Developing Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration Proceedings

By Barry Winograd[1]

Introduction

The curtain rose on a new era of employment law with the U.S. Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane*[2] approving mandatory arbitration of statutory discrimination claims. The *Gilmer* case has had significant policy and practice implications in the decades that followed, including a multi-front legal battle over efforts to reform, if not eliminate, mandatory proceedings arising out of employer-promulgated agreements that are a condition of employment. After a brief review of this recent history, this Article offers a proposal for heightened standards of professional responsibility for arbitrators serving in these cases.

This proposal is drawn from work already undertaken by a special committee of the National Academy of Arbitrators (NAA). The NAA is an organization with a primary interest in the arbitration of labor-management disputes under collective bargaining agreements.[3] However, NAA members also have long served as neutrals in resolving other employment disputes in the non-union setting. The proposal outlined below is presently being considered for adoption by the NAA as a set of guidelines ("the Guidelines") for arbitrators serving in mandatory employment arbitration cases.

I. Recent History of Arbitration Doctrine and Reform

As a starting point in this analysis, the U.S. Supreme Court is unlikely to change its direction on arbitration issues. The Court in the past several years has reiterated that it will

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[2] 500 U.S. 20 (1991).

[3] National Academy of Arbitrators, http://naarb.org

enforce mandatory arbitration in a variety of settings, even if there is protective state legislation or an administrative procedure available for aggrieved individuals.[4]

The Supreme Court's perspective has fueled the legal debate after *Gilmer*, which has continued virtually nonstop in law journals and the popular press. This includes critical commentary about changes in jurisprudence in the 1980s and 1990s that forms the background to the *Gilmer* decision under the Federal Arbitration Act (FAA).[5] Among other points, this commentary has expressed apprehension about the potential adverse impact of mandatory arbitration on public law dealing with discrimination and employee rights. Contrasting views have argued that, compared to the courts, mandatory employment arbitration offers greater and more effective access to employees seeking resolution of their claims.[6]

Since *Gilmer*, debate also has extended to empirical assessments.[7] Some research suggests that claimants have experienced favorable decisions at rates comparable to civil trials.[8] However, research also suggests significant concerns about mandatory arbitrations, such as more limited damage recoveries, less success for unrepresented plaintiffs, and undue influence for repeat employer participants.[9]

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[4] See, e.g., *Preston v. Ferrer*, 552 U.S. 346 (2008); *Marmet Health Care v. Brown*, 565 U.S. ___, 132 S.Ct. 1201 (2012); *Nitro-Lift Technologies v. Howard*, 568 U.S.___, 133 S.Ct. 500 (2012).

[5] 9 U.S. C. Section 1, et seq. For a few of the many articles on these developments, see, e.g., Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s,* 73 Den. U. L. Rev. 1017 (1996); Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99 (2006); Schwartz, *Mandatory Arbitration and Fairness,* 84 Notre Dame, L. Rev. 1247 (2009)

[6] St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783 (2007-08).

[7] Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes,* 8 J. Emp. L. Studies 1 (2011).

8 *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Dispute Res. J. 44 (2003); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005).

[9] Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes,* 8 J. Emp. L. Studies 1 (2011).

In addition to legal scholarship, there have been challenges in the courts to the enforcement of mandatory arbitration agreements. In the decade after *Gilmer*, federal cases established that excessive employer control over the arbitration process would be viewed as a violation of basic principles of due process and fairness undermining statutory protections for employees.[10] Under state law, the unconscionability doctrine has been advanced as a means of protecting employee rights, applying the proviso contained in section 2 of the FAA that bars enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[11]

These decisions aside, problems have persisted on the judicial front and the Supreme Court has expanded the reach of mandatory arbitration in the employment context. As one example, the U.S. Supreme Court in *Circuit City v. Adams*[12] rejected an effort to exclude employees from coverage under the FAA by applying a narrow construction to exclusionary language in section 1 of the statute that precludes enforcement for "contracts of employment for workers engaged in interstate commerce."13 In *14 Penn Plaza v. Pyett*,[14] the Supreme Court gave a green light to collective bargaining agreements permitting unions to waive an individual's right to litigate a discrimination claim in court and to authorize individual arbitration instead.

Opponents of mandatory arbitration also face problems in other areas of the law. For example, mandatory arbitration opponents were defeated when the U.S. Supreme Court approved class action waivers in consumer agreements as a bar to anti-trust class actions, even where the facts demonstrate it would be too costly to effectively vindicate a complaint in an individual arbitration.[15] One observer of arbitration developments, critical of judicial inaction, appealed

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[10] See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Shankle v. B-G Maint. Mgmt.*, 163 F.3d 1230 (10th Cir. 1999); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C.Cir., 1997).

[11] 9 U.S.C. §2. A leading case considering the unconscionability doctrine is *Armendariz v. Foundation Psychcare*, 24 Cal.4th 83 (2000).

[12] *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). On remand, the employment arbitration agreement nevertheless was deemed unconscionable: *Circuit City v. Adams*, 279 F.3d 1104 (9th Cir. 2002).

13 9 U.S.C. § 1.

[14] 556 U.S. 247 (2009).

[15] *American Express v. Italian Colors*, 570 U.S.___, 133 S.Ct. 2304 (2013).

for statutory and professional regulation to improve the quality and fairness of mandatory arbitration proceedings.[16]

Apart from legal writing and judicial challenges, opponents have sought relief in legislative and administrative forums, but with limited success. The most significant legislative drive has died on the vine, year after year. The Arbitration Fairness Act, which has been introduced in Congress for several sessions, seems to be going nowhere.[17] In an administrative forum, the Equal Employment Opportunity Commission issued a policy declaration in 1997 disapproving mandatory arbitration agreements for discrimination cases, but this position statement lacks the authority of a formal rule.[18]

For its part, the National Labor Relations Board (NLRB) has ruled that mandatory arbitration agreements cannot prohibit the right to file charges with the agency.[19] More recently, the NLRB held that arbitration programs barring employees from seeking class-wide relief interfere with the right under federal labor law to engage in protected, concerted activity.[20] So far, however, the appellate courts disagree with this position.[21]

II. The Gap in Professional Standards

A major gap in the field of mandatory employment arbitration concerns professional and ethical standards for arbitrators. There is a precedent for such standards. Decades ago, a code of professional responsibility was adopted for arbitrators of labor-management disputes arising out of collective bargaining relationships.[22] This code, the product of a three-party project

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[16] Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 Emp. Rts. & Empl. Pol'y 363 (2007); Malin, *The Arbitration Fairness Act*: *It Need Not Be and Should Not Be an All or Nothing Proposition*, 87 Ind. L. J. 289 (2012).

[17] The legislative proposals introduced in 2013 are S.B. 878 and H.R. 1844; also see Malin, *The Arbitration Fairness Act, supra,* 87 Ind. L. J. 289 (2012).

[18] http://www.eeoc.gov/policy/docs/mandarb.html.

[19] *U-Haul Co. of California*, 347 NLRB No. 34 (2006); *Utility Vault*, 345 NLRB No. 4 (2005).

[20] *D. R. Horton*, 357 NLRB No. 184 (2012).

[21] See *D.R. Horton v. NLRB* ___F.3d____(5th Cir., Dec. 13, 2013); also see *Owen v. Bristol Care, Inc.,* 702 F.3d 850 (8th Cir. 2013).

[22] http://naarb.org/code.asp.

involving the NAA, the AAA, and the Federal Mediation and Conciliation Service, deals largely with arbitration of traditional labor law disputes under collective bargaining agreements and does not provide a comprehensive set of standards for non-union employment arbitration.

Aside from a code for labor arbitrators, designating agencies such as the American Arbitration Association (AAA) have had ethical rules for commercial arbitration in place for many years. These long-standing rules cover voluntary, bilateral arbitration agreements in a wide variety of business fields, but not the mandatory cases we now encounter.[23] The AAA's ethical rules were developed with a committee of the American Bar Association decades ago, with only modest revision since.

Following *Gilmer,* the organizations with administrative responsibility for such disputes have attempted to regulate the administration of non-union employment cases. An early post-*Gilmer* development in the mid-1990s was the Due Process Protocol.[24] The Protocol was drafted under the auspices of the American Bar Association's labor section with contributions from individuals associated with different groups in the employment field, including plaintiff and defense counsel, as well as leaders in the NAA. The Protocol spelled out minimum standards for mandatory arbitration proceedings, among them protection of statutory rights, bilateral selection of arbitrators, and fair hearing procedures. Similarly, the AAA and the Judicial Arbitration and Mediation Service (JAMS) have both adopted employment arbitration rules to ensure minimum standards of fair procedure, including employer fee responsibilities for plans promulgated as a condition of employment.[25] At times, however, agency actions reveal conflicting forces at work, as in rules that have been approved for class-action proceedings.[26]

California took a major step in developing rules for arbitration a decade ago when it established several ethical standards to regulate the conduct of arbitrators and appointing

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[23] http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased.

[24] See http://naarb.org/protocol.asp; see also Harding, *The Limits of the Due Process Protocol*, 19 Ohio St. J. Disp. Resol. 369 (2004).

[25] The AAA's employment rules can be found at: http://www.adr.org/aaaShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased. The employment rules for JAMS are at: http://www.jamsadr.com/rules-employment-arbitration/.

[26] Higginbotham, *Buyer Beware*, 58 Duke L.J. 103, 122-129 (2008).

agencies.[27] The California standards impose broad disclosure obligations on arbitrators and appointing agencies for all types of contractual proceedings, provide parties with disqualification rights, and permit awards that violate those rights to be vacated.[28] The California standards, however, have not been adopted nationally, are preempted in certain fields, such as the securities industry,[29] and are not crafted to address specific problems arising in employment cases.

For the NAA, its history with negotiated, voluntary arbitration systems for labor-management disputes under collective bargaining agreements has spurred the organization to go on record as favoring voluntary arbitration.[30] Nevertheless, recognizing that mandatory arbitration is now firmly in place in the non-union setting, the NAA has proposed practice recommendations for arbitrators[31] and procedural reforms to be incorporated in legislation, if any is forthcoming.[32]

III. Proposed Guidelines for Professional Standards

To fill the regulatory gap for arbitrator conduct in mandatory employment arbitration proceedings, members of a special committee of the NAA have proposed formal Guidelines to establish standards of professional responsibility for arbitrators. Although the Guidelines as presently proposed are subject to organizational modification and approval, several principal elements have evolved through internal discussion.

If the Guidelines are adopted by the NAA later in 2014, individual arbitrators will be

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[27] Code of Civil Procedure Section 1281.85, et. seq. The state's Judicial Council in 2002, approved the *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*. (Cal. Rules of Court, App. Div. VI.) The standards are posted at: www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf.

[28] *Orvitz v. Schulman*, 133 Cal.App.4th 830 (2005). In this respect, California law may be at odds with federal practice in reviewing arbitration awards. (See, e.g., *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240 (3rd Cir. 2013); *Merit Ins. v. Leatherby Ins.*, 714 F.2d 673 (7th Cir. 1983).)

[29] *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir., 2005); *Jevne v. Superior Court*, 35 Cal.4th 935 (2005).

[30] http://naarb.org/due_process.asp.

[31] *Id.*

[32] http://naarb.org/documents/SenatorFeingoldMaterialsHolley.pdf.

encouraged to advise parties in employment cases of the arbitrator's commitment to adhere to the Guidelines. In addition, the Guidelines can be adopted by other agencies and organizations active in the field, such as the AAA and JAMS. Advocates and law firms also can press arbitrators to adhere to the Guidelines as a requirement for appointment.

In advancing these standards, members of the NAA involved in their development are mindful that, as a general, threshold principle, arbitrators following the Guidelines will remain subject to applicable federal and state law and administering agencies' rules, where those laws and rules govern the course and conduct of a proceeding.

Among the Guidelines being considered within the Academy are the following:

1. To assure procedural fairness and minimum standards of due process, arbitrators must be attentive to employer-promulgated arbitration plans that are a condition of employment. An arbitrator must insist upon correction of any deficiency, or decline to take the case.

2. Arbitrators must make a reasonable effort to address public law governing the workplace when it is at issue. An arbitrator unwilling or unable to do so, based on personal inclination or insufficient experience, should refuse an appointment.

3. Arbitrators must know the source of an appointment. Once informed, an arbitrator must decline to take a case from a panel created by one party or when only one side has selected the arbitrator.

4. After appointment, and as a continuing duty, arbitrators must promptly provide a written disclosure to the parties recounting any personal, professional, financial, or social relationship to a party, representative, or known witness. The nature and extent of the relationship must be described, and this duty extends to past and present connections. The disclosure obligation also applies to an advocate's law firm and to an employer, as well as to other arbitrators when there is a tripartite panel. Further, arbitrators must disclose service in past proceedings, or in another neutral dispute resolution capacity, with the parties or their representatives.

5. Within a reasonable time after a disclosure, arbitrators should permit parties an automatic disqualification of an arbitrator without specific cause needing to be shown, and must otherwise abide by applicable law or agency procedures regarding objections to service.

6. Prehearing discovery must permit the fair and full exploration of issues consistent with the circumstances of the case, while also maintaining the expedited nature of arbitration.

7. Ex parte communications are prohibited, including any communications with one party regarding compensation or disclosure of a prospective award.

8. One party may be solely responsible for the arbitrator's fees in accord with applicable law, agency rules, or agreement of the parties.

9. Monetary deposits for arbitrator fees may be required as a condition of going forward with an arbitration. Fee deposits must be secured and set aside until fees are earned.

10. Arbitrators must give notice to all parties, and an opportunity to respond, if an arbitrator believes a case should be decided on the basis of a rationale or position not previously presented.

11. Arbitrators cannot publish an award without the consent of the parties.

12. A post-award clarification regarding the merits of a decision can only be provided if both parties have provided consent to clarify.[33]

The Guidelines listed above are not offered as a complete set, although they should be sufficient as a starting place. In the future, other issues can be reviewed based on a track record assessing initial implementation of the Guidelines. One potential issue might be whether arbitrators should provide notice to parties at the time of selection of an intent to accept–or not accept–subsequent appointment in another case with the same advocates or parties while the original appointment is in effect. Another example is whether there are ethical implications affecting the consideration of motions for summary judgment in proceedings in which the extent and scope of discovery is limited. A third example might be how an arbitrator should handle a case when an advance deposit is not paid, including whether non-payment should be treated as a material breach of an arbitration agreement resulting in dismissal of the arbitration and the option to pursue further relief in court.

Ultimately, a question for those active in the field is whether the Guidelines should, at some point, be transformed into an enforceable code. If the Guidelines evolved into a code, the

[33] The Guidelines, while pending within the NAA, were presented for discussion at *Forced Arbitration: A Symposium* at Berkeley Law on February 27, 2014.

NAA could enforce the code against its arbitrator-members, though not against advocates. If the code was widely adopted, administrative agencies and organizations could subject arbitrators to discipline.

While there are issues to be addressed in the future, several members of the NAA's special committee are of the view that we need not wait to take at least initial steps to fill an important regulatory gap. Further, a set of professional standards with points such as those described above hopefully will find substantial support in the employment law community of practitioners and organizations. Granted, there are current laws and rules that apply to mandatory proceedings, but these laws and rules do not fully address arbitrator conduct and do not preclude heightened standards of professional responsibility in the field. In the absence of reform legislation, improved professional standards can insure greater confidence that those serving as decision-makers in mandatory employment arbitration cases are adhering to fair procedures for the protection of all parties.

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 25, 2013

Title
Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

Rules, Forms, Standards, or Statutes Affected
Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration

Recommended by
Civil and Small Claims Advisory Committee
Hon. Dennis M. Perluss, Chair

Agenda Item Type
Action Required

Effective Date
July 1, 2014

Date of Report
September 19, 2013

Contact
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Executive Summary

All persons serving as neutral arbitrators under an arbitration agreement are required to comply with ethics standards adopted by the Judicial Council under Code of Civil Procedure section 1281.85. The Civil and Small Claims Advisory Committee recommends amendments to these ethics standards in response to recent appellate court decisions concerning the standards and suggestions received. Among other things, these amendments would: (1) codify the holdings in decisions on the inapplicability of the standards to arbitrators in securities arbitrations and on the time for disclosures when an arbitrator is appointed by the court; (2) require new disclosures about financial interests a party or attorney in the arbitration has in an administering arbitration provider or the provider has in a party or attorney and about any disciplinary action taken against an arbitrator by a professional licensing agency; (3) clarify required disclosures about associations in the private practice of law and other professional relationships between an arbitrator's spouse or domestic partner and a lawyer in the arbitration; (4) require arbitrators in consumer arbitrations to inform the parties in a pending arbitration of any offer of employment

from a party or attorney for a party in that arbitration; and (5) prohibit arbitrators from soliciting appointment as an arbitrator in a specific case or specific cases.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, effective July 1, 2014, as follows:

1. Amend standard 2 to:
   - Codify case law holding that, in the context of the standards, "proposed nomination" does not include the court's "nomination" of a list of potential arbitrators for consideration by the parties under Code of Civil Procedure section 1281.6; and
   - Fill a gap in the definition of an arbitrator's "extended family," which currently covers spouses of an arbitrator's relatives but does not specifically cover the domestic partners of these relatives.

2. Amend standard 3 to:
   - Exempt from application of the standards arbitrators serving in a type of automobile warranty arbitration program authorized by federal regulation and in which the arbitrator's award is not binding;
   - Codify case law holding that the standards are preempted for arbitrators serving in the security industry arbitration programs governed by rules approved by the Securities and Exchange Commission; and
   - Provide that the amendments to the standards do not apply to arbitrations in which the arbitrator was appointed before the effective date of the amendments.

3. Amend standard 7 to:
   - Reflect the proposed amendments to standard 12 by providing that offers of employment from a party or attorney in a pending consumer arbitration need not be disclosed under this standard if the arbitrator has complied with the requirements in standard 12 that arbitrators in consumer arbitrations inform parties of such offers;
   - Clarify that standard 7 governs both initial disclosures (those made before final appointment of an arbitrator) and supplemental disclosures (those made after the initial disclosures have been made);
   - In response to case law, clarify that arbitrators must disclose if their spouse or domestic partner was associated in the practice of law with a lawyer in the arbitration within the preceding two years;
   - Also in response to case law, clarify that the standards include a separate obligation to disclose professional relationships between an arbitrator or an arbitrator's family

members and party or a lawyer for a party in the arbitration that are not specifically covered by other subparts of standard 7(d);

- Add a new requirement that arbitrators disclose whether:
  - They were disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board;
  - They resigned their membership in the State Bar or another professional or occupational licensing agency or board while public or private disciplinary charges were pending; or
  - Within the preceding 10 years other public discipline was imposed on them by a professional or occupational disciplinary agency or licensing board; and
- Make other nonsubstantive clarifying changes.

4. Amend the comment to standard 7 to:
   - Reflect the proposed amendments to the text of the standard that would add a new obligation to disclose professional discipline and clarify the standard's application to both initial and supplemental disclosures;
   - Clarify that the supplemental disclosure requirement applies to matters that existed at the time the arbitrator made his or her initial disclosures but of which the arbitrator only subsequently became aware and also to matters that arise because of developments during the course of an arbitration;
   - Clarify that just because a particular matter is not among the examples of matters specifically listed in 7(d) does not mean that it need not be disclosed—it still needs to be evaluated under the general standard relating to disclosures concerning the arbitrator's impartiality; and
   - Correct several cross-referencing errors, update other cross-references to reflect the proposed amendments to the standard, and make other nonsubstantive clarifying changes.

5. Amend standard 8 to:
   - Add new requirements that arbitrators in a consumer arbitration administered by a provider organization disclose whether:
     - The provider organization has a financial interest in a party; or
     - A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated has a financial interest in the provider organization.
   - Provide that an arbitrator may rely on information supplied by a provider organization to make required disclosures under this standard only if the provider organization represents that the information is current as of the preceding calendar quarter;
   - Clarify that, if an arbitrator is relying on information from a provider organization's website to make required disclosures under this standard, the web address of the provider

organization must be provided in the arbitrator's initial disclosure statement and the web address provided must be for the specific web page at which the information is located;

- Clarify that disclosures relating to relationships with provider organizations must be made as part of the initial disclosure; and
- Make the language of this standard consistent with the proposed amendments to the introductory sentence of standard 7.

6. Amend standard 12 to provide that, in consumer arbitrations, the arbitrator must inform parties of any offers of employment or new professional relationships from a party or a lawyer for a party in the arbitration and of the acceptance of any such offers.

7. Amend standard 16 to provide that the information an arbitrator must provide to parties about the terms of their compensation must include information about any requirements regarding advance deposit of fees and any practice concerning situations in which a party fails to timely pay the arbitrator's fees, including whether the arbitrator will or may stop the arbitration proceedings.

8. Amend the comment to standard 16 to clarify that this standard is not intended to affect any authority a court may have to make orders with respect to the enforcement of arbitration agreements or arbitrator fees.

9. Amend standard 17 to:
   - Provide that arbitrators may advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment;
   - Provide that arbitrators must not solicit appointment as an arbitrator in a specific case or specific cases; and
   - Add a definition of "solicit."

The text of the proposed standards is attached at pages 28–45.

Previous Council Action

Code of Civil Procedure section 1281.85, enacted in 2001, required the Judicial Council to adopt ethics standards effective July 1, 2002, for all neutral arbitrators serving in arbitrations under an arbitration agreement.[1] In November 2001, then Chief Justice Ronald M. George appointed the Blue Ribbon Panel of Experts on Arbitrator Ethics—which included law school faculty; sitting

[1] This section also established parameters for the scope and content of the ethics standards: "These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter [ch. 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95]. The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships."

and retired judges; legislative and executive branch representatives; business, consumer, and labor representatives; and practicing arbitrators—to review and provide input on drafts of the ethics standards for arbitrators prepared by the Admnistrative Office of the Courts (AOC). In April 2002, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (arbitrator ethics standards) developed by the AOC in consultation with the Blue Ribbon Panel.[2] At that time, the council also directed the AOC to recirculate the adopted standards for public comment. In December 2002, the AOC, after consulting with the Blue Ribbon Panel, recommended amendments to the standards based on the additional public comments received and the Judicial Council adopted these amendments effective January 1, 2003. The standards have not been amended since then.

At its February 28, 2012 meeting, the Judicial Council considered a proposal from the AOC to amend the arbitrator ethics standards in response to appellate court decisions and other input concerning the standards accumulated during the decade since the enactment of the standards.[3] At that meeting, Mr. Cliff Palefsky addressed the council concerning the arbitrator ethics standards, including suggesting additional amendments to the standards. The council did not vote on the substance of the proposed amendments to the standards at that meeting, but instead referred the proposal to the council's Rules and Projects Committee (RUPRO) to assign it to an appropriate Judicial Council advisory body for its review and recommendation. RUPRO referred the proposal to the Civil and Small Claims Advisory Committee (CSCAC) with a recommendation that the committee create a working group including individuals with experience and expertise in the area of contractual arbitration. In addition to considering the possible amendments to the arbitrator ethics standards included in the February 2012 proposal, RUPRO asked that this working group consider: (1) whether any amendments to the arbitrator ethics standards should be proposed to the council; and (2) the suggestions raised by Mr. Palefsky.

Rationale for Recommendation

Background

Legislation and adoption of current standards

In 2001 the Legislature enacted Code of Civil Procedure section 1281.85, which required the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations under an arbitration agreement—that is, arbitrators in private, contractual arbitrations. Among the concerns that motivated this legislation was the fact that these private arbitrators, while subject to fairly detailed statutory disclosure requirements, were not subject to any comprehensive set of mandatory ethics standards like the Code of Judicial Ethics provisions that apply to judges and

[2] The full text of the standards is available on the California Courts website on the same page as the California Rules of Court at: *www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf*.

[3] The February 2012 report to the Judicial Council can be accessed at: *http://www.courts.ca.gov/documents/jc-20120228-itemJ.pdf*.

arbitrators in the judicial arbitration program.[4] The goals of requiring compliance with these ethics standards included ensuring that parties can have confidence in the integrity and fairness of private arbitrators.[5] Both to provide parties with a remedy and to encourage compliance with the disclosure requirements in the arbitration statutes and the standards, in this same legislation the Legislature also clarified that a private arbitrator's failure to disclose in a timely fashion a ground for disqualification of which the arbitrator was then aware is a ground for vacation of an arbitrator's award.[6]

As required by this legislation, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. The stated goals of these standards are to "guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process." Among other things, these standards address arbitrators' general duty to uphold the integrity and fairness of the arbitration process, required disclosures, disqualification, duty to refuse gifts, limitations regarding future professional relationships or employment, compensation, and marketing.

Development of current proposal

In the decade since the Judicial Council adopted these standards, there have been several appellate court decisions addressing the standards' application in various circumstances. The Judicial Council has also received some suggestions for amending the standards. In 2011, the AOC, with input from former members of the Blue Ribbon of Experts on Arbitrator Ethics, developed a proposal to amend the standards in response to these appellate decisions and

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[4] See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended August 20, 2001, p. 4, "While lawyers who act as arbitrators under the judicial arbitration program are required to comply with the Judicial Code of Ethics, arbitrators who act under private contractual arrangements are, surprising to many, currently not required to do so. . . . Because these obligations do not attach to private arbitrators, parties in private arbitrations are not assured of the same ethical standards as they are entitled to in the judicial system." See also Sen. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended April 16, 2001, p. 4, which states: "However, any person, whether a retired judge, active or inactive lawyer, or layperson, when deciding a private arbitration matter is not required to comply with the Judicial Code of Ethics. This shortcoming is a problem, asserts the author, because parties to private arbitrations deserve the same fairness, integrity and impartiality from their private judges as they would receive from a public judge in a public case."

