

Ruling will help to safeguard a fair arbitration process

By Benjamin T. Ikuta

The recently published 4th District Court of Appeal decision in *Grabowski v. Kaiser Foundation Health Plan, Inc.*, 2021 DJDAR 4536 (May 10, 2021), is critical in helping ensure a fair and unbiased process in arbitration. Frankly, a decision like *Grabowski* is long overdue in finding that improper ex parte communications in arbitration can no longer be swept under the rug.

In short, *Grabowski* held that an arbitrator's failure to disclose an ex parte communication with the prevailing party that showed potential bias mandates vacating the arbitration award. This is true regardless of whether the aggrieved party can prove prejudice or that the improper communication impacted the final award. It is the first opinion that analyzed ex parte communications under the arbitrator's disclosure requirements under Code of Civil Procedure Section 1286.2(a)(6)(A).

Grabowski involved an underlying medical malpractice where the claimant argued that health care providers at Kaiser Permanente failed to properly diagnose an ovarian tumor for years. As in nearly every medical malpractice case against Kaiser, there was a binding arbitration agreement. At arbitration, the claimant represented herself in proper and received assistance from her mother. Her mother was recording the proceedings on her cellphone

and inadvertently left the recording running during a break in the middle of the arbitration as the claimant and her mother left the room.

During that break, without the claimant present, the arbitrator and the Kaiser attorney engaged in ex parte communication. They discussed how the case was "the wrong case" for the claimant and how difficult it was factually. The arbitrator made comments making light of the

the ex parte communication was proper and did not constitute misconduct. Kaiser's attorneys did not even attempt to provide an explanation or justification for the conversation. Instead, at the trial court, Kaiser blamed the claimant for recording the conversation without Kaiser's consent.

The superior court disagreed with Kaiser and found that the ex parte communication was improper

to the claimant mandated vacating the award. In doing so, the Court of Appeal focused on the arbitrator's disclosure requirements under Code of Civil Procedure Section 1286.2(a)(6)(A) rather than Section 1286.2(a)(1).

Pursuant to Section 1286.2(a)(6)(A), if the arbitrator "failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware," the trial court must vacate the arbitration award. Importantly, "an arbitrator's failure to make a required disclosure requires vacation of the award, without a showing of prejudice." *Haworth v. Superior Court*, 50 Cal. 4th 372, 394 (2010).

While Kaiser finally admitted to the Court of Appeal that the ex parte communication was improper, Kaiser repeatedly argued that the disclosure requirements under Section 1286.2(a)(6)(A) did not apply to ex parte communications. Kaiser asserted that 1286.2(a)(6)(A) only applied to an arbitrator disclosing to the parties when that arbitrator took new matters relating to that party. As such, Kaiser argued that since only 1286.2(a)(1) applied, that the claimant had to show a nexus between the improper communication and the adverse award. Kaiser relied on *A.M. Classic Const., Inc. v. Tri-Build Development Co.*, 70 Cal. App. 4th 1470 (1999), in arguing that a claimant has to show a prejudicial link between the ex parte communication and the final award. While

A.M. expressed concerns regarding the improper ex parte communication, it affirmed a trial court orders denying a petition to vacate under a section 1286.2(a)(1) analysis, finding that the improper ex parte communications did not result in an "award ... procured by corruption, fraud or other undue means."

at 1478 ("Counsel's ex parte communications were inappropriate, and under different, more egregious circumstances, might require vacation of an arbitration award.").

The *Grabowski* opinion rejected this argument, explaining that it was applying the mandatory disclosure requirements under Section 1286.2(a)(6)(A). Under Code of Civil Procedure Sections 1281.85, 1281.9(a) and the Ethics Standards, an arbitrator has a continuing duty to disclose any matter that could cause doubt that the arbitrator is impartial. The Court of Appeal explained that "the arbitrator's ex parte communication with Kaiser's counsel could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial." Accordingly, the arbitrator was required to disclose the communication so that the claimant could decide whether to seek disqualification. In *Grabowski*, "[t]he arbitrator's failure to disclose a ground for disqualification requires that the arbitration award be vacated without any further showing of prejudice." (Emphasis added.)

Unfortunately, perhaps due to

the more informal setting of arbitration, improper and prejudicial ex parte banter occurs far more than it should. Too often, such conduct occurred without any repercussion. Particularly in medical malpractice actions, which typically involve serious injury or death, such improper conduct is a stain on the entire process. The *Grabowski* opinion is crucial to dissuade the type of behavior that occurred there, behavior that was discovered by happenstance. *Grabowski* will help ensure all parties have access to a fair and impartial process in arbitration. ■

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claimant's self-represented status and her inability to effectively represent herself. The arbitrator and the defense lawyer shared a hearty laugh about the claimant's shortcomings as an advocate. The laughter was mocking and disrespectful in nature.

At the end of the five-day arbitration, the arbitrator issued an award in favor of Kaiser. The claimant filed a petition to vacate the award with the superior court based on the improper communication. Remarkably, Kaiser argued to the trial court that

and unethical. However, the superior court denied the petition on the grounds that the claimant failed to show a nexus between the communication and the adverse award under Code of Civil Procedure Section 1286.2(a)(1). Under Section 1286.2(a)(1), a trial court must vacate an award if there is a finding that "[t]he award was procedure by corruption, fraud or other undue means."

The Court of Appeal reversed, finding that the arbitrator's failure to disclose the ex parte communication