

AMENDED IN SENATE APRIL 16, 2001

SENATE BILL

No. 475

Introduced by Senator Escutia

February 22, 2001

An act to amend ~~Section 639~~ *Sections 639, 1281.6, 1281.9, and 1286.2* of, and to add Section 640.5 to, the Code of Civil Procedure, relating to ~~referees~~ *dispute resolution*.

LEGISLATIVE COUNSEL'S DIGEST

SB 475, as amended, Escutia. ~~Referees: appointment~~ *Dispute resolution: referees and arbitrators.*

Existing law provides that when the parties to an action do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in certain cases.

This bill would specifically provide that the appointment shall be subject to the procedures specified in a provision of existing law.

Existing law requires the Judicial Council to collect specified information on the use of references in certain cases in which the parties do not consent to the appointment of a referee and to make a specified report thereof to the Legislature by January 1, 2003.

This bill would also require the Judicial Council to collect specified information from the trial courts on the use of referees in discovery matters whether appointed upon agreement of the parties or when the parties do not consent. Further, this bill would require the Judicial Council to report thereon to the Legislature by ~~an unspecified date~~ *January 1, 2004*.

Existing law provides that a written agreement to submit to arbitration is valid. Existing law establishes standards for arbitration.

This bill would require that, beginning July 1, 2002, arbitrators must comply with ethical standards adopted by the Judicial Council. This bill would also require the Judicial Council, consistent with the standards established for arbitrators in the judicial arbitration program, to adopt ethics standards that address the disclosure of actual and potential conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, the acceptance of gifts, and the establishment of future professional relationships.

Existing law requires the court to vacate an arbitration award if the arbitrator, upon receipt of a timely demand, fails to disqualify themselves from the proceedings.

This bill would require the courts also to dismiss an arbitration award if the arbitrator failed to disclose, within the time required for disclosure, grounds for disqualification of which the arbitrator was than aware.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 639 of the Code of Civil Procedure is
2 amended to read:

3 639. (a) When the parties do not consent, the court may, upon
4 the written motion of any party, or of its own motion, appoint a
5 referee in the following cases pursuant to the provisions of
6 subdivision (b) of Section 640:

7 (1) When the trial of an issue of fact requires the examination
8 of a long account on either side; in which case the referees may be
9 directed to hear and decide the whole issue, or report upon any
10 specific question of fact involved therein.

11 (2) When the taking of an account is necessary for the
12 information of the court before judgment, or for carrying a
13 judgment or order into effect.

14 (3) When a question of fact, other than upon the pleadings,
15 arises upon motion or otherwise, in any stage of the action.

16 (4) When it is necessary for the information of the court in a
17 special proceeding.

18 (5) When the court in any pending action determines that it is
19 necessary for the court to appoint a referee to hear and determine
20 any and all discovery motions and disputes relevant to discovery



1 in the action and to report findings and make a recommendation
2 thereon.

3 (b) In a discovery matter, a motion to disqualify an appointed
4 referee pursuant to Section 170.6 shall be made to the court by a
5 party either:

6 (A) Within 10 days after notice of the appointment, or if the
7 party has not yet appeared in the action, a motion shall be made
8 within 10 days after the appearance, if a discovery referee has been
9 appointed for all discovery purposes.

10 (B) At least five days before the date set for hearing, if the
11 referee assigned is known at least 10 days before the date set for
12 hearing and the discovery referee has been assigned only for
13 limited discovery purposes.

14 (c) When a referee is appointed pursuant to paragraph (5) of
15 subdivision (a), the order shall indicate whether the referee is
16 being appointed for all discovery purposes in the action.

17 (d) All appointments of referees pursuant to this section shall
18 be by written order and shall include the following:

19 (1) When the referee is appointed pursuant to paragraph (1),
20 (2), (3), or (4) of subdivision (a), a statement of the reason the
21 referee is being appointed.

22 (2) When the referee is appointed pursuant to paragraph (5) of
23 subdivision (a), the exceptional circumstances requiring the
24 reference, which must be specific to the circumstances of the
25 particular case.