[5] See Sen. Rules Com., Off. of Sen. Floor Analysis, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended August 27, 2001, p. 5, "Proponents assert that rules should apply to private arbitrators to ensure that parties to the arbitration can have confidence in the integrity and fairness of the private arbitrator."

[6] With regard to this provision, the Assembly Judiciary Committee report on the bill stated: "Vacation of an arbitrator's award is the only mechanism for enforcement of the arbitrator's duties. . . .This provision appears appropriate not only to provide a remedy to consumers, who are often forced into private arbitration and who have suffered the arbitrator's non-disclosure, but equally important to provide arbitrators with an incentive to self-regulate. As the author explains, this self-regulation incentive is central to the purpose of the bill, given the continuing absence of any other public oversight of the arbitration industry. As the U.S. Supreme Court has commented, 'We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. (*Commonwealth Coatings Corp. v. Continental Casualty Co*., 393 U.S. 145, 149 (1968).)'" (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended August 20, 2001, p. 8).

suggestions. That earlier proposal was circulated for public comment between April 21 and June 20, 2011, and, as noted above, a modified version of the proposal was recommended for adoption in February 2012. The Judicial Council decided that the earlier proposal should be considered by one of its advisory committees. The proposal was referred by RUPRO to the CSCAC with a recommendation that it form a working group including individuals with experience and expertise in the area of contractual arbitration.

In response to this directive, CSCAC formed the Arbitrator Ethics Standards Working Group. This working group, a roster of which is attached, includes all of the individuals who were members of the CSCAC's Alternative Dispute Resolution (ADR) subcommittee as of late May 2012 when the group was formed. It also includes former members of the Blue Ribbon Panel of Experts on Arbitrator Ethics, a representative designated by the California Judges Association, Mr. Palefsky (the individual who submitted suggestions to the Judicial Council in February 2012 concerning the arbitrator ethics standards), and several others with expertise in the area of contractual arbitration.

The Arbitrator Ethics Standards Working Group considered and made recommendations to CSCAC on all of the issues referred to the committee by RUPRO. The attached revised proposal to amend the arbitrator ethics standards was developed by the working group and recommended for adoption by CSCAC. Some of the recommended amendments are intended to conform the arbitrator ethics standards to case law. Others are intended to modify or clarify the standards in light of case law or suggestions received by the Judicial Council. This proposal contains all of the same proposed amendments to standards 2 and 3 and most of the same amendments to standards 7 and 8 as were contained in the proposal presented to the Judicial Council in February 2012. It also contains some new proposed amendments to standards 7, 12, 16, and 17. The description of the proposal below includes information about whether each proposed amendment was part of the proposal previously presented to the Judicial Council or is new.

Application to arbitrators in securities arbitrations

In 2005, both the California Supreme Court in *Jevne v. Superior Court* (2005) 35 Cal.4th 935 and the United States Court of Appeals for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 held that the federal Securities Exchange Act preempts application of the California arbitrator ethics standards to arbitrators for the National Association of Securities Dealers (NASD).[7] The courts concluded NASD arbitrators are governed by arbitration rules that were approved by the U.S. Securities and Exchange Commission (SEC) under federal law and that the California standards relating to disqualification are in conflict with the SEC-approved rules.

To reflect these court decisions, CSCAC recommends amending standard 3, which addresses the application of the standards, and its accompanying comment, to explicitly exempt arbitrators

[7] In 2007, the NASD merged with the New York Stock Exchange's regulation committee to form the Financial Industry Regulatory Authority, or FINRA.

serving in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the SEC under federal law. This proposed amendment was included in the proposal presented to the Judicial Council in February 2012.[8]

Disclosure of public professional discipline

In *Haworth v. Superior Court of Los Angeles* (2010) 50 Cal.4th 372, the California Supreme Court considered whether an arbitrator was obligated to disclose that, when he was a judge, he had been publicly censured by the Commission on Judicial Performance.[9] Because neither the California Arbitration Act nor the arbitrator ethics standards specifically required disclosure of such professional discipline, the court based its determination on whether, under the particular facts of the case, that public censure was a matter that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.[10] Based on a variety of factors, including that the conduct that was the basis of the public censure was directed at court staff, not litigants; was not the same type of conduct that was the subject of the arbitration; had occurred 15 years before the arbitration took place; and that there was no indication of similar conduct in the 10 years since the censure had been imposed, the court held that disclosure of the public censure was not required under the general impartiality standard.

To help support the broad goals of the ethics standards— to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process—CSCAC recommends adding a new requirement, separate from the requirement for disclosures relating to the arbitrator's impartiality, that an arbitrator make disclosures to the parties about certain public professional disciplinary actions. Specifically, arbitrators would be required to disclose if:

- They were disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board;

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[8] These same changes were also previously circulated for public comment in late 2005, along with a request for comments on all the standards.

[9] In the underlying case before the arbitrator, a female patient filed an action for battery and medical malpractice against a male doctor who had performed cosmetic surgery on her. Two months after the arbitration panel, in a split decision, issued its award in favor of the doctor, the patient learned that the arbitrator who authored the award had been publicly censured while he was a judge for engaging in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The conduct that was the basis for this judicial discipline included making sexually suggestive remarks to and asking sexually explicit questions of female staff members; referring to a staff member using crude and demeaning names and descriptions and an ethnic slur; referring to a fellow jurist's physical attributes in a demeaning manner; and mailing a sexually suggestive postcard to a staff member addressed to her at the courthouse. The patient then filed a petition in the superior court seeking to vacate the arbitration award on the ground, among others, that the arbitrator had failed to disclose this public censure.

[10] See 50 Cal.4th 372, 381 ["Neither the statute nor the Ethics Standards require that a former judge or an attorney serving as an arbitrator disclose that he or she was the subject of any form of professional discipline. At issue here is the general requirement that the arbitrator disclose any matter that reasonably could create the appearance of partiality."]

- They resigned their membership in the State Bar or another professional or occupational licensing agency or board while public or private disciplinary charges were pending; or
- Within the preceding 10 years other public discipline was imposed on them by a professional or occupational disciplinary agency or licensing board.

The information that would be required to be disclosed under this proposed amendment is similar to information that must be disclosed by many other ADR neutrals, lawyers, and applicants for judicial office:

- Arbitrators serving in securities arbitrations under the FINRA rules are currently required to disclose information about professional discipline to the parties in those arbitrations;[11]
- Mediators serving in court-connected mediation programs for general civil cases must report to the court if they have been subject to professional discipline;[12]
- Members of the State Bar of California must report such disciplinary matters to the State Bar;[13] and
- Prospective judges are required to disclose such information to the Governor before they are appointed as superior court judges.[14]

CSCAC recommends that this new disclosure obligation be kept separate from the requirement for disclosures relating to the arbitrator's impartiality, which is located in subdivision (d) of standard 7. This information, like the similar information reported by judicial applicants, attorneys, and court-connected mediators, is not intended to assist in assessing the arbitrator's ability to be impartial but to help assess other characteristics that may be important in an arbitrator, such as the individual's integrity. This new disclosure requirement would therefore be placed in subdivision (e) of standard 7, which currently requires disclosure of other information

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[11] See the FINRA arbitrator disclosure checklist at *http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009442.pdf*. This checklist requires arbitrators in that program to disclose whether "any professional entity or body with licensing authority cited you for malpractice; denied, suspended, barred, or revoked your registration or license (e.g., insurance, real estate, securities, legal, medical, etc.); or restricted your activities in any way." Any affirmative responses are provided to the parties in the arbitration.

[12] See Cal. Rules of Court, rule 3.856(c). Among other things, rule 3.856 requires such mediators to inform the court if (1) public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency; or (2) the mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending.

[13] See Bus. & Prof. Code, § 6068(o). This code section requires State Bar members to report the imposition of discipline against them by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

[14] See *Application for Appointment as Judge of the Superior Court* at *http://www.gov.ca.gov/docs/Judicial_application_Worksheet.txt*. Among many other things that must be disclosed on this application is information about (1) whether the applicant has ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group; and (2) whether, as a member of any organization or as a holder of any office or license, the applicant has been suspended or otherwise disqualified or had such license suspended or revoked; been reprimanded, censured or otherwise disciplined; or had any charges, formal or informal, made or filed against them.

about the arbitrator's ability to conduct the arbitration that is unrelated to the arbitrator's ability to be impartial, but is important to assessing whether a person should serve as an arbitrator in a case.

The proposed amendment to the ethics standards, like the FINRA rules, would require disclosure of this disciplinary information to the parties in the arbitration. In contrast, in the case of court-connected mediators, lawyers, and prospective judges, the disclosures are not made to parties, but to a public officer or entity responsible for determining the eligibility of individuals to serve in these capacities. Unlike for these occupations, however, there is no public officer or entity responsible for determining the eligibility of individuals to serve as arbitrators in contractual arbitration. In contractual arbitration, it is generally the parties who decide who will serve as the arbitrator in their case. Therefore, to enable the parties to make an informed decision about who will serve as their arbitrator, the proposed amendment would require the information about public professional discipline be disclosed to the parties.

By establishing a clear disclosure requirement, this amendment should reduce uncertainty for arbitrators and parties about what professional disciplinary actions must be disclosed, avoid possible protracted litigation over whether such actions should have been disclosed under the general impartiality standard,[15] support the finality of arbitration awards, and enhance public confidence in the integrity of private arbitrators and the arbitration process.

This proposed amendment was included in the proposal presented to the Judicial Council in February 2012. However, the current proposal makes clear that the resignations that must be disclosed include those in which either public or private disciplinary charges are pending and clarifies what information about the professional discipline must be disclosed.

Disclosure of relationships with a lawyer in the arbitration

In another case decided in 2010, *Johnson v. Gruma Corporation* (9th Cir. 2010) 614 F.3d 1062, the Ninth Circuit Court of Appeals considered whether the ethics standards required an arbitrator to disclose that his wife had been a partner in the law firm of an attorney who was hired to represent one of the parties in the arbitration. Finding no provision in the ethics standards specifically identifying prior association in the practice of law between the arbitrator's spouse and a lawyer in the arbitration as a relationship that must be disclosed, the court held that the arbitrator was not required to disclose this relationship.

To clarify that the ethics standards are intended to require disclosure of an arbitrator's spouse's prior association in the practice of law with a lawyer in the arbitration as well as other professional relationships that the arbitrator or a member of the arbitrator's immediate family has

[15] The *Haworth* case went twice from the superior court to the Court of Appeal to the Supreme Court before it was finally resolved, four years after the arbitration award was rendered and the petition to vacate the award was initially filed.

or has had with a lawyer for a party, CSCAC recommends making the following changes to standard 7:

- Moving the current provision relating to the arbitrator's past association in the practice of law with a lawyer in the arbitration from standard 7(d)(8) (which relates to professional relationships that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or a lawyer in the arbitration) to 7(d)(2) (which relates to family relationships with a lawyer in the arbitration). While this provision could logically be placed in either subdivision, because 7(d)(2) already addresses situations in which the arbitrator is currently associated in the practice of law with a lawyer in the arbitration, readers may expect that past relationships of this type would also be addressed in the same subdivision. Moving this provision to 7(d)(2)(B) ensures it appears in the first location in which readers might logically look for it.
- Expanding this provision to specifically address situations in which the arbitrator's spouse or domestic partner had a past association in the practice of law with a lawyer in the arbitration. Explicitly listing such past relationships will eliminate any doubt about whether these relationships must be disclosed.
- Removing the introductory language about other professional relationships from standard 7(d)(8) and place it in its own separate subdivision as proposed standard 7(d)(9). Placing this provision in its own subdivision would emphasize that it establishes disclosure obligations distinct from, and in addition to, those established by the other provisions in standard 7(d). The existing provisions of 7(d)(8)(B) and (C) relating to disclosure of employee, expert witness, and consultant relationships would remain in standard 7(d)(8), but would be consolidated into a single provision.

These proposed amendments were included in the proposal presented to the Judicial Council in February 2012.

Disclosures relating to administering provider organizations

When the ethics standards were originally adopted by the Judicial Council in April 2002, they included a requirement that, in consumer arbitrations administered by a provider organization, the arbitrator was required to disclose, among other things, whether that provider organization had a financial interest in a party or whether a party or lawyer in the arbitration had a financial interest in the provider organization. After the ethics standards were adopted, a new statutory provision, Code of Civil Procedure section 1281.92, was enacted that prohibits provider organizations from administering any consumer arbitration where such a relationship exists. In December 2002, in recognition of this statutory provision, the Judicial Council deleted the obligation to make such disclosures from the standards.

During the succeeding 10 years, it was discovered that a major provider of consumer arbitration services in California, National Arbitration Forum (NAF), was purchased by one of the major users of its arbitration services. Despite this, NAF continued to provide arbitration services in

consumer arbitrations in violation of section 1281.92. Because disclosure of this type of relationship was no longer required, arbitrators in these consumer arbitrations were not obligated to disclose this relationship between NAF and one of the parties in the arbitration.

CSCAC recommends reinstating the provisions, which were removed from the standards by the council in 2002, requiring that in consumer arbitrations administered by a provider organization, the arbitrator disclose whether that provider organization has a financial interest in a party or whether a party or lawyer in the arbitration has a financial interest in the provider organization.

This proposed amendment was not included in the proposal presented to the Judicial Council in February 2012.

Initial and supplemental disclosures

The ethics standards address both initial disclosures (those made when an arbitrator is notified that he or she has been nominated by the parties or appointed by the court to arbitrate a dispute) and supplemental disclosures (those made any time after the initial disclosures are made). Under standard 7(c), both initial and supplemental disclosures are required to include any matters listed in standards 7(d) and (e). The appellate briefs filed in *Johnson v. Gruma Corporation*, however, reflect some confusion about whether the ethics standards address initial disclosures and about what matters must be disclosed in supplemental disclosures.

To clarify that the standards are intended to govern both initial and supplemental disclosures and what must be disclosed in each, CSCAC recommends several changes to the standards:

- Amend standard 7(c) to include separate headings identifying the requirements for initial and supplemental disclosures; and
- Amend the references to the persons who must make disclosures in the introductory provision of standard 7(d), in standard 7(e), and in the introductory provision of standard 8(b) to clarify whether the disclosures must be made only by proposed arbitrators (initial disclosures) or by both proposed arbitrators and arbitrators (supplemental disclosures).

In 2008, in *Jakks Pacific, Inc. v. Superior Court* (2008) 160 Cal.App.4th 596, the Court of Appeal addressed the time frame for initial disclosures in situations in which the court appoints the arbitrator under Code of Civil Procedure section 1281.6. The court in that case held that it is the appointment of the arbitrator under that statute, not the "nomination" of a list of potential arbitrators for consideration by the parties, that triggers the requirement for disclosure under the standards and related statutes. The proposed amendment to standard 2(a)(2) reflects the holding in *Jakks.*

These proposed amendments were included in the proposal presented to the Judicial Council in February 2012.

Offers of employment from parties or attorneys in a pending arbitration

Standard 12(b) currently requires that a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers from a party or a lawyer for a party of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant,[16] including offers to serve as a dispute resolution neutral in another case, and provides that a party may disqualify the arbitrator based on this disclosure. Standard 7(b)(2) provides that if an arbitrator makes this disclosure and is not disqualified by any party, the arbitrator is not required to disclose to the parties in that arbitration any offer of employment that the arbitrator subsequently receives or accepts from a party or lawyer for a party while that arbitration is pending.

Concerns have been expressed about whether the disclosure and ability to disqualify an arbitrator under standard 12(b) provides sufficient protection for parties, particularly consumer parties, against the possibility of arbitrator bias or the appearance of bias that may arise when the arbitrator receives offers of employment from another party or attorney in the arbitration. Among other things, it has been suggested that it may be unclear to parties that an arbitrator who has disclosed that he or she will entertain such offers of employment will not subsequently inform the parties if and when he or she actually receives such an offer.

To address these concerns, this proposal would amend standard 12 to require that the arbitrator must inform parties in a pending consumer arbitration of any such offer of other employment from a party or attorney for a party in that arbitration and of the acceptance of any such offer. The proposed amendments would further provide that if the arbitrator complies with this requirement, the receipt or acceptance of the offer, by itself, is not grounds for disqualification of the arbitrator, does not constitute corruption in or misconduct by the arbitrator, and need not also be disclosed by the arbitrator under standard 7. If, however, the arbitrator fails to inform the parties as required, that would constitute a failure to comply with the arbitrator's obligation to make a disclosure required under these ethics standards.

These proposed amendments were not included in the proposal presented to the Judicial Council in February 2012.

Arbitrator fees

Standard 16(b) requires that, before accepting appointment, an arbitrator must inform all parties in writing of the terms and conditions of the arbitrator's compensation. The standard specifically requires that this information include any basis to be used in determining fees and any special fees for cancellation, research and preparation time, or other purposes.

[16] Standard 12(a) specifically prohibits an arbitrator from entertaining or accepting any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration.

There is other information about arbitrator fees that may also be very important for parties to receive before an arbitrator is appointed, including information about requirements for advance deposit of fees and about the arbitrator's practice if a party fails to timely pay the arbitrator's fees. To ensure that parties receive this important information, this proposal would amend standard 16 to specifically require that information about these issues be included in the fee information provided before an arbitrator accepts appointment. This proposed amendment was not included in the proposal presented to the Judicial Council in February 2012.

Marketing

Standard 17 addresses marketing by arbitrators. This standard prohibits arbitrators from making any representation in their marketing that directly or indirectly implies favoritism or a specific outcome, and from soliciting business from a participant in the arbitration while the arbitration is pending.

Concerns have been raised about the potential appearance of bias that may arise if an arbitrator solicits work as an arbitrator in a specific case or cases from an individual or entity that is not currently a participant in an arbitration, but that ultimately would or might be one of the parties before that arbitrator if the individual or entity chose to arbitrate the solicited case or cases. To address these concerns, this proposal would prohibit arbitrators from soliciting appointment in a specific case or specific cases. This proposed amendment was not included in the proposal presented to the Judicial Council in February 2012.

Other proposed changes

In addition to the amendments described above, CSCAC recommends several other amendments to the standards based primarily on suggestions received by the Judicial Council:

Standard 2(o). This provision, which defines "extended family," currently covers spouses of an arbitrator's relatives but does not specifically cover the domestic partners of these relatives. The proposal includes an amendment designed to fill this gap.

Standard 3(b)(2)(D). The recommended amendment to this provision would make a substantive change by exempting arbitrators serving in a type of automobile warranty arbitration authorized by federal regulations. This program is similar to the automobile warranty and attorney-client fee arbitration programs already exempted in (b)(2)(D) and (b)(2)(C) in that, under the applicable regulations, the decisions rendered are not binding on the consumer party.

Standard 7(d)(5). This recommended amendment would delete an obsolete provision. Standard 7(d)(5)(A) defines "prior case" for purposes of this provision as "any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002." The last clause in this provision was included because, at the time this standard was adopted in 2002, arbitrators had not necessarily been keeping the records about their service as dispute resolution neutrals who would

be required to make the disclosures required under (d)(5), and so disclosures of such service concluded before 2002 were not required. Because the standard only requires disclosure of service in cases concluded within the preceding two years, this provision is no longer necessary.

Comment to standard 7. The recommended amendments to this comment would, among other things:

- Correct cross-references to renumbered or relettered provisions;
- Clarify that the requirement to make supplemental disclosures applies to matters that existed at the time the arbitrator made his or her initial disclosures but of which the arbitrator only subsequently became aware and also to matters that arise because of developments during the course of an arbitration, such as when a party hires a new lawyer (as occurred in the *Johnson v. Gruma* case); and
- Clarify that just because a particular matter is not specifically listed among the examples of matters in standard 7(d) does not mean it need not be disclosed; it still needs to be evaluated under the general disclosure standard.

Standard 8(a). This proposed amendment is intended to do two things:

- Provide that an arbitrator may only rely on information from a provider organization's website to make required disclosures under this standard if the provider organization represents that the information on that website is current as of the most recent quarter. This provision reflects the requirement in Code of Civil Procedure section 1291.96 that provider organizations post quarterly information on the consumer arbitrations they have administered.
- Clarify that if an arbitrator is relying on information from a provider organization's website to make required disclosures under this standard, the web address of the provider organization must be provided in the arbitrator's initial disclosure statement. This is important because there are time limits specified for the submission of that disclosure statement.

With the exception of the first amendment to standard 8(a) described above, all of these proposed amendments were included in the proposal presented to the Judicial Council in February 2012.

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal was circulated for public comment between April 19 and June 19, 2013, as part of the regular spring 2013 comment cycle. Sixteen individuals or organizations submitted comments on this proposal. One commentator agreed with the proposal and one agreed with the proposal if modified. The remaining commentators did not indicate a position on the proposal as a whole, but provided comments on specific proposed amendments. The Arbitrator Ethics Standards Working Group and the full CSCAC reviewed the public comments. The full text of

the comments received and the committee responses are set out in the attached comment chart at pages 46–110. The main substantive comments and the committee's responses are discussed below.

Standard 3—Application and effective date

Several commentators provided input on the effective date of the proposed amendments. Two commentators indicated that the 2-month period between the Judicial Council's October 25, 2013 meeting and the originally proposed January 1, 2014 effective date would not be sufficient to implement the proposed changes. Based on these comments, the committee recommends that the proposed amendments take effect July 1, 2014, rather than January 1, 2014. This will give arbitrators and arbitration provider organizations additional time to implement these changes, including making necessary changes to conflict-checking programs and other software.

Two other commentators suggested that a clarification was needed about whether the rule amendments would be applicable only to new cases after the effective date of the amendments or to cases already under way. To avoid confusion and disruption of pending arbitrations, when the ethics standards were originally adopted, they were specifically made inapplicable to cases in which the arbitrator was appointed before the effective date of the standards. For similar reasons, the committee recommends that these proposed amendments to the ethics standards only apply to arbitrators in arbitrations in which they are appointed on or after the proposed effective date of the amendments.

Standards 7(b) and 12—Disclosures and limitations relating to offers of future professional relationships or employment from parties or attorneys in a pending arbitration

The portion of the proposal that received the most comments was the proposed amendments to standards 7(b) and 12 relating to offers of future professional relationships or employment from a party or attorney in a pending arbitration.

Proposal circulated for public comment—As noted above, standard 12(b) currently requires arbitrators to disclose before appointment whether they will entertain offers for future professional relationships or employment from a party or attorney for a party in that arbitration while the arbitration is pending and allows parties to disqualify an arbitrator based on this disclosure. Standard 7(b), in turn, provides that if the arbitrator complied with standard 12(b), the arbitrator is not required to disclose any such offer of employment he or she subsequently received or accepts. The proposal circulated for public comment would have further required that, in consumer arbitrations, the arbitrator inform the parties in the pending arbitration before accepting any such offer from a party or attorney for a party in that arbitration and give the parties an opportunity to object to the arbitrator accepting the offer. The proposed amendments to standard 7(b), in turn, recognized this proposed requirement to inform the parties in the pending arbitration of such offers.

Public comments—Thirteen of the sixteen commentators provided input on these proposed amendments:

- One commentator agreed with the proposal as a whole, including this provision.
- One commentator indicated that it did not disagree with the amendments, but suggested that the language of the proposed amendment to standard 7(b) be clarified.
- Two commentators expressed the view that the proposed amendments did not go far enough in addressing offers of employment.
- Six commentators did not explicitly state a position on the proposed amendments but expressed concerns about the amendments or suggested narrowing their application.
- Three commentators specifically indicated that they opposed these amendments. Two of these also suggested that the proposed amendments, if not eliminated from the proposal, should be modified.

The concerns raised by these commentators about the proposal circulated for comment include:

- There is insufficient justification provided for amending the standards. There is no information indicating that the advance disclosure and disqualification procedure established by standard 12(b) is not providing sufficient protection for consumer parties.
- The right to object to the arbitrator taking a new case or other offer of employment will not be effective in protecting consumer parties. Even if a party does not want an arbitrator to accept new employment from the other side, the party will be reluctant to exercise the right to object for fear of angering the arbitrator. As a result, the right to object is an essentially illusory protection.
- If a party did object to an arbitrator accepting a new case or other business from a party or attorney in the pending arbitration, it could result in actual or perceived bias on the part of the arbitrator, thus expanding the grounds for motions to vacate awards. If a party does object and the arbitrator subsequently rules against that party, the party may, legitimately or not, claim that the arbitrator was biased against him or her because of the objection. This may be used as the basis for seeking vacatur of an unfavorable award.
- The objection procedure can lead to gamesmanship—parties who think that the arbitrator is likely to rule against them may have an incentive to object to the arbitrator accepting offers either because they want to punish the arbitrator or because the arbitrator might choose to withdraw when such an objection is filed.
- The amendments will discourage arbitrators, particularly full-time, well-respected arbitrators, from serving as arbitrators in consumer arbitrations because:
  - The proposed procedure places the arbitrator in the uncomfortable position of seeking a favor from the parties and attorneys in the pending arbitration, in the form of asking those parties for permission to accept an offer;
  - Arbitrators will not want to deal with the potential administrative burdens and delays associated with these cases;

    - Arbitrators will not want to be prevented from accepting new cases that are the core of their practice, including commercial and potentially even labor arbitrations, by taking an occasional consumer case.
- These amendments will delay appointment of arbitrators in new arbitrations. Even if no party in the pending arbitration objects to the arbitrator serving in a new case, there will be additional time needed to inform the parties and give them an opportunity to object. There will be even more time needed to redo the arbitrator selection process in those new arbitrations in which the arbitrator originally agreed to by the parties is unavailable because the parties in a pending arbitration objected to the arbitrator taking a new case. Delay in reaching resolution may harm the parties in the new arbitrations, including consumer parties.
- Implementing the objection procedure will be particularly difficult in situations, such as in the Kaiser dispute resolution program, where there is a panel of arbitrators who serve in cases in which one or more entities is a party in all or most cases.

