

S165906

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

**RANDAL D. HAWORTH, M.D. F.A.C.S.,
THE BEVERLY HILLS SURGICAL CENTER, INC.**

Petitioners,

vs.

**SUPERIOR COURT OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES,**

Respondent.

SUSAN AMY OSSAKOW

Real Party in Interest.

*After a Decision by the Court of Appeal, Second
Appellate District, Division Five, 2nd Civil No. B204354*

**AMICUS BRIEF OF UNITED POLICYHOLDERS
IN SUPPORT OF REAL PARTY IN INTEREST
SUSAN OSSAKOW**

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, United Policyholders certifies that it is a non-profit 501(c)(3) organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: August 31, 2009

SHARON J. ARKIN

INTRODUCTION

The appellate court in this case held that a neutral arbitrator should have disclosed his prior censure, imposed while he sitting as a judge, to the parties to the arbitration. One basis for the dissenting opinion in the appellate court was that requiring neutral arbitrators to make such a disclosure would also require sitting judges to make the same disclosure. The dissent contended that such an extension of the existing requirements for judicial disclosures would be unwarranted and unjustified, especially given this Court's decision in *People v. Chatman* (2006) 38 Cal.4th 344, stating that “[c]ourts must apply with restraint statutes authorizing disqualification of a judge due to bias.” (*Chatman*, at 363.)

But, as discussed in detail below, the principle quoted in *Chatman* is derived from older cases, and is a rule that has recently been challenged by legal commentators. The current scholarship on the issue concludes that recusal rules should be applied with a focus on maintaining the public perception of the integrity of the judiciary rather than on the operational efficiency of the court system or the application of the traditional concept of a judge's “duty to sit.” And encouraging more – rather than less - disclosure at the inception of a case will assure that any potential biases do not infect the judicial process. Thus, early disclosure of any and all

potential bases for bias – whether for a neutral arbitrator or for a judicial officer – is a “win-win” because it enhances the public’s trust in the integrity of the judiciary and it eliminates the risk of later challenges for bias which require relitigation of the case.

In light of the recent scholarly commentary on this issue, this Court should reassess the rules for determining how and when facts, if known, might cause someone aware of those facts to “reasonably entertain a doubt that the [decision maker] would be able to be impartial.” (Code of Civil Procedure section 1281.9; Code of Civil Procedure section 170.1(a)(6)(A)(iii).)

INTEREST OF THE *AMICUS*

The financial security that insurance policies provide is critical to consumers and is an integral part of the fabric of our economy and our society. United Policyholders is a non-profit charitable organization founded in 1991 that is helping preserve the integrity of the insurance system by serving as an information resource on policyholders’ interests, rights and duties. Donations, grants and volunteer labor support the organization’s work

United Policyholders monitors the national insurance marketplace with a particular focus on California. The organization's staff and volunteers participate in public policy forums, disseminate information about the claim process, and file amicus briefs in cases involving coverage and claim disputes. United Policyholders serves as a clearinghouse on consumer issues related to commercial and personal lines insurance products. (www.unitedpolicyholders.org.)

This case falls squarely within the parameters of United Policyholders' interests because it deals with the requirements for disclosure by neutral arbitrators. United Policyholders has worked for years with thousands of insureds who have lost their homes to natural disasters and who have been forced by policy terms and statutory law into arbitrating the value of their losses using three-arbitrator panels like that involved in this case. The disclosure requirements for neutral arbitrators is critically important because it affects the ability of insurance consumers to obtain a fair and reasoned recovery of the policy benefits for which they have paid years of premiums. These decisions by arbitration panels go to the core of the insurer/insured relationship, and thus to the core of United Policyholders' mission.

LEGAL ARGUMENT

1.

THE FOCUS OF DISCLOSURE AND RECUSAL RULES SHOULD BE ON ENHANCING THE PUBLIC’S PERCEPTION OF THE INTEGRITY OF THE JUDICIARY

The dissent in the lower court relied on this Court’s statement in *People v. Chatman* (2006) 38 Cal.4th 344, 363 that “[c]ourts must apply with restraint statutes authorizing disqualification of a judge due to bias.” Although *Chatman* is a fairly recent decision, the standard expressed in it is of more ancient lineage.