26 (3) The subject matter or matters included in the reference.

27 (4) The name, business address, and telephone number of the
28 referee.

29 (5) The maximum hourly rate the referee may charge and, at the
30 request of any party, the maximum number of hours for which the
31 referee may charge. Upon the written application of any party or
32 the referee, the court may, for good cause shown, modify the
33 maximum number of hours subject to any findings as set forth in
34 paragraph (6).

35 (6) (A) Either a finding that no party has established an
36 economic inability to pay a pro rata share of the referee's fee or a
37 finding that one or more parties has established an economic
38 inability to pay a pro rata share of the referee's fees and that another
39 party has agreed voluntarily to pay that additional share of the



1 referee's fee. A court shall not appoint a referee at a cost to the
2 parties if neither of these findings is made.

3 (B) In determining whether a party has established an inability
4 to pay the referee's fees under subparagraph (A), the court shall
5 consider only the ability of the party, not the party's counsel, to pay
6 these fees. If a party is proceeding in forma pauperis, the party
7 shall be deemed by the court to have an economic inability to pay
8 the referee's fees. However, a determination of economic inability
9 to pay the fees shall not be limited to parties that proceed in forma
10 pauperis. For those parties who are not proceeding in forma
11 pauperis, the court, in determining whether a party has established
12 an inability to pay the fees, shall consider, among other things, the
13 estimated cost of the referral and the impact of the proposed fees
14 on the party's ability to proceed with the litigation.

15 (e) In any matter in which a referee is appointed pursuant to
16 paragraph (5) of subdivision (a), a copy of the order appointing the
17 referee shall be forwarded to the office of the presiding judge of
18 the court. The Judicial Council shall, by rule, collect information
19 on the use of these references and the reference fees charged to
20 litigants, and shall report thereon to the Legislature by January 1,
21 2003. This subdivision shall become inoperative on January 1,
22 2004.

23 SEC. 2. Section 640.5 is added to the Code of Civil Procedure,
24 to read:

25 640.5. It is the intent of the Legislature that the practice and
26 cost of referring discovery disputes to outside referees be
27 thoroughly reviewed. Therefore, in addition to the requirements of
28 subdivision (e) of Section 639, the Judicial Council shall collect
29 information from the trial courts on the use of referees in discovery
30 matters pursuant to either Sections 638 and 639. The collected data
31 shall include information on the number of referees, the cost to the
32 parties, and the time spent by the discovery referee. The Judicial
33 Council shall report thereon to the Legislature by January 1, ~~2003~~
34 2004.

35 SEC. 3. Section 1281.6 of the Code of Civil Procedure is
36 amended to read:

37 1281.6. If the arbitration agreement provides a method of
38 appointing an arbitrator, that method shall be followed. If the
39 arbitration agreement does not provide a method for appointing an
40 arbitrator, the parties to the agreement who seek arbitration and



1 against whom arbitration is sought may agree on a method of
2 appointing an arbitrator and that method shall be followed. In the
3 absence of an agreed method, or if the agreed method fails or for
4 any reason cannot be followed, or when an arbitrator appointed
5 fails to act and his or her successor has not been appointed, the
6 court, on petition of a party to the arbitration agreement, shall
7 appoint the arbitrator.

8 When a petition is made to the court to appoint a neutral
9 arbitrator, the court shall nominate five persons from lists of
10 persons supplied jointly by the parties to the arbitration or obtained
11 from a governmental agency concerned with arbitration or private
12 disinterested association concerned with arbitration. The parties to
13 the agreement who seek arbitration and against whom arbitration
14 is sought may within five days of receipt of notice of the nominees
15 from the court jointly select the arbitrator whether or not the
16 arbitrator is among the nominees. If the parties fail to select an
17 arbitrator within the five-day period, the court shall appoint the
18 arbitrator from the nominees.