The suggestions made by these commentators include:

- Remove the circulated amendments to standard 7(b) and standard 12 from the proposal.
- If there is a concern that parties do not understand when they receive the initial disclosure from an arbitrator that they will not be informed of subsequent offers, then:
    - Make this clearer in the initial disclosure; and
    - Impose a requirement of disclosure of future offers—but without imposing a consent requirement.
- If the notice and objection procedure is retained:
    - In standard 7(b), separate the provisions relating to consumer arbitrations and other arbitrations; and
    - In standard 12, clarify what information the arbitrator must provide about the offer.

Committee response to comments—In light of the concerns raised by commentators, the committee made the following changes to the proposal:

- Eliminated the proposed requirement to give parties in the pending consumer arbitration the right to object to the arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required:
    - Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;
    - The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer; and
    - The arbitrator is not also required to disclose that offer or its acceptance under standard 7.

These provisions are intended to make clear that receiving or accepting such an offer does not, by itself, create grounds for either disqualification of the arbitrator or vacatur of the arbitrator's decision.

The committee concluded that these changes should address the majority of the concerns raised by the commentators, which were focused on the objection procedure in the proposal circulated for comment, while ensuring that parties in consumer arbitrations have full information about relationships between the arbitrator that will be rendering a decision about their dispute and other parties in the case. This openness should also serve as a deterrent to any effort by a party in a consumer arbitration to influence an arbitrator through offers of additional employment.

- Exempted offers to serve as a labor arbitrator or to serve as a dispute resolution neutral without compensation from the requirement to inform parties in consumer arbitrations when an offer is made. This change is intended to address some of the commentators' concerns about discouraging arbitrators from serving in consumer arbitrations. As several commentators noted, arbitrators in labor arbitrations are not covered by the ethics standards and such arbitrations are not required to be disclosed under standard 7. Similarly, arbitrators are not required to disclose uncompensated service as a dispute resolution neutral under standard 7 and such offers do not raise concerns about potential economic influence on the arbitrator.
- Revised the initial disclosure requirement to separately address consumer arbitrations and other arbitrations:
  - For consumer arbitrations, the disclosure would be required to indicate that the parties would be informed of any offer made while the arbitration is pending; and
  - In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers.

  These changes should make the initial disclosure requirement easier to understand and more effective in making clear the consequences if parties choose not to exercise their right to disqualify a proposed arbitrator based on this disclosure.

There was not unanimity among the members of the Arbitrator Ethics Standards Working Group or the Civil and Small Claims Advisory Committee with regard to this proposed amendment. A minority of the working group members supported the adoption of additional measures, including more broadly applying the duty to inform parties of offers to all arbitrations, rather than just to consumer arbitrations, further strengthening the initial disclosure by requiring arbitrators to obtain a written acknowledgement of this disclosure signed by the parties, or keeping the objection procedure that was in the proposal circulated for public comment. Two members of the working group, and one member of the committee, Mr. Thomas Brandi, urged that arbitrators be prohibited from entertaining offers of employment from a party or attorney while the arbitration is pending. Mr. Brandi opposed the recommendation with respect to standard 12 for this reason.

Standard 7(e)—Disclosure of professional discipline

When the earlier proposal to amend the standards was circulated for public comment in 2011, these amendments garnered the most public comment. This time, there was little comment on these amendments and no opposition. One commentator suggested the proposal should be more specific about what information must be disclosed about professional discipline. In response to this comment, the committee revised the proposal to require the disclosure specify the date of the disciplinary action, what professional or occupational disciplinary agency or licensing board took the action, and the charge made or reasons given by that professional or occupational disciplinary agency or licensing board for the disciplinary action.

Standard 8—Disclosures relating to administering provider organizations

Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization—The proposal circulated for public comment included proposed amendments to standard 8(a) that would provide an arbitrator may only rely on information from a provider organization's website to make required disclosures under standard 8 if the provider organization represents that the information on that website is current as of the most recent quarter. This provision was intended to reflect the requirement in Code of Civil Procedure section 1291.96 that provider organizations post quarterly information on the consumer arbitrations they have administered and the text of the proposed amendment specifically referenced Code of Civil Procedure section 1291.96.

Two commentators provided input on this proposed amendment. One commentator noted that the Legislature is currently considering possible amendments to section 1291.96 and therefore suggested the cross-reference to this section could create uncertainty. Another commentator suggested it would be clearer if the standard simply referred to the web information being current as to the immediately preceding calendar quarter. Based on these comments, the committee revised the language of this proposed amendment to eliminate the reference to Code of Civil Procedure section 1291.96 and to refer to the immediately preceding calendar quarter. This modified language is still consistent with the quarterly data publication requirement of Code of Civil Procedure section 1291.96; in order for an arbitrator to rely on any information a provider supplied under section 1291.96 in making a disclosure under standard 8, the arbitration provider organization would still be required to represent that the data were current up to the end of the preceding calendar quarter.

Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization—The proposal circulated for public comment included proposed amendments requiring that, in consumer arbitrations administered by a provider organization, the arbitrator disclose whether that provider organization has a financial interest in *or relationship* with a party or whether a party or lawyer in the arbitration has a financial interest in *or relationship* with the provider organization. In the invitation to comment, these proposed amendments were described as reinstating provisions previously removed from the standards in 2002 when the Legislature adopted Code of Civil

Procedure section 1291.92 prohibiting an arbitration provider organization from administering an arbitration where any such relationship exists.

Several commentators pointed out, while Code of Civil Procedure section 1291.92 does address situations in which a provider organization has a financial interest in a party or a party or lawyer in the arbitration has a financial interest in the provider organization, it does not address situations involving a "financial relationship" between a provider organization and a party or attorney. They also correctly pointed out the provisions that were in the ethics standards from April through December 2002 and were removed in response to the adoption of section 1291.92 similarly did not address "financial relationships" between a provider organization and a party or attorney. Finally, they noted, while "financial interest" is defined in the standards through a cross-reference to Code of Civil Procedure section 170.5, there is no definition of "financial relationship" in the standards, which could result in uncertainty about what must be disclosed. Several suggested modifying this proposed amendment to eliminate, limit, or clarify the proposed disclosure obligations with respect to financial relationships.

Based on these comments, the committee revised the proposal to delete the references to "financial relationship" in the proposed amendments to standard 8(b)(1)(A) and (B). Eliminating these references will not mean an arbitrator in a consumer arbitration administered by a provider organization has no obligation to make disclosures with respect to financial relationships between the provider organization and a party or attorney. The introductory sentence of standard 8(b)(1) currently requires disclosure of:

> Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration.

As in standard 7, 8(b)(1)(A) and (B) simply provide examples of matters that must be disclosed under this broader standard. Note, however, the introductory sentence of standard 8 specifies the disclosure obligation only applies to "significant" financial or professional relationships or affiliations. The amendments to standard 8(b)(1)(A) and (B) circulated for public comment would have broadened this to require disclosure of any financial relationship between an administering provider organization and a party or attorney, which appears to be the main source of the commentators' concerns.

Standard 16—Arbitrator compensation

To ensure that parties receive information about requirements for advance deposit of fees and about the arbitrator's practice if a party fails to timely pay the arbitrator's fees that may be important to them in selecting an arbitrator, the proposal circulated for public comment included proposed amendments to standard 16 to specifically require information about these issues be included in the fee information provided before an arbitrator accepts appointment.

Two commentators expressed concern that this provision would require or encourage arbitrators to adopt a set policy regarding advance deposit of fees or failure to pay fees. In response to these comments, the committee revised the proposal to include an amendment to the comment accompanying standard 16 to clarify that this provision is not intended to require that arbitrators establish a fixed policy or practice in this regard, only that, if an arbitrator or administering provider organization has such a policy or practice, the parties be informed of that policy or practice.

Standard 17—Marketing

Proposal circulated for public comment—The proposal circulated for public comment would have prohibited arbitrators from soliciting a particular case or "caseload" for themselves or for a "closed panel" of which they are a member. The invitation to comment specifically sought input on whether the language of the proposed amendment was sufficiently clear.

Public comments—This portion of the proposal received the second largest number of comments. Seven commentators suggested the language used in the proposed amendment, including specifically "solicit," "caseload," and "closed panel," was unclear. Four of these commentators expressed opposition to this amendment as drafted.

The main concern raised by these commentators was that, absent clear definitions, specific exemptions for certain activities, and/or examples of prohibited activities, this amendment could be construed very broadly to prohibit arbitrators from engaging in activities that the commentators suggested are not unethical or do not raise concerns about actual or perceived bias and should be permissible, including:

- Responding to a request for a preappointment interview by parties in a dispute who are trying to select an appropriate individual to arbitrate their dispute or participating in such an interview;
- Seeking appointment in specific types of cases, such as medical malpractice or employment cases, in which the neutral has expertise;
- Sending marketing material to attorneys who specialize in a particular type of case and seeking to be considered as an arbitrator in future disputes of that type;
- Contacting provider organizations that maintain a panel of arbitrators with expertise in a subject area, such as Kaiser, about being placed on their panel;
- Helping to staff a provider organization's booth at a professional conference;
- Providing an attorney, law firm, or business with the business card of a provider organization or information about the provider's procedures or services;
- Suggesting a particular provider organization would be suitable to handle a particular case or caseload; and
- Helping to prepare a response on behalf of a provider organization to a request for proposals to provide dispute resolution services for a series of disputes.

The suggestions made by these commentators include:

- Remove this requirement from the proposal (commentators who opposed this amendment);
- Define "solicit," "caseload," and "closed panel" or otherwise clarify this proposed amendment; and
- Add a comment to make it clear the standard does not preclude ordinary marketing activities or providing examples of what is permitted and what is not.

Committee response to comments—In light of the concerns raised by commentators, the committee revised the proposed amendments to standard 17 to:

- Narrow the amendment to prohibiting solicitation of appointment as an arbitrator in a specific case or specific cases. This revision eliminates the use of the terms "caseload" and "closed panel," which commentators found problematic. The proposed new language should also be familiar to arbitrators because it is based on the language of the Ethics for International Arbitrators of the International Bar Association, which provides that "it is inappropriate to contact parties in order to solicit appointment as an arbitrator" and the language of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes in effect from 1977–2003, which provided that "it is inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves."
- Add a definition of "solicit." The basic definition recommended is modeled on the definition in Rule 1-400 of the Rules of Professional Conduct of the State Bar of California, with the addition of language about online communication from the Model Rules of Professional Conduct of the American Bar Association. It should therefore be familiar to attorney arbitrators. The recommended provision also identifies specific activities that are not considered solicitation, including responding to a request for proposals from all parties in a case to submit a proposal to provide arbitration services in that case and responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.
- Consolidate the language relating to marketing activities in subdivision (a).

Other alternatives considered

In addition to the alternatives considered in response to the public comments on the proposal circulated for public comment in 2013, CSCAC also considered other alternatives.

Not proposing any amendments to the standards

CSCAC considered the option of not proposing any changes to the ethics standards at this time. This would mean that standards would not reflect recent decisions about their application, arbitrators would continue to have no specific obligation to disclose public professional discipline, and there would be inconsistencies between the intended scope of disclosures about past professional relationships between an arbitrator's spouse and a lawyer in the arbitration and

the case law concerning these disclosures. The committee concluded the recommended changes will provide helpful clarifications of the standards in light of recent case law and help ensure that the standards better serve their goals of guiding the conduct of arbitrators, informing and protecting participants in arbitration, and promoting public confidence in the arbitration process.

Not recommending the addition of a new requirement for disclosure of professional discipline
CSCAC considered not recommending the addition of a new requirement that arbitrators disclose public professional discipline. Factors that support not recommending such a requirement include:

- Arbitrators are already required to disclose any professional discipline the arbitrator believes could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;
- Parties in an arbitration can access information about public professional discipline imposed on an arbitrator by contacting the appropriate professional or occupational disciplinary agency or licensing board for the profession of which the arbitrator is or was a member;
- The length and complexity of the disclosure requirements for arbitrators would be increased if this requirement were added; and
- Arbitrators and arbitration provider organizations would need to modify their disclosure checklists or practices if this requirement were added.

Factors that support adding such a requirement to the ethics standards include:

- Requiring disclosure by arbitrators will place the burden of obtaining and sharing information about public professional discipline on the person who is most knowledgeable about whether any such discipline has been imposed, rather than on parties, including self-represented parties, who may be unaware of the complete professional background of an arbitrator or lack knowledge about how to access information about public professional discipline;
- The parties who must decide who will serve as a neutral arbitrator in their case will receive disclosures about public professional discipline imposed on the arbitrator that are consistent with disclosures that currently must be made to parties by arbitrators in securities arbitrations conducted under FINRA rules and by potential judges, attorneys, and mediators in court-connected mediation programs to the public officials or body that determines whether individuals can serve in those capacities. This should improve public confidence in the integrity of private arbitrators and the arbitration process; and
- It will be clearer that certain public professional discipline must be disclosed. This should:
    - Reduce burdens on arbitrators of having to assess every public professional disciplinary action based on whether it could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;

- Reduce situations in which public professional discipline is not disclosed, resulting in parties questioning the integrity of the arbitration process and potentially filing requests to vacate arbitration awards;
- Reduce burdens on courts by reducing the number of requests to vacate arbitration awards based on failure to disclose public professional discipline and reducing the circumstances in which courts will have to assess such requests based on the fact-intensive criterion of whether the undisclosed professional discipline could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial; and
- Support the finality of arbitration awards.

Evaluating these factors, the CSCAC concluded the reasons to include a requirement for disclosure of public professional discipline in the ethics standards outweigh the reasons not to include it. CSCAC therefore recommends amending the standards to include such a requirement.

Alternative limitations on future professional relationships or employment

CSCAC also considered proposing the following alternative amendments to standard 12, regarding future professional relationships or employment:

- Prohibiting an arbitrator from entertaining or accepting any offer of employment from a party or lawyer for a party in a pending arbitration; or
- Requiring that an arbitrator who wishes to entertain or accept any offers of employment from a party or lawyer for a party in a pending arbitration, before accepting appointment, not simply disclose this but obtain the written consent of all parties.

The committee ultimately decided to focus on consumer arbitrations, rather than all arbitrations, because the consumer parties in these arbitrations are typically more vulnerable, have less information and knowledge about the arbitration process, and are less able to exercise choices with regard to that process. The committee decided not to propose a prohibition on accepting offers of employment in these arbitrations for a combination of reasons, including that the parties already have the right to disqualify an arbitrator based on the initial disclosure the arbitrator would entertain offers of employment from a party or attorney in the pending arbitration and that most other relationships between an arbitrator and a party or attorney are not prohibited, but subject to disclosure under the standards.

Implementation Requirements, Costs, and Operational Impacts

Because the ethics standards apply to arbitrators in contractual arbitration, not court-connected arbitration programs, this proposal should not result in appreciable implementation requirements, costs, or operational impacts on the courts. There will be impacts on arbitrators and arbitration provider organizations, however, including a need to update existing disclosure checklists and practices.

Attachments

1. Roster of Arbitrator Ethics Standards Working Group at page 27
2. Standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration at pages 28–45
3. Comment chart at pages 46–110

Civil and Small Claims Advisory Committee
Arbitrator Ethics Standards Working Group

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County of Los Angeles

Mr. Jay Folberg, Co-Chair
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Mr. Kevin Baker
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Mr. Gene Wong
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Standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration would be amended, effective July 1, 2014, to read:

Standard 2. Definitions

As used in these standards:

(a) Arbitrator and neutral arbitrator

(1) * * *

(2) Where the context includes events or acts occurring before an appointment is final, "arbitrator" and "neutral arbitrator" include a person who has been served with notice of a proposed nomination or appointment. For purposes of these standards, "proposed nomination" does not include nomination of persons by a court under Code of Civil Procedure section 1281.6 to be considered for possible selection as an arbitrator by the parties or appointment as an arbitrator by the court.

(b)–(n) * * *

(o) "Member of the arbitrator's extended family" means the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator's spouse or domestic partner or the spouse or domestic partner of such person.

(p)–(s) * * *

Standard 3. Application and effective date

(a) * * *

(b) These standards do not apply to:

(1) Party arbitrators, as defined in these standards; or

(2) Any arbitrator serving in:

(A) An international arbitration proceeding subject to the provisions of title 9.3 of part III of the Code of Civil Procedure;

(B) A judicial arbitration proceeding subject to the provisions of chapter 2.5 of title 3 of part III of the Code of Civil Procedure;

(C) An attorney-client fee arbitration proceeding subject to the provisions of article 13 of chapter 4 of division 3 of the Business and Professions Code;

(D) An automobile warranty dispute resolution process certified under California Code of Regulations title 16, division 33.1 or an informal dispute settlement procedure under Code of Federal Regulations title 16, chapter 1, part 703;

(E) An arbitration of a workers' compensation dispute under Labor Code sections 5270 through 5277;

(F) An arbitration conducted by the Workers' Compensation Appeals Board under Labor Code section 5308;

(G) An arbitration of a complaint filed against a contractor with the Contractors State License Board under Business and Professions Code sections 7085 through 7085.7; ~~or~~

(H) An arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements~~.~~; or

(I) An arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission under federal law.

(c) The following persons are not subject to the standards or to specific amendments to the standards in certain arbitrations:

(1) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards in those arbitrations.

(2) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to standard 8 in those arbitrations.

(3) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2014, are not subject to the amendments to standards 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014 in those arbitrations.

Comment to Standard 3

With the exception of standard 8 and the amendments to standards 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014, these standards apply to all neutral arbitrators appointed on or after July 1, 2002, who meet the criteria of subdivision (a). Arbitration provider organizations, although not themselves subject to these standards, should be aware of them when performing administrative functions that involve arbitrators who are subject to these standards. A provider organization's policies and actions should facilitate, not impede, compliance with the standards by arbitrators who are affiliated with the provider organization.

Subdivision (b)(2)(I) is intended to implement the decisions of the California Supreme Court in *Jevne v. Superior Court* ((2005) 35 Cal.4th 935) and of the United States Court of Appeals for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* ((9th Cir. 2005) 400 F.3d 1119).

Standard 7. Disclosure

(a) Intent

This standard is intended to identify the matters that must be disclosed by a person nominated or appointed as an arbitrator. To the extent that this standard addresses matters that are also addressed by statute, it is intended to include those statutory disclosure requirements, not to eliminate, reduce, or otherwise limit them.

(b) General provisions

For purposes of this standard:

(1) * * *

(2) *Offers of employment or professional relationship*

(A) Except as provided in (B), if an arbitrator has disclosed to the parties in an arbitration that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12, the arbitrator is not also required under this standard to disclose to the parties in that arbitration any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending.

(B) In a consumer arbitration, if an arbitrator has disclosed to the parties that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12 and has informed the parties in the pending arbitration about any such offer and the acceptance of any such offer as required by subdivision (d) of standard 12, the arbitrator is not also required under this standard to disclose that offer or the acceptance of that offer to the parties in that arbitration.

(3) * * *

(c) Time and manner of disclosure

(1) *Initial disclosure*

Within ~~ten~~ 10 calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing all matters listed in subdivisions (d) and (e) of this standard of which the arbitrator is then aware.

(2) *Supplemental disclosure*

If an arbitrator subsequently becomes aware of a matter that must be disclosed under either subdivision (d) or (e) of this standard, the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter.

(d) Required disclosures

~~A person who is nominated or appointed as an arbitrator~~ A proposed arbitrator or arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be impartial, including, but not limited to, all of the following:

(1) *Family relationships with party*

The arbitrator or a member of the arbitrator's immediate or extended family is:

(A) A party~~,~~;

(B) ~~a party's~~The spouse or domestic partner~~,~~ of a party; or

(C) An officer, director, or trustee of a party.

(2) *Family relationships with lawyer in the arbitration*

(A) Current relationships

The arbitrator, or the spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator's spouse or domestic partner is:

~~(A)~~(i) A lawyer in the arbitration;

~~(B)~~(ii) The spouse or domestic partner of a lawyer in the arbitration; or

~~(C)~~(iii) Currently associated in the private practice of law with a lawyer in the arbitration.

(B) Past relationships

The arbitrator or the arbitrator's spouse or domestic partner was associated in the private practice of law with a lawyer in the arbitration within the preceding two years.

(3) *Significant personal relationship with party or lawyer for a party*

The arbitrator or a member of the arbitrator's immediate family has or has had a significant personal relationship with any party or lawyer for a party.

(4) *Service as arbitrator for a party or lawyer for party*

(A) The arbitrator is serving or, within the preceding five years, has served:

(i) As a neutral arbitrator in another prior or pending noncollective bargaining case involving a party to the current arbitration or a lawyer for a party.

(ii) As a party-appointed arbitrator in another prior or pending noncollective bargaining case for either a party to the current arbitration or a lawyer for a party.

(iii) As a neutral arbitrator in another prior or pending noncollective bargaining case in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration.

(B)–(C) * * *

(5) *Compensated service as other dispute resolution neutral*

The arbitrator is serving or has served as a dispute resolution neutral other than an arbitrator in another pending or prior noncollective bargaining case involving a party or lawyer for a party and the arbitrator received or expects to receive any form of compensation for serving in this capacity.

(A) Time frame

For purposes of this paragraph (5), "prior case" means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator's proposed nomination or

appointment~~, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002~~.

(B)–(C) * * *

(6) *Current arrangements for prospective neutral service*

Whether the arbitrator has any current arrangement with a party concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in or, within the last two years, has participated in discussions regarding such prospective employment or service with a party.

(7) *Attorney-client relationship*

Any attorney-client relationship the arbitrator has or has had with a party or lawyer for a party. Attorney-client relationships include the following:

(A) An officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator's private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law;

(B) In any other proceeding involving the same issues, the arbitrator gave advice to a party or a lawyer in the arbitration concerning any matter involved in the arbitration; and

(C) The arbitrator served as a lawyer for or as an officer of a public agency which is a party and personally advised or in any way represented the public agency concerning the factual or legal issues in the arbitration.

(8) *Employee, expert witness, or consultant relationships*

The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party or for a lawyer in the arbitration.

~~(8)~~(9) *Other professional relationships*

Any other professional relationship not already disclosed under paragraphs (2)–~~(7)~~(8) that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or lawyer for a party~~,~~.~~ including the following:~~

~~(A) The arbitrator was associated in the private practice of law with a lawyer in the arbitration within the last two years.~~

~~(B) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party; and~~

~~(C) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a lawyer in the arbitration.~~

~~(9)~~(10) *Financial interests in party*

The arbitrator or a member of the arbitrator's immediate family has a financial interest in a party.

~~(10)~~(11) *Financial interests in subject of arbitration*

The arbitrator or a member of the arbitrator's immediate family has a financial interest in the subject matter of the arbitration.

~~(11)~~(12) *Affected interest*

The arbitrator or a member of the arbitrator's immediate family has an interest that could be substantially affected by the outcome of the arbitration.

~~(12)~~(13) *Knowledge of disputed facts*

The arbitrator or a member of the arbitrator's immediate or extended family has personal knowledge of disputed evidentiary facts relevant to the arbitration. A person who is likely to be a material witness in the proceeding is deemed to have personal knowledge of disputed evidentiary facts concerning the proceeding.

~~(13)~~(14) *Membership in organizations practicing discrimination*

The arbitrator~~'s membership in~~ is a member of any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. Membership in a religious organization, an official military organization of the United States, or a nonprofit youth organization need not be disclosed unless it would interfere with the arbitrator's proper conduct of the proceeding or would cause a person aware of the fact to reasonably entertain a doubt concerning the arbitrator's ability to act impartially.

~~(14)~~(15) Any other matter that:

(A) Might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;

(B) Leads the proposed arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration; or

(C) Otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice.

(e) ~~Inability to conduct or timely complete proceedings~~ Other required disclosures

In addition to the matters that must be disclosed under subdivision (d), ~~an~~ a proposed arbitrator or arbitrator must also disclose:

(1) *Professional discipline*

(A) If the arbitrator has been disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. The disclosure must specify the date of the revocation, what professional or occupational disciplinary agency or licensing board revoked the license, and the reasons given by that professional or occupational disciplinary agency or licensing board for the revocation.

