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Mark A. Sponseller

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Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators

by

MARK A. SPONSELLER*

I. Introduction

[The arbitration system] is founded, as is every system for the securing of justice, upon faith and trust. History has nothing finer than the constant and ever-recurring faith of men of every era and condition that, by finding the facts and applying accepted rules of conduct, whether crystallized in law or based on custom, justice will be done .... For the man who deliberately and voluntarily submits his case to another's decision and pledges himself to abide by it has active faith of a high order in the method and in the integrity of the arbitrator.¹

Commercial disputes are increasingly being submitted to arbitration² for resolution. Parties to these disputes place their faith in the arbitrator and the arbitration process. The parties, however, are not likely to consider the possibility of misconduct³ by the arbitrator or the organization that sponsors the arbitration. Nor are the parties likely to be aware that arbitrators generally enjoy absolute immunity from civil liability for actions taken in connection with an arbitration.

This Note recommends statutory enactment of a qualified immunity for arbitrators and their sponsoring organizations. In making this recommendation, the Note, in Part II, examines vacatur of arbitration

* Member, Third Year Class; B.A. 1983, Rutgers College, Rutgers University; M.B.A. 1988, New York University.


2. Arbitration has been defined as:
   A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.
   An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation.


3. "Misconduct," as used in this Note, includes corruption, fraud, partiality, actions in excess of authority, and reckless disregard of a party's rights.

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awards as a remedy for misconduct. Part III examines the history of and justification for judicial immunity, which serves as the basis for arbitral immunity. Building on this foundation, the evolution of arbitral immunity is discussed, with special emphasis on California law. Justifications for absolute arbitral immunity are refuted in Part IV by analyzing the weaknesses in the analogy between arbitration and civil litigation. Policy arguments for and against absolute immunity are then scrutinized. Finally, this Note proposes a qualified immunity statute.

This Note limits its examination to commercial arbitration, and does not address the arbitration, mediation and appraisal acts performed by engineers, architects, accountants, appraisers, stock exchange arbitrators, labor grievance committees and other similar groups. Because the functions of these actors and the processes they follow differ from those of commercial arbitration, it would be necessary to consider separately the justifications for their immunity from civil liability before determining the extent to which they should be immune.

II. Vacating an Arbitration Award

The setting aside of an arbitration award is perhaps the most common remedy sought by parties subjected to arbitral misconduct. At common law, an arbitration award could be set aside on only four grounds: (1) corruption, (2) partiality, (3) excess of authority, and (4) such palpable mistake of facts that, if it had not been made, the decision of the arbitrators, according to their manifest intent, would have been different. This common law rule has essentially been codified by the Uniform Arbitration Act, adopted in nearly all of the states and by the Federal Arbitration Act.

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4. This topic is especially timely given that California's codification of arbitral immunity is set to expire in 1996, at which time the legislature is to have "commission[ed] a study on whether it is necessary to extend quasi-judicial immunity to [arbitrators]." CAL. CIV. PROC. CODE § 1280.1 note (Deering Supp: 1992).
9. An arbitration award under the Federal Arbitration Act will be vacated:
   (1) Where the award was procured by corruption, fraud, or undue means.
   (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
   (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
These grounds, however, preserve a very narrow avenue of relief; when faced with an arbitration award, courts will not review the merits of the controversy, the nature and sufficiency of the evidence, the nature and credibility of the parties, nor alleged errors of law.\textsuperscript{10}

California has not adopted the exact language of the Uniform Arbitration Act nor the language found in the Federal Arbitration Act; the grounds for vacatur, however, are essentially the same. Section 1286.2 of the California Civil Procedure Code sets out the grounds for vacatur.\textsuperscript{11} The statute defines a narrow range of offenses that warrant judicial review and that are sufficient for vacating an award. In essence, an award will be vacated in only three circumstances: (1) If there is a showing of "corruption, fraud or other undue means" on the part of the parties or the arbitrator; (2) if an arbitrator's misconduct substantially prejudiced a party's rights; or (3) if the arbitrators exceeded their powers as defined by the arbitration agreement and the resulting award cannot be corrected.\textsuperscript{12}

This principle of limited judicial review was applied in \textit{City of Oakland v. United Public Employees}:\textsuperscript{13}

\begin{quote}
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
\end{quote}

\begin{footnotes}
\item 10. Pacific Vegetable Oil Corp. v. C.S.T. Ltd., 174 P.2d 441, 448 (Cal. 1946).
\item 11. \textit{CAL. CIV. PROC. CODE} § 1286.2 (West 1982). The full text of the statute reads:

\begin{quote}
Subject to Section 1286.4 [procedural prerequisites], the court shall vacate the award if the court determines that:
\begin{enumerate}
\item The award was procured by corruption, fraud or other undue means;
\item There was corruption in any of the arbitrators;
\item The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
\item The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or
\item The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
\end{enumerate}
\end{quote}

\textit{Id.} The statute provides the primary means for vacating an award. \textit{See} Canadian Indem. Co. v. Ohm, 76 Cal. Rptr. 902, 904 (Ct. App. 1969). In addition, the United States Supreme Court has held that an actual showing of fraud, misconduct or partiality is not necessary to vacate an arbitration award. Rather, the failure to disclose the possibility of partiality may be enough to vacate an award. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968). California has adopted this holding in Figi v. New Hampshire Ins. Co., 166 Cal. Rptr. 774 (Ct. App. 1980). \textit{But see} Tipton v. Systron Donner Corp., 160 Cal. Rptr. 303 (Ct. App. 1979) (holding that there is no requirement that non-neutral arbitrators appointed by the parties pursuant to an agreement must be neutral or impartial); Johnston v. Security Ins. Co., 86 Cal. Rptr. 133 (Ct. App. 1970) (vacating insurance arbitration award for failure of arbitrator to disclose relationship with claimant's appraiser).
\item 12. \textit{CAL. CIV. PROC. CODE} § 1286.2 (West 1982).
\item 13. 224 Cal. Rptr. 523 (Ct. App. 1986).
\end{footnotes}
The merits of a controversy in arbitration are not open for judicial review. The findings of an arbitrator on questions of law as well as questions of fact are final and conclusive. It is not appropriate for courts to review the sufficiency of the evidence to support the arbitrator's award or to pass upon the validity of the arbitrator's reasoning; a court simply may not substitute its judgment for that of an arbitrator. A
award will not be set aside merely because the arbitrator erred in finding the facts or applying the law. A court must enforce an arbitrator's award even if it conflicts with substantive law, so long as it is authorized by the arbitration agreement. Neither will errors in reasoning invalidate an otherwise proper award. Every intendment of validity must be given the award and doubts must be resolved in its favor. "A court must affirm an arbitrator's award if it 'can in any rational way be derived from the agreement,' ... and can only reverse if 'there is a manifest disregard of the agreement ...'"

Thus, arbitration awards must be affirmed even in the face of insufficient evidence, obvious errors of law, obvious errors in reasoning, and findings of fact contrary to the evidence. Due to this strong presumption in favor of an award and the relatively limited grounds that a court will consider in reviewing an award, arbitration awards are exceedingly difficult to overturn.