Chatman cites, without analysis, to this Court’s decision in *In re Scott* (2003) 29 Cal.4th 783, 817 for the proposition that “[p]otential bias and prejudice must clearly be established by an objective standard” before recusal or disclosure can be required and that “[c]ourts must apply with restraint statutes authorizing disqualification of a judge due to bias.” (*Chatman*, at 363.) The *Scott* decision similarly repeats that rule – again without analysis – from an even earlier decision of an appellate court in

Roitz v. Coldwell Banker Residential Brokerage Co. (1998) 62 Cal.App.4th 716, 723-724.

The *Roitz* court, in turn, relied on a 1964 decision of this Court (*McClenny v. Superior Court*, 60 Cal.2d 677, 680) for the statement that disqualification rules must be “applied with restraint.” (*Id.*, at 724.) Notably, however, the *McClenny* decision was dealing with the issue of a peremptory challenge under Code of Civil Procedure section 170.6, not a disqualification for actual or perceived bias under section 170.1. And – even more importantly - the *McClenny* court’s “restraint” language was based solely on the legislative history of section 170.6 and did not consider or decide the issue of the standard to be applied to Code of Civil Procedure section 170.1 – the section at issue in this case.

Thus, the statement of the rule by this Court in *Chatman* – which was relied on by the dissent in the lower court, as well as the defendant in this Court – is without logical or precedential support in the first instance. But more importantly, even if that were the rule established by this Court in 1964, it is time for it to be reassessed. Indeed, during the last decade legal scholars have begun to call for reforms in the application of disclosure and recusal rules for the judiciary.

A. The focus of disclosure and recusal rules should be the promotion of the public's confidence in the judiciary.

There are two reasons for disqualification rules – “promoting confidence in the judiciary and providing a fair trial to litigants.” (Hoekema, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 Temple L.Q. 697, 705, Fall, 1987 [“Hoekema”].) Providing a fair trial requires the recusal of judges who have an actual, demonstrable bias. (*Id.*) “Protecting and promoting public confidence in the judiciary, in contrast, depends not only on actual fairness in particular cases but also on the appearance of fairness.” (*Id.*) Thus, “[d]isqualification based on the *appearance* of bias may be required to promote public confidence when, in fact, *no actual partiality exists.*” (*Id.*; *emphasis added.*)

But as Amanda Frost noted in her 2005 University of Kansas Law Review article, “[t]he laws governing judicial recusal are failing at one of their primary objectives: protecting the reputation of the judiciary.” (Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan. L.R. 531, 531, 551, April 2005 [“Frost”].)

Historically, recusal laws have been passed with the intention that they be broadly applied. (Frost, at 533-534, 541, 543.) But in their actual application, the judiciary traditionally construes them narrowly. (*Id.*) This

essentially results in a rule where only actual bias – proven by clear and convincing evidence – is sufficient for recusal. The cases basically read out of the statutes and the guidelines the requirement for recusal in situations where a reasonable person aware of the facts might “entertain a doubt” about the judge’s impartiality. As a result, “disqualification decisions are systematically underused and underenforced.” (Goldberg, Sample & Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503, 524 (Spring 2007) [“Goldberg”])

Or, as Jeffrey W. Stempel explains in *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 Buff. L. R. 813, 814-815, May 2009, “judges are erroneously pushed to resolve close disqualification issues against recusal when the presumption should run in exactly the opposition direction.” Rather, “[i]n close cases, judges should err on the side of recusal in order to enhance public confidence in the judiciary and to ensure that subtle, subconscious, or hard-to-prove bias, prejudice, or partiality does not influence decision-making.”

The restriction of disclosure and recusal requirements to cases where actual bias is proven engenders a perception in the public that courts are not transparent or independent. But in order to protect judicial independence, “courts must embrace the public demand for accountability – not by yielding to pressure on hot-button issues, but by recognizing that with

independence comes a duty to preserve both the reality and appearance of justice.” (Goldberg, at 504.) To do this, “courts must demonstrate their accountability for the decisions they make by more aggressively distancing themselves from situations in which their fairness and impartiality might reasonably be questioned.” (*Id.*)

Further, as Goldberg notes, “enhanced disclosure might be one of the simplest and most important reforms available” to enhance the public’s trust and confidence in the judiciary. (*Id.* at 527.) To that end, “judges could be required to disclose orally or in writing, at the outset of the litigation, any facts that might plausibly be construed as bearing on the judges’ impartiality.” (*Id.*, at 528.)