19 ~~All neutral arbitrators shall comply with the requirements of~~
20 ~~subdivision (a) of Section 1297.121, which requirements shall~~
21 ~~apply to every agreement to arbitrate pursuant to this title.~~

22 *SEC. 4. Section 1281.9 of the Code of Civil Procedure is*
23 *amended to read:*

24 1281.9. (a) In any arbitration pursuant to an arbitration
25 agreement, when a person is to serve as a neutral arbitrator, ~~subject~~
26 *that person shall:*

27 *(1) Comply with the disclosure and disqualification*
28 *requirements established by this section.*

29 *(2) Comply with the requirements of subdivision (a) of Section*
30 *1297.121.*

31 *(3) Beginning July 1, 2002, comply with the ethics standards*
32 *for arbitrators adopted by the Judicial Council pursuant to this*
33 *section. The Judicial Council shall adopt ethics standards effective*
34 *July 1, 2002, applicable to all arbitrators who are subject to this*
35 *section. The standards adopted by the Judicial Council shall*
36 *address the disclosure of actual and potential conflicts of interest,*
37 *including prior service as an arbitrator or other dispute resolution*
38 *neutral entity, disqualifications, acceptance of gifts, and*
39 *establishment of future professional relationships. These*
40 *standards shall be consistent with the standards established for*



1 *arbitrators in the judicial arbitration program and may expand but*
2 *shall not contract the disclosure and disqualification requirements*
3 *established by this chapter.*

4 (b) Subject only to the disclosure requirements of law, the
5 proposed neutral arbitrator shall disclose in writing within 10
6 calendar days of service of notice of the proposed nomination or
7 appointment, to all parties, all of the following:

8 (1) The names of the parties to all prior or pending
9 noncollective bargaining cases in which the proposed neutral
10 arbitrator served or is serving as a party arbitrator for any party to
11 the arbitration proceeding or for a lawyer for a party and the results
12 of each case arbitrated to conclusion, including the date of the
13 arbitration award, identification of the prevailing party, the names
14 of the parties' attorneys and the amount of monetary damages
15 awarded, if any. In order to preserve confidentiality, it shall be
16 sufficient to give the name of any party who is not a party to the
17 pending arbitration as "claimant" or "respondent" if the party is
18 an individual and not a business or corporate entity.

19 (2) The names of the parties to all prior or pending
20 noncollective bargaining cases involving any party to the
21 arbitration or lawyer for a party for which the proposed neutral
22 arbitrator served or is serving as neutral arbitrator, and the results
23 of each case arbitrated to conclusion, including the date of the
24 arbitration award, identification of the prevailing party, the names
25 of the parties' attorneys and the amount of monetary damages
26 awarded, if any. In order to preserve confidentiality, it shall be
27 sufficient to give the name of any party not a party to the pending
28 arbitration as "claimant" or "respondent" if the party is an
29 individual and not a business or corporate entity.

30 (3) Any attorney-client relationship the proposed neutral
31 arbitrator has or had with any party or lawyer for a party to the
32 arbitration proceeding.

33 (4) Any professional or significant personal relationship the
34 proposed neutral arbitrator or his or her spouse or minor child
35 living in the household has or has had with any party to the
36 arbitration proceeding or lawyer for a party.

37 ~~(b)~~

38 (c) A proposed neutral arbitrator shall be disqualified if he or
39 she fails to comply with subdivision ~~(a)~~ (b) and any party entitled
40 to receive the disclosure serves a notice of disqualification within



1 15 calendar days after the proposed nominee or appointee fails to
2 comply with subdivision ~~(a)~~ (b). A proposed neutral arbitrator
3 shall be deemed to have complied with subdivision ~~(a)~~ (b) with
4 respect to any arbitration commenced prior to January 1, 1995, if
5 the person declares in writing that he or she has disclosed all
6 required information pertaining to those arbitrations within his or
7 her knowledge or possession and has made a good faith effort to
8 obtain the required information from any arbitration service
9 administering those prior cases.