One scholar has estimated that "[t]he number of arbitrator's awards challenged in court is less than two hundred out of more than twenty-five thousand (perhaps as many as forty thousand) awards issued each year." If this estimate is accurate, less than one percent of all arbitration awards are challenged. This may be interpreted as evidence of the futility of challenging an award.

Not only may it be futile to challenge an award, but the result of a successful challenge—vacatur—does not compensate the aggrieved party for her lost time, wasted attorney's fees, payments to arbitrators, and other incidental and consequential damages. Vacatur is an important means of nullifying the effect of an improper award; as a remedy for arbitrator misconduct, however, it is at best incomplete.

III. Background on Judicial and Arbitral Immunity

A. Judicial Immunity

The judicial immunity doctrine, which is almost 400 years old, can be traced back to two English cases, *Floyd v. Barker* and *The Marshal-

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sea. In *Floyd v. Barker*, a criminal defendant, who was convicted of murder by a jury and sentenced to death by Judge Barker, brought suit against the judge, the prosecutor, the jury and the grand jury for illegally conspiring against him. Lord Coke announced that a judge... cannot be charged for conspiracy, for that which he did openly in Court as Judge or justice of peace: and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice will do injustice; but if he hath conspired before out of Court, this is extrajudicial; ... and false and malicious prosecutions, out of Court... amounts to an unlawful conspiracy.

This constitutes one of two important limits on judicial immunity: The so-called “judicial acts” limit on judicial immunity precludes immunity when the judge's acts are administrative, legislative, or personal, rather than judicial.

In *The Marshalsea*, a judgment debtor sued the judge who had ruled against him, claiming that the judge lacked subject matter jurisdiction and thus was not immune from suit. Lord Coke agreed and held that while a judge is not liable for his acts when there is jurisdiction over the subject matter, the judge may be held liable for actions outside his jurisdiction. This constitutes the second important limit on judicial immunity: Actions taken in the complete absence of jurisdiction may subject a judge to personal liability.

The United States Supreme Court tested the limits of these two exceptions to judicial immunity in *Stump v. Sparkman*. In *Stump*, an Indiana judge signed an order authorizing a tubal ligation on a fifteen-year-old girl in an ex parte proceeding based on a petition by the girl's mother. Despite the fact that no hearing was held, no notice was given to the girl, no guardian ad litem was appointed to protect her interest, and neither the petition nor the order was ever filed in the county circuit court, the Court found that the judge had acted in his “judicial capacity.” The Court examined past decisions and determined that a mere “lack of formality” (i.e., a judge's failure to follow procedure) is not de-
terminative of whether a judge’s actions are “judicial.” Rather, the determinative factors are whether the act constitutes a function “normally performed by a judge,” and whether the involved parties thought they were “deal[ing] with the judge in his judicial capacity.” The Court found that both of these factors were satisfied in Judge Stump’s case. First, state judges with general jurisdiction normally approve petitions relating to the affairs of minors; and second, the girl’s mother submitted the petition to Judge Stump for the purpose of obtaining judicial approval.

As to the jurisdictional requirement for judicial immunity, the Court, despite the extreme and irreversible nature of the judge’s order, interpreted a general jurisdictional statute and found that the judge had not acted beyond his jurisdiction.

Private remedies that compensate an injured party thus exist, if at all, only when judicial immunity is not applicable; when the action involved is not a judicial act or the judge has acted with a complete lack of jurisdiction. There have been several cases in which private parties have been allowed to sue judges in tort for malicious prosecution and abuse of process when the judges acted with a complete lack of jurisdiction. Judges have also been held liable for non-judicial acts that are considered ministerial or administrative. For example, when a judge excluded African-Americans from juries, the United States Supreme Court held that the duty of impartial jury selection was administrative rather than judicial and no immunity attached. The Supreme Court has also determined that a judge’s hiring and firing decisions with regard to her staff are administrative and not deserving of absolute judicial immunity.

In addition to the narrowly defined private remedies allowed under the exceptions to judicial immunity, judges may be subject to a variety of

29. Id. at 360-61.
30. Id. at 362.
31. Id.
32. Id.
33. Id. at 357-58 & n.8.
34. See King, supra note 20, at 571-76.
35. Id. at 576. Because of the “clear absence of jurisdiction” requirement for piercing immunity, these cases have involved justices of the peace, not judges of general jurisdiction. Id.
36. See id. at 576-77.
37. Ex parte Virginia, 100 U.S. 339, 348 (1879).
38. Forrester v. White, 484 U.S. 219, 229-30 (1988). The Civil Rights Act, 42 U.S.C. § 1983 (1988), has also been used to bring suits against judges. See, e.g., Briley v. California, 564 F.2d 849 (9th Cir. 1977); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). However, for these suits to be successful, the plaintiff must first demonstrate that one of the exceptions to judicial immunity is applicable. See Forrester, 484 U.S. at 227-30.
“public remedies” for their misconduct. One commentator argues that the existing public remedies for judicial misconduct are not effective deterrents because they are infrequently used and do not compensate injured litigants. Nevertheless, a judge may be subject to discipline for violations of the code of judicial conduct in force in her jurisdiction. The ABA Model Code of Judicial Conduct sets out standards for judicial conduct. Under the Code, judges are required to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and violation of the law is grounds for discipline. Specifically, judges are required to decide matters assigned to them and perform their duties without bias or prejudice. The purpose of the Code is not to create the basis for civil liability or criminal prosecution. Violations of the Code may, however, be sufficient to result in involuntary retirement, removal, or censure.

B. Arbitral Immunity

The 1880 Iowa case of Jones v. Brown is one of the earliest cases addressing arbitral immunity. When the arbitrator sued to collect his

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39. See King, supra note 20, at 563-69.
40. The public remedies include impeachment, address, recall and election, judicial disciplinary commissions, and disbarment. Id.
41. Id.
42. In 1924 the American Bar Association (ABA) approved the Canons of Judicial Ethics. In 1972 the ABA approved a new Model Code of Judicial Conduct and in 1990 considered a revised Model Code. In 1974 the U.S. Judicial Conference adopted the Code of Conduct for Federal Judges. Nearly all states and the District of Columbia have promulgated standards based more or less on these codes. The codes themselves do not provide an enforcement mechanism. The first judicial conduct commission was created in California in 1960. Now all 50 states, the District of Columbia, and the federal government have permanent entities to receive and investigate complaints against judges. Shirley S. Abrahamson, Foreword to Jeffrey M. Shaman et al., Judicial Conduct and Ethics at vii (1990).
43. The preamble to the Code states that:
The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

44. Id. Canon 2A.
45. Id. Canon 3B(1).
46. Id. Canon 3B(5).
47. Id. Pmbl.
48. See King, supra note 20, at 567-68 (discussing the proposed Judicial Tenure Act, S. 1423, Draft No. 2, 95th Cong., 2d Sess. (1978) and “typical” state commissions on judicial discipline).
49. 6 N.W. 140 (Iowa 1880).
50. See Nolan & Abrams, supra note 5, at 235 & n.40.
fee, a party to the arbitration counterclaimed that the arbitrators had conspired to defraud him by submitting an award before all of the evidence was presented to them.\textsuperscript{51} The court dismissed the fraud action ruling that the arbitrator was immune from liability for his judicial acts.\textsuperscript{52}