Goldberg also discusses the fact that such a disclosure requirement has flaws: There is an “added burden on judges or clerks,” there may be a “potential intrusiveness on judge’s privacy,” and there is the simple reality that there is a “low probability that judges would disclose many of the most relevant facts. (For example, no one will say, ‘I am a racist’. . . .)” (*Id.*)

Goldberg responds to these criticisms by noting that the “practical burden on judges is small, however, and the marginal cost to their privacy is slighter still, because judges already have an ethical obligation to disclose pertinent facts, even if this obligation has not been formalized into a legal rule.” (*Id.*)

B. Requiring that a judge disclose the fact of censure will enhance the public’s trust without overburdening the courts.

The public censure issued by this Court to Judge Gordon established, after hearing and evidence, Judge Gordon’s gender bias. (See Part 2, below.) Typically, the determination of whether a judge has an inherent bias against any particular group is a matter of guesswork for the litigants and their attorneys. A blanket rule requiring that a judge disclose a censure takes the “guesswork” out of the equation. While other judges may have undisclosed and unrecognized prejudices and biases – which cannot easily be reached by any rule – a rule that a judge must disclose a public censure on a particular issue is easy to formulate and simple to enforce.

There are some possible objections to such a rule. Probably the foremost concern of any judge would be the simple embarrassment of having to repeatedly disclose to potential parties that the censure occurred. But a public censure is just that – public. The fact that it is embarrassing to the judge receiving it does not warrant the risk of undermining the public’s trust in the integrity of the judiciary by keeping its existence an “inner circle” secret. Moreover, requiring a judge to disclose a public censure to the parties in a case will likely have an ameliorative effect by providing a repeated reminder to the judge to avoid the unacceptable behavior involved

and provide further deterrence for the censured judge – and other judges – from engaging in the censured behavior.

One other point. Disclosure of a censure which demonstrates a bias also gives a judge the opportunity to describe to the parties the type of efforts made by the judge to overcome the bias. For example, a censure evidencing a gender bias – like the one in this case – gives the judge an opportunity to explain about sensitivity training, counseling and courses taken in an effort to overcome the bias. Such a disclosure provides the opportunity for the parties to waive that as a basis for disqualification and allows that judge to proceed with the litigation. Parties may well prefer a judge who has at least acknowledged the bias and taken steps to overcome it over a judge who refuses to acknowledge that there is a problem at all.

This also raises the “temporal” issue argued by the defendant and the dissent: i.e., that the censure was so long ago that its impact is minimal. The problem with that argument is that social psychology principles and common sense tell us that biases are not easily overcome without effort on the part of the prejudiced person. (Simonson & Maushak, *Handbook of Research for Educational Communications and Technology*, Chapter 34, section 34.3.2, Iowa State University, available at <http://www.aect.org/edtech/ed1/34/34-04.html> [“opinions tended to persist unless the individual underwent some new learning experience.” Additionally, “[f]or attitude

change to occur, more than rehearsal and practice had to take place.”].) While a judge’s *behavior* may well change in the face of a public censure, the underlying attitude very well may not. And it is that underlying attitude which creates the “doubt that the judge would be able to be impartial.” (Code of Civil Procedure section 170.1(a)(6)(A)(iii).) Thus, the mere passage of time has no bearing on the determination of whether the censure should be disclosed. As discussed above, the better course is to require the disclosure, but allow the judge to additionally explain the efforts made to overcome the apparent bias.

Nor is there any merit to the defendant’s “floodgates” arguments. The simple fact is that there are few public censures issued in any given year. As reflected on the website of the Commission on Judicial Performance (<http://cjp.ca.gov/index.php?id=9>), since 1961, there have been a total of only 43 censures issued – less than one per year. Even considering every type of public discipline imposed on judicial officers since 1961, including censures, reprovls and admonishments, the total is a mere 117 – less than three per year.