(B) If the arbitrator has resigned his or her membership in the State Bar or another professional or occupational licensing agency or board, whether in California or elsewhere, while public or private disciplinary charges were pending. The disclosure must specify the date of the resignation, what professional or occupational disciplinary agency or licensing board had charges pending against the arbitrator at the time of the resignation, and what those charges were.

(C) If within the preceding 10 years public discipline other than that covered under (A) has been imposed on the arbitrator by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. "Public discipline" under this provision means any disciplinary action imposed on the arbitrator that the professional or occupational disciplinary agency or licensing board identifies in its publicly available records or in response to a request for information about the arbitrator from a member of the public. The disclosure must specify the date the discipline was imposed, what professional or occupational disciplinary agency or licensing board imposed the discipline, and the reasons given by that professional or occupational disciplinary agency or licensing board for the discipline.

(2) *Inability to conduct or timely complete proceedings*

~~(1)~~(A) If the arbitrator is not able to properly perceive the evidence or properly conduct the proceedings because of a permanent or temporary physical impairment; and

~~(2)~~(B) Any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner.

(f) Continuing duty

An arbitrator's duty to disclose the matters described in subdivisions (d) and (e) of this standard is a continuing duty, applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding.

Comment to Standard 7

This standard requires proposed arbitrators to disclose to all parties, in writing within 10 days of service of notice of their proposed nomination or appointment, all matters they are aware of at that time that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial as well as those matters listed under subdivision (e). ~~and to disclose~~ This standard also requires that if arbitrators subsequently become aware of any additional such matters, they must make supplemental disclosures of these matters within 10 days of becoming aware of them. This latter requirement is intended to address both matters existing at the time of nomination or appointment of which the arbitrator subsequently becomes aware and new matters that arise based on developments during the arbitration, such as the hiring of new counsel by a party.

Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator. It provides the parties with the necessary information to make an informed selection of an arbitrator by disqualifying or ratifying the ~~proposed~~ arbitrator following disclosure. See also standard 12, concerning disclosure and disqualification requirements relating to concurrent and subsequent employment or professional relationships between an arbitrator and a party or attorney in the arbitration. A party may disqualify an arbitrator for failure to comply with statutory disclosure obligations (see Code Civ. Proc., § 1281.91(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is a ground for *vacatur* of the arbitrator's award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

The arbitrator's overarching duty under subdivision (d) of this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be impartial. While the remaining subparagraphs of subdivision (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The ~~absence of the particular~~ fact that none of the interests, relationships, or affiliations specifically listed in the subparagraphs of (d) are present in a particular case does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator's ability to be impartial and that therefore must be disclosed. Similarly, the fact that a particular interest, relationship, or affiliation present

in a case is not specifically enumerated in one of the examples given in these subparagraphs does not mean that it must not be disclosed. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under ~~paragraph~~ subdivision (d): is the matter something that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial?

Code of Civil Procedure section 1281.85 specifically requires that the ethics standards adopted by the Judicial Council address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity. Section 1281.85 further provides that the standards "shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter [chapter 2 of title 9 of part III, Code of Civil Procedure, sections 1281–1281.95]."

Code of Civil Procedure section 1281.9 already establishes detailed requirements concerning disclosures by arbitrators, including a specific requirement that arbitrators disclose the existence of any ground specified in Code of Civil Procedure section 170.1 for disqualification of a judge. This standard does not eliminate or otherwise limit those requirements; in large part, it simply consolidates and integrates those existing statutory disclosure requirements by topic area. This standard does, however, expand upon or clarify the existing statutory disclosure requirements in the following ways:

- Requiring arbitrators to ~~disclose~~ make supplemental disclosures to the parties regarding any matter about which they become aware after the time for making an initial disclosure has expired, within 10 calendar days after the arbitrator becomes aware of the matter (subdivision ~~(f)~~(c)).
- Expanding required disclosures about the relationships or affiliations of an arbitrator's family members to include those of an arbitrator's domestic partner (subdivisions (d)(1) and (2); see also definitions of immediate and extended family in standard 2).
- Requiring arbitrators, in addition to making statutorily required disclosures regarding prior service as an arbitrator for a party or attorney for a party, to disclose both prior service~~s both~~ as a neutral arbitrator selected by a party arbitrator in the current arbitration and prior compensated service as any other type of dispute resolution neutral for a party or attorney in the arbitration (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)~~(C)~~(A)(iii) and (5)).
- If a disclosure includes information about five or more cases, requiring arbitrators to provide a summary of that information (subdivisions (d)(4)(C) and (5)(C).
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or, within the preceding two years, was an employee, expert witness, or consultant for a party or a lawyer in the arbitration (subdivision~~s~~ (d)(8) ~~(A) and (B))~~.
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an interest that could be substantially affected by the outcome of the arbitration (subdivision (d)~~(11)~~(12)).

~~If a disclosure includes information about five or more cases, requiring arbitrators to provide a summary of that information (subdivisions (d)(4) and (5).~~

- Requiring arbitrators to disclose membership in organizations that practice invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation (subdivision (d)~~(13)~~(14)).

- Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, resigned membership in the State Bar or another licensing agency or board while disciplinary charges were pending, or had any other public discipline imposed on him or her by a professional or occupational disciplinary agency or licensing board within the preceding 10 years (subdivision (e)(1)). The standard identifies the information that must be included in such a disclosure; however, arbitrators may want to provide additional information to assist parties in determining whether to disqualify an arbitrator based on such a disclosure.

- Requiring the arbitrator to disclose any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner (subdivision ~~(d)~~(e)(2)).

- Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of matters that were not known at the time of nomination or appointment but that become known afterward (subdivision ~~(e)~~(f)).

It is good practice for an arbitrator to ask each participant to make an effort to disclose any matters that may affect the arbitrator's ability to be impartial.

Standard 8. Additional disclosures in consumer arbitrations administered by a provider organization

(a) General provisions

(1) *Reliance on information provided by provider organization*

Except as to the information in (c)(1), an arbitrator may rely on information supplied by the administering provider organization in making the disclosures required by this standard only if the provider organization represents that the information the arbitrator is relying on is current through the end of the immediately preceding calendar quarter. If the information that must be disclosed is available on the Internet, the arbitrator may comply with the obligation to disclose this information by providing in the disclosure statement required under standard 7(c)(1) the Internet address of the specific web page at which the information is located and notifying the party that the arbitrator will supply hard copies of this information upon request.

(2) *Reliance on representation that not a consumer arbitration*

An arbitrator is not required to make the disclosures required by this standard if he or she reasonably believes that the arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration.

(b) Additional disclosures required

In addition to the disclosures required under standard 7, in a consumer arbitration as defined in standard 2 in which a dispute resolution provider organization is coordinating, administering, or providing the arbitration services, a ~~person~~ proposed arbitrator who is nominated or appointed as an arbitrator on or after January 1, 2003 must disclose the following within the time and in the same manner as the disclosures required under standard 7(c)(1):

(1) *Relationships between the provider organization and party or lawyer in arbitration*

Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration. Information that must be disclosed under this standard includes:

(A) The provider organization has a financial interest in a party.

~~(A)~~(B) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of or has a financial interest in the provider organization.

~~(B)~~(C) Within the preceding two years the provider organization has received a gift, bequest, or favor from a party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated.

~~(C)~~(D) The provider organization has entered into, or the arbitrator currently expects that the provider organization will enter into, an agreement or relationship with any party or lawyer in the arbitration or a law firm with which a lawyer in the arbitration is currently associated under which the provider organization will administer, coordinate, or provide dispute resolution services in other noncollective bargaining matters or will provide other consulting services for that party, lawyer, or law firm.

~~(D)~~(E) The provider organization is coordinating, administering, or providing dispute resolution services or has coordinated, administered, or provided such services in another pending or prior noncollective bargaining case in which a party or lawyer in the arbitration was a party or a lawyer. For purposes of this paragraph, "prior case" means a case in which the dispute resolution neutral affiliated with the provider organization concluded his or her service within the two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the dispute resolution neutral concluded his or her service before July 1, 2002.

(2) *Case information*

If the provider organization is acting or has acted in any of the capacities described in paragraph (1)~~(D)~~(E), the arbitrator must disclose:

(A) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current arbitration who is involved in the pending case or who was involved in the prior case;

(B) The type of dispute resolution services (arbitration, mediation, reference, etc.) coordinated, administered, or provided by the provider organization in the case; and

(C) In each prior case in which a dispute resolution neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge appointed under article VI, § 4 of the California Constitution, or a referee appointed under Code of Civil Procedure sections 638 or 639, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

(3) *Summary of case information*

If the total number of cases disclosed under paragraph (1)~~(D)~~(E) is greater than five, the arbitrator must also provide a summary of these cases that states:

(A) The number of pending cases in which the provider organization is currently providing each type of dispute resolution services;

(B) The number of prior cases in which the provider organization previously provided each type of dispute resolution services;

(C) The number of such prior cases in which a neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge, or a referee; and

(D) The number of prior cases in which the party to the current arbitration or the party represented by the lawyer in the current arbitration was the prevailing party.

(c) Relationship between provider organization and arbitrator

If a relationship or affiliation is disclosed under ~~paragraph~~ subdivision (b), the arbitrator must also provide information about the following:

(1) Any financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases, including whether the

arbitrator has a financial interest in the provider organization or is an employee of the provider organization;

(2) The provider organization's process and criteria for recruiting, screening, and training the panel of arbitrators from which the arbitrator in this case is to be selected;

(3) The provider organization's process for identifying, recommending, and selecting potential arbitrators for specific cases; and

(4) Any role the provider organization plays in ruling on requests for disqualification of the arbitrator.

(d) * * *

Comment to Standard 8

This standard only applies in consumer arbitrations in which a dispute resolution provider organization is administering the arbitration. Like standard 7, this standard expands upon the existing statutory disclosure requirements. Code of Civil Procedure section 1281.95 requires arbitrators in certain construction defect arbitrations to make disclosures concerning relationships between their employers or arbitration services and the parties in the arbitration. This standard requires arbitrators in all consumer arbitrations to disclose any financial or professional relationship between the administering provider organization and any party, attorney, or law firm in the arbitration and, if any such relationship exists, then the arbitrator must also disclose his or her relationship with the dispute resolution provider organization. This standard ~~does not~~ requires an arbitrator to disclose if the provider organization has a financial interest in a party or lawyer in the arbitration or if a party or lawyer in the arbitration has a financial interest in the provider organization ~~because~~ even though provider organizations are prohibited under Code of Civil Procedure section 1281.92 from administering any consumer arbitration where any such relationship exists.

Subdivision (b). Currently expected relationships or affiliations that must be disclosed include all relationships or affiliations that the arbitrator, at the time the disclosure is made, expects will be formed. For example, if the arbitrator knows that the administering provider organization has agreed in concept to enter into a business relationship with a party, but they have not yet signed a written agreement formalizing that relationship, this would be a "currently expected" relationship that the arbitrator would be required to disclose.

Standard 12. Duties and limitations regarding future professional relationships or employment

(a) Offers as lawyer, expert witness, or consultant

From the time of appointment until the conclusion of the arbitration, an arbitrator must not entertain or accept any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration.

(b) Offers for ~~other~~ employment or professional relationships other than as a lawyer, expert witness, or consultant

(1) In addition to the disclosures required by standards 7 and 8, within ten calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case.

(2) If the arbitrator discloses that he or she will entertain such offers of employment or new professional relationships while the arbitration is pending:

(A) In consumer arbitrations, the disclosure must also state that the arbitrator will inform the parties as required under (d) if he or she subsequently receives an offer while that arbitration is pending.

(B) In all other arbitrations, the disclosure must also state that the arbitrator will not inform the parties if he or she subsequently receives an offer while that arbitration is pending.

(3) A party may disqualify the arbitrator based on this disclosure by serving a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91(b).

(c) Acceptance of offers under (b) prohibited unless intent disclosed

If an arbitrator fails to make the disclosure required by subdivision (b) of this standard, from the time of appointment until the conclusion of the arbitration the arbitrator must not entertain or accept any such offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral.

(d) Required notice of offers under (b)

If, in the disclosure made under subdivision (b), the arbitrator states that he or she will entertain offers of employment or new professional relationships covered by (b), the arbitrator may entertain such offers. However, in consumer arbitrations, from the time of appointment until the conclusion of the arbitration, the arbitrator must inform all parties to the current arbitration of any such offer and whether it was accepted as provided in this subdivision.

(1) The arbitrator in a consumer arbitration must notify the parties in writing of any such offer within five days of receiving the offer and, if the arbitrator accepts the offer, must notify the parties in writing within five days of that acceptance.

The arbitrator's notice must identify the party or attorney who made the offer and provide a general description of the employment or new professional relationship that was offered including, if the offer is to serve as a dispute resolution neutral, whether the offer is to serve in a single case or multiple cases.

(2) If the arbitrator fails to inform the parties of an offer or an acceptance as required under (1), that constitutes a failure to comply with the arbitrator's obligation to make a disclosure required under these ethics standards.

(3) If an arbitrator has informed the parties in a pending arbitration about an offer as required under (1):

(A) Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;

(B) The arbitrator is not also required to disclose that offer or its acceptance under standard 7; and

(C) The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer.

(4) An arbitrator is not required to inform the parties in a pending arbitration about an offer under this subdivision if:

(A) He or she reasonably believes that the pending arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration;

(B) The offer is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements; or

(C) The offer is for uncompensated service as a dispute resolution neutral.

~~(d)~~(e) Relationships and use of confidential information related to the arbitrated case

An arbitrator must not at any time:

(1) Without the informed written consent of all parties, enter into any professional relationship or accept any professional employment as a lawyer, an expert witness, or a consultant relating to the case arbitrated; or

(2) Without the informed written consent of the party, enter into any professional relationship or accept employment in another matter in which information that

he or she has received in confidence from a party by reason of serving as an arbitrator in a case is material.

Comment to Standard 12

Subdivision (d)(1). A party may disqualify an arbitrator for failure to make required disclosures, including disclosures required by these ethics standards (see Code Civ. Proc., § 1281.91(a) and standard 10(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is also a ground for *vacatur* of the arbitrator's award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

Subdivision (d)(4)(B). The arbitrations identified under this provision are only those in which, under Code of Civil Procedure section 1281.85(b) and standard 3(b)(2)(H), the ethics standards do not apply to the arbitrator.

Standard 16. Compensation

(a) An arbitrator must not charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration.

(b) Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees; ~~and~~ any special fees for cancellation, research and preparation time, or other purposes; any requirements regarding advance deposit of fees; and any practice concerning situations in which a party fails to timely pay the arbitrator's fees, including whether the arbitrator will or may stop the arbitration proceedings.

Comment to Standard 16

This standard is not intended to affect any authority a court may have to make orders with respect to the enforcement of arbitration agreements or arbitrator fees. It is also not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established.

Standard 17. Marketing

(a) An arbitrator must be truthful and accurate in marketing his or her services. An arbitrator may advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment ~~and~~ but must not make any representation that directly or indirectly implies favoritism or a specific outcome. An arbitrator must ensure that his or her personal marketing activities and any activities carried out on his or her behalf, including any activities of a provider organization with which the arbitrator is affiliated, comply with this requirement.

(b) An arbitrator must not solicit business from a participant in the arbitration while the arbitration is pending.

(c) An arbitrator must not solicit appointment as an arbitrator in a specific case or specific cases.

(d) As used in this standard, "solicit" means to communicate in person, by telephone, or through real-time electronic contact to any prospective participant in the arbitration concerning the availability for professional employment of the arbitrator in which a significant motive is pecuniary gain. The term solicit does not include: (1) responding to a request from all parties in a case to submit a proposal to provide arbitration services in that case; or (2) responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

Comment to Standard 17

Subdivision (b) and (c). Arbitrators should keep in mind that, in addition to these restrictions on solicitation, several other standards contain related disclosure requirements. For example, under standard 7(d)(4)-(6), arbitrators must disclose information about their past, current, and prospective service as an arbitrator or other dispute resolution for a party or attorney in the arbitration. Under standard 8(b)(1)(C) and (D), in consumer arbitrations administered by a provider organization, arbitrators must disclose if the provider organization has coordinated, administered, or provided dispute resolution services, is coordinating, administering, or providing such services, or has an agreement to coordinate, administer, or provide such services for a party or attorney in the arbitration. And under standard 12 arbitrators must disclose if, while an arbitration is pending, they will entertain offers from a party or attorney in the arbitration to serve as a dispute resolution neutral in another case.

~~This~~ These provisions ~~is~~ are not intended to prohibit an arbitrator from accepting another arbitration from a party or attorney in the arbitration while the first matter is pending, as long as the arbitrator complies with the provisions of standard 12 and there was no express solicitation of this business by the arbitrator.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
1.	ADR Services, Inc. By: Lucie Barron, President Los Angeles, California	NI	See comments on specific provisions below.	See responses to specific comments below.
2.	American Arbitration Association By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York	NI	The American Arbitration Association ("AAA") is supportive of the Council's desire to review the Standards periodically to consider changes to bring them into conformance with practice and legal developments. However, some proposed amendments would create such administratively cumbersome recordkeeping requirements that the AAA may be unable to continue to administer consumer arbitrations in California. See comments on specific provisions below.	 See responses to specific comments below.
3.	California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California	NI	For the most part, the CDRC supports the proposed amendments. However, it has the following comments on certain of the proposed revisions. See comments on specific provisions below.	 See responses to specific comments below.
4.	Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	NI	See comments on specific provisions below.	See responses to specific comments below.
5.	Consumer Attorneys of California By: Jacqueline Serna Associate Legislative Counsel	NI	Our Position: In general, we support the proposed changes to the Ethics Standards for Neutral Arbitrators in	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
			Contractual Arbitration. However, with regards to Amendment No. 4, CAOC believes the proposal does not go far enough in protecting the neutrality of arbitrators. Our comment focuses on this amendment which we propose should be strengthened. See comments on specific provisions below.	See responses to specific comments below.
6.	Ruth Glick Attorney at Law Burlingame, California	NI	I wish to weigh in on the proposed amendments to the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Although I am Chair-Elect of the Dispute Resolution Section of the American Bar Association and a Fellow of the College of Commercial Arbitrators, these comments are made by me individually, and not on behalf of these organizations. See comments on specific provisions below.	See responses to specific comments below.
7.	Hon Arnold H. Gold (ret.) Studio City	NI	I am a retired Judge of the Superior Court for Los Angeles County. I provide dispute resolution services through Alternative Resolution Centers, headquartered in Los Angeles. See comments on specific provisions below.	See responses to specific comments below.
8.	JAMS By: Jay Welsh Executive Vice President, General	NI	JAMS is pleased to provide the following comments to the proposed changes and amendments to the Ethical Standards for	

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
	Counsel JAMS		Neutral Arbitrators in Contractual Arbitration. We will only comment on those proposals which we question. You may assume that if there is no specific mention of a proposal in this letter, JAMS has no objection to the proposed change. See comments on specific provisions below.	See responses to specific comments below.
9.	Judicate West By: Var Fox, Co-Founder Santa Ana, California	NI	As requested, this response addresses the impacts on arbitrators and arbitration provider organizations, including a need to update existing disclosure checklists and practices, in addition to the specific requests for comment: * * * Judicate West has great concerns about the purpose, need for and specific language used in the proposed amendments. * * * As is discussed in greater detail herein, Judicate West is very concerned that the application of the proposed amendments may serve to increase both the potential for the appearance of bias and create actual bias. In addition, Judicate West suggests that before these amendments are finalized further discussion and revisions are advisable. Judicate West is willing to work with the Judicial Council to aid in this process. We all want the Standards to provide further clarity for arbitrators on what must be done to be in compliance with the standards. We certainly do not want to create new ways for attorneys or	

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SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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List of All Commentators, Overall Positions on the Proposal, and General Comments				
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			parties to increase the financial burden on their opposing counsel in attempts to get around unfavorable rulings by finding new ways to attack an award. See comments on specific provisions below.	 See responses to specific comments below.
10.	John Kagel, Attorney-at-Law Palo Alto	NI	See comments on specific provisions below.	See responses to specific comments below.
11.	William McGrane Attorney at Law San Francisco, California	NI	See comments on specific provisions below.	See responses to specific comments below.
12.	Luella Nelson Arbitrator/Mediator	NI	See comments on specific provisions below.	See responses to specific comments below.
13.	Office of the Independent Administrator By: Sharon Oxborough Independent Administrator Los Angeles, California	NI	The OIA has reviewed the proposed amendments to the Ethic Standards for Neutral Arbitrators in Contractual Arbitration. Some of the changes respond to recent appellate court decisions and we support those changes. See comments on specific provisions below.	 See responses to specific comments below.
14.	Orange County Bar Association By: Wayne R. Gross, President Newport Beach, California	AM	See comments on specific provisions below.	See responses to specific comments below.
15.	Superior Court of San Diego County By: Michael Roddy, Executive Officer	A	No additional comments	No response required

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SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
16.	Thomas D. Weaver Tustin, California	AM	See comments on specific provisions below.	See responses to specific comments below.

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SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 2 – Definitions		
Commentator	**Comment**	**Committee Response**
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Proposed Change to 2(o)** Judicate West is concerned about the ever expanding disclosures that an arbitrator is supposed to make. Many of our arbitrators have grown children, nieces and, even, grandchildren. It is inconceivable that an arbitrator is going to stay in daily contact with all these members of his family to know if they have had any contact with a person or company that would need to be disclosed, if he or she had known about it. Because a neutral doesn't always know every activity of every person in his/her extended family, the standard should be based on actual bias, not just the appearance of bias. The requirements for an arbitrator should mirror those that are required for sitting judges.	The committee acknowledges that this proposed amendment may expand the disclosure obligations of arbitrators. However, the committee's view is that this expansion is appropriate and in keeping with the current disclosure obligations created by statute and the ethics standards. The current definition of "member of the arbitrator's extended family" includes the spouses of the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator's spouse or domestic partner, but does not include the domestic partner of such a person. It is the committee's view that domestic partners who have registered as required under the Family Code have a relationship to each other that is sufficiently similar to spouses that the same requirements regarding disclosure should apply. The committee notes that the ethics standards do not require that arbitrators know every activity of their extended family members. Standard 7 requires disclosure of matter of which the arbitrator is "aware." Subdivision (b) of standard 9, which addresses the arbitrator's duty of inquiry with regard to matters that must be disclosed, provides that: "An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships or other matters involving his or her extended family and former spouse that are required to be disclosed under standard 7 by: (1) Seeking information about these relationships and

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SPR13-01

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Standard 2 – Definitions		
Commentator	**Comment**	**Committee Response**
		matters from the members of his or her immediate family and any members of his or her extended family living in his or her household; and (2) Declaring in writing that he or she has made the inquiry in (1)."
Luella Nelson Arbitrator/Mediator	The revision to add "domestic partner" adds such interesting problems of another sort that it requires a definition, at a minimum. Is this only legally registered domestic partners, or does it include informal shacking up or, for that matter, just roommates with no commitment whatsoever? Both same-sex and opposite-sex couples? Does it matter if they're not having sex? (In other words, do you want to go beyond formally recognized relationships?)	Current standard 2(h) provides that "domestic partner" means a domestic partner as defined in Family Code section 297.
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the following Standard 2 and Standard 3 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existing Standards. These proposals are: • Standard 2(a)(2) regarding the nomination of an arbitrator. • Standard 2(o) including "domestic partner" as a member of arbitrator's family	No response required

SPR13-01
Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)
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Standard 3 – Application and effective date		
Commentator	**Comment**	**Committee Response**
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the following Standard 2 and Standard 3 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existing Standards. These proposals are: * * * • Standard 3(b)(2)(D) regarding the exclusion of automobile warranty dispute from the Standard. • Standard 3(b)(2)(I) regarding the preemption of SEC proceedings from state regulation.	No response required
Hon Arnold H. Gold (ret.) Studio City	Even though the preamble to the proposal states that the amended Standards will not become effective until January 1, 2014, there needs to be a provision that the amendments are not applicable to existing cases. Otherwise, chaos and much litigation will arise over questions such as: (A) Do they apply retroactively? (B) If they do, what is the significance on an ongoing case of, say, a disclosure (or compliance with some other requirement) that met the then existing standards but didn't meet the new standards? I suggest a grace period, such as: "These amendments are not applicable to any case in which the selection of the arbitrator was made by agreement, order or otherwise prior to _____ [perhaps March 1, 2014?]."	Based on this and other comments, the committee has revised the proposal to clarify that the proposed amendments will not apply to persons who are serving in arbitrations in cases in which they were appointed to serve as arbitrators before July 1, 2014.
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Application to Arbitrators in Securities Arbitrations** Judicate West supports this amendment and finds the wording and rationale well supported in the case law and within the real life practicalities of arbitration. The suggested wording of the	No response required