Common-law immunity for arbitrators is similar to judicial immunity.\textsuperscript{53} Immunity generally applies to "arbitral acts" performed during the course of an arbitration over which the arbitrator has some jurisdiction.\textsuperscript{54} Arbitration associations, in turn, derive their immunity from the arbitrator.\textsuperscript{55} Thus, when immunity attaches to the arbitrator, it attaches to the association; conversely, when immunity does not attach to the arbitrator, it does not protect the sponsoring organization.\textsuperscript{56}

The 1983 California Court of Appeal decision in \textit{Baar v. Tigerman}\textsuperscript{57} has generated considerable doubt as to the "absoluteness" of arbitral immunity in California. In \textit{Baar}, the court refused to grant immunity to an arbitrator who breached his contract to render a timely award.\textsuperscript{58} During a period of about three-and-one-half years, the arbitrator, Tigerman, held forty-three days of evidentiary hearings and ten days of closing arguments.\textsuperscript{59} After final submission of the dispute to the American Arbitration Association (AAA), Tigerman failed to render an award within the time allowed by statutory and AAA rules.\textsuperscript{60} In fact, more than seven months after final submission he still had not rendered an award.\textsuperscript{61} The parties to the arbitration then filed a civil action against Tigerman and the AAA alleging, among other claims, breach of contract and negligence.\textsuperscript{62} The trial court held that arbitral immunity protected the defendants and sustained demurrers to all complaints.\textsuperscript{63} The appellate court reversed,\textsuperscript{64} distinguishing earlier cases by observing that immunity had previously been applied when there was alleged misconduct by the arbitrator in arriving at a decision.\textsuperscript{65} In contrast, Baar's complaint did

\begin{footnotes}
\item 51. Jones v. Brown, 6 N.W. at 141.
\item 52. \textit{Id.} at 143.
\item 53. \textit{See} Nolan & Abrams, \textit{supra} note 5, at 237.
\item 54. \textit{Id.} at 238.
\item 55. \textit{Baar v. Tigerman}, 189 Cal. Rptr. 834, 839 (Ct. App. 1983).
\item 56. \textit{Id.}
\item 57. \textit{Id.}
\item 58. \textit{Id.} at 835
\item 59. \textit{Id.} at 836.
\item 60. \textit{Id.}
\item 61. \textit{Id.}
\item 62. \textit{Id.}
\item 63. \textit{Id.}
\item 64. \textit{Id.} at 840.
\item 65. \textit{Id.} at 837.
\end{footnotes}
not allege misconduct in arriving at a decision, but rather focused on the failure to make any award whatsoever.\textsuperscript{66}

In reaching its decision the court distinguished an early case in which judicial immunity was granted to a judge who failed to render an award.\textsuperscript{67} The court analyzed the differences between judicial proceedings and arbitrations: judges derive their power from the Constitution and the people while arbitrators derive their power from private contracts; judicial action has far-reaching and precedential consequences whereas arbitrators do not create and are not bound by precedent; an independent judiciary is essential to the preservation of democracy whereas arbitration plays a less noble role; trials are public whereas arbitration is private; and judges must follow the law while arbitrators may disregard it.\textsuperscript{68} The court thus concluded that, in this case, the analogy to judicial proceedings was insufficient to warrant arbitral immunity.\textsuperscript{69} Rather than blindly analogizing to judicial immunity, the court recognized the "fundamental" differences between the two types of proceedings, analyzed the public policy reasons for arbitral immunity and reasoned that "arbitration remains essentially a private contractual arrangement between parties."\textsuperscript{70}

Focusing on the contractual nature of arbitration, the court concluded that breach of an arbitration contract may create a cause of action.\textsuperscript{71} The court then cited with approval an Iowa decision that held that an arbitrator’s alleged corruption in the performance of his duties constituted a cause of action for breach of the implied term of fair dealing in the contract between the arbitrator and the parties, even though the arbitrator was immune from a cause of action alleging corruption.\textsuperscript{72} Thus, the party was availed of contract remedies, but not tort remedies.\textsuperscript{73}

As to the issue of the AAA’s liability, the court held that arbitral immunity does not protect the sponsoring organization when the arbitrator is not immune from liability or when the organization’s actions are administrative, rather than discretionary.\textsuperscript{74} Plaintiffs stated a cause of action when they alleged that the AAA failed to exercise reasonable care in the selection of the arbitrator and thereafter failed to properly administer the arbitration.\textsuperscript{75}

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 838 (citing Wyatt v. Arnot, 94 P. 86 (Cal. Ct. App. 1907)).
\textsuperscript{68} Id. at 837-38.
\textsuperscript{69} Id. at 837.
\textsuperscript{70} Id. at 838.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 838-39 (citing Bever v. Brown, 9 N.W. 911 (Iowa 1881)).
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 839-40.
\textsuperscript{75} Id.
The extent of the *Baar* holding is not clear insofar as the court in *Baar* supports two conflicting objectives without qualifying its support for either. The conflict is best summarized by the court: “While we must protect an arbitrator acting in a *quasi-judicial capacity*, we must also uphold the contractual obligations of an arbitrator to the parties involved.” As discussed below, these conflicting objectives are not readily reconciled.

The court concluded that immunity is appropriate when a party alleges that an arbitrator is guilty of misconduct in arriving at a decision, yet recognized a contract cause of action when an arbitrator is guilty of corruption. In doing so, the court appeared to say that, unlike a judge, an arbitrator has entered into a contractual relationship with the parties to a dispute. Therefore, even though the arbitrator is immune from liability for quasi-judicial acts, she nonetheless has contractual duties that may form the basis for a valid cause of action. This reasoning is logically coherent. Nevertheless, virtually any claim of misconduct in arriving at a decision can be stated as a breach of the implied covenant of good faith and fair dealing. Arbital immunity could thus be effectively circumvented in most, if not all, cases by labeling the wrong as a contract breach. This is contrary, however, to the court’s recognition of the importance arbital immunity plays in protecting the arbitrator’s “fearless and independent decision making.”

An alternative interpretation of *Baar* limits the ruling to the facts of the case. According to this interpretation, arbitrators may be held liable for complete nonperformance of their contract with the parties. Anything short of complete nonperformance would be protected by arbital immunity. This limited exception to arbital immunity, however, prevents other forms of contract breach from being recompensed and is

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76. *Id.* at 838.
77. See *supra* text accompanying notes 71-73.
78. *Baar v. Tigerman*, 189 Cal. Rptr. at 836.
79. For a discussion of the justifications of limited arbital immunity, see *infra* Part IV.
80. See Nolan & Abrams, *supra* note 5, at 252-53. Nolan argues that *Baar* stands for the proposition that nonperformance is an exception to arbital immunity:
Nonfeasance is the only type of claim which justifies a departure from arbital immunity because it is the only situation in which the functional comparability test does not work. Litigants have some remedies when a judge fails to act, such as the administrative authority of the chief judge of the court or a writ of mandamus from a higher court. Parties to an arbitration lack these remedies and may have more need for a tort or contract action against the nonperforming arbitrator.

*Id.* at 253.
therefore inconsistent with the court’s imperative to “uphold the contractual obligations of an arbitrator to the parties involved.”