10 ~~(e)~~

11 (d) (1) If the proposed neutral arbitrator complies with
12 subdivision ~~(a)~~ (b), the proposed neutral arbitrator shall be
13 disqualified on the basis of the disclosure statement after any party
14 entitled to receive the disclosure serves a notice of
15 disqualification, within 15 calendar days after service of the
16 disclosure statement.

17 (2) A party shall have the right to disqualify one
18 court-appointed arbitrator without cause in any one arbitration,
19 and may petition the court to disqualify a subsequent appointee
20 only upon a showing of cause.

21 ~~(d)~~

22 (e) The right of a party to disqualify a proposed neutral
23 arbitrator pursuant to this section shall be waived if the party fails
24 to serve the notice pursuant to the times set forth in this section,
25 unless the proposed nominee or appointee makes a material
26 omission or material misrepresentation in his or her disclosure. In
27 no event may a notice of disqualification be given after a hearing
28 of any contested issue of fact relating to the merits of the claim or
29 after any ruling by the arbitrator regarding any contested matter.
30 Nothing in this subdivision shall limit the right of a party to vacate
31 an award pursuant to Section 1286.2, or to disqualify an arbitrator
32 pursuant to any other law or statute.

33 ~~(e)~~

34 (f) An arbitrator shall disclose to all parties the existence of any
35 grounds specified in Section 170.1 for disqualification of a judge;
36 and, if any such ground exists, shall disqualify himself or herself
37 upon demand of any party made before the conclusion of the
38 arbitration proceeding. However, this subdivision does not apply
39 to arbitration proceedings conducted under a collective bargaining



1 agreement between employers and employees or their respective
2 representatives.

3 ~~(f)~~

4 (g) For purposes of this section, “lawyer for a party” includes
5 any lawyer or law firm currently associated in the practice of law
6 with the lawyer hired to represent a party.

7 ~~(g)~~

8 (h) For purposes of this section, “prior cases” means
9 noncollective bargaining cases in which an arbitration award was
10 rendered within one of the following time periods:

11 (1) Three years prior to the date of the proposed nomination or
12 appointment if the proposed nomination or appointment occurs on
13 or between January 1, 1995, and December 31, 1995.

14 (2) Four years prior to the date of the proposed nomination or
15 appointment if the proposed nomination or appointment occurs on
16 or between January 1, 1996, and December 31, 1996.

17 (3) Five years prior to the date of the proposed nomination or
18 appointment if the proposed nomination or appointment occurs on
19 or after January 1, 1997.

20 ~~(h)~~

21 (i) For purposes of this section, “any arbitration” does not
22 include an arbitration conducted pursuant to the terms of a public
23 or private sector collective bargaining agreement.

24 *SEC. 5. Section 1286.2 of the Code of Civil Procedure is*
25 *amended to read:*

26 1286.2. Subject to Section 1286.4, the court shall vacate the
27 award if the court determines any of the following:

28 (a) The award was procured by corruption, fraud or other
29 undue means.

30 (b) There was corruption in any of the arbitrators.

31 (c) The rights of the party were substantially prejudiced by
32 misconduct of a neutral arbitrator.

33 (d) The arbitrators exceeded their powers and the award cannot
34 be corrected without affecting the merits of the decision upon the
35 controversy submitted.

36 (e) The rights of the party were substantially prejudiced by the
37 refusal of the arbitrators to postpone the hearing upon sufficient
38 cause being shown therefor or by the refusal of the arbitrators to
39 hear evidence material to the controversy or by other conduct of
40 the arbitrators contrary to the provisions of this title.



1 (f) An arbitrator making the award was subject to
2 disqualification upon grounds specified in Section 1281.9, but
3 *either: (1) failed to disclose within the time required for disclosure*
4 *a ground for disqualification of which the arbitrator was then*
5 *aware; or (2) failed upon receipt of timely demand to disqualify*
6 *himself or herself as required by that provision. However, this*
7 *subdivision does not apply to arbitration proceedings conducted*
8 *under a collective bargaining agreement between employers and*
9 *employees or between their respective representatives.*

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