Standard 3 – Application and effective date		
Commentator	**Comment**	**Committee Response**
	standard seems to achieve the stated purpose. * * * **Proposed Change to 3(b)(2)(D)** Judicate West supports this amendment and finds the wording and rationale well supported in the case law and within the real life practicalities of arbitration. The suggested wording of the standard seems to achieve the stated purpose. * * * **Proposed Change to Standard 8(a)** Judicate West opines that the allowance of 2 months is insufficient to allow most provider organizations to update their websites, as needed, and more time should be allowed. Attempting to capture all this information on a website is a huge job and will require additional employees to create and maintain it. * * * **Offers of Employment from Parties or Attorneys in a Pending Arbitration** *** * *** Developing the staff, personnel, and computer tracking to be in compliance with this proposed amendment will take Judicate West more than the two months allotted in the proposed amendments.	No response required Based on this and other comments, the committee has revised its proposal to recommend that the proposed amendments to the ethics standards take effect July 1, 2014.
John Kagel, Attorney-at-Law Palo Alto	As a footnote, I assume if adopted, this amendment [to standard 12] will not have retroactive effect?	Based on this and other comments, the committee has revised the proposal to clarify that the proposed amendments will not apply to persons who are serving in arbitrations in cases in which they were appointed to serve as arbitrators before July 1, 2014.
Office of the Independent Administrator	**Implementation Time** The Judicial Council asked if two months is sufficient time for	Based on this and other comments, the committee has revised its proposal to recommend that the proposed

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 3 – Application and effective date		
Commentator	**Comment**	**Committee Response**
By: Sharon Oxborough Independent Administrator Los Angeles, California	implementation. It is not. For the OIA, the Arbitration Oversight Board would have to meet to amend the current Rules, the OIA would create new procedures to implement the changes, and then inform all the neutral arbitrators on the OIA panel so they can implement the changes. Doing this in November and December would only add to the confusion and difficulties. The OIA needs at least four months to implement the amendments.	amendments to the ethics standards take effect July 1, 2014.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
ADR Services, Inc. By: Lucie Barron, President Los Angeles, California	This comment pertains to proposed Standard 12(d) regarding "consumer arbitrations." The proposed Standard requires an arbitrator to solicit parties who are appearing before him/her in one arbitration, for the purpose of seeking permission to accept assignment of a second arbitration, if the second arbitration involves a party, attorney or law firm that is also involved in the first arbitration. The proposal is at least ostensibly aimed at promoting arbitrator neutrality in consumer arbitrations. Arbitrator neutrality is an important aspect of any arbitral system, perhaps the most important; maybe rivaled only by other components of Due Process. However, the proposal under consideration will not promote arbitrator neutrality in consumer arbitrations. Instead it will tend to reduce the level of arbitrator neutrality. The reason the proposal would tend to reduce, rather than to promote, arbitrator neutrality in consumer arbitrations is that the proposed Standard would reduce the pool of arbitrators available for consumer arbitrations. Many arbitrators would opt out of consumer arbitration (for reasons which are discussed later below). The arbitrators opting out of consumer arbitrations would tend to be those most likely to be impartial, and least likely to be tempted to engage in biased conduct. These would be the busiest, most market-selected, most in-demand arbitrators. The elimination of this in-demand cohort of arbitrators from the available-arbitrator pool would reduce consumer choice and relegate consumer arbitrations to arbitrators less in demand. Arbitrators less in demand would tend to be more susceptible to temptations to curry favor by departures from strict neutrality. An in-demand arbitrator by	Based on this and other comments, the committee revised the proposal to: • Eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: o Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; o The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer; and o The arbitrator is not also required to disclose that offer or its acceptance under standard 7. • Exempt offers to serve as a labor arbitrator or to serve as a dispute resolution neutral without compensation from the requirement to inform parties in consumer arbitrations when an offer is made. • Revise the initial disclosure requirement to separately address consumer arbitrations and other

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Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	contrast will have no reason to depart from strict neutrality, and hence be more likely to act solely on the merits with complete Due Process. Thus reducing the pool of available arbitrators would not serve the cause of arbitrator neutrality. One reason many arbitrators would leave the pool of arbitrators available for consumer arbitrations is the dubious ethical quality of a requirement that an arbitrator "request a favor" from parties who are contemporaneously appearing before that arbitrator. Yet this is precisely what Standard 12(d) requires. Standard 12(d)(3) requires that the arbitrator must have "sought the parties' consent as required by this subdivision." The busiest and most ethically sensitive arbitrators would be reluctant to request favors from parties appearing before them. Instead, this group of arbitrators would simply cease accepting assignments on "consumer arbitrations." Hence this cohort of arbitrators – those most sought after in the marketplace – will be removed from the pool of arbitrators available for consumer arbitrations. This reduction in consumer choice would not benefit consumers, or the arbitral process generally. A second, perhaps even more telling reason why the proposal will reduce arbitrator availability, and hence tend to reduce the general level of neutrality, is that many arbitrators will decline to entangle their calendars in the administrative work, delays, regulatory risks, etc. which the proposal contemplates. The requirement to seek permission from parties in currently-pending "consumer arbitrations" would create a time-consuming case review requirement each time a new matter was proposed, followed by an unseemly requirement to solicit consents, followed by a waiting period, etc. The short-term needs of other cases – such as mediation needs arising shortly	arbitrations: o For consumer arbitrations, the disclosure would be required to indicate that the parties would be informed of any offer made while the arbitration is pending; and o In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
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	before trial, urgent discovery matters, etc. – could not be accommodated. Unless an arbitrator had a pressing need for consumer arbitration work, logic would dictate devoting efforts elsewhere. Many former arbitrators have already opted to confine their practices to other ADR processes even without additional burdens of the type being contemplated here. Further burdening the arbitration of "consumer arbitrations" will simply further reduce the arbitrator pool available for these arbitrations. ADR Services, Inc., supports the maintenance of the integrity of the arbitral process. The present proposal, however, even though perhaps well-intentioned, will not serve that objective. Instead, it will only tend to diminish the quality of services available for consumer arbitrations. Other, less harmful, procedures are available to preserve and promote the integrity of the arbitral system. Thus we urge that this proposal be rejected.	
California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California	Standard 7(b)(2). The CDRC does not disagree with the substance of the proposed revision to this Standard, but suggests that it would be more clear if revised to read as follows: If an arbitrator has disclosed to the parties in an arbitration that he or she will entertain offers of employment or of professional relationships from a party or a lawyer for a party while the arbitration is pending as required by subdivision (b) of Standard 12, the arbitrator is not also required to disclose such an offer to the parties in a pending arbitration, except that in a consumer arbitration the arbitrator must inform the parties in the pending arbitration of any such offer and seek their consent as required by subdivision (d) of Standard 12.	Based on this and other suggestions, the committee has modified the proposal to amend standard 7(b) to distinguish between the obligations in consumer arbitrations and other arbitrations.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	For the reasons discussed more fully below, the ADR Committee opposes the proposed amendment to Standard 12 that would require informed consent in consumer arbitrations before accepting offers of employment or new professional relationships from a party or a lawyer for a party in a pending arbitration. For the same reasons, the ADR Committee opposes the parallel disclosure that would be required under Standard 7(b)(2). If, however, the proposed amendment to Standard 12 is adopted, the ADR Committee believes the language of Standard 7(b)(2) should be clarified. As drafted, the same sentence discusses 1) consumer arbitrations; 2) non-consumer arbitrations; 3) informing parties in a consumer arbitration about an offer under Standard 12(d); and 4) the absence of the need to disclose the offer under Standard 7 (which would need to be disclosed under Standard 12 in a consumer arbitration but not a non-consumer arbitration). The ADR Committee believes this Standard would be clearer if it were divided into two separate provisions. The first would apply to non-consumer arbitrations and the second would apply to consumer arbitrations. * * * The ADR Committee opposes the addition of Standard 12(d) - Informed consent required in consumer arbitrations before accepting offers. Very little is said by way of justification for this informed consent provision in consumer arbitrations. As noted in the Invitation to Comment, this provision was not included in the proposal circulated for public comment in 2011. It was originally in a Judicial Council proposal in April 2002; however, it was removed when the Standards were amended in December 2002. One of the main reasons for its removal was	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: • Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; • The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer; and • The arbitrator is not also required to disclose that offer or its acceptance under standard 7. The committee has also revised the initial disclosure requirement to separately address consumer arbitrations and other arbitrations: • For consumer arbitrations, the disclosure would be required to indicate that the parties would be informed of any offer made while the arbitration is pending; and

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	the ability of the parties to disqualify an arbitrator under Standard 12(b) upon the disclosure that the arbitrator intended to accept new appointments and employment during the pendency of the arbitration. This was viewed as providing sufficient protection for the parties to the consumer arbitration. (See "Executive Summary and Origin," page 9, Drafter's Notes, page 31) The ADR Committee believes the informed consent proposal is flawed for several reasons. First, assuming the arbitration process has already begun and the arbitrator has been appointed, the parties are no longer able to disqualify the arbitrator using Standard 12(b). If only one party objects to the new business and declines to provide consent, any ruling against that party could be challenged during a vacatur proceeding by that party alleging that the ruling was a reflection of the arbitrator's ire at losing income as a direct result of that party's refusal to consent to the new business. The technical basis would be "arbitrator misconduct" or "a failure to disqualify or disclose bias against that (non-consenting) party because of changed circumstances." This potential basis for challenge is an ongoing characteristic of this informed consent scheme. Second, arbitrators involved with various consumer panels may be assigned numerous cases at various stages of processing at any given time, making it difficult at best to fully comply with all provisions of the proposed Standard. This would also present issues for arbitrators on a single panel. If, for example, an arbitrator is on the Kaiser panel, it would appear as though the arbitrator could not take any additional matters from Kaiser without obtaining the informed consent of all parties in all of	• In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	the pending Kaiser matters in which he or she is serving as an arbitrator. Third, arbitrators are required to disclose relationships and pending cases with the same parties and attorneys before they are appointed. To allow consumer parties to disallow arbitrators from seeking new business would have a chilling effect on encouraging qualified and popular arbitrators to handle consumer arbitrations. This Standard could literally require arbitrators to handle only one case at a time, regardless of how far along in the process that arbitration is. Its ultimate effect may drive experienced practitioners away from consumer arbitration and leave the resolution of these disputes to arbitrators who have very little business or are inexperienced. Fourth, there is the added complexity this proposal would place on arbitrators and providers. Assuming an arbitration hearing is in session when a new request for employment is made, the arbitrator must disclose the new offer within five days and then wait seven days for the parties to respond. If a recess is taken pending this decision, the arbitration process is delayed nearly two weeks. For every new offer during the pendency of the arbitration, there would be a separate twelve day delay. In addition, arbitration offers usually contain time limits for acceptance which are often shorter than this twelve day period. Consequently, the arbitrator would effectively be prevented from making a timely acceptance due to the Standard's informed consent schedule. In conclusion, this proposal was tried and rejected previously. The ADR Committee sees no new information that would justify its resurrection.	

SPR13-01

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Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
Consumer Attorneys of California By: Jacqueline Serna Associate Legislative Counsel	Amendment No. 4 Is a Step in the Right Direction, but does Not Go Far Enough: Currently, an arbitrator can accept an offer of employment on another matter from a party in a pending arbitration without disclosing that new relationship to the other party. (Standard 7(b)(2)). Amendment 4 would require arbitrators to obtain the parties' consent before accepting an offer of employment. While we applaud the enhancement of the current standards, we believe this amendment is insufficient. Although the amendment appears to give parties the freedom to determine whether they believe the prospective employment would create bias, parties could feel compelled to give their consent in fear of retaliation by their arbitrator. Simply requiring the consent of the parties may allow a strong potential for bias or retaliation if the party objects to the new employment of the arbitrator. A party that is uncomfortable with the arbitrator accepting an offer from another party during the pending arbitration would be forced to weigh their concerns over a potentially biased arbitrator, now employed by an involved party, against their fear of retaliation. Permitting these additional employment relationships forces parties to choose between two adverse possibilities and question the propriety of their arbitrator which many people are unwilling to do. Furthermore, consumers will generally be one-time participants in arbitration, but the party who formed the contract typically chooses the arbitration provider and is much more likely to be a repeat-player. Thus, the forming party, or their attorney, will almost always be the party offering further employment. This amendment creates an illusory consent requirement and	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. Although, under the proposed amendments, the arbitrator would not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer, under the existing standards, an arbitrator can be disqualified based on the initial disclosure that he or she will entertain offers of employment from a party or attorney while the arbitration is pending.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	does not allow parties to freely object to conflicts with their arbitrator.	
Ruth Glick Attorney at Law Burlingame, California	In regard to the amendments concerning consumer arbitrations, I have some concern about these new requirements being inadvertently directed to possible commercial arbitration situations or encouraging some commercial arbitrations to become consumer arbitrations to take advantage of the perceived benefit of giving a losing party additional opportunities to overturn an award. Standard 2(d) defines consumer arbitration as a contract drafted by the non-consumer party with the consumer party being required to accept it. Standard 2 (e) defines a consumer party as an individual who seeks, or acquires, including by lease, any goods or services primarily for personal, family or household purposes including, but not limited to, financial services, insurance and other goods and services as defined in section 1761 of the Civil Code, an enrollee or subscriber in a health care service plan, an individual with a medical malpractice claim, and an employee or applicant for employment in a dispute subject to an arbitration agreement. Yet, there is still a big gray area on what constitutes a consumer or commercial arbitration. For example, with the codification of cases on the inapplicability of standards to arbitrators in securities arbitrations, would very wealthy hedge fund investors, trading primarily in commodities, be considered consumers under this amendment? Second, would a CEO, or similarly other highly paid executive whose attorney negotiated an employment agreement with an arbitration clause, be considered a consumer? Third, would legal malpractice claims brought by individuals be considered consumer arbitrations? I suspect	The committee is not aware of current problems and does not anticipate that the proposed amendments will lead to future problems either with respect to appropriately identifying consumer arbitrations or with non-consumer parties attempting to characterize themselves as consumer parties or arbitrations as consumer arbitrations. The committee also notes that the proposed amendments to standard 12 provide that: "An arbitrator is not required to inform the parties in a pending arbitration about an offer under this subdivision if he or she reasonably believes that the pending arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration." (A similar provision also appears in standard 8) This allows an arbitrator to avoid confusion and gamesmanship by losing parties by asking parties, in advance of the arbitration, to indicate whether the arbitration is a consumer arbitration. If the arbitrator then reasonably relies on the parties' representation that it is not a consumer arbitration, the obligation to seek consent in consumer arbitrations under the proposed amendments to standard 12 would not apply.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	these might be considered consumer arbitrations by default or request, as I don't believe there has been any case law yet on these issues. However, I am concerned that the proposed amendment to Standard 12 requiring an arbitrator to obtain informed consent in consumer arbitrations before accepting any offer of other dispute resolution employment from a party or attorney in the arbitration would encourage litigation about consumer designation from losing parties seeking a new legal theory to overturn an award. In addition, requiring an arbitrator to seek informed consent during a pending arbitration will give opportunities to the parties to thwart the arbitration process while it is pending resulting in a waste of time, money and resources for all parties involved. Standard 12 already gives consumer parties and their attorneys the power to prevent an arbitrator from accepting offers of employment or new professional relationships with parties and attorneys in the arbitration. They can simply disqualify arbitrators who indicate they will accept such employment as provided in Standard 12(b). Furthermore, many arbitrators who hear employment cases also conduct labor arbitrations. In both the public and private sectors, large law firms whose attorneys also serve as advocates in employment arbitrations and mediations, often represent entities and unions in the labor arena. Even though the Ethics Standards exempt collective bargaining agreements, it is unclear to me what kinds of disclosures an arbitrator who is conducting a collective bargaining arbitration with a law firm that then represents a party in an unrelated employment arbitration or mediation must provide and from whom informed consent must be sought. Often these arbitrations are pending	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. Under standard 3, the ethics standards do not apply to arbitrations "conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements." Thus the obligation to seek parties consent established by the proposed standard 12 would not apply to arbitrators in such arbitrations. In addition, the committee has revised the proposal to provide that an arbitrator is not required to inform the parties in a pending arbitration about an offer if it is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
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	for many months so that overlapping cases might be more frequent than anticipated. For all these reasons, I think that the proposed amendment to Standard 12 would create more problems than it would prevent, especially since consumer parties already have sufficient protection against the possibility of possible arbitrator bias. They can simply, at the outset, disqualify any arbitrator who indicates a willingness to accept additional employment from the parties or attorneys.	labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.
Hon Arnold H. Gold (ret.) Studio City	I am deeply troubled by the proposal to add to the Ethical Standards a requirement of disclosure of future offers of employment where the arbitrator's initial disclosure stated that he or she will accept future offers of employment. (See proposed revisions to Standard 7(b)(2) and Standard 12(d).) I am even more troubled by the proposed addition of a requirement that the consent of the parties to the pending arbitration be obtained before an arbitrator whose initial disclosure stated that he or she will accept future offers of employment in fact proposes to accept a future offer of employment. With respect to the proposed new <u>disclosure</u> requirement: A. I am unaware that any substantial problem has arisen under the existing Standard, justifying imposing still another layer of administrative chores on the arbitrator. B. The language of the existing standard and the language of the disclosure of willingness to entertain future offers are quite clear, and\ it is also clear (notwithstanding the comment to the	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: • Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; • The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer;

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
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	contrary in the next-to-last sentence of the first paragraph on page 4 of the Invitation to Comment) that no existing Standard requires disclosure of future offers where willingness to entertain future offers is disclosed. If a party is unwilling to risk that a future employment might prejudice the arbitrator, that party can simply exercise his or her right under Standard 12(b) to disqualify the arbitrator at the outset. The proposed new consent requirement will wreak much mischief and is unnecessary: A. A party who doesn't like the way a pending arbitration is progressing can simply withhold consent, unfairly penalizing the arbitrator, in a situation (by far the usual situation) where the new employment offered is extremely unlikely to cause arbitrator prejudice. B. Once the disclosure is made, if legitimate grounds for disqualification appear the party already has the right, under Standard 10(a)(5) and 10(c), to proceed to disqualify the arbitrator. I believe that it is clear from the absence of any disclosure requirement in the existing Standards that an arbitrator who indicates at the outset that he or she will accept future offers of employment from a party or attorney involved in the current case need not disclose those future offers. However, if the drafters of the proposed new/amended Standards continue to be concerned that the reader of the Standards might not realize that, that problem can be solved by simply amending the standards to impose a requirement of disclosure of future offers - but again, without imposing a consent requirement.	and • The arbitrator is not also required to disclose that offer or its acceptance under standard 7.

SPR13-01

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Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
JAMS By: Jay Welsh Executive Vice President, General Counsel JAMS	**Offers of employment from parties in a pending arbitration.** First of all the use of the word "employment" is misleading. Really what we are talking about is the offer or acceptance of additional ADR related cases from either party. At the present time there is a safe harbor rule, in that if the arbitrator notifies the parties at the outset that she intends to accept other matters during the pendency of the case in question, the parties can make the decision at the outset whether they want to proceed with that arbitrator on that basis. As we understand the proposed amendment, this system would be continued for non consumer arbitrations but as to consumer arbitrations there is now the introduction of the notion of a mandatory disclosure of the new case and informed consent. We suggest that this only apply to *in pro per* consumers and not to consumers represented by counsel. Clearly, counsel should be able to agree to the safe harbor concept. We should note that this requirement potentially could have a chilling effect on the most qualified neutrals that have a busy practice in that many will not want to limit themselves in the manner suggested by the proposed amendment.	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment.
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Offers of Employment from Parties or Attorneys in a Pending Arbitration** Judicate West understands the proposed amendment attempts to address a concern of the appearance of bias in favor of those who might bring repeat business to an arbitrator. The concern is not about "offers of employment," but acceptance of additional ADR related cases from either party or counsel. The real problem is the proposed language in Standard 12, the new requirement of a mandatory disclosure of a new case and	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to

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Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
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	informed consent. Although the background of the proposed amendment does not address any litigation specifically, in our reading of recent litigation, the courts have routinely found that an arbitrator who competently informed the parties that he/she would be accepting other matters during the arbitral proceedings, and then did accept an unrelated, separate matter for a separate mediation or arbitration was not biased and had not erred. In essence, this proposed change is to attempt to eradicate the appearance of bias, not actual bias. Unfortunately, it is highly likely that this type of requirement, if put into effect would create actual bias. Currently, if an arbitrator will accept additional ADR related work he/she must notify the parties and counsel of that fact and then each party and their counsel may choose whether or not to accept that arbitrator at the beginning, before time and money have been spent in the process of arbitration. With the proposed changes, it is foreseeable that a party could prohibit an arbitrator from conducting an unrelated arbitration or mediation where no actual bias had existed. In such a situation would not the party be concerned that the arbitrator may very well end up biased against that party? If the arbitrator later decided against that party, wouldn't they then move to vacate the award for bias? Also, one must question which party is going to interfere in their arbitrator's conducting future arbitrations in an unrelated matter and not be concerned that the arbitrator might not be happy with that party in the present case. A party may feel compelled to give informed consent for an arbitrator to take another matter to avoid	requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: • Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; • The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer; and • The arbitrator is not also required to disclose that offer or its acceptance under standard 7.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
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	irritating the arbitrator. Application of this new standard would create the appearance of bias as even a signed informed consent would be suspect whether that party really wanted to give consent or felt unstated pressured to do so. Thus, a party's use of this new rule, whether they give informed consent or not, may very well result in actual bias. It is suggested that the current disclosures and notifications are sufficient to eliminate the appearance of bias and actual bias, and the current proposed amendment, if utilized, will create actual bias. In addition, the process of tracking down parties and attorneys, obtaining informed consent, and keeping track of all that information for each case for each arbitrator is an administrative nightmare and will increase costs for arbitration many times over. Developing the staff, personnel, and computer tracking to be in compliance with this proposed amendment will take Judicate West more than the two months allotted in the proposed amendments. In addition, it is unclear whether arbitrations regarding motor vehicle accidents are included within the consumer arbitrations that require the informed consent and additional disclosures. It seems preposterous that an arbitrator handling one small matter for a large insurance company that is represented by a large attorney firm, may be precluded from taking on additional unrelated matters for a significant number of unrelated parties. The burden on the arbitrators and the provider organization seems unreasonably high for an attempt to eliminate a fear of a perception of bias.	

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
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	Judicate West, as a provider organization, coordinates the business end of assisting the parties with choosing arbitrators and calendaring, removes the neutrals from the process and effectively eliminates bias. Introducing the measures prescribed in this proposed amendment will create bias where none currently exists.	
John Kagel, Attorney-at-Law Palo Alto	This letter has two purposes with respect to the Standard 12 proposed amendment: The first is essentially a practical inquiry. The second is to point out either the purpose or the effect of the proposal. By way of background I have been a full time neutral arbitrator and mediator for over 40 years. I am a past president of the National Academy of Arbitrators, and my practice largely but not solely, deals with collective bargaining agreement disputes. I also served on the original "Blue Ribbon" panel that vetted the original Standards. As you know, collective bargaining agreement arbitrations are not covered by the Standards. (Standard 3(b)(2)(h)). Arbitrators of those disputes are covered by standards of professional conduct governed and enforced by the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the American Arbitration Association and, it is my recollection, also adhered to by the California State Mediation and Conciliation Service. My practical question is this: Assuming, as I have been, appointed to a consumer arbitration dealing with employment issues as defined in Standard 2(d) and (e)(4) and I have given proper notice that I will accept offers to serve as a dispute	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: • Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; • The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer; and • The arbitrator is not also required to disclose that offer or its acceptance under standard 7.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	resolution neutral in another case where the lawyers' law firm in the consumer arbitration case may be involved. Such a case might last nine months or a year, and might extend longer if further proceedings are needed on attorneys' fees, or illness of a party. Assume also the employer is represented by a large law firm such as Littler Mendelson or Seyfarth Shaw, or the individual is represented by a large firm such as Weinberg, Roger and Rosenfeld. In some collective bargaining agreements I am a named arbitrator where those firms serve as counsel Does the proposed standard mean that any collective bargaining case involving those law firms which appoints me as arbitrator in the normal course of my practice must not only be disclosed, but also I cannot accept the appointment without the consent of the parties to the on-going consumer case? The answer speaks for itself, for I will have no knowledge or control over whatever vagaries those parties may consider in giving such permission. And, if the proposed amendment means that they have such a veto, and I hope you will tell me if they do in this example, I will opt out of any consumer cases. This leads to the second point of this comment. I am no fan of consumer arbitration because I strongly believe that arbitration should be a two-sided voluntary process. But, since consumer arbitration exists I have taken such cases either on a *pro bono* basis on request of the American Arbitration Association, or otherwise served, on the grounds that the parties might be better off with an experienced neutral than otherwise. But the effect, as shown by my example above, will be to drive experienced arbitrators with busy practices away from consumer arbitration as defined, and that seems to be the	The committee has also revised the proposal to provide that an arbitrator is not required to inform the parties in a pending arbitration about an offer if it is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	purpose of the amendment. Consider the proposed reason for the amendment stated only in the passive voice, "concerns have been expressed…it has been suggested…" As noted, this proposal was eliminated from the original draft in 2002 and there has been a decade of experience since. Apparently, there has been no reported case concerning it during that time. So who has the concern and who has made the suggestions? What experience are they citing? If substantive, I would like to know, and "they" may be right. But without that information, the net effect may very well be as I predict. It may be a good thing to get rid of consumer arbitration as defined, but that should be done directly, not drive it into a process that becomes moribund, but on the way there will produce some shoddy results when experienced, non-venal arbitrators are excluded from the process.	
Office of the Independent Administrator By: Sharon Oxborough Independent Administrator Los Angeles, California	The OIA does not support changing standard 12 to require neutral arbitrators to allow parties in current cases to prevent them from accepting new work with the same parties. If that change is made, additional refinements are required, including deleting language in standard 7(b)(2) and standard 12 that refers to "informed consent." * * * **Standard 7(b)(2) Offers of employment or professional relationship** The new language in standard 7(b)(2) refers to neutral arbitrators having "informed the parties in the pending arbitration about any such offer and sought their consent as required by subdivision (d) of standard 12." (Emphasis added.) Subdivision (d) of standard 12, however, does not require neutral arbitrators to seek the consent of the parties. Rather it requires the neutral arbitrators to allow the parties to object.	Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: • Receiving or accepting that offer does not, by itself,

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	The language should therefore be changed to "has complied with subdivision (d) of standard 12." (Similar language occurs in standard 12, subdivisions (d) and (d)(3) and should be similarly changed.) **Standard 12 Duties and limitations regarding future professional relationships or employment** The OIA strongly urges the Judicial Council not to amend standard 12 and require that neutral arbitrators provide parties in open cases the opportunity to object to neutral arbitrators taking new cases with the same parties or attorneys. As discussed below, the reasons expressed for changing standard 12 are extremely speculative and amount to confusion, which could be cured by making the language in standard 12 or neutral arbitrator disclosures clearer. Moreover, the change would, in our opinion, accomplish little good but would encourage gameplaying by attorneys, cause neutral arbitrators to avoid accepting cases with pro per claimants, and delay cases for about 20 days. If, however, the Judicial Council decides to go forward with the change, further changes are necessary: 1) all references to "informed consent" must be deleted; 2) the standard must detail what information the neutral arbitrator's notice to the parties is to include; 3) the standard should add a section that states if a party serves a timely objection, the neutral arbitrator cannot accept the new case unless he or she recuses him or herself from the prior case; and 4) the time period when neutral arbitrators have to provide notice should be changed as it currently lasts until 30 days after an award is made. The rationale for the proposed change is, according to the Invitation to Comment, page 4,	constitute corruption in or misconduct by the arbitrator; • The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer; and • The arbitrator is not also required to disclose that offer or its acceptance under standard 7.