A compromise position is to hold an arbitrator liable when a party can prove that the arbitrator’s actions were the result of malice or a reckless disregard of the party’s rights. A cause of action might be stated in contract or tort when an arbitrator’s decision is the result of such malice or disregard. On the other hand, immunity would be appropriate for negligently derived decisions.

In 1985, two years after the decision in *Baar*, the California Legislature added section 1280.1 to the California Code of Civil Procedure. As enacted, the statute was to expire on January 1, 1991. In 1990, the legislature amended the statute to extend the expiration date to January 1, 1996. The full text of the statute now reads:

An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract.

The immunity afforded by this section shall supplement, and not supplant, any otherwise applicable common-law or statutory immunity.

This section shall remain in effect only until January 1, 1996, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1996, deletes or extends that date.

The second paragraph was added in 1990, apparently to eliminate any confusion as to what effect the statute was to have on common-law immunity.

This immunity statute was approved, conditioned on the Senate Rules Committee’s commission of a study on the need for arbitral immunity; the study was to examine case law, statutory law, and public policy arguments. The temporary nature of the statute and the requirement

82. See infra text accompanying notes 184-195.
84. Id.
85. Id.
86. Id.
87. Id.
88. 1990 Cal. Stat. ch. 817, § 3. The complete text provides:

The Senate Rules Committee shall commission a study on whether it is necessary to extend quasi-judicial immunity to neutral third persons who are engaged in mediation, arbitration, conciliation, evaluation, or similar dispute resolution efforts. The study shall evaluate the pertinent case law and statutory provisions, including the litigation privilege under subdivision (2) of section 47 of the Civil Code [privileged communications in judicial proceedings] and the immunity for arbitrators provided in Section 1280.1 of the Code of Civil Procedure. Further, the study shall examine the competing policy arguments regarding exemptions from accountability for paid and volunteer persons appointed by the court and those not appointed by the court. The study shall be conducted under the auspices of a seven-member commission
that a study be conducted reflect the legislature’s concern that absolute arbitral immunity may be too broad.

As stated by the statute, there was no intended diminution of common-law immunity. A literal reading of the statute, however, indicates that there was also no supplemental effect. The common-law rule is that arbitrators have the same protections from civil liability as do judicial officers. Therefore, the statute’s provision that “[a]n arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract” adds nothing to the common law.

Arguably, the statute also has no effect on the Baar decision. The arbitrator in Baar faced a suit for breach of contract, a situation no judge has to face. Thus, affording “the immunity of a judicial officer” would not bar the action. Nevertheless, the same court that authored the Baar decision found in a 1989 decision, Coopers & Lybrand v. Superior Court, that “[t]he purpose of the legislation was to supersede our holding in Baar.” Therefore, despite the vague language, courts in California are likely to seize upon the word “contract” found in the statute and hold that the Baar decision extends absolute immunity to an arbitrator with respect to her obligations under an arbitration contract.

The statute, however, does not mention arbitration associations. Apparently, then, the holding in Baar is still valid with regard to these organizations. Under Baar, there are two situations in which an arbitration association may be held liable: first, when the arbitrator is held liable under a contract breach theory, and second, when the organization

appointed by the Senate Rules Committee, except as specified, to be composed, as follows:
(a) A professor of law from a University of California law school. (b) A representative of a voluntary bar association. (c) A representative of the California Trial Lawyers Association. (d) A representative of the State Bar of California. (e) A lawyer selected by the Chair of the Assembly Committee on Judiciary. (f) A lawyer selected by the Chair of the Senate Committee on Judiciary. (g) A nonlawyer representative of the public engaged in dispute resolution selected by the Chair of the Senate Committee on Judiciary.

The study and report shall be completed and transmitted to the Legislature on or before January 1, 1993.

90. See supra notes 50-54 and accompanying text.
93. Id. at 836.
96. Id. at 720. See infra text accompanying notes 103-118 for a discussion of the case and its holding.
has mishandled its administrative actions.\textsuperscript{99} Nevertheless, if California’s immunity statute for arbitrators grants immunity from contract breach claims (as suggested by the court in \textit{Coopers & Lybrand}),\textsuperscript{100} then a court faced with the question of liability of an arbitration association on a contract breach theory might extend immunity to the association based on the notion that the association derives its immunity from the arbitrator.\textsuperscript{101} This protection, however, should not extend to administrative acts because the statute only covers acts performed “in the capacity of arbitrator.”\textsuperscript{102}

\textit{Coopers & Lybrand} is the only published case interpreting immunity under section 1280.1.\textsuperscript{103} Coopers & Lybrand, an accounting firm, was retained by two parties, the Federated Group, Inc. and Atari Corporation.\textsuperscript{104} Atari was in the process of purchasing Federated for approximately $35,000,000.\textsuperscript{105} Coopers was retained to audit Federated’s balance sheet to determine whether adjustments affecting the value of the transaction were required.\textsuperscript{106} The owner of the controlling interest in Federated alleged that Coopers, expecting to receive future business from Atari, overstated balance sheet adjustments to Atari’s benefit.\textsuperscript{107} Coopers demurred on the ground that they were acting as arbitrators and were protected by arbitral immunity.\textsuperscript{108} The appellate court held that a factual question remained as to whether the parties’ agreement was for arbitration\textsuperscript{109} but proceeded nonetheless to discuss the state of arbitral immunity.\textsuperscript{110}

The \textit{Coopers} court, the same court that had decided \textit{Baar}, acknowledged that in \textit{Baar}\textsuperscript{111} it had held that the arbitrator’s contractual obligations to the parties involved must be given credence.\textsuperscript{112} It stated, however, that the purpose of section 1280.1\textsuperscript{113} was to supersede the \textit{Baar} holding and “to expand arbitral immunity to conform to judicial immunity when the arbitrator is acting under any statute or contract.”\textsuperscript{114} The court took notice of various legislative materials in its quest for the stat-

\begin{itemize}
\item \textsuperscript{99} \textit{Id.} at 839-40.
\item \textsuperscript{100} 260 Cal. Rptr. at 720.
\item \textsuperscript{101} \textit{See} 189 Cal. Rptr. at 839.
\item \textsuperscript{102} \textsc{Cal. Civ. Proc. Code} \textsection{} 1280.1 (Deering Supp. 1992).
\item \textsuperscript{103} \textsc{Cal. Civ. Proc. Code} \textsection{} 1280.1 (Deering Supp. 1992).
\item \textsuperscript{104} 260 Cal. Rptr. at 716.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 721.
\item \textsuperscript{110} \textit{Id.} at 719-21.
\item \textsuperscript{111} \textit{Baar} v. Tigerman, 189 Cal. Rptr. 834 (Ct. App. 1983).
\item \textsuperscript{112} 260 Cal. Rptr. at 720.
\item \textsuperscript{113} \textsc{Cal. Civ. Proc. Code} \textsection{} 1280.1 (Deering Supp. 1992).
\item \textsuperscript{114} 260 Cal. Rptr. at 720 (citing Senate Bill No. 1001).
\end{itemize}
ute's legislative intent. According to the court, the legislature determined that due to overwhelming court congestion, the policy of encouraging persons to serve as arbitrators justified complete immunity. The court also observed that the legislature demonstrated its "concern about the impact of such sweeping arbitral powers" by making the statute an "experimental" one and providing an expiration date. In summary, until the legislature acts to change the immunity statute or the California Supreme Court interprets the statute differently, arbitrators in California are not likely to be held liable for any breaches of duties owed under contracts to perform arbitration services.

