Limits on Discovery to Arbitrators and Dispute Resolution Providers

By David V. Wilson II

Everyone involved in the handling or defense of construction defect claims is aware that arbitration is a common method of "resolution" of such claims. However, there is an all too common sequel to the hard-fought arbitration hearing when it becomes time to confirm or enforce the award at the courthouse. Unhappy parties to the arbitration, in an attempt to fish for evidence of one of the few reasons an award can be disturbed, may attempt to serve discovery in the trial court to the arbitrator, the members of the arbitration panel, or the dispute resolution provider itself. The common target of this discovery is evidence of an allegedly undisclosed conflict of interest on the part of the arbitrator. When this happens, counsel for the successful party should be familiar with the wide-range of legal authority which indicates such discovery is improper.

For example, Courts have refused to allow the parties to an arbitration proceeding to call an arbitrator as a witness to testify by deposition or at trial. Courts have repeatedly condemned compelling arbitrators to testify, even though it may be difficult to prove actual bias or a lack thereof without their testimony. *Woods v. Saturn Distribution Corp.*, 78 F.3d 424 (9th Cir.), **cert. dism**., 518 U.S. 1051 (1996); *O.R. Securities, Inc. v. Professional Planning Assocs., Inc.*, 857 F.2d 742, 748 (11th Cir. 1988). In *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 898-99 (2nd Cir. 1991), the Court stated that without clear evidence of impropriety, the losing party to an arbitration was simply engaging in a fishing expedition by requesting to depose the arbitrator to determine if there was some

basis to pursue a claim of bias. **See also** *In Re National Risk Underwriters, Inc.,* 884 F.2d 1389, 1989 WL 100649 (4th Cir. 1989) (stating that the losing party to an arbitration cannot depose the arbitrator absent an objective showing of fraud, misconduct or bias); *Doctor's Associates, Inc. v. Qasim,* 2000 U.S. App. LEXIS 22197 *6-7 (2nd Cir. 2000); *Gearhardt v. Cadillac Plastics Group, Inc.*, 140 F.R.D. 349 (S.D. Ohio 1992); *United Food & Commercial Workers International Union, AFL-CIO v. SIPCO, Inc.,* 1990 U.S. Dist. LEXIS 20210 (S.D. Iowa 1990).

Thus, in the absence of clear evidence of impropriety, a party is not entitled to discovery by way of deposing an arbitrator. *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 702 (2nd Cir. 1978); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 90 F. Supp.2d 893, 899 (S.D. Ohio 2000). Further, a party must use due diligence and cannot raise questions of bias or fraud only after the rendition of a decision by the arbitrator. *Woods v. Saturn Distribution Corp.*, 78 F.3d at 430; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, supra.

Arbitral immunity protects all acts of the arbitrator within the scope of the arbitral process. *Olson v. National Assoc. of Securities Dealers*, 85 F.3d 381, 383 (8th Cir. 1996). Arbitral immunity extends to the process of selecting arbitrators and to the actual arbitration proceeding. *Id*. **See also** *Austin Mun. Securities v. Nat. Assoc. of Securities Dealers*, 575 F.2d 676, 689-91 (5th Cir. 1985); *Austern v. Chicago Board Options Exchange, Inc.*, 898 F.2d 882, 886 (2nd Cir.), **cert. denied**, 498 U.S. 850 (1990); *Cort v. American Arbitration Ass'n*, 795 F. Supp. 970 (N.D. Cal. 1992).

There are strong policy reasons why the law recognizes a privilege that in effect relieves an arbitrator of the duty to testify. Because the parties involved in an arbitration are bound by the decision, there is a strong temptation by the loser to sue the arbitrator. The potential for undue influence of an arbitrator by a disgruntled litigant weakens the integrity of the arbitral process - parties are less certain that a decision will be final and fair. Furthermore, exposing arbitrators to litigation because of acts committed in their official capacity could discourage other individuals from serving as neutral arbitrators. Exposing an arbitrator to discovery or requiring an arbitrator to appear in court to testify pursuant to a subpoena invites a fishing expedition that could unravel an arbitration decision.

In addition, responding to a subpoena imposes financial costs on the arbitrator in terms of producing documents and hiring attorneys to respond. Thus, the policy behind arbitral immunity extends to discovery seeking the production of documents. **See** *Eder Brothers, Inc. v. Int'l. Brotherhood of Teamsters, Local 1040, et al.*, 416 A.2d 702 (Conn.Super.Ct. 1980)(subpoena duces tecum to chairman of arbitration panel quashed); **see also** *Harter v. Iowa Grain Co.*, 1998 U.S. Dist. LEXIS 22855 (D.C.Dist. 1998) *vacated on other grounds*, 1998 U.S. App. LEXIS 28491 (D.C. Cir. 1998)(subpoena requesting documents from arbitration provider quashed and motion to compel production of those documents denied).

The purpose of arbitration is to provide an expeditious resolution to a dispute. Allowing challenges to the deliberation process would override all limitations on the

review of arbitration awards. Arbitration would be transformed from a method of dispute resolution into another pretrial formality. For this reason, as a general rule, an arbitrator's testimony cannot be used to impeach an arbitration award. **See** Annotation, "Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award," 80 A.L.R.3d 155 (1977). Frankly, this is the same policy behind Federal Rule of Evidence 606(b), which makes a juror incompetent to testify in order to impeach the jury's verdict. Participants in an arbitration are entitled to the same finality and certainty that parties to a jury verdict seek. Indeed, by contracting for arbitration in the first place, the parties manifested their intent to bargain for more finality and certainty than litigants in a jury trial. Thus, arbitrators should be just as protected from inquiry and discovery into their mental processes as jurors receive from Rule 606. Fortunately, most courts give them that protection and more.

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