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	"Among other things, it has been suggested that it may be unclear to parties that an arbitrator who has disclosed that he or she will entertain such offers of employment will not subsequently inform the parties if and when he or she actually receives such an offer. It has also been suggested that it is difficult for parties to determine whether or not they are comfortable with their arbitrator entertaining or accepting offers of employment from the other side in an arbitration without knowing the nature of such offers." Has anyone actually commented that he or she was confused? Pro pers in the OIA system have disqualified neutral arbitrators because of the current disclosure of taking future work, so it can work. But if the Judicial Council believes that the current standard or disclosure is confusing, the solution is to clarify the standard, not to change the present disclosure system to an objection to new work system, for the reasons discussed below. A new system will obviously delay the selection of the neutral arbitrator in the new case for 22 days, given the time prescribed in the standard as well as statutory time for mailing. Putting a neutral arbitrator in place quickly is the key to the successful administration of an arbitration. The new system also makes it possible that parties in the new case will not get the neutral arbitrator they want because a party in the first case objects or, more likely, because an attorney for the recurring party is reluctant to agree to a neutral arbitrator if he or she has an open case. In about 30% of OIA cases, the neutral arbitrator is jointly chosen by the parties deciding upon a particular arbitrator.	

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	The OIA does not believe, however, that very many attorneys would actually object to a neutral arbitrator taking a new case: the neutral arbitrators who serve on more than one case at a time do so because they are popular with both claimant and respondent attorneys. Moreover, attorneys are loath to take actions that they see as potentially upsetting to neutral arbitrators. (For example, we have been told by attorneys who are upset by a neutral arbitrator in a case that they do not want to submit a negative anonymous evaluation because the neutral arbitrator might discover it.) During the six months that the notice and objection system operated in 2002, notices were sent in 269 OIA cases: 1 party objected. Thus, it is unlikely that attorneys who do not disqualify a neutral arbitrator who discloses that he or she might take future work with a party would subsequently deny the neutral arbitrator the ability to take such work. There is, however, one obvious exception to this rule: if an attorney believes that a neutral arbitrator is not sympathetic to his or her case, that the hearing is going badly, or - given the definition of "conclusion of the arbitration" - the award is against the party, that attorney would have an incentive to object to the neutral arbitrator accepting a new case. The reason to object is that neutral arbitrator very likely would resign from the first case to take the second case. After all, if the neutral arbitrator remained on the first case, the objecting party could easily claim that the neutral arbitrator is biased because the party objected. Thus, an attorney could, for purely tactical reasons, object to a neutral arbitrator taking new work and force a new neutral arbitrator in his or her case to be selected, thus succeeding in gaming the system and slowing the results.	

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	Pro pers would be much more likely to object to neutral arbitrators taking new work. Approximately 25% of OIA cases involve pro pers. Currently, 24% of OIA neutral arbitrators will not accept cases involving pro pers because they can involve much more work. The OIA believes that many more neutral arbitrators would refuse such cases if standard 12 is changed. These are the reasons for not changing standard 12. If the Judicial Council decides to require neutral arbitrators to inform the parties of offers of new work and give them the chance to object, the following changes are needed: 1. "informed consent" needs to be removed from subdivision (d). It could be replaced with "the arbitrator may not accept any such offer until the time for the parties to object in the current arbitration has elapsed." 2. "the parties' consent" in subdivision (d)(3) needs to be removed. It could be replaced with "if an arbitrator has complied with this subdivision, the arbitrator is not required to disclose that offer under standard 7." 3. "to obtain the informed consent of the parties" in the drafter's notes for standard 12 must be deleted. It could be replaced with "to notify the parties of the offer and of the parties' right to object." 4. The obligation to inform the parties and the parties' right to object exists until 30 days after the neutral arbitrator has written the award. (See definition of "Conclusion of the arbitration"	The committee respectfully disagrees with this suggestion. During the 30 days following service of an award, the arbitrator retains the authority to correct that

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	standard 2(c)(1).) This makes no sense. 5. Subdivision (1) requires the neutral arbitrator to "notify the parties in writing of the offer," without specifying the content of the notice. Given that unsuccessful parties will claim that the notice was not valid because it did not provide enough information, the Judicial Council must be specific. Is it enough to say "I have been asked to serve as a neutral arbitrator in a new case involving party X or attorney Y"? 6. A new subdivision should be added that specifies that if a party serves a timely objection on the neutral arbitrator, the neutral arbitrator may not accept the new offer unless the neutral arbitrator resigns from the current arbitration.	award. The concerns about the potential bias or appearance of bias from offers of employment from a party or attorney in such an arbitration thus remain during that 30-day period. Based on this and other comments, the committee has modified the proposal to indentify the information that must be included in an arbitrator's notice regarding an offer. As noted above, the committee has revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to offers.
Orange County Bar Association By: Wayne R. Gross, President Newport Beach, California	As to offers of employment in a pending arbitration, it is suggested that language should require arbitrators in any arbitration, be it consumer or otherwise, to obtain the written consent of the parties.	Based on other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment.
Thomas D. Weaver Tustin, California	It appears that an arbitrator must obtain informed consent from parties/attorneys in a pending arbitration, before accepting employment as a neutral, even if the subsequent employment is as a Mediator. Many arbitrators are also mediators, and in that regard generally handle many more mediations than	Based on other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for

Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment		
Commentator	**Comment**	**Committee Response**
	arbitrations. I'm not sure whether applying the consent rule to subsequent employment as a neutral Mediator is necessary to protect the arbitration parties in the same manner as requiring consent for a subsequent Arbitration with one of the current parties/attorneys. Also, should "informed" consent be defined? Just what does that mean? Is there some special information which has to be conveyed to the current parties/attorneys other than the fact that you have been asked to be a neutral in a new matter with one of the current parties/attorneys? Generally, upon initial contact, the neutral knows very little, if anything, about the case for which he is being asked to serve.	a party in that arbitration while the arbitration is pending – the "consent" aspect of the proposal that was circulated for public comment. Based on this and other comments, the committee has modified the proposal to indentify the information that must be included in an arbitrator's notice regarding an offer.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	Standard 7(c) - Time and manner of disclosure. The ADR Committee supports the proposed change. Standard 7(d) - Required disclosures. The ADR Committee agrees with this rewording of subdivision (d) to clarify that the Standard applies to the proposed arbitrator as well as the appointed arbitrator. The proposed change reflects the ongoing duty to disclose new information of which the arbitrator becomes aware after the initial disclosures. * * *	No response required
	The ADR Committee supports the following Standard 7 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existent Standards. These proposals are: Standard 7(d)(1) - Family relationships with party. Standard 7(d)(5) - Compensated service as other dispute resolution neutral. * * *	No response required
	The ADR Committee supports the following Standard 7 proposals without further comment. They reflect renumbering and syntax modifications without changing the substance of the Standards. These proposals are: Standard 7(d) (10), (11), (12), (13), (14) and (15). * * *	No response required
	The ADR Committee questions part of the proposed amendment to the Comment to Standard 7. This extensive Comment describes the spirit as well as the precise provisions of the amended Standard dealing with disclosures. The ADR Committee believes, however, that the example used on page	The committee agrees with this comment and has modified the proposed amendment to the advisory committee comment to eliminate the specific example of a matter not listed in the subparagraphs of standard 7(d) that might need to be disclosed under the over-arching

Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
	23 at lines 33 – 38 conflicts with and potentially expands the disclosures required in the Standard itself, and creates an ambiguity regarding the significance of the examples listed in the Standard. Under Standard(d)(2)(B) the arbitrator would need to disclose that his or her spouse or domestic partner was associated in the practice of law with a lawyer in the arbitration within the proceeding two years. Yet the proposed Comment indicates that disclosure would be required if the arbitrator's spouse had been in the private practice of law with the lawyer in the arbitration for 30 years until 3 years before. The ADR Committee believes this Comment is potentially problematic. Standard 7(d) generally requires disclosure of "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be impartial." The Standard then goes on to list specific examples requiring disclosure, thereby drawing certain bright lines in the Standard itself. As drafted, the proposed language appears to draw a separate bright line in the Comment. Although an arbitrator might conclude (or a court might ultimately find) that disclosure of 30 years of practice until 3 years before needs to be disclosed, to suggest this in the Comment as a defined principle which must be recognized in all situations undermines the "bright line" disclosure requirements in the Standard itself. There are other situations that might need to be disclosed under Standard 7(d), even though they are not specifically identified in the various provisions of that Standard. This proposal seeks to emphasize that point by specifically noting in the Comment that "the fact that a particular interest, relationship, or affiliation present in a case is not specifically enumerated in one of the examples given in these subparagraphs does not	disclosure standard.

Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
	mean that it must not be disclosed." That should suffice to make the point. The proposed Comment, by using one specific example, blurs the distinction between the Standard and the Comment. The ADR Committee further believes the examples used in the Standard should provide a fairly definite line between what should and what need not be disclosed – leaving the specific to control over the general – and that the "examples" should not effectively be extinguished by an amorphous general rule.	
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Initial and Subsequent Disclosures** Judicate West understands the desire for disclosure of bias where and when it might occur. The problem is that the language suggested, "including, but not limited to" is, again, very broad and opens up the flood gates of litigation within litigation. Judicate West has already been subject to these types of tactics, when a party is unhappy with the arbitral proceedings, and so sues the arbitrator and provider organization in an effort to create actual bias against that attorney. The goal of ADR is to provide swift resolution. Ambiguity and overly broad loopholes that allow for gamesmanship do not serve justice and the need that ADR fills. Again, since the information to be disclosed is not defined in this amendment, the method for satisfactory disclosure is completely undefined. * * * **Standard 7d(5)** Judicate West approves of the deletion of those few words: "but does not include any case in which the arbitrator concluded his or her service before January 1, 2002."	This proposed amendment is intended only as a clarification, not a substantive change. The initial sentence of standard 7(d) currently provides that a proposed arbitrator "must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial, *including all of the following*" (emphasis added). Thus the current language already indicates that the paragraphs that follow enumerate examples of matters that must be disclosed under this general standard, not an exclusive list of the matters that must be disclosed. The proposed addition of "not limited to" is merely intended to make this as clear as possible. No response required

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
	Proposed Change to Comment to standard 7 The proposed language is overly broad, vague and ambiguous. The judicial Council is opening the floodgates of litigation and the allowing the losing party another metaphorical bite at the apple. The proposed amendment does not state what constitutes sufficient disclosure and what reasonable consequences a party can achieve for mistake in failure to disclose?	In response to the comments of the ADR Committee of the State Bar of California, above, the committee and has modified the proposed amendment to the advisory committee comment to eliminate the specific example of a matter not listed in the subparagraphs of standard 7(d) that might need to be disclosed under the over-arching disclosure standard. The committee's view is that the amendments to the advisory committee comment in the revised proposal are simply clarifying changes that do not alter the substance of the comment or impact the substance of the disclosure obligations established by the standard.
Luella Nelson Arbitrator/Mediator	I write to add my comments to those already submitted by my colleague, John Kagel, which I heartily endorse and will try not to repeat. The "Ethics" standards should be written narrowly and focused on identified problems. Expansion in the manner done here is unwise and unwarranted by the underlying legislation for the reasons pointed out by Mr. Kagel, among others. By way of background, I have been a full-time arbitrator and mediator since 1986. At different times over the years, I have served as the Chair of the Labor and Employment Law Sections of the State Bar of California, the Bar Association of San Francisco, and the Oregon State Bar. Most of my work arises under collective bargaining agreements. My practice also includes employment arbitration in other states -- but I have declined all such cases in California ever since the "Ethics" standards went into effect, because those standards are unreasonable and administratively unworkable for a full-time neutral (and because life is short).	The Judicial Council's authority with respect to adoption of the ethics standards for neutral arbitrators is established by Code of Civil Procedure section 1281.85. That code section provides, in relevant part, that the Judicial Council must adopt: "ethical standards for all neutral arbitrators . . .. These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter." Thus, the Judicial Council does not have the authority to adopt standards directed at parties in arbitration proceedings nor to limit the disclosure obligations established by the applicable chapter of the Code of Civil Procedure [ch. 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95]. In large part, the disclosure obligations set out in standard 7 simply consolidate and integrate the disclosure requirements already applicable to arbitrators in contractual arbitrations under Code of

Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
	One of many difficulties with the "Ethics" standards as written, and as proposed to be revised, is that they place the burden of disclosure on the participant who is least likely to know of the purported conflict -- the arbitrator. They place no burden on the parties or their advocates to notify the arbitrator (or each other) of pertinent facts or changes in those facts. They also presume a conflict when no reasonable person would believe that a conflict exists. If these "Ethics" standards were designed to do anything other than make arbitration expensive and non-final, they would put the burden on the participants who have the most opportunity to learn and disclose pertinent details at the time the arbitrator is proposed and whenever the facts change during the pendency of the arbitration. To avoid gaming the system by a party or advocate who believes things didn't go well at hearing, they would also place a greater burden on the party seeking recusal where the conflict is theoretical or remote; where the purported conflict arises so far into the process that permitting one party to force a recusal would be inequitable; or where the non-disclosure was inadvertent or based on the arbitrator's lack of personal knowledge of the purported conflict. Since the actual effect of the "Ethics" standards is to make arbitration impossibly expensive and non-final, and since I have plenty of other work that keeps me from having the leisure time to chase down purported conflicts, I decline any case that remotely smells of a "consumer" arbitration (as defined in the "Ethics" standards) unless I receive written assurances from both parties that it is not such an animal. I am only one example, from many, of full-time neutrals who have	Civil Procedure section 1281.9 and, though a cross-reference in that section, under section 170.1, and standards applicable to arbitrators in the judicial arbitration program, with which Code of Civil Procedure section 1281.85 requires the ethics standards must be consistent. The committee also notes that the ethics standards do not require that arbitrators know about every relationship with associates of lawyers in the arbitration. Standard 7 requires disclosure of matter of which the arbitrator is "aware." Subdivision (c) of standard 9, which addresses the arbitrator's duty of inquiry with regard to matters that must be disclosed, provides that: "An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships with any lawyer associated in the practice of law with the lawyer in the arbitration that are required to be disclosed under standard 7 by: (1) Informing the lawyer in the arbitration, in writing, of all such relationships within the arbitrator's knowledge and asking the lawyer if the lawyer is aware of any other such relationships; and (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration.

Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
	found it inadvisable to take employment arbitration cases in California because of the "Ethics" standards. I know this because, after declining an employment arbitration selection a few years after the "Ethics" standards went into effect, the advocates asked if I could suggest any full-time neutrals who were still taking employment arbitration cases in California. In an attempt to accommodate that request, I sent an e-mail out to about 40 California labor arbitrators whom I knew or believed had done employment arbitration in the past. 4 responded they were still taking such cases (2 of those no longer do). The others said "not any more" or didn't respond. For an example of the problem for full-time neutrals posed by the "Ethics" standards, let us assume that I still heard employment arbitrations in California in addition to my labor arbitration/mediation practice. Let us further assume that, within the disclosure period, I had employment cases with named partners of Dewey, Cheatham & Howe, a boutique employer-side law firm. However, assume I have not had a case with anyone in DC&H in the past year. Within that year, DC&H dissolved. Dewey is now of counsel to Littler Mendelson; Cheatham has divorced, now uses her maiden name, and is now a partner at Seyfarth Shaw; after gender reassigment surgery, Henry Howe has changed the first name to Helen, and she is a partner at Morrison Foerster. [I select these firms' names only because they are large San Francisco Bay Area employer-side firms, not out of any knowledge about their attorneys' personal or professional histories, nor whether there is a transgender attorney in California named Henry or Helen Howe.] Let us further assume that I received no individual mailed announcements of these changes, and was out of town when the news of the DC&H law firm dissolution was bandied	

Standard 7 – Disclosure - General		
Commentator	**Comment**	**Committee Response**
	about. (That is often the case; I usually learn attorneys have changed firms when I encounter them at professional conferences and get their new cards. So far, I have not learned of any gender reassignments in that manner.) Under the above scenario, the "Ethics" standards would require me to disclose my past cases with DC&H if I served as an arbitrator in employment cases with Littler, Seyfarth, or Morrison -- even if none of the former DC&H partners had any involvement in the new or pending cases, and even if I was personally unaware of the DC&H dissolution and diaspora. The attorneys at the Littler, Seyfarth, or Morrison firms would have no obligation to alert me that lawyers with whom I have had cases in the past are now with their firms. That is an irrational division of the responsibility for disclosure. Law firms maintain conflicts databases, and incoming attorneys add that data in the process of switching law firms. Unless the arbitrator changes his/her name, law firms can easily determine whether anyone already in the firm or later joining the firm has had a case with that arbitrator. The same cannot be said of arbitrators' access to information about law firm personnel changes. Is it reasonable or logical to expect an arbitrator to conduct recurrent checks of the rosters of attorneys at each law firm with whom s/he has pending or new cases while the case is pending? (Life is short.)	

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

Standard 7(d)(2), (8) and (9) – Disclosure of family relationships with lawyer in the arbitration		
Commentator	**Comment**	**Committee Response**
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the following Standard 7 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existent Standards. These proposals are: • Standard 7(d)(2) - Family relationships with lawyer in the arbitration. • Standard 7(d)(8) - Employee, expert witness, or consultant relationships. The ADR Committee questions the proposed amendments to Standard 7(d)(9) - Other professional relationships. In each of the previous disclosures, there is a "within the preceding two years" limitation placed on the disclosures. This limitation is absent from the catch-all category of "Other professional relationships." It is not clear whether the intent is for this Standard to require a disclosure of a professional relationship that goes back even beyond the typical two year limit, and whether the disclosures in this category are in fact meant to be life long. There is no stated reason and appears to be no justification for treating "other professional relationships" in a manner that differs from the treatment of the specified professional relationships. The ADR Committee believes this category should be treated in the same manner as the other disclosures, and that the "within the preceding two years" language should be added to Standard 7(d)(9).	No response required The Judicial Council's authority with respect to adoption of the ethics standards for neutral arbitrators is established by Code of Civil Procedure section 1281.85. That code section provides, in relevant part, that the "may expand but may not limit the disclosure and disqualification requirements established by this chapter." Code of Civil Procedure section 1281.9 within this referenced chapter (ch. 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95), requires that arbitrators disclose, among other things: "Any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party" (Code Civ. Proc., §1281.9(a)(6)). This statute does not limit the obligation to disclose professional relationships between a proposed neutral arbitrator or a member of the arbitrator's immediate family and a party or lawyer for a party to those within the preceding two years. Under Code of Civil Procedure section 1281.85, the Judicial Council does not have the authority to so limit this statutory disclosure obligation.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 7(d)(2), (8) and (9) – Disclosure of family relationships with lawyer in the arbitration		
Commentator	**Comment**	**Committee Response**
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Disclosure of Relationships with a Lawyer in the Arbitration** Judicate West supports this amendment in theory. If an arbitrator or a Judge knows of a relationship between himself/herself, his/her spouse, his/her domestic partner and a lawyer in the arbitration then those relationships should be disclosed. Judicate West finds the limitation to relationships within the last two years rational and workable. The problem, again, is in defining sufficient disclosure. **Proposed Change to Standard 7(d)(8)** Judicate West, again, is concerned about the real life application of these amendments. What is sufficient disclosure and what reasonable consequences for mistake in failure to disclose? If an estranged niece or grandchild of an arbitrator worked for a company a year before, could that fact then be used as grounds for vacating and award?	No response required The committee notes that the ethics standards do not require that arbitrators know every activity of their extended family members. Standard 7 requires disclosure of matter of which the arbitrator is "aware." Subdivision (b) of standard 9, which addresses the arbitrator's duty of inquiry with regard to matters that must be disclosed, provides that: "An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships or other matters involving his or her extended family and former spouse that are required to be disclosed under standard 7 by: (1) Seeking information about these relationships and matters from the members of his or her immediate family and any members of his or her extended family living in his or her household; and (2) Declaring in writing that he or she has made the inquiry in (1)."

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 7(e)(1) – Disclosure of professional discipline		
Commentator	**Comment**	**Committee Response**
California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California	Standard 7(e)(1). The CDRC supports this proposed standard as revised from the version circulated in 2011. It believes that parties should have the information required as relevant to evaluating the personal integrity of an arbitrator. Some individuals question whether the standards should require disclosure of personal history having no bearing on bias. However, a precedent for this type of disclosure was established in the original Standard 7(e)(13) which requires disclosure of membership in an organization that practices invidious discrimination, even if the membership does not indicate any potential bias in the case at hand.	No response required
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the new provision, Standard 7(e) - Other required disclosures.	No response required
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Disclosure of Professional Discipline** In Haworth v. Superior Court of Los Angeles (2010) 50 Cal.4th 372 the court pointed out that "[n]either the statute nor the Ethics Standards require that a former judge or an attorney serving as an arbitrator disclose that he or she was the subject of any form of professional discipline." (Id. @ 381.) Judicate West supports this amendment to require disclosure of public discipline by the State Bar in concept, but has concerns about the wording and the effect of the proposed ambiguous language within the real life practicalities of arbitration. The term "disclosure" is used throughout these proposed amendments. It is unclear what are the standards for disclosure and how little or much must be disclosed to be in compliance with the requirement. For example, if a list of disclosures for a	In response to this comment, the committee has revised the proposal to provide additional guidance concerning the minimum information must be provided in a disclosure concerning professional discipline. An

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Standard 7(e)(1) – Disclosure of professional discipline		
Commentator	**Comment**	**Committee Response**
	neutral lists "public discipline" with a reference to the state bar web site, is that sufficient disclosure? If more is required, how much more? Without clarity and specificity, the door is opened for game playing attorneys, unsatisfied with a decision to seek vacatur. For Judicate West, records of professional discipline are not typically a concern, but the combined ambiguity and increased burdens on the arbitrators will only serve to decrease surety for the arbitrators of whether they are in compliance and decrease their willingness to fill these much needed positions. In addition, Judicate West also has concerns about the overly broad terms used in section (A) of this proposed amendment. The revocation of a license is not limited to the practice of law, is not limited in time, and is not limited to relevant jurisdictions. For example, if someone had a carpenter's license removed for political or monetary reasons in another country more than 40 years before, the proposed language of this amendment would require disclosure. It is difficult to conceive of any situation where that fact may be relevant and certainly, would not, in and of itself, indicate incompetency to practice law in California. The language of this proposed amendment is overly broad and invites vacatur and litigation where none is needed. Also, it would seem logical that all arbitrators and Judges should have their public discipline be public if it could affect the appearance of bias in our judicial system. It is unclear whether this amendment applies to court-appointed arbitrators. Judicate West has deep respect for sitting Judges, Retired Judges and members of the California bar that all work in different ways to promote justice. Judicate West recommends that the requirements and burdens, for this and all of the	arbitrator would be free to, and may want to, provide additional information to assist parties in determining whether to disqualify an arbitrator based on such a disclosure. Because the expertise sought by arbitration users and the professional backgrounds of arbitrators vary considerably from arbitration to arbitration, the committee's view is that arbitrators should disclose not just disbarments, but any license revocation. This permits the parties to determine the relevance of the disclosed information given the particular circumstances of the dispute. Information about public discipline imposed on California judges from 1961 to the present is available on the website of the Commission on Judicial Performance at: http://cjp.ca.gov/pub_discipline_and_decisions.htm. The ethics standards for neutral arbitrators in contractual arbitration do not apply to arbitrators serving the judicial arbitration program. Those arbitrators are subject to a separate set of ethical

Standard 7(e)(1) – Disclosure of professional discipline		
Commentator	**Comment**	**Committee Response**
	proposed amendments, be the same for retired judges who work as neutrals, as they are on currently sitting Judges. The terms of this proposed amendment should be narrowly defined to address the concern brought up in Haworth, to make sure parties know if an arbitrator they are selecting has been subject to public discipline for conduct associated with the practice of law.	obligations established by the Code of Judicial Ethics, California Rules of Court, and local court rules. Although neither the Code of Judicial Ethics nor California Rules of Court require disclosure of professional discipline to the parties in a judicial arbitration, the local rules of many courts require that this information be provided to the court. The court then uses that information to determine whether to permit the individual to serve on the court's panel of arbitrators. Similarly, potential judges must provide such information to the Governor in the application for appointment as a judge.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

Standard 8(a) - Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California	Standard 8(e). Relief from the burden of disclosing information to which an arbitrator does not have access, as provided by Standard 8(e), depends on arbitration providers making available information required by Code of Civil Procedure Section 1281.96. Assembly Bill 802, which presently is pending in the Legislature, would, if enacted into law, significantly amend Code of Civil Procedure Section 1281.96. Since the provisions of Section 1281.96 presently are uncertain, approval of proposed Standard 8(e) would be like accepting the proverbial "pig in a poke." Thus, the CDRC objects to the proposed standard at this time. Instead, the CDRC urges the proposed revision be withdrawn so that its impact can be assessed and considered further after it is known whether AB802 has become law and in what form.	Based on this comment, the committee has revised its proposal to eliminate the reference to Code of Civil Procedure Section 1281.96 and to instead simply require that the provider organization represent that the information the arbitrator is relying is "current through the end of the immediately preceding calendar quarter."
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the following Standard 8 proposals without further comment: Standard 8(a) – General Provisions.	No response required
Hon Arnold H. Gold (ret.) Studio City	The meaning of the phrase "current as of the most recent quarter" in proposed amended Standard 8)(1) (at line 44 on page 25 of the Invitation to Comment) should be clarified. I suspect that what the drafters had in mind really was "current through the end of the immediately preceding calendar quarter." As drafted, however, if a disclosure takes place, say, on May 15 of a year, it is arguable that the phrase in question could require that the information be current through March 31 or May 15 or even (absurdly) June 30 of that year.	Based on this comment, the committee has revised its proposal to incorporate the language suggested by the commentator.