In addition to California, a few other states have codified common-law absolute immunity for arbitrators. As an example, the Florida statute provides that arbitrators and mediators "shall have judicial immunity in the same manner and to the same extent as a judge." In North Carolina, "[a]rbitrators . . . have the same immunity as judges from civil liability for their official conduct." Arbitrators in Wisconsin "are immune from civil liability for any act or omission within the scope of their performance of their powers and duties."

Jurisdictions without immunity statutes (including federal courts) rely on common-law immunity. The typical statutes enumerated

115. Id. at 720 n.7.
116. Id. at 720.
117. Id. at 720-21.
123. See Nolan & Abrams, supra note 5, at 261. There is some variation among the jurisdictions as to the judicial nature of independent appraisers, accountants, engineers, architects, labor grievance committees, etc., and thus the extent of quasi-judicial immunity that they enjoy. See Levine v. Wiss & Co., 478 A.2d 397 (N.J. 1984) (New Jersey Supreme Court refused to extend arbitral immunity to an accounting firm appointed by the trial court to value a business interest for the purposes of a divorce settlement); see also Gammel v. Ernst & Ernst, 72 N.W.2d 364 (Minn. 1955) (reaching the same result in Minnesota). But see Penn Cent. Corp. v. Consolidated Rail Corp., 441 N.Y.S.2d 266 (App. Div. 1981) (determination of immunity held to depend not on what label is used to describe defendants but whether parties agreed to resolution of their dispute by third person). In Howard v. Drapkin, 271 Cal. Rptr. 893 (Ct. App. 1990), quasi-judicial immunity was granted to a psychologist who was hired by both parents to a child custody dispute. The court extended absolute quasi-judicial immunity to "neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the
above add nothing to common-law immunity. Thus, in all jurisdictions arbitrators are protected by the common-law immunity or a statutory enactment of this immunity.\textsuperscript{124}

IV. Justifications for Arbitral Immunity

One way to judge the validity of absolute arbitral immunity is to examine the justifications for it. The United States Supreme Court analyzed the justifications for quasi-judicial immunity in \textit{Butz v. Economou}.\textsuperscript{125} The case concerned the immunity of United States Department of Agriculture administrative law judges from damage claims arising out of asserted violations of the plaintiff's constitutional rights.\textsuperscript{126} The Court conferred absolute immunity on these administrative law judges insulating them from charges of malice in confirming an administrative complaint.\textsuperscript{127} The Court reasoned that a grant of absolute immunity is justified by the importance of protecting the administrative law judges

making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes." \textit{Id.} at 903. These differences illustrate the need for a separate analysis of quasi-judicial immunity for non-arbitrators. Such an analysis is, however, beyond the scope of this Note.


Maryland has limited "absolute" common-law immunity in the narrow context of health care malpractice arbitration by enacting a qualified immunity statute. \textit{MD. CTS. & JUD. PROC. CODE ANN.} \textsection 5-352 (1990). For the text of the statute, see \textit{infra} text accompanying note 179.


126. \textit{Id.} at 480.

127. \textit{Id.} at 514. The court reasoned:

Absolute immunity is . . . necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges . . . .

We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages . . . . [F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature . . . . They are conducted before a trier of fact insulated from political influence . . . . A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision . . . . The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.”

\textit{Id.} at 512-13 (citations omitted) (citing 5 U.S.C \textsection 555-557 (1976)).
against intimidation, as well as the presence of procedural safeguards that effectively control possible misconduct.128 When those safeguards are lacking, absolute immunity is less appropriate, and the threat of private damage claims against the quasi-judicial officer may be necessary to effectively control possible misconduct.129

In the arbitration context, most of the safeguards listed by the Supreme Court130 are lacking. In contrast to a judge, an arbitrator need not follow precedent, rules of evidence, nor the rules of law.131 An arbitrator, who is likely to be a business person or attorney, does not enjoy political insularity to the same degree as a judge.132 Unlike judicial findings in civil litigation, in which “parties are entitled to know the findings and conclusions on all of the issues of fact, law or discretion”133 an arbitration award is nothing more than a statement of the rights and obligations of the parties.134 In fact, arbitration associations discourage arbitrators from giving reasons for a decision “because they identify targets for the losing party to attack.”135 A record of the proceedings, fundamental to civil litigation, is not required in an arbitration.136 In most cases a transcript of the arbitration proceedings will not be prepared.137 Because appellate review of an arbitration proceeding is significantly limited,138 the usefulness of a transcript as a procedural safeguard is similarly limited.139 Thus, the safeguards relied upon by the Supreme

128. Id. at 512.
129. Cf. Id. (judicial safeguards reduce need for private damage actions).
130. Id. at 512-13.
131. See Lauria v. Soriano, 4 Cal. Rptr. 328, 333 (Ct. App. 1960) ("[A]rbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence . . . .").
132. Admittedly, this point is not as persuasive when an arbitrator is compared to an elected judge or a judge subject to recall. Even these judges are, however, likely to be more insulated from the influences of the business community in relation to any particular case than an arbitrator who is directly selected by the parties. In fact, Professor Nolan, an advocate of absolute arbitral immunity, acknowledges that “selection by the parties makes the arbitrator subject to the very 'political influence' that worried the Supreme Court.” Nolan & Abrams, supra note 5, at 234.
135. ROBERT COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 29 (3d ed. 1986).
136. See id. at 26 (“Transcripts and briefs can be eliminated if the parties and their attorneys are willing to do so. In general, the AAA encourages parties to streamline their procedures. Purchasing an official transcript can be particularly expensive. In arbitration, transcripts are often a waste of money. In most cases, the arbitrator and the attorneys rely upon their own notes.”).
137. Id.
138. See supra Part II for discussion of judicial review of arbitration awards for the purpose of vacatur.
139. MARTIN DOMKE, COMMERCIAL ARBITRATION 84-85 (1965) ("[P]arties in commer-
Court in recognizing judicial immunity are not found in the arbitration context.

Professor Nolan, in his article on arbitral immunity, argues that despite these differences, there are ample safeguards within the arbitration process to justify immunity.\textsuperscript{140} According to Professor Nolan, the voluntary nature of the process supports a presumption that those who use it know of the risks.\textsuperscript{141} Put more bluntly, Professor Nolan seems to say that by voluntarily submitting a dispute to arbitration, the parties assume the risk of a breakdown in the process and accept the lack of a remedy for the resulting harms. Parties choosing arbitration, however, probably do not consciously assume the risk of non-redressable arbitrator misconduct or bias. This is especially true given that many parties agree to an arbitration clause as part of an overall commercial contract at a time when a dispute is not anticipated.\textsuperscript{142}

Arbitrators are often participants in the industry for which they perform arbitration services.\textsuperscript{143} This creates a familiarity with industry practices and ethical codes.\textsuperscript{144} Professor Nolan asserts that this familiarity with industry practices and ethical codes serves as a form of precedent.\textsuperscript{145} Familiarity with the industry, however, is not binding and is therefore no substitute for rules of precedent and the threat of appellate review.\textsuperscript{146} Since the safeguards described by the Supreme Court are absent, absolute arbitral immunity is not appropriate, and the threat of private damage claims against the arbitrator becomes necessary to discourage possible misconduct.