Moreover, not all of those censures, reprovls or admonishments would require disclosure in any event. Only those involving a bias or prejudice against a particular group based on gender, race, religion or other protected category would be relevant. The censure issued to Judge Gordon

clearly reflected a gender bias. (See Part 2, below.) Others do not. For example, a public admonishment issued to Judge Ronald M. Sohigian addressed abuse of his use of the OSC process. (See, http://cjp.ca.gov/userfiles/file/Public_Admon/Sohigian_DO_04-26-07.pdf.) But his abuse of that process was not directed to any particular protected group and disclosure would not be triggered on the basis of the type of litigant or type of case before him.

Because there are so few public censures, admonishments or reprovings, and because not all of them would necessarily trigger a disclosure requirement, the impact of requiring a judge to disclose a disciplinary action that exposes a racial, gender or other bias will be minimal with respect to the court's operations, but may well have a significant impact in a particular case.

The bottom line is that there is no practical reason not to require disclosure. Such a rule will have a limited scope but will have a ameliorative effect on the public's trust in the integrity of the judicial process.

2.

**THE FACTS IN THIS CASE EXEMPLIFY THE
REASONS WHY MORE, RATHER THAN LESS,
DISCLOSURE BY DECISION-MAKERS
SHOULD BE THE RULE**

Not only should disclosure of public discipline of judges be required as a general rule, the specific facts in this case warranted the trial court's order vacating the arbitration award.

The public censure issued to Judge Gordon was based on his making “sexually suggestive remarks to and ask[ing] sexually explicit questions of female staff members,” as well as “using crude and demeaning names and descriptions.” (Censure, App., Vol. 1, pp 50-52.) These are *exactly* the type of examples that the Judicial Council itself has used in describing and delineating gender bias. (Guidelines for Judicial Officers: Avoiding the Appearance of Bias, Judicial Council Advisory Committee on Access and Fairness, August, 1996, available at <http://www.courtinfo.ca.gov/programs/access/documents/genderb.pdf>, pp 1, 3, 4 [telling off-color jokes, making remarks about a woman's appearance, clothing, etc., adopting a demeaning tone or attitude toward women].)

Since the conduct condemned in Judge Gordon's censure is precisely the kind of improper conduct exemplified in the Judicial Council's own Gender Bias Guidelines, there can be no dispute that Judge Gordon's behavior constituted gender bias.

Nor can there realistically be any dispute that while Judge Gordon's behavior may have changed over the years (although there is nothing in the record to support such a conclusion), the arbitrator's award in this case clearly demonstrates that his basic attitude has not. For example, the award erroneously stated that Ms. Ossakow had had five prior facial surgeries and that "after five facial surgeries, [Ossakow] could have done without a sixth." (*Haworth v. Superior Court (Ossakow)* (2008) 164 Cal.App.4th 930, ___, 79 Cal.Rptr.3d 800, 802.) Nothing in the award, or the record, explains the relevance of the fact that Ms. Ossakow had had prior cosmetic surgeries. And the statement that she "could have done without a sixth" cosmetic surgery is nothing but a gratuitous and demeaning comment that has nothing to do with the merits of the case. This is, again, the type of demeaning comment that the Judicial Council has labeled as a type of gender bias which must be restrained.

Thus, not only did Judge Gordon's failure to disclose the censure create the appearance of an impropriety because he failed to disclose an established bias, the arbitration award itself amply demonstrates that Judge

Gordon retains an *actual* bias against women. The only way to protect the public's trust in the integrity of both the judiciary and the arbitration system is to affirm the appellate court's decision vacating the arbitration award.

CONCLUSION

The reputation of the judiciary – the perception of the public as to the honesty and integrity of the judicial process – is of utmost importance. It is not enough to simply mouth the standard. It is critical to enforce it. If decisions which are tainted by even the appearance of bias are not reversed, the public's confidence will be undermined.

Dated: August 31, 2009

THE ARKIN LAW FIRM

SHARON J. ARKIN
Attorney for *Amicus Curiae*
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address 333 S. Grand Avenue, 25th Floor, Los Angeles, CA 90071.

On **August 18, 2009**, I served the within document described as:

<p><u>APPLICATION FOR EXTENSION OF TIME TO FILE</u> <u>AMICUS BRIEF AND APPLICATION</u></p>

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth in the attached service list with postage paid thereon and depositing them with the United States Postal Service at Brookings, Oregon.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 18, 2009 at Brookings, Oregon.

SHARON J. ARKIN

HAWORTH v. S.C. (OSSAKOW)

Case Number S165906

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