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SPR13-01

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Standard 8(a) - Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Proposed Change to Standard 8(a)** Judicate West opines that the allowance of 2 months is insufficient to allow most provider organizations to update their websites, as needed, and more time should be allowed. Attempting to capture all this information on a website is a huge job and will require additional employees to create and maintain it. In addition, the definition of sufficient disclosure is not to be found. There are real safety concerns if retired judges will have the names of their family members and their family members' employers posted online.	The ethics standards do not require provider organizations to post any information on their websites. Standard 8(a) simply allows arbitrators, in making the disclosures required by standard 8, to rely on information supplied by the administering provider organization, including information that may be on the provider organization's website, if certain requirements are met. The disclosures required under standard 8 relate primarily to relationships between the provider organization and the parties or attorneys. Standard 8 does not require any disclosures relating to family members of the arbitrator. Code of Civil Procedure section 1281.96 does require that each quarter, provider organizations make available information regarding the consumer arbitrations that they administered within the preceding five years and requires provider organizations above a certain size to make this information available on their website. None of the information required under Code of Civil Procedure section 1281.96 (either currently or as it is proposed to be amended) relates to family members of the arbitrator.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
American Arbitration Association By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York	Specifically, the AAA has significant concerns about the proposed amendment to Standard 8 which would require that arbitrators make disclosures regarding financial interests or relationships between a party, their lawyer or their law firm, and the administering organization. Specifically, among other things, the proposed amendments to Standard 8 would require that arbitrators disclose if: "(A) The provider organization has a financial interest in or relationship with a party. (B) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of or has a financial interest in or relationship with the provider organization…."(Emphasis in original.) The AAA has both practical and substantive concerns with these amendments. As a practical matter, it would be impossible for the AAA to capture every financial interest and relationship with every lawyer and law firm that might potentially be involved in a consumer arbitration in California. While the term "financial interest" is defined in the Standards, the terms "relationship with a party" and "relationship with the provider organization" are not defined in the Standards. Nor are there any materiality or temporal limitations contained within the amended Standards that would qualify those terms. As a result, the amendments would result in the requirement that the AAA capture an impossibly broad range of information. An explanation of some aspects of the AAA's structure illustrate the scope of relationships that would need to be tracked under the amended Section 8, and the difficulties the	Based on this and other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: "Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration" The committee is not recommending any change to this existing provision.

Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
	AAA would face in doing so. The AAA is a not for profit 501(c)(3) organization with offices throughout the United States and internationally, and with a roster of approximately 7,000 arbitrators and mediators. In addition, because of the breadth of dispute types administered by the AAA and the educational programs and other services that we provide, the AAA has interacted in some way with an extremely large number of organizations and individuals. In addition, the AAA has likely interacted with most large, medium and small law firms within the United States. The AAA's Board of Directors, which plays no role in the AAA's day to day administration of arbitrations, is composed of approximately 100 volunteer members, also located around the world and from a variety of entities. Organizationally, the AAA also interacts with a variety of companies and vendors necessary for the AAA's ongoing operations. In addition, the AAA regularly convenes regional and national groups and committees to address timely policy issues impacting arbitration or mediation. As just one example, the AAA convened a task force to draft the Consumer Debt Collection Due Process Protocol Statement of Principles to consider whether arbitration should be used to resolve consumer debt collection disputes, and if so, what heightened due process standards should be implemented for those types of cases. The task force which drafted that Protocol included consumer advocates and representatives, business representatives, former judges, academics, government officials and representatives of the AAA. During the drafting process, the Task Force also sent out drafts	

Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
	of the Protocol for comment to another larger group of similarly interested advocates. Activities similar to the task force on Debt Collection are initiated by the AAA on a large and small scale on a regular basis. Under the proposed amendments to Standard 8, the AAA would be required to capture, track all participants in these activities taking place nationally, and perhaps internationally, because of the possibility that one of these contacts would constitute a "relationship" that may need to be provided to an arbitrator in a California consumer arbitration, who would then disclose it to the parties. Because of the excessive time and cost that would be incurred creating a process for compliance with Standard 8 as proposed, the AAA may simply be unable to continue to administer consumer arbitrations in California. As a substantive matter, it also appears that the sole problem the Standard 8 amendments are intended to address (the National Arbitration Forum's administration of consumer debt arbitrations) are not actually solved by the amendments. As stated in the drafter's notes, Code of Civil Procedure 1281.92 already prohibits provider organizations from administering a consumer arbitration where the provider has a financial interest in a party or an attorney for a party. Further, even if the content of CCP 1281.92 had been incorporated into the Standards previously, it is highly unlikely that expanded disclosure requirements would have changed or impacted NAF's conduct. In addition, the Executive Summary and the Drafters' Notes to the Invitation to Comment imply that the proposed amendments merely incorporate the existing requirements of section 1281.92	

Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
	into the Standards. In fact, the amendments significantly expand the disclosure requirements currently provided for in section 1281.92, which states that sponsoring organizations are prohibited from administering a consumer arbitration where the sponsoring organization has a financial interest (as defined in section 170.5) in a party or attorney for a party, and vice versa. Section 1281.92 does not address in any way a provider organization's other relationships with a party, lawyer or law firm appearing in an arbitration as the amendments to Standard 8 would do. For the reasons already explained, even using the AAA's best efforts, it would be extremely difficult to comply with Standard 8 as amended. Furthermore, the amendments would have a disproportionately negative impact on the AAA due to our unique structure as a not for profit organization with a large geographical presence, and a roster of arbitrators that includes thousands of individuals. * * * For these reasons the AAA opposes the proposed amendments to Standards 8 and 17 in their entirety.	
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the following Standard 8 proposals without further comment: Standard 8(b) – Additional disclosures required.	No response required
Ruth Glick Attorney at Law Burlingame, California	The proposed new addition to Standard 8 (b)(1)(B) requires the arbitrator to disclose relationships between a provider organization and a party or lawyer in the arbitration. As a sole practitioner, I can tell you how hard it already is to keep track of all the parties and attorneys from arbitration and mediations I have conducted. I do not have the ability to discover whether a	Based on other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: "Any significant past, present, or

Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
	party or lawyer in the arbitration serves on a panel of the provider organization. Since this information is solely within the purview of the ADR organization, why must the arbitrator be responsible for the providing this information? In an administered arbitration, shouldn't the primary responsibility for disclosure lie on the shoulders of the ADR provider?	currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration" The committee is not recommending any change to this existing provision.
Hon Arnold H. Gold (ret.) Studio City	While seemingly not providing the basis for any new or amended standard, the statement in lines 16 and 17 on page 3 of the Invitation to Comment is incorrect. Code of Civil Procedure Section 1281.92 does not prohibit "provider organizations from administering any consumer arbitration where" the provider organization has a financial interest in **or relationship** with a party" or where a party or lawyer has "a financial interest in **or relationship** with the provider organization." "Financial interest," yes; but not just any "relationship." The disqualification contained in Section 1281.92 only applies to financial interests. So, for example, if a neutral who provides services through a provider organization is an attorney for a party in the arbitration in question, that relationship must be disclosed, but the provider organization is not absolutely precluded from administering the arbitration in question. Accordingly, the proposed Drafters' Note set forth at lines 41 - 43 on page 27 of the Invitation to Comment needs to be revised.	Based on this and other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: "Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration" The committee is not recommending any change to this existing provision.
JAMS By: Jay Welsh	**Disclosures relating to administering provider organizations.**	Based on this and other comments, the committee has revised its proposal to remove the references to financial

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
Executive Vice President, General Counsel JAMS	This relates to the requirement that the arbitrator disclose whether the provider organization has a financial interest or relationship with a party. We feel that this is overly broad and it would be helpful to add the word "significant" to this description as it appears in the Standard 8(b)(1) definition relating to relationships with a party or lawyer in arbitration and the arbitrator. We would also suggest that there be a specific exclusion for 1. Being written in as the arbitration provider in an agreement and 2. Any relationship which is open to the public, like a checking account or cell phone provider. That kind of relationship should not be subject to disclosure or be a reason for disqualification.	relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: "Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration" The committee is not recommending any change to this existing provision.
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Disclosures Relating to Administering Provider Organizations** Judicate West supports this amendment in concept. The Background section of the Invitation To Comment identifies the goal is to force the disclosure if a "major user" of a provider organization was actually the owner of that service. However, the wording utilized is overly broad. "Financial interest or relationship," is very broad and would arguably include incidental and harmless items, such as if an owner or shareholder of a provider organization had a few investments with a management company that had invested with a company that hires that provider organization for ADR work, or if an owner of a provider organization and an attorney in a law firm both invest in a third company. At Judicate West, neither of these situations would be known to the parties and would not result in any bias, nor the appearance of bias. Unfortunately,	Based on this and other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: "Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration" The committee is not recommending any change to this existing provision.

Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization		
Commentator	**Comment**	**Committee Response**
	the term "relationship" is so broad and ambiguous that it will be used by attorneys who want to seek vacatur of an award, even when no appearance of bias nor actual bias exist. The amendment should be limited to the identified goal, "ownership interest." The stated purpose is to disclose bias based on pecuniary interests by an attorney or law firm in a provider organization. The wording "professional relationship or affiliation" is broad and may be misinterpreted to encompass business activities of contact between the provider organization and a law firm during an arbitration, as the e-mails and telephone calls necessitated for scheduling of hearings and other matters would constitute a professional relationship or affiliation. As mentioned above, the form and detail needed to adequately disclose this information and the consequence for failure to disclose should be specifically stated for clarity and compliance.	

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

Standard 16 - Compensation		
Commentator	**Comment**	**Committee Response**
California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California	Standard 16(b). The CDRC supports the proposed revision to Standard 16(b) in principle. However, the CDRC is concerned that the proposed language may, in effect, require an arbitrator to have a fixed policy with respect to the consequences of a party failing to pay the arbitrator's fees. Thus, the CDRC must object to the proposal unless comment is added to make it clear that an arbitrator may comply with the requirement by disclosing a flexible policy that depends on the particular circumstances involved.	In response to this comment and others, the committee has revised its proposal to add a sentence to the comment accompanying standard 16 indicating that it not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established.
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee supports the Amendments to Standard 16 - Compensation. This amendment is necessary to provide clarification to practitioners regarding the terms and conditions of their employment. This information, provided in advance of appointment, supports the integrity and openness of the process.	No response required
Ruth Glick Attorney at Law Burlingame, California	The addition to Standard 16, Compensation, advising whether there is any requirement for advance fee deposit or practice in which party fails to timely pay an arbitrator's fees, may be informative but might also have unintended consequences. For example, wouldn't arbitrators, as a result of this amendment, require full advance fee deposit even from individuals who can least afford it despite having made accommodations to slow payers, or financially challenged parties in the past? This amendment might also encourage financially stronger parties to increase costs by adding motions, discovery disputes, etc. to balloon expenses before a hearing and thereby hijack the arbitration procedure.	In response to this comment and others, the committee has revised its proposal to add a sentence to the comment accompanying standard 16 indicating that it not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 16 - Compensation		
Commentator	**Comment**	**Committee Response**
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Arbitrator Fees** Judicate West already informs its clients of fees and its procedures for collection of fees. Judicate West accomplishes this by transmitting to the parties the actual fees charged for the selected arbitrator and Judicate West payment policies and by means of the Judicate West Commercial Arbitration Rules that restate the payment policies. Implementation of this proposed amendment will add a step in the process of arbitrator selection and, thereby, have an effect of increasing, to some degree, the costs of arbitration. As the requirements require transmission of information and not acknowledgment by the parties, implementation within the suggested 2 months should be sufficient for full implementation of any procedures needed to comply with this requirement.	No response required

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SPR13-01

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Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
American Arbitration Association By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York	The AAA would also like to express an additional concern about the proposed amendment to Standard 17, which would prohibit an arbitrator from soliciting a specific case, or caseload for themselves or for a "closed panel" that they are a member of. As drafted, it is not clear what a "closed panel" is. In fact, it is extremely rare that any panel of arbitrators is completely open to any individual who seeks to join it. The AAA, for example, has stringent requirements that applicants must meet before they will be added to the roster. Accordingly, if the intent is to preclude any arbitrator from merely suggesting that a particular organization may be suitable to administer a case or caseload, then the proposed amendment to Standard 17 simply goes too far. Further, and in response to the Judicial Council's questions, the meaning of "solicitation" and "caseload" would benefit substantially from adequate and reasonable definitions. Additionally, it is worth noting that the proposed amendments to the Standards will have another unintended consequence, which is to discourage some highly qualified arbitrators from serving. The Standards were originally drafted, among other reasons, to provide greater credibility and comfort to parties regarding the ethics of arbitrators. However, over time concerns about the ability, even after making a significant effort, to comply with the Standards and the possibility of collateral litigation resulting from a mistake have caused some arbitrators to simply decline potential appointments, and has also caused some parties to simply avoid California as a venue for arbitrations altogether. For these reasons the AAA opposes the proposed amendments to Standards 8 and 17 in their entirety.	Based on this and other comments, the committee revised the proposed amendments to: • Narrow the amendment to prohibiting solicitation of appointment as an arbitrator in a specific case or specific cases. This revision eliminates the use of the terms "caseload" and "closed panel" which commentators found problematic. • Add a definition of "solicit." The basic definition recommended is modeled on the definition in Rule 1-400 of the Rules of Professional Conduct of the State Bar of California, with the addition of language about on-line communication from the Model Rules of Professional Conduct of the American Bar Association. The recommended provision also identifies specific activities that are not considered solicitation, including responding to a request for proposals from all parties in a case to submit a proposal to provide arbitration services in that case and responding to a request for a pre-appointment interview by parties. • Consolidate the language relating to marketing activities in subdivision (a).

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SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California	Standard 17(c). The CDCR supports this proposed standard in principle. To the extent that soliciting appointment to a particular case or caseload may be regarded as implying an arbitrator will give preferential treatment to the party being solicited, this proposed standard is not unrelated to an appearance of potential bias. However, the CDRC is concerned that the particular proposed language may be construed overbroadly. The CDRC believes that this problem cannot be cured by attempting to define "solicit." Instead, the CDRC must object to the proposed standard unless comment is added to make it clear that the standard does not preclude such ordinary activities as helping to staff a provider's booth at a professional conference, responding to a request for a pre-appointment interview or including themselves among the candidates if asked for a recommendation about someone to serve in a particular case. Finally, the second sentence of this proposed standard contains a grammatical incongruity, to wit, "they are a member of." This should be revised to read "of which they are members."	Please see the response to the comments of the American Arbitration Association, above.
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	The ADR Committee believes the proposed language in Standard 17(c) - Marketing is potentially problematic and needs further clarification concerning the meaning of "solicit a particular case or caseload." The proposed Standard would specifically allow an arbitrator to "advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment." Although the portion of the solicitation prohibition that refers to a "particular case" seems relatively clear – setting forth a prohibition against directly asking parties or their attorneys to be appointed to serve as an arbitrator in a	Please see the response to the comments of the American Arbitration Association, above.

Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
	specific case – the reference to "caseload" is not at all clear, particularly given what is specifically allowed under the Standard. Many arbitrators have expertise in specific fields, and refer to that expertise in one way or another as part of their biographical information in marketing and other materials. Does this Standard prohibit, for example, arbitrators from contacting employment law attorneys with that marketing material, seeking to be considered as arbitrators in future employment disputes? Would this be a permissible conveyance of "biographical information" or an impermissible solicitation of a particular "caseload"? Is the Standard meant to prohibit arbitrators who specialize in medical malpractice cases, for example, from contacting Blue Cross/Blue Shield or Kaiser Permanente with the aim of being placed on their panel of neutrals? Does the Standard place any limitations on arbitrators who are seeking appointment in specific types of cases? Does the Standard attempt to draw any distinction between "types of cases" and a particular "caseload"? If so, what is that distinction? Ultimately, the ADR Committee concluded that the phrase "solicit a particular case or caseload" is vague, ambiguous and overly broad, and may include legitimate marketing as well as improper conduct.	
Hon Arnold H. Gold (ret.) Studio City	The wording of the last sentence of proposed new Standard 17(c) (at lines 33-35 on page 32 of the Invitation to Comment) is problematical. Would it, for example, preclude an arbitrator from applying to the Kaiser Office of Independent Administrator for inclusion on the list of arbitrators to whom that office assigns cases?	Please see the response to the comments of the American Arbitration Association, above.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
JAMS By: Jay Welsh Executive Vice President, General Counsel JAMS	**Our last comment relates to Standard 17(c) on Marketing.** This is an unfair limitation on the right of a Neutral to market her practice. In addition, there is no relationship required in the proposal between the case being heard and the marketing activity. We will not comment on the Constitutional implications of such a limitation, but it is questionable as a prohibition of free speech. In addition, it is not clear that the Judicial Council has the jurisdiction to regulate private arbitrator activities unrelated to the enforcement of a judgment. Many of our Neutrals are asked by Counsel to respond to RFPs on handling major cases like distributions of settlement funds in Pharma related cases, or civil rights cases like the African American Farmer cases against the Department of Agriculture. The Neutrals are then intimately involved in working with JAMS in structuring the administration of the case and the response to the RFP. This ill conceived proposed prohibition would mean that the Neutral involved could be in violation of this ethical requirement even though the new case had no relationship or connection to any arbitration being handled by that Neutral. Accordingly, we request that the last sentence of Subparagraph (c) be stricken. Subparagraph (b) is sufficient to protect the public and not penalize the Neutral.	Please see the response to the comments of the American Arbitration Association, above.
Judicate West By: Var Fox, Co-Founder Santa Ana, California	**Marketing** Judicate West does not support the suggested change in Standard 17 and questions the necessity for this standard, altogether, since it is not based on specific responses to case law. Judicate West further suggests that the proposed wording as written does not address the proposed purpose. The first problem identified in this standard is that the wording used is too vague and ambiguous. The words “solicit”, “a	Please see the response to the comments of the American Arbitration Association, above.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
	particular case or caseload", and "closed panel" are not defined. In the field of marketing provider organizations, the role of the Judicate West staff and the competency and thoroughness of the staff is important to obtaining business. Communicating which neutrals are available to conduct mediation or arbitration is vital. Moreover, meeting neutrals may aide the parties in feeling confident about utilizing that neutral or another at any future mediation or arbitration. The success of Judicate West and the neutrals, especially those that conduct mediations, is the ability to give the personal touch. The attorneys and parties feel they know the mediator, the staff and their case matters to Judicate West staff and that neutral. A second problem with the wording of the proposed standard as written is that it can include a neutral meeting an attorney or firm to generally inform them about the services Judicate West can provide. The wording "closed panel" is broad enough to encompass all neutrals at Judicate West. Therefore, if a neutral met with a law firm or an attorney for a law firm and suggested they utilize Judicate West, the entire panel of neutrals at Judicate West may be excluded. If a closed panel is intended to be limited to something smaller than the entire panel of neutrals for a provider organization then it must be defined. In addition, the term "solicit" is so broad that it may encompass the handing out of a business card or a suggestion that somebody call Judicate West if they need a neutral. The distinguished attorneys and retired Judges and Justices at Judicate West are called upon to educate about the law. It is easy to conceive of a situation in which a Judge would participate in such a workshop or class and when asked about	

Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
	ideas or methods for resolving a problem he or she suggests that neutrals at Judicate West are available to assist in resolving disputes. In that scenario if the neutral knows that attorney has problems he is looking to resolve, even if they have not discussed any specific case, the wording of the proposed amendment is broad enough that it is unclear whether that is allowed solicitation. The wording of what is the prohibited conduct should be stated explicitly. Currently, it is so vague we are just guessing at the intended meaning of "elimination of appearance of bias." Also, the standard is so broad that it can envelope a multitude of ethical business practices designed to aid attorneys and parties in resolving disputes and reduce the caseloads in the courtrooms. It is of benefit to the attorneys and parties to meet neutrals, but the wording of this standard is so overly broad that any contact may be deemed solicitation. It is unclear how a neutral could communicate his willingness to serve as an arbitrator and not be soliciting "a case or caseload." Judicate West questions what practices would be allowed under this ambiguous proposed amendment. If a neutral informs an executive at a company or a lawyer for a company about Judicate West's Rules for Commercial Arbitration and the company decides to incorporate, when possible, an arbitration clause naming Judicate West, has that neutral "solicited a caseload"? Finally, Judicate West queries fairness and the right to limit a neutral's ethical marketing practices that are not specifically related to the enforcement of a judgment. Obviously,	

Standard 17 - Marketing		
Commentator	**Comment**	**Committee Response**
	marketing must be ethical and not in any way give the appearance of bias, but this standard stymies and prohibits neutral and desired contact with attorneys, which is not the purpose of the standard.	
Office of the Independent Administrator By: Sharon Oxborough Independent Administrator Los Angeles, California	**Standard 17 Marketing** The Judicial Council requested specific comments regarding the proposed amendments to standard 17. Are the changes sufficiently clear? Is the meaning of "solicitation" and "caseload" in this amendment clear or should these terms be defined? The OIA believes the amendments are not clear and recommends that the terms be defined. The Judicial Council could consider providing in its comment or drafter's notes section an example of what is permitted and what is not.	Please see the response to the comments of the American Arbitration Association, above.

SPR13-01

Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

Other		
Commentator	**Comment**	**Committee Response**
Ruth Glick Attorney at Law Burlingame, California	Finally, I am hopeful that the Judicial Council would consider directing its time and resources to guiding well-intentioned arbitrators in their disclosures. For example, I have and written and spoken about arbitrator disclosures in the new age of Internet and social media. I noticed that Judicial Council has provided guidelines to California judges. However, there appears to be no discussion or consideration by the Council to provide similar guidelines to California arbitrators subject to these Ethics Standards. I welcome your thoughts about this topic.	The committee would welcome specific suggestions for improving the ethics standards.
William McGrane Attorney at Law San Francisco, California	As is evidenced by, inter alia, the attached Referee's Report, I was recently involved in a Haworth-type situation involving a judicial referee which resulted in that referee's disqualification. Your attached proposed changes to the disclosure rules for judicial arbitrators should be expanded to deal with the disclosures required by Canon 6, which is also within AOC purview. This is especially true given the increased popularity in the ADR community of judicial reference, which both waives jury and yet still preserves appeal rights. The consequences of not making universal changes are well illustrated by what happened in my case, i.e., a mistrial based on a non-disclosure of prior public discipline that will wind up setting the parties back collectively more than a million dollars in legal fees. There is no reason to allow persons who seek to act as private judges to conceal otherwise public discipline, and 10 years is a reasonable time within which to so require same be disclosed, though, since the discipline remains public record until death, even 10 years creates a dichotomy between what is knowable and what is disclosed. If it were me, I would require disclosure as long as the record remains otherwise public. But, in any case, 10 years is a lot better than what I just went	The ethics standards applicable to referees are in a different set of rules. This suggestion will be referred to the committee that considers amendments to those rules.