In addition to procedural safeguards, the Supreme Court justified absolute immunity on the basis that it is “necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.”\textsuperscript{147} Clearly, the public policy favoring arbitration\textsuperscript{148} would be frustrated by a qualified immunity doctrine that facilitates vexatious suits by unhappy parties who have no substantial evidence of misconduct or bias and are in reality merely making collateral attacks on the arbitration award. Malicious or corrupt arbitrators

\textsuperscript{140} See Nolan & Abrams, supra note 5, at 234.
\textsuperscript{141} Id.
\textsuperscript{142} See Cound, supra note 134, at 1238.
\textsuperscript{143} See Nolan & Abrams, supra note 5, at 234.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} See infra text accompanying notes 165-175 for a discussion of the Code of Ethics for Arbitrators in Commercial Disputes and the fact that only informal remedies exist for violations of this Code.
should, however, be liable for damages that their misconduct has caused. Thus, the legislature should devise an immunity doctrine that strikes a balance between the interest of litigants in being protected from arbitrator misconduct and the interest of arbitrators in being protected from groundless suits.

Another frequently cited justification for arbitral immunity relies on a difference between arbitrators and judges. Courts have held that since most arbitrators serve on a voluntary basis, the threat of lawsuits against them would outweigh their non-monetary motivations for performing arbitration services and thus the availability of this form of alternative dispute resolution would suffer. 149 This argument's premise is defective. While it is true that commercial arbitrators historically have been volunteers serving infrequently and without compensation, 150 the number of cases in which arbitrators are paid and the amount of compensation they receive has increased along with the number of disputes submitted to arbitration. 151 Rather than assuming that arbitrators serve on a voluntary basis, courts have held that parties must "fairly and reasonably compensate an arbitrator for services rendered." 152

Arbitration is rapidly becoming a "profession." Universities, recognizing this trend, have established degrees in alternative dispute resolution. 153 Graduates with this degree are seeking positions as professional arbitrators and mediators. 154 There has been a proliferation of "for profit" arbitration firms established by former builders, retired judges and attorneys. 155 Furthermore, as attorneys have served more frequently, law firms have begun requiring their members to bill at the normal hourly rate. 156

As arbitration becomes more of a profession than a part-time voluntary service to an individual's trade or profession, arguments advocating professional accountability become stronger. Few would contend that potential lawyers, doctors, or accountants are deterred from entering their chosen profession because of the possibility that they may be held


151. Id.


153. Id.

154. Id.

155. Id.

156. Id. at 39.
liable for their misconduct. Therefore, the argument that potential liability for misconduct will hamper the availability of arbitration is becoming increasingly invalid. While imposing potential liability may speed this professionalization by increasing the need for malpractice insurance, increased professionalism and accountability is not an undesirable outcome.

Justifications for absolute immunity for arbitration associations rest on the premise that organizational immunity derives from that of the arbitrator:

Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusionary. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association.\textsuperscript{157}

Thus, an arbitration association should not be held liable for the acts of an arbitrator when the arbitrator herself is immune from liability. However, the "judicial acts" limitation on immunity\textsuperscript{158} should serve as an independent source of organizational liability apart from any actions of the arbitrator. Furthermore, certain functions of an arbitration association concern the \textit{administration} of the arbitration proceeding. If the sponsoring organization negligently or corruptly fails to follow its own rules on arbitrator selection or supervision of the proceeding, it should be held accountable for the damages caused by these improper administrative acts under the current "administrative acts" exception to absolute immunity, regardless of whether the individual arbitrator has misperformed an administrative act.

Public policy justifies holding arbitration associations liable for a breakdown in the arbitration process. As the purveyor of these services, they are better able to insure against the risk of damages than are individual parties to an arbitration. The incremental insurance costs could be passed on to the parties to the arbitration, and damages resulting from instances of arbitrator or association misconduct could be compensated by this insurance. This approach to liability and damage compensation is consistent with the development of strict products liability in Califor-

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\textsuperscript{157} Baar v. Tigerman, 189 Cal. Rptr. 834, 839 (Ct. App. 1983) (quoting Corey v. New York Stock Exchange, 691 F.2d 1205, 1211 (6th Cir. 1982)).

\textsuperscript{158} A judge's administrative acts are not "judicial" and are thus not protected by common-law judicial immunity. \textit{See supra} text accompanying notes 19-21. Because arbitral and judicial immunity are coextensive, \textit{Coopers & Lybrand}, 260 Cal. Rptr. at 721, administrative acts of an arbitrator are similarly unprotected. To the extent that the \textit{Coopers & Lybrand} decision extends immunity beyond the common-law rule (based on the court's interpretation of California Code of Civil Procedure 1280.1), it merely protects arbitrators from contract breach actions of the type asserted in Baar v. Tigerman, 189 Cal. Rptr. at 838-39. For a discussion of the \textit{Coopers & Lybrand} decision, \textit{see supra} text accompanying notes 103-118. The decision does not, however, purport to abridge the "judicial acts" requirement for application of immunity. \textit{See Coopers & Lybrand}, 260 Cal. Rptr. at 720.
nia. The public policy arguments supporting strict products liability are equally appropriate in the context of arbitration services. The primary purpose of strict products liability “is to insure that the costs of injuries resulting from defective products are borne by the producers that put injurious products on the market, rather than by the innocent injured consumers who are powerless to protect themselves.”

In the same manner, the costs of damages resulting from a malicious or corrupt arbitrator should be borne by the arbitrators and arbitration associations that put the damaging services on the market, rather than by innocent parties. The arbitration association can insure against this risk of damages and distribute the cost among its clientele.

V. Private and Public Remedies for Arbitral Misconduct

Parties to arbitration that have been subjected to arbitrator misconduct have advanced a number of theories to support a civil cause of action in an attempt to collect damages and obtain other relief. Beyond breach of contract claims based on a complete failure of performance, however, the various theories asserted by plaintiff’s lawyers to hold arbitrators personally liable for misconduct have consistently been rebuffed by arbitral immunity. Overall, therefore, the current form of absolute arbitral immunity successfully defeats most private actions against arbitrators.


161. Escola, 150 P.2d at 441 (Traynor, J., concurring).

162. See Nolan & Abrams supra note 5, at 240-51.


164. See Nolan & Abrams, supra note 5, at 240-51, 260. The authors discuss the theories in detail and conclude that:

[1]he only limitations on immunity are these:

(1) Arbitrators, like all other citizens, are liable for any crimes they commit;

(2) Arbitrators are liable for negligence or breach of contract if they totally fail to perform their obligations;

(3) Arbitrators who violate a person’s constitutional or civil rights, an unlikely event, might be subject to injunctive or declaratory relief . . .

