continued the same language of the former Commentary to Canon 3E except that the disclosure rule was limited to trial judges.<sup>4</sup> (*Id.* at p. 933.) It was later renumbered canon 3E(2).

The disclosure rule in canon 3E(2) was substantively changed in 2007 to its current iteration: “A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” The change in the canon deletes the former subjective test (“information that the judge *believes* the parties or their lawyers might consider relevant”) to one that is objective (“information that is *reasonably relevant* to the question of disqualification”). (Italics added.)

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190, effective March 1, 1995, added a constitutional provision that required the California Supreme Court to make rules for the conduct of judges and judicial candidates. After adopting the 1992 Code of Judicial Conduct on an interim basis in March 1995, the Supreme Court formally adopted the newly named “California Code of Judicial Ethics” on January 15, 1996. It too has been amended from time to time. (See Preface to California Code of Judicial Ethics, amended January 21, 1995.)

<sup>4</sup> The rules governing disqualification and disclosure are different for trial judges and appellate justices. (See generally Canon 3.)

The common theme in the development of the law of judicial disclosure and disqualification is that the disclosure rules, must, by practical application, be broader than the disqualification rules. If that were not so, the disclosure rules would fall by the wayside because judges would simply disqualify. There would be nothing to disclose. The standards are different for disclosure and disqualification because they serve different purposes. As Judge Rothman has written in his book, “Canon 3E(2) serves the important role of reaffirming the integrity and impartiality of the judicial institution. It provides the parties with the reassurance the judge has examined whether or not certain factors in regard to the case require recusal, that the judge has determined recusal is not required, and that, in spite of that determination, the judge believes the parties and their counsel should be made aware of the factors.” (Rothman, *Cal. Judicial Conduct Handbook* (2007 3d. ed.) § 7.73, p. 381; see also Appendix F.)<sup>5</sup> Disclosure also provides the parties with an opportunity to bring to the court’s attention additional information of which the judge was not aware but which might bear on disqualification. And, of course, it provides the parties with information upon which they might seek disqualification of the judge under the for cause procedures of section 170.3. (*Ibid.*)

*D. The Development of Arbitral Disqualification and Disclosure under California Law*

In contrast to the development of the law as applied to judges, disqualification and disclosure rules for arbitrators have a different bloodline. Section 1281.9, the first arbitration disqualification and disclosure statute, was adopted in 1994.<sup>6</sup> The version of

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<sup>5</sup> This edition of the book was written before the 2007 change in Canon 3E(2) that replaced “judge believes” with “is reasonably relevant.” The policies described by Judge Rothman are the same under either version.

<sup>6</sup> Before 1994, case law addressed the issue of arbitral disqualification and disclosure without the benefit of an applicable statute. Thus in *Johnston v. Security Ins. Co.* (1970) 6 Cal.App.3d 839, the Court of Appeal considered the Federal Arbitration Act and the then recent United States Supreme Court case of *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145 to hold that “even in the absence of any showing of actual, fraud, corruption or partiality [the statutory criteria] on the part of the

the statute relevant to our inquiry followed a 2001 amendment. (Stats. 2001, ch. 362, § 5.) It provides in part: “(a) 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, including all of the following: [¶] (1) The existence of any ground specified in Section 170.1 for *disqualification* of a judge.” (§ 1281.9, subd. (a); italics added.)

Unlike the parallel statutory and canonical tracks for judges, from the outset the legislature included both disqualification and disclosure rules in one statute. Other statutes in this area have followed suit. (See, e.g., §§ 1281.85 [combining disclosure and disqualification requirements]; 1286.2, subd. (a)(6) [failure “to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware”].) Section 1281.85 also directs the Judicial Council to adopt ethics standards for arbitrators. In carrying out the statutory mandate, the Council promulgated the Ethical Standards for Neutral Arbitrators in Contractual Arbitration, Standard 7 (“Standard 7”). Standard 7 deals with both disclosure and disqualification.

Although there is nothing inherently suspect about having both the disqualification and the disclosure rules in the same provisions, it appears the structure may have had the unintended consequence of blurring the different standards for arbitrator disqualification and the arbitrator’s duty to disclose relevant facts. Whether in the judicial or arbitral forum, the events that trigger disclosure must be different than those for disqualification. Otherwise, instead of disclosure there will be only disqualification. The confusion is exacerbated by some sloppy statutory draftsmanship that, I believe, has contributed to the result the majority reaches today. Somewhat remarkably, the lack of clarity is caused primarily by three common words: “might,” “could,” and “would.” “Might” is the past

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third (neutral) arbitrator, his failure to disclose even sporadic but substantial business relationships with a party to the arbitration constituted legal cause for vacating the award.” (*Johnston*, at pp. 841-842.) The *Johnston* court applied the federal rule and affirmed the trial court’s order vacating the award. (*Id.* at p. 845.)