Other		
Commentator	**Comment**	**Committee Response**
	through, that is for sure.	
Luella Nelson Arbitrator/Mediator	I close by noting that labor arbitration cases are almost universally heard by full-time neutrals. Labor arbitration moved in that direction after trying the alternative of having arbitrators who at times wore advocate hats -- which is where "consumer" arbitration is now in California, and is being forced further in that direction by the "Ethics" standards. Since at least the 1970's, labor arbitrator panels administered by most government agencies (e.g., the Federal Mediation & Conciliation Service and the California State Mediation & Conciliation Service) and private entities (e.g., AAA) have not included advocates. By excluding advocates, those panels vastly reduce the likelihood of actual (as opposed to theoretical or manufactured) conflicts; the rest of the risk is addressed by communication among advocates about labor arbitrators. When Senate Bill 1638 (which added the disclosure provisions in CCP 1281.9) was pending in 1994, union and employer advocates jointly and successfully lobbied to have arbitration under collective bargaining agreements excluded from the disclosure requirements. I know this because I was the Chair of the Labor and Employment Law Section of the State Bar of California at the time and gave a "heads up" to advocates on both sides of the table about the pending legislation. They carried the ball from there. I encourage the Judicial Council to use any revisions in the "Ethics" standards to nudge "consumer" arbitration toward sophistication. The standards as written, and even more so as revised, nudge it the other direction. The underlying legislation does not require this result.	The committee would welcome specific suggestions for improving the ethics standards.

CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS
OF PRACTICE IN ADR

Principles for ADR Provider Organizations

May 1, 2002

CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS OF PRACTICE IN ADR

May 1, 2002

Principles for ADR Provider Organizations[1]

The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed the following Principles for ADR Provider Organizations to provide guidance to entities that provide ADR services, consumers of their services, the public, and policy makers. The Commission is a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, which is chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, has also developed the CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.[2]

[1] The Principles for ADR Provider Organizations were prepared under the auspices of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. CPR-Georgetown Commission members are noted on the final page of this document.

The Principles were drafted by a Commission committee co-chaired by Margaret L. Shaw and former staff director Elizabeth Plapinger, who also served as reporter. The Drafting Committee also included: Prof. Marjorie Corman Aaron, Howard S. Bellman, Christopher Honeyman, Prof. Carrie Menkel-Meadow, William K. Slate II *(see note 5 infra)*, Thomas J. Stipanowich, Hon. John L. Wagner, and Michael D. Young. Eric Van Loon and Vivian Shelansky also provided invaluable assistance in the drafting effort.

A second committee of the Commission, chaired by Charles Pou, developed the definition of ADR Provider Organization used in these Principles, as well as a taxonomy of ADR Provider Organizations which helped guide this effort. *See Taxonomy of ADR Provider Organizations,* Appendix A.

[2] The final version of the Ethics 2000 proposal specifically addresses the lawyer's expanded role as ADR neutral and problem solver for the first time. It does so in four ways. *First,* the Ethics 2000 proposal recognizes the lawyer's neutral, nonrepresentational roles in the proposed Preamble to the Model Rules of Professional Conduct. *See* Ethics 2000 Proposal at Preamble para. [3] ("In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals.") *Second,* the proposal indicates that a lawyer may have a duty to advise a client of ADR options. The proposed language to Comment 5 of Rule 2.1 states: "...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute alternatives to litigation." *Third,* the Ethics 2000 proposal defines the various third-party roles a lawyer may play, including that of an arbitrator or mediator. *See* Proposed Rule 2.4. ("A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.") *Fourth,* the proposal addresses the unique conflicts of interest issues raised when lawyers and law firms provide both representational and neutral services. *See* Proposed Rule 1.12 (conflicts of interest proposal including screening procedures for former judges, arbitrators, mediators or other third-party neutrals.) For a complete version of the Ethics 2000 report and status, *see http://www.abanet.org/cpr/ethics2k.html.*

The Principles for ADR Provider Organizations were developed by a committee of the CPR-Georgetown Commission, co-chaired by Commission member Margaret L. Shaw and former Commission staff director Elizabeth Plapinger, who also served as reporter.[3] The Principles were released for public comment from June 1, 2000 through October 15, 2001.[4] The final version reflects many of the substantive recommendations the Commission received during the comment period.[5]

[3] Ms. Plapinger is currently a CPR Fellow and Senior Consultant to the CPR Public Policy Projects, and a lecturer in law at Columbia Law School where she teaches ADR policy and process.

[4] The CPR-Georgetown Principles for ADR Provider Organizations have been the subject of several articles and public discussions during the comment period. *See, e.g., Special Feature: The CPR-Georgetown Ethical Principles for ADR Providers,* Disp. Resol. Mag. (ABA Dispute Resolution Section, Spring 2001), including Margaret Shaw and Elizabeth Plapinger, *The CPR-Georgetown Ethical Principles for Providers Set the Bar* at 14; Michael D. Young, *Pro: Principles Mitigate Potential Dangers of Mandatory Arbitration at* 18; Cliff Palesfsky, *Con: Proposed CPR Provider Ethics Rules Don't Go Far Enough* at 18. *See also* Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution,* 28 Fordham Urban Law J., 979, 987-990 (April 2001); Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration,* The San Francisco Chronicle Francisco Chronicle, at A15 (October 8, 2001).

During the comment period, the CPR-Georgetown Provider Principles have also been used as guidelines for consideration of measurement of quality standards of dispute resolution programs in a variety of settings. For example, at the 2000 Annual Meeting of State Programs of Dispute Resolution sponsored by the Policy Consensus Institute in New Mexico, it was noted that a number of states have used the Principles for framing discussions and establishing standards and other evaluative criteria for assessing the quality of dispute resolution development. Additionally, it was suggested that the Provider Principles should serve broadly as templates for development and evaluation of state-sponsored dispute resolution programs. Internationally, during the comment period, the Provider Principles were translated into Italian and Spanish to provide guidance to relevant groups in Italy and South America.

[5] Drafting committee member and President of the American Arbitration Association William K. Slate II has declined to fully endorse the CPR-Georgetown Principles for ADR Provider Organizations, stating that he does not believe the Principles are fully applicable to the American Arbitration Association (AAA) because of its "unique size and complexity." While "endors[ing] the basic premises of the Principles which encourage transparency and disclosure" Mr. Slate explained his position in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member. In the correspondence, which is on file at CPR, Mr. Slate stated, "I believe the [CPR-Georgetown] Principles will prove to be invaluable and [provide] appropriate guidelines for small provider organizations and for providers who serve in dual roles, by assisting in drafting agreements and then serving as neutrals. Although the AAA does not fall into either of these categories, the AAA endorses the basis premises of the Principles which encourage transparency and disclosure. As a result of my work with CPR on these Principles, the AAA has already developed an organizational ethical statement which has been posted for the past few months on the AAA website that we believe recognizes the unique size and complexity of the AAA in the ADR marketplace, while acknowledging and respecting the basic concerns that guided the CPR Principles." Mr. Slate also thanked the CPR-Georgetown Commission, and its sponsoring institutions, for providing "a true service to the advancement and credibility of alternative dispute resolution by recognizing the serious issues of ADR providers with actual or apparent conflicts of interest and convening a group to address these issues. I was pleased to be a part of this group and appreciate the consideration given to my opinions and perspective." Letter of 2/4/02 from William K. Slate to Thomas J. Stipanowich, on file at CPR.

Preamble

As the use of ADR expands into almost every sphere of activity,[6] the public and private organizations that provide ADR services are coming under greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers.[7] The growth and increasing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel this effort by the CPR-Georgetown Commission to develop the following Principles for ADR Provider Organizations.[8]

The Principles build upon the significant policy directives of the past decade which recognize the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services.[9] Several core ideas guide the Commission's effort, namely that:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR Provider Organizations and to inform consumers, policy makers and the public generally.
- The most effective architecture for maximizing the fairness, impartiality and quality of dispute resolution services is the meaningful *disclosure* of key information.
- Consumers of dispute resolution services are entitled to sufficient information about ADR Provider Organizations, their services and affiliated neutrals to make well-informed decisions about their dispute resolution options.

[6] Today, ADR processes or techniques are used in almost every kind of legal and nonlegal dispute and in all almost all sectors, including family, school, commercial, employment, environmental, banking, product liability, construction, farmer-lender, professional malpractice, etc. In the past decade, ADR has become a familiar part of federal and state courts, administrative practice, and regulatory and public policy development. The development of ADR systems for public and private institutions, as well as the use of ADR to arrange transactions are also well established. *See generally* Stephen D. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation and Other Process (Aspen Law and Business, 3rd ed., 1999).

[7] To date, much of the policy and case law development has focused on the fairness and integrity of ADR processes and forums that provide arbitration pursuant to contract in the areas of consumer services, health care and employment. *See, e.g.,Circuit City Stores, Inc. v. Saint Clair Adams,* 279 F.3d 889 (9th Cir. 2002) (employment); *Cole v. Burns Int'l Security Services,* 105 F.3d 1465 (D.C. Cir. 1997) (employment); *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (employment); *Engalla v. Kaiser Permanente Medical Group, Inc.,* 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr.2d 843 (1997) (health care); *Ting v. AT&T,* 182 F. Supp.2d 902 (N.D. Cal. 2002) (consumer). *See also Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 121 S. Ct. 513 (2000) (Truth in Lending Act claim).

Recent policy directives have recognized the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services. *See, e.g., Task Force on Alternative Dispute Resolution in Employment, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (1995)(hereafter cited as Employment Due Process Protocol); Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, *Ensuring Competence and Quality in Dispute Resolution Practice* (Draft Report 1994)(hereafter cited as SPIDR Report on Qualifications); American Arbitration Association, *Consumer Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Consumer Disputes* (May 1998)(hereinafter cited as Consumer Due Process Protocol); American Arbitration Association, American Bar Association, and American Medical Association, *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes* (June 1998)(hereafter cited as Health Care Due Process Protocol); Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation* (1992); and JAMS Minimum Standards of Fairness for Employment Arbitrations (1995, 1998).

Commentators also have begun to consider the role of ADR provider organizations in the delivery of private justice and the procedural fairness of ADR forums. *See generally Carrie Menkel-Meadow, Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR,* 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect,* 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues,* Currents 1 (AAA, December 1998)("All providers, whether for-profit or non-profit, facilitate and implement ADR in one or more forms and for good or ill, they all compete in the marketplace without significant outside regulation."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wis. L. Rev. 33.

[8] In publishing these standards, the drafters also note the increasing recognition of entity or organizational ethical responsibility or liability. *See generally* Ted Schneyer, *Professional Discipline for Law Firms?,* 77 Cornell L. Rev. 1 (Nov. 1992); New York Bar Disciplinary Rules governing law firm conduct, adopted May 1996.

[9] *See supra 7.*

- ADR Provider Organizations should foster and meet the expectations of consumers, policy makers and the public generally for fair, impartial and quality dispute resolution services and processes.

In addition to establishing a benchmark for responsible practice, the CPR-Georgetown Commission hopes that the Principles will enhance understanding of the ADR field's special responsibilities, as justice providers, to provide fair, impartial and quality process. This document hopes also to contribute to the ADR field's commitment to self-regulation and high standards of practice.

Scope of Principles

The following Principles were developed to offer a framework for responsible practice by entities that provide ADR services. In framing the nine Principles that comprise this document, the drafters tried to balance the need for clear and high standards of practice against the risks of over-regulating a new, diverse and dynamic field.

The Principles are drafted to apply to the full variety of public, private and hybrid ADR provider organizations in our increasingly intertwined private and public systems of justice.[10] A single set of standards was preferred because the Principles address core duties of responsible practice that apply to most organizations in most settings. The single set of Principles may also help alert the many kinds of entities providing ADR services of their essential, common responsibilities. Additional sector-specific obligations will likely continue to develop for particular kinds of ADR provider organizations, depending on their sector, nature of services and operations, and representations to the public. The proposed Principles were developed to guide responsible practice and, like ethical rules, are not intended to create grounds for liability.

Definition

The proposed Principles are intended to apply to entities and individuals which fall within the following definition:

> **An ADR Provider Organization includes any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services.**

[10] For an overview of the array of organizations that offer dispute resolution services, *see Taxonomy of ADR Provider Organizations, infra* at Appendix A ("'ADR provider organizations' come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals, and in their resources and management philosophies."). *See also* Thomas J. Stipanowich, *Behind the Neutrals: A Look at Provider Issues,* Currents 1 (AAA, December 1998) (Noting that "[t]he contemporary landscape of ADR ranges from complex, multi-faceted organizations of national and international scope to ad hoc arrangements among individuals" and includes "more specialized services marketing particular procedures, groups that have evolved to serve the special needs of a community, industry, or business sector; and mom-and-pop mediation services.")

The Taxonomy of ADR Provider Organizations, included as Appendix A, analyzes these diverse organizations along three major continua: the organization's structure, the organization's services and relationships with neutrals, and the organization's relationships with users or consumers.

Comment

This definition of an ADR Provider Organization includes entities or individuals that manage or administer ADR services, *i.e.,* entities or individuals who serve as ADR "middlemen."[11] The definition intends to cover all private and public entities, including courts and public agencies, that provide conflict management services, including roster creation, referral to neutrals, administration and management of processes, and similar activities. It is not intended to govern the individuals who provide direct services as neutrals;[12] rather this definition addresses the entities (either organizations or individuals) that administer or manage dispute resolution services.

The definition excludes persons or organizations who do not hold themselves out as offering conflict management services, although their services may incidentally serve to reduce conflict. These may include persons or organizations whose primary activities involve representing parties in disputes, providing counseling, therapy or similar assistance, or offering other services that may incidentally serve to reduce conflict. Importantly, however, if a law firm, accounting or management firm, or psychological services organization holds itself out as offering conflict management services as defined herein, it would be considered an ADR Provider Organization and fall within the ambit of these Principles.

[11] *See also* Consumer Due Process Protocol, *supra* note 7 ("An Independent ADR Institution is an organization that provides independent and impartial administration of ADR Programs for Consumers and Providers, including, but not limited to, development and administration of ADR policies and procedures and the training and appointment of Neutrals.")

[12] There are a number of ethics codes for ADR neutrals promulgated by national ADR professional organizations (*e.g.,* the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1977, under revision); the CPR-Georgetown Commission's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); and the transdisciplinary ABA/AAA/SPIDR Model Standards of Conduct for Mediators (1995)), by state-wide regulatory or judicial bodies (*e.g.,* Florida Rules for Certified and Court- Appointed Mediators (Amended Feb. 3, 2000); Minnesota Rule 114; Virginia Code of Professional Conduct), as well as by individual court or community ADR programs (*e.g.,* D. Utah Code of Conduct for Court-Appointed Mediators and Arbitrators) and individual ADR provider organizations (*e.g.,* JAMS Ethics Guidelines for Mediators and Arbitrators).

Principles for ADR Provider Organizations

I. Quality and Competence of Services

The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.

a. Absent a clear and prominent disclaimer to the contrary, the ADR Provider Organization should take all reasonable steps to maximize the likelihood that (i) the neutrals who provide services under its auspices are qualified and competent to conduct the processes and handle the kind of cases which the Organization will generally refer to them; and (ii) the neutral to whom a case is referred is competent to handle the specific matter referred.

b. The ADR Provider Organization's responsibilities under Principles I and I.a decrease as the ADR parties' knowing involvement in screening and selecting the particular neutral increases.

c. The ADR Provider Organization's responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.

Comment

[1] With the growth of voluntary and mandatory ADR use in all kinds of private and public disputes, the Drafting Committee believes it is essential to hold the ADR Provider Organizations, which manage these forums and processes, to the highest standards of quality and competence. This Principle thus establishes that ADR Provider Organizations are responsible, absent specific disclaimer, for taking all reasonable steps to maximize the quality and competence of the services they offer.

The Principle holds ADR Provider Organizations responsible for the quality and competence of the services they render, but articulates a rule of reason in determining the precise contours of that responsibility for each Organization. The nature of this obligation will vary with the circumstances and representations of the organization. The Drafting Committee adopts this approach over a more prescriptive rule because of the vastly different organizations that currently provide ADR management services.[13]

Understanding that ADR Provider Organizations come in a variety of forms and hold themselves out as offering different levels of quality assurance, this Principle permits the Organization to limit its quality and competence obligation by a clear and prominent communication to that effect to the parties and the public. Specifically, the Principle provides that the ADR Provider Organization can diminish these obligations by a clear and prominent representation that the Organization intends a minimal or no warranty of quality or competence. Such a disclaimer may be appropriate, for example, where a bar association assembles a roster of available neutrals as a public service, but establishes only minimal criteria for inclusion and engages in no screening or assessment of the listed neutrals.

[2] Maximum quality and competence in the provision of neutral services has two main components under this Principle. The Organization is required to take all reasonable steps to maximize the likelihood that neutrals affiliated with the organization are qualified and competent (1) to conduct the

[13] *See supra* note 10 for a discussion of the varied landscape of ADR provider organizations; *see also Taxonomy of ADR Provider Organizations, infra* at Appendix A; Stipanowich, *supra* note 7, at 14 ("The provider's 'administrative' role varies greatly; in NASD arbitrations, case managers routinely sit in on hearings; at the AAA, case managers facilitate many aspects of the ADR process, while the CPR Institute for Dispute Resolution offers 'non-administered' procedures with minimal involvement by its employees.")

processes and handle the kind of cases which the organization will generally refer to them;[14] and (2) to handle the specific matter referred.[15]

[3] This Principle advisedly uses the related concepts of both qualification and competency. In the multidisciplinary field of conflict resolution, where neutrals come from a variety of professions of origin, there is no bright line between the concept of qualifications and competence. Unlike single disciplinary fields, where there are specific entry qualifications and examinations that certify that a practitioner is generally qualified to work in the field, no such universal entry standard exists in the conflict resolution field. Accordingly, the Principle uses the twin concepts of qualification and competency, as they are generally understood in the field today, as including a combination of process training and experience, and substantive education and experience.[16]

[4] Principle I.b reflects, and is consistent with ADR standards honoring party autonomy and knowing choice.[17] It provides that when knowledgeable parties have meaningful choice in the identification and selection of individual neutrals, the duty for assuring the quality or competence of the neutral chosen transfers in part from the administering Organization to the parties themselves. Where party choice is limited by contract, statute or court rules, the ADR Provider Organization retains responsibility for maximizing the likelihood of individual neutral competence and quality.

[5] Under Principle I.c, the ADR Provider Organization has a continuing duty to take all reasonable steps to oversee, monitor and evaluate the quality and competence of affiliated neutrals.[18] Determination of the specific monitoring and evaluation measures needed to fulfill this obligation will turn on the circumstances of each ADR Provider Organization. Currently, a spectrum of organizational oversight practice exists from extensive to modest monitoring of neutral performance. Some oversight measures used by Organizations include user evaluations, feedback forms, debriefings, follow-up calls, and periodic performance reviews.[19]

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[14] As the dispute resolution field grows and becomes more specialized, ADR provider organizations are developing specialized panels or groups to handle disputes in particular subject areas, such as insurance or employment conflicts, or specific kind of processes, such as multiparty mediation. This Principle provides that neutrals be competent and qualified in their areas of general substantive and process expertise, as well being competent and qualified to serve in the specific matter referred. It does not suggest that all neutrals affiliated with an organization must be competent and qualified in all substantive areas and processes covered by the ADR provider organization.

[15] While there continues to be limited understanding about the mix and types of training, personal attributes and experience that predict effective performance, there is a growing willingness in the field to contemplate some objective criteria for judging competence. *See* Howard S. Bellman, *Some Reflections on the Practice of Mediation,* Negotiation J. 205 (July 1998). The current best practices standard for promoting competence relies on "some combination of training, experience, skills-based education, apprenticeships, internships, mentoring and supervised experience" and that "the appropriate combinations must be linked to the practice context." SPIDR Report on Qualifications, *supra* note 7, at 11-12. *See also* Margaret Shaw, *Selection, Training, and Qualifications of Neutrals,* National Symposium on Court-Connected Dispute Resolution Research (1994); Christopher Honeyman, *The Test Design Project: Performance-Based Assessment: A Methodology for Use in Selecting, Training, and Evaluating Mediators* (NIDR, 1995); Consumer Due Process Protocol, *supra* note 7, ("Elements of effective quality control include the establishment of standards for neutrals, the development of a training program, and a program of ongoing performance evaluation and feedback.")

[16] *See, e.g.,* SPIDR Report on Qualifications, *supra* note 7 and note 15 generally. For an example of how these combined concepts are used in the development of a roster of neutrals, see the roster entry criteria established by the U.S. Institute for Environmental Conflict Resolution for environmental mediators, at www.ecr.gov/r_entry. htm.

[17] *See, e.g.,* SPIDR Law and Public Policy Committee, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991).

[18] *See, e.g.,* National Standards for Court-Connected Mediation Programs, Standard 16, Evaluation ("Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.")

[19] *See* SPIDR Report on Qualifications, *supra* note 7, at 12 (ADR Provider Organization should "be assessed on a regular basis," through such means as "consumer input, review of complaints, self-assessment, trouble-shooting, regular audits, peer review and visiting committees from other programs.")

II. Information Regarding Services and Operations

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

a. The nature of the ADR Provider Organization's services, operations, and fees;

b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;

c. The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;

d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and

e. The method by which neutrals are selected for service.

Comment

[1] Reasonable and meaningful disclosure of key information about the ADR Provider Organization is the cornerstone of this document. In conformity with established ADR standards,[20] this Principle underscores the importance of clear, accurate and understandable information to informed decision-making by consumers of dispute resolution services and the public generally.

[2] This Principle, like this document generally, applies the rule of reason to the extent and form of the required disclosure. While some may prefer an absolute rule, the drafters believe that requiring reasonable disclosure consistent with the nature, structure and services of the organization and the knowledge base of the individual user, is more appropriate in this evolving field. Currently, ADR Provider Organizations come in a wide variety of organizational forms, provide a variety of services, and operate in an array of disparate settings.[21] These entities can differ considerably in their services, policies, relationships with the affiliated neutrals, affiliation criteria, markets, and their approaches to listing and referring cases to affiliated neutrals. A principle establishing an affirmative obligation to provide key information should recognize these differences, as well as differences in effective means of disclosure.[22]

[3] This Principle calls for reasonable disclosure of information about relevant financial relationships between the affiliated neutrals and the ADR Provider Organization. Information about specific compensation arrangements is not contemplated under this section. Rather, general statements of the existence or absence of consequential financial links, either direct or indirect, between the affiliated neutral and the ADR Provider Organization that may have an impact on the conduct of the Organization or the neutral, or may be reasonably perceived as having such an effect, are expected.[23]

[20] *See, e.g.,* SPIDR Report on Qualifications, *supra* note 7, at 6 ("It is the responsibility of . . . programs offering dispute resolution services to define clearly the services they provide . . . and provide information about the program and neutrals to the parties."); National Standards for Court-Connected Mediation, *supra* note 7, Standards 3.1-3.2.

[21] *See Taxonomy of ADR Provider Organizations, infra* at Appendix A; *see also supra* note 10 and accompanying text.

[22] We recognize that the kinds of disclosures advocated by this Principle will be different, for example, for a large international organization, like the American Arbitration Association, and a small mediation firm.

[23] In some organizations, there is no financial relationship with affiliated neutrals other than their inclusion on a roster. In other entities, affiliated neutrals are owners, employees, contributors, franchisees, independent contractors or stand in other consequential economic relationship to the ADR organization. *See Taxonomy of ADR Provider Organizations, infra* at Appendix A.

III. Fairness and Impartiality

The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.

Comment

ADR parties and the public are entitled to fair processes and impartial forums. As justice providers, ADR Provider Organizations have an obligation to take all reasonable steps to ensure the impartiality and fundamental process fairness of their services. This mandate may have particular importance when the ADR Provider Organization undertakes to administer an in-house dispute resolution program, another organization's process or policy, or processes designed or requested by one party to a dispute. Recent ADR policy directives and case law provide the field, courts and regulators with important baselines of fundamental fairness and impartiality.[24] To date, key indicia of fair and impartial processes and forums include: competent, qualified, and impartial neutrals; rosters of neutrals that are representative of the community of users; joint party selection of neutrals; adequate representation; access to information; reasonable cost allocation; reasonable time limits; and fair hearing procedures.[25] Building on these standards, this Principle establishes an across-the-board obligation on the part of the ADR Provider Organization to ensure the impartiality and fundamental process fairness of its services.

IV. Accessibility of Services

ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.

Comment

As the profession and business of dispute resolution grows, ADR Provider Organizations have a responsibility to provide services to low-income parties at reasonable or no costs. This access-to-services obligation can be satisfied in various ways, depending on the circumstances of the ADR Provider Organization. For example, the Provider Organization can offer *pro bono* neutral services or sliding scale fees. The entity could also require its affiliated neutrals to participate as neutrals in dispute resolution programs offered by the courts, government, nonprofit groups or other institutions