Id.
The Code of Ethics for Arbitrators in Commercial Disputes may provide some minimal "public" remedy for arbitral misconduct and a correspondingly minimal deterrent effect on this misconduct. The Code was written by the American Arbitration Association (AAA) as a guide to arbitrators in fulfilling their duties under an arbitration contract. It sets forth a number of the arbitrator's responsibilities. Among these, "[a]n arbitrator should uphold the integrity and fairness of the arbitration process." An arbitrator is required to disclose current or past relationships with parties and pecuniary interests in the subject matter, as well as to avoid delay and render a timely award. Furthermore, an arbitrator "should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings." The Code does not provide for a disciplinary mechanism or establish any additional grounds for judicial review of arbitration awards.

The Code of Ethics for Arbitrators is analogous to the ABA Model Code of Judicial Conduct in that both admonish unfair actions and failures to disclose potential conflicts of interest. As a guide to arbitrator conduct without any meaningful enforcement mechanism, however, the Code's analogy to the ABA Model Code of Judicial Conduct is weakened. Whereas violations of the Code of Judicial Conduct can result in a judge's removal from the bench, violations of the Code of Ethics for Arbitrators go unpunished or merely result in less frequent listing of the offending arbitrator in the association's reference list of qualified arbitrators. The Code of Ethics for Arbitrators in Commercial Disputes therefore provides only a weak deterrent against arbitral misconduct.

Statutes that establish criminal sanctions for a limited form of arbitral misconduct, namely bribery, are common. In California, arbitra-

165. Code of Ethics for Arbitrators in Commercial Disputes, Pmbl. (1977), in ROBERT COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 141-42 (1986). The Code was cosponsored by the ABA. Id. at 142. The Code does not supersede agreements between the parties or applicable law with respect to arbitrator conduct. Id. Use of the Code as a guide is not intended to be limited to arbitrations administered by the AAA or cases in which arbitrators are lawyers. Id. at 141. Rather, the Code "is presented as a public service to provide guidance in all types of commercial arbitration." Id.

166. Id. passim.
167. Id. Canon I at 142.
168. Id. Canon II at 143-44.
169. Id. Canon IV at 145.
170. Id.
171. Id. Pmbl. at 141.
172. See supra notes 42-48 and accompanying text.
174. See supra note 48 and accompanying text.
175. Goering, supra note 173, at 830.
176. See, e.g., ALASKA STAT. § 11.46.660 (1991); D.C. CODE ANN. § 22-704 (1991); FLA.
tors that ask for, receive or agree to receive bribes to influence their decisions are guilty of a crime and can be jailed for up to four years.177 This statute's deterrent effect on arbitrator misconduct, however, is questionable. Owing to its apparent lack of enforcement178 and narrow focus, this penal statute is not a sufficient substitute for the threat of private damage claims as a deterrent to misconduct.

VI. Proposed Qualified Immunity for Arbitrators

Currently, Maryland is the only jurisdiction to have enacted a qualified immunity statute for arbitrators:

> In the absence of an affirmative showing of malice or bad faith, each arbitrator in a health care malpractice claim under Title 3, Subtitle 2A of this article from the time of acceptance of appointment has immunity from suit for any act or decision made during tenure and within the scope of designated authority.179

This statute enables a Maryland plaintiff, in the limited context of health care malpractice arbitration, to make an affirmative showing of malice or bad faith and thereby defeat an arbitrator's immunity.180 Every other jurisdiction and the federal courts rely on common-law immunity, either by judicial decision or by legislative enactment.181 The following proposal would change this state of affairs. The proposed statute is aimed specifically at California, since California's immunity statute for arbitrators will expire in 1996.182 The arguments and logic that support this proposal, however, make it equally appropriate for inclusion in the Uniform Arbitration Act and the Federal Arbitration Act.


177. CAL. PENAL CODE § 93 (West 1988). The full text of the statute follows:

> Every judicial officer, juror, referee, arbitrator, or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or decision upon any matters or question which is or may be brought before him for decision, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three or four years.

Id. (emphasis added).

178. This author could not find any reported cases involving California Penal Code § 93 and arbitrators.


180. Id. There are no reported cases interpreting this statute.

181. See supra notes 119-124 and accompanying text.

A. Objectives of a Qualified Immunity Statute

The recognized exceptions to arbitral immunity, including actions taken wholly without jurisdiction (i.e., outside the context of an arbitration proceeding) and misconduct of an administrative nature, should remain unprotected. Misconduct that occurs during the performance of an "arbitral act" over which the arbitrator has jurisdiction, however, should be evaluated against a qualified immunity standard. The appropriate standard would be derived from the common-law requirement that a plaintiff prove subjective bad faith or malice.

A recent United States Supreme Court case, Wyatt v. Cole, discusses the evolution of the common-law immunity into the qualified immunity that most government officials now enjoy. The Court has determined that "government officials performing discretionary functions are shielded from 'liability for civil damages insofar as their conduct [does] . . . not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " This "wholly objective" standard "completely reformulated qualified immunity along principles not at all embodied in the common law." The reasons for abrogating the common-law inquiry into the actor's subjective state of mind was to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." The Court determined that these rationales were not applicable to private defendants and therefore refused to extend this form of immunity beyond government officials.

In his concurring opinion, Justice Kennedy noted that the objective standard qualified immunity was developed at a time when summary immunity existed. See supra notes 49-54 and accompanying text.

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183. See supra notes 49-54 and accompanying text.
186. Id. at 1832 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
187. Id. (quoting Anderson v. Creighton, 483 U.S. 635, 645 (1987)).
188. Id. (quoting Harlow v. Fitzgerald, 456 U.S. 800, 818 (1982)).
189. Id. at 1834. In Wyatt, the defendants, a private individual (Bill Cole) and his attorney, were alleged to have "conspired[d] with state officials to violate constitutional rights" when they invoked an unconstitutional state replevin statute causing a court to order the sheriff to seize 24 head of cattle, a tractor, and other property from Mr. Cole's former business partner. Id. at 1829, 1834. The business partner sued under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for deprivation, under color of state law, of his constitutional right to due process. Id. at 1829-30. The Court looked to the most closely analogous common-law torts of 1871 (malicious prosecution and abuse of process) to determine whether defendants would have been afforded an immunity under the common law. Id. at 1831. The Court determined that no such immunity existed in 1871, the year the Civil Rights Act was passed. Id. at 1831-32. Therefore, defendants were not entitled to any immunity. Id. Furthermore, the Court held that the rationales for the Harlow objective standard for qualified immunity of government officials (to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment") were not applicable to private defendants. Id. at 1832-33. Therefore, the defendants were not entitled to Harlow immunity. Id. at 1833.
judgment standards regarding a factual question such as subjective intent made it difficult for a defendant to prevail.\textsuperscript{190} Justice Kennedy noted that summary judgment may now be entered against a party "'who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"\textsuperscript{191} Justice Kennedy also noted that at common law, in both malicious prosecution and abuse of process actions, it was essential for the plaintiff to prove that the wrongdoer acted with malice (a subjective element) and without probable cause (an objective element).\textsuperscript{192} Therefore, assuming that an element of plaintiff's claim is that the defendant acted with malice, the claim "may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred."\textsuperscript{193} This ability to dispose of an action at the summary judgment stage, even when the inquiry involves the subjective state of mind of the defendant, greatly reduces the need for an objective standard qualified immunity.