tense of “may” and connotes possibility or probability. (Merriam-Webster Online Dict. (2016) <[www.merriam-webster.com/dictionary/might](http://www.merriam-webster.com/dictionary/might)> [as of Apr. 5, 2016].) “Could” is the past tense of “can” and is used to suggest something that is of “less force or certainty.” (Merriam-Webster Online Dict. (2016) <[www.merriam-webster.com/dictionary/could](http://www.merriam-webster.com/dictionary/could)> [as of Apr. 5, 2016].) “Would” is used more in terms of what is “going to happen or be done.” (Merriam-Webster Online Dict. (2016) <[www.merriam-webster.com/dictionary/would](http://www.merriam-webster.com/dictionary/would)> [as of Apr. 5, 2016].) Briefly, both “might” and “could” express less certainty of occurrence than “would.”

Reviewing the arbitration statutes and Standard 7, one finds the use of all three words. For example, in section 1281.9, the arbitrator “shall disclose all matters that *could* cause a person aware of the facts to reasonably entertain a doubt.” (Italics added.) The statute proceeds to incorporate section 170.1, which as we have seen uses the phrase, “[a] person aware of the facts *might* reasonably entertain.” (Italics added.) Standard 7 arguably worsens the problem.

Subdivision (d) of Standard 7 and the ensuing Comment state that an arbitrator must disclose all matters “that *could* cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.” (Italics added.) In subdivision (d)(1), the standard replaces “could” with “might.” “Would,” on the other hand is used pretty uniformly throughout to describe the judge’s likely ability to be impartial, not the state of mind of the litigant that triggers disclosure.

Even appellate courts have substituted one standard for another. For example in *Haworth*, the Supreme Court was applying an earlier Court of Appeal decision to the facts before it: “ ‘An impression of possible bias in the arbitration context means that one *could* reasonably form a belief that an arbitrator was biased *for or against a party for a particular reason*. (Betz v. Pankow [(1995) 31 Cal.App.4th 1503, 1511].) Ossakow contends, and the Court of Appeal held, that Judge Gordon’s public censure *would* cause a person to reasonably conclude that this arbitrator might be biased against a female plaintiff in a medical malpractice case involving cosmetic surgery.’ ” (*Haworth, supra*, 50 Cal.4th at p. 389; bolded italics added.) Similarly, in *Benjamin Weill, supra*, the court

reversed the two tests in section 1281.9, subdivision (a)(1) when it stated: “The *Haworth* court rejected the argument that the censure *would* cause a person to reasonably conclude the arbitrator *might* be biased against a female plaintiff in a medical malpractice case involving cosmetic surgery.” (*Benjamin Weill, supra*, 195 Cal.App.4th at p. 64, italics added.) Respectfully, the two italicized words should have been interchanged.

*E. Disclosure Must Be Broader Than Disqualification*

This brings me to the majority opinion, which also appears to use the “would” test to describe the belief of the interested party. “We fail to see how this would cause a person to reasonably entertain a doubt that Rolston would be able to be impartial to a client.” (Maj. opn., at p. 8.) Instead of stating that it failed to see how this *would* cause a person to reasonably entertain a doubt about the arbitrator’s impartiality, the majority, I suggest, should have used the broader terms “could” under section 1281.9 or “might” pursuant to section 170.1.

This rather lengthy exegesis of short words is not the mere meanderings of a hypertechnical wordsmith, but reflects what I believe to be a significant departure from the standards that govern arbitral disclosure.

Section 1281.9 must be read in context with its companion provisions. (*People v. Eribarne* (2004) 124 Cal.App.4th 1463, 1467.) Section 1281.85 provides that the Ethical Standards for Arbitrators must “address the disclosure of interests, relationships, or affiliations that *may* constitute conflicts of interest. (§ 1281.85, subd. (a) (italics added).) Once a proposed neutral arbitrator submits his section 1281.9 disclosure statement, he “shall be disqualified on the basis of the disclosure statement” if a party serves a notice of disqualification within 15 days. (§ 1281.91, subd. (b)(1).) “A party shall have the right to disqualify one court-appointed arbitrator without cause in any single arbitration, and may petition the court to disqualify a subsequent appointee only upon a showing of cause.” (§ 1281.92, subd. (b)(2).)

As I read these provisions, parties to an arbitration have the right to disclosure of information that may (might) amount to a conflict of interest in order to protect their rights to disqualify a proposed arbitrator whose impartiality they doubt. In order to

effectuate that right, the disclosure standards must be read in light of section 1281.85, subdivision (a), which frames disclosure in terms of information that *may* constitute a conflict of interest.

I am inclined to believe that arbitrator Rolston’s practice emphasis on law firm matters could cause a reasonable person to doubt his impartiality in a client versus law firm dispute. Regardless, that fact – the nature of his law practice – is not unconnected from the issue of whether his client base might cast doubt on his impartiality as it did in *Benjamin Weill, supra*, 195 Cal.App.4th 40. Instead, it is a fact that a reasonable party engaged in such a dispute might well wish to consider when deciding whether to accept a proposed neutral arbitrator or exercise his rights to disqualify that person.

As noted, the majority has framed the test in terms of information that would cause a reasonable person to doubt a proposed arbitrator’s impartiality. I believe this takes away from the parties their right to obtain relevant information about the proposed arbitrator and leaves it to the arbitrators to decide for themselves whether the nature of their law practice or other business relationships could cast doubt on their impartiality.

It appears that this potential for confusion may have been one of the forces that contributed to the Supreme Court’s modification to canon 3E(2) on judicial disclosure. The amendment deleted the subjective judge’s belief about the disclosure of information and replaced it with: [¶] “A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” Although our Supreme Court has concluded that disqualification and disclosure rules for arbitrators and judges are not coterminous, it is apparent that in interpreting the same language in 1281.9 and canon 3E(2) there is no reason for a different result. I suggest that a reasonable construction of sections 1281.9 and 1281.85 – one certainly consistent with their express

language – is that an arbitrator must “disclose information that is reasonably relevant to the question of disqualification.”<sup>7</sup>

### *Conclusion*

#### A.

Little doubt exists that full and complete disclosure of relevant information that bears on an arbitrator’s potential disqualification is essential to the public perception that arbitration is a fair and just method of dispute resolution. An arbitrator who fails to disclose relevant information on disqualification is an arbitrator who will inevitably invite after-the-award claims of bias. This is particularly so under the current state of the law that compels consumers, employees and others to submit to arbitration on the basis of a standard and often complex agreement that is often times not bargained for at arms’ length.

As one commentator has written:

“By providing all disclosures up front, arbitrators then place the parties in the best position to opt to disregard the conflicts or to use the knowledge to find a more suitable neutral. It follows therefore, that post-award challenges on grounds of arbitrator bias would be substantially reduced, thereby reinforcing the efficiency and finality of arbitration as a process. As Justice White observed in *Commonwealth Coatings*, ‘it is far better for a potential conflict of interest “[to] to be disclosed at the outset” than for it to “come to light” after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.’ Emphasis on candidness at the forefront of arbitration by the chosen neutrals ensures the continued likelihood of a streamlined means of dispute resolution throughout. [¶] The best way to address issues of arbitrator bias, therefore, is to ensure that from the onset, arbitrators are required to openly and broadly disclose prior relationships and dealings that may overlap or intertwine with the pending arbitration.” (Melworm, *Biased; Prove It: Addressing Arbitrator Bias and the*

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<sup>7</sup> If my interpretation is wrong, I would strongly urge the Legislature to revisit this issue and clarify the breadth of the arbitration disclosure standards.

Merits of Implementing Broad Disclosure Standards, 22 *Cardozo J. Int'l & Comp. L.* 431, 470 (2014).)

B.

Our Supreme Court has recognized some of the fundamental differences between judges and arbitrators in the overall dispute resolution system that we have. (*Haworth supra*, 50 Cal.4th at pp. 392-393.) A judge must decide all cases in which he or she is not disqualified. (§ 170.) A judge is extremely limited in his or her extrajudicial activities. (Cal. Code Jud. Ethics, canon 4.) Unlike judges, arbitrators can accept a wide range of professional relationships. Arbitrators who are lawyers may continue to practice law. Judges cannot. (*Id.* at canon 4G.) Arbitrators are paid by the disputants; judges are not. But the standard for disclosing information that is reasonably relevant to potential disqualification should be identical even though the specific grounds for disqualification may differ from judge to arbitrator.

The *Haworth* court recognized as such when it refused to create a rule sought by appellant that arbitrator disclosure should be “broader than the standard applicable for judicial recusal.” (*Haworth, supra*, 50 Cal.4th at p. 392.) “The language of both applicable statutes is virtually identical, and the judicial standard is explicitly made applicable to arbitrators.” (*Ibid.*)

Using this standard, I find no doubt that information that Rolston’s law practice was in large measure devoted to representing lawyers was “reasonably relevant” to the issue of disqualification. Because Rolston did not disclose this information, I would reverse the judgment and direct the trial court to grant the motion to vacate the arbitration award and deny the motion to confirm that award. (§ 1286.2, subd. (a)(6).)

RUBIN, J.