SHOULD LAWYERS BE SANCTIONED FOR ARBITRATION MISCONDUCT?

Appellate decision raises questions about courts’ authority in such cases

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Law is in large part a self-regulating profession and consistent with this model, the 5th Circuit Court of Appeals in September reversed an order by a district court imposing a $10,000 sanction on an attorney for her conduct during an arbitration proceeding. The appellate court held that the sanction order was beyond the inherent power of the district court in traditional, contractual arbitration. The case is Positive Software v. New Century Mortgage v. Ophelia F. Cámara.

Positive Software Solutions, Inc. sued New Century Mortgage Corporation for infringing on its license for telemarketing software, and the district court ordered the parties to arbitrate according to their contract. Attorney Ophelia Cámara appeared for New Century, and advised New Century on discovery issues during arbitration.

Following arbitration, the district court vacated the award in favor of New Century because the arbitrator had not disclosed a prior professional relationship with Cámara, but the vacatur was reversed and remanded by the 5th Circuit. Cámara and the arbitrator had both represented an unrelated third party in a protracted patent litigation years earlier, but they had never met or participated in any meetings, calls, hearings, depositions, or trials together.

Ultimately, New Century declared bankruptcy and Positive Software settled its claims during the bankruptcy proceeding.

Limitations On Court’s Authority

Relying on the fact that it had ordered the parties to arbitrate and exercising what it thought was its inherent authority, the district court ordered a $10,000 sanction against Cámara. But the 5th Circuit explained that inherent authority is for controlling matters before the trial court and conduct that directly disobeys the court’s orders.

The 5th Circuit, in part quoting a 2008 decision addressing inherent authority, said, “inherent power does not extend to collateral proceedings that ‘do not threaten the court’s own judicial authority or proceedings.’” Simply ordering the parties to arbitrate pursuant to their own contractual agreement did not transform the arbitration into a judicial proceeding over which the District Court had inherent authority.

The 5th Circuit emphasized that arbitration was an alternative to litigation and that to treat it as if it were a type of judicial proceeding would undermine the whole purpose of arbitration, i.e., to avoid litigation using a private dispute resolution process. It noted that court-imposed sanctions on conduct during arbitration are also in tension with the Federal Arbitration Act which contemplates a very limited role for courts.

Arbitrators’ Power

Curiously, the 5th Circuit notes that both Positive Software and New Century agreed that, pursuant to their arbitration agreement, the arbitrator had the authority to sanction the attorneys for bad-faith conduct.

Typically, an arbitrator would not have the authority to directly sanction attorneys for misconduct during arbitration because the attorneys are not parties to the arbitration agreement. The arbitrators’ authority is over the parties, not the attorneys. There are numerous instances where arbitrators impose sanctions on parties (usually in the form of attorneys’ fees), but authority to do so is found within the broad grant of authority to the arbitrator within the parties’ arbitration agreement. The sanction is against the party, not the attorneys.
The question is thus posed: Could an arbitrator impose sanctions directly on the attorneys as opposed to the parties? Such a sanction might involve reducing the amount due to a lawyer for his or her work on the proceeding, or it could be in the form of an outright fine. But a reduction in the attorney's fee would interfere with the separate fee agreement between the party and lawyer—an agreement to which the arbitrator is not a party—and there is no obvious basis on which an arbitrator could compel an outright fine, or guidance as to whom such fines would be paid.

Alternatively, lawyers could consent to be subject to arbitration sanctions for misconduct during the arbitration—perhaps they would agree to donate any monetary sanctions to a contractually specified charity. Realistically though, there is no incentive for lawyers to agree to this sort of arrangement. Lawyers are already subject to any malpractice claims their clients may bring, and to disciplinary action through the grievance process.

**Addressing Misconduct**

The method of sanctioning an attorney for conduct during arbitration is to do so indirectly through sanctions imposed on a party. After all, if a party encourages or knows of its lawyer's misconduct, it too is acting in bad faith.

However, if an arbitrator imposed excessive or unjustified sanctions on an innocent party because of its attorney’s behavior, that party might seek a determination from a court that the arbitrator exceeded his authority under the arbitration agreement.

However, the lawyer is not completely shielded from sanction. If a party is harmed as the result of his attorney's misconduct during arbitration, the party can fire the attorney and bring a malpractice action, just as any client can whenever he believes the lawyer has failed in his or her professional duty. Moreover, the arbitrator, opposing counsel or the client can file a grievance asking that disciplinary action be taken against the lawyer.

Malpractice, the grievance process, and the importance of reputation all work together to discourage attorney misconduct during arbitration. It is an area in which law must be self-regulating because excessive judicial involvement undermines the purpose of private dispute resolution, and there is no contractual incentive for parties to grant arbitrators authority to sanction attorney misconduct.