Based on these common-law origins and the Court's refusal to extend an objective standard qualified immunity to private individuals, the following structure is proposed for suits against arbitrators. The plaintiff would be required to prove that the arbitrator's alleged misconduct was performed with subjective bad faith or malice.\textsuperscript{194} The difficulty of proving subjective bad faith is more apparent than real. Because the existence of subjective bad faith is a question of fact, it may be established by inference from the evidence of objective bad faith. That is, if a plaintiff establishes that the arbitrator's actions were performed without any objectively reasonable grounds for belief in the propriety of the conduct in light of all circumstances existing at the time of the conduct, an inference of subjective bad faith is established. Of course, the arbitrator may rebut this inference with sufficient proof of subjective good faith.\textsuperscript{195} To survive summary judgment, therefore, the plaintiff would have to present either (1) evidence of subjective bad faith; or (2) evidence of objective bad faith that is sufficient to support an inference of subjective bad faith.

\textsuperscript{190} Id. at 1835 (Kennedy, J., concurring).
\textsuperscript{191} Id. (Kennedy, J., concurring) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).
\textsuperscript{192} Id. at 1835 (Kennedy, J., concurring).
\textsuperscript{193} Id. at 1837 (Kennedy, J., concurring).
\textsuperscript{194} Contrary to Justice Kennedy's assertion that at common law, both malice and lack of probable cause had to be proven by the plaintiff, id. at 1835, 1838 n.1, his application of this principle indicates that the determinative issue is the defendant's subjective state of mind. See id. at 1837 ("[I]t ought to be open to [the plaintiff] at least in theory to argue that the defendant's [subjective] bad faith eliminates any [objectively reasonable] reliance on the statute, just as it ought to be open to the defendant to show [subjective] good faith even if some construct of a reasonable man in the defendant's position would have acted in a different way.").
\textsuperscript{195} See id. at 1837 (Kennedy, J., concurring).
Affidavits, depositions and testimony of arbitrators should be allow-
ed over the objection of the arbitrators to prove misconduct. The
standard for compelling this testimony should be the same as the current
standard for proving misconduct in an action to vacate an award.196
Thus, this type of evidence would be allowed when it is offered by a
dissenting arbitrator,197 or when some objective basis exists for a reason-
able belief that misconduct has occurred.198

Mandatory sanctions would be useful in deterring unfounded suits,
which is an important objective of the revised qualified immunity statute.
Rule 11 of the Federal Rules of Civil Procedure should be used as the
model. Rule 11 requires an attorney to certify that she believes, after
reasonable inquiry, that the pleading is “well grounded in fact and is
warranted by existing law or a good faith argument for the extension,
modification, or reversal of existing law” and is not filed for any im-
proper purpose.199 If a complaint (or “other paper”) is signed in viola-
tion of the rule, the court “shall impose upon the person who signed it, a
represented party, or both, an appropriate sanction, which may include
... a reasonable attorney’s fee.”200 A similar provision should be added
to the California Civil Procedure Code for suits brought against
arbitrators.

One possible means of preventing the cost of arbitrator malpractice
insurance from significantly affecting the overall desirability and availa-
bility of arbitration would be to limit the liability of an arbitrator and the
arbitration association. As an example of this type of legislation, Califor-
nia limits compensation for noneconomic losses resulting from medical
malpractice to $250,000.201 The purpose of this statute was to reduce
medical malpractice insurance premiums.202 In the area of arbitration

196. Generally, arbitrators have a testimonial privilege that enables them to refuse to tes-
tify to the circumstances of awards that they render. See Nolan & Abrams, supra note 5, at
254-55. An exception to this privilege exists when a party seeks to prove arbitrator miscon-
duct for the purpose of vacating an award. See, e.g., Kauffman v. Haas, 318 N.W.2d 572, 574
387 (N.C. 1976). The North Carolina Supreme Court has provided a test that balances the
arbitrator’s interest in being free from harassment with the needs of litigants to obtain evidence
of misconduct: “An arbitrator’s deposition of misconduct may be allowed in evidence only
when some objective basis exists for a reasonable belief that misconduct has occurred.” Caro-
lina-Virginia Fashion Exhibitors, Inc. v. Gunter, 230 S.E.2d at 387 (emphasis added). The
type of misconduct that the court intended to reach with this test was “misconduct which can
likely be corroborated or denied, either by other members of the arbitration panel or by extrin-
sic evidence.” Id. at 387.

198. See id. at 387.
199. FED. R. CIV. P. 11.
200. Id.
malpractice, maximum liability could be set at some appropriate level, perhaps $1,000,000.

Finally, associations and organizations that sponsor, employ or are composed of a partnership of arbitrators should be held jointly and severally liable whenever it is determined that the associated arbitrator is liable. In addition, administrative acts that are negligently or maliciously performed should serve as an additional basis for liability without regard to the actions of an arbitrator in a particular case.

B. Proposed Revision to the California Code of Civil Procedure

Based on the foregoing discussion, the following is proposed as a replacement for the current arbitral immunity statute in California:203

Qualified immunity of arbitrators and arbitration organizations from civil liability

(a) In the absence of an affirmative showing of malice or subjective bad faith, an arbitrator has immunity from suit for any action that is

(1) properly characterized as quasi-judicial, and
(2) performed within the context of an arbitration proceeding.

(b) For the purpose of subsection (a), the existence of malice or subjective bad faith is a question of fact that may be established by inference from evidence that the arbitrator's actions were performed without any objectively reasonable grounds for belief in the propriety of the conduct in light of all circumstances existing at the time of the conduct.

(c) In an action against an arbitrator, the arbitrator may be compelled to answer depositions or provide other forms of testimony only when some objective basis exists for a reasonable belief that misconduct has occurred.

(d) Arbitration organizations that sponsor or employ an arbitrator are jointly and severally liable for damages assessed against the arbitrator.

(e) The proponent of a claim that seeks to hold an arbitrator liable for the arbitrator's actions certifies that to the best of the proponent's knowledge, information, and belief formed after reasonable inquiry, the claim is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not made for any improper purpose. If a claim is filed in violation of this subsection, the court, upon motion or upon its own initiative, shall impose upon the proponent an appropriate sanction, which may include an order to pay to the opposing party the amount of the reasonable expenses incurred because of the claim, including a reasonable attorney's fee.

(f) Administrative acts of an arbitration organization that cannot be properly characterized as quasi-judicial do not enjoy immunity from

liability. This liability attaches whether or not an arbitrator is also found liable.

(g) In no action against an arbitrator or arbitration organization shall the amount of damages for pecuniary losses exceed one million dollars ($1,000,000).

VII. Conclusion

In California, due to the temporary nature of the immunity statute for arbitrators, the legislature must take action before 1996 to either reenact or amend this statute. In an effort to guide the evolution of the doctrine of arbitral immunity, this Note has examined absolute arbitral immunity in light of the procedural obstacles to vacating an arbitration award, the differences between arbitration proceedings and civil proceedings, the differences between arbitrators and judges, the justifications offered for absolute immunity, and the current lack of both private and public remedies for arbitral misconduct. The result of this examination is a proposal for a qualified immunity for arbitrators and their associations as a replacement for absolute arbitral immunity.

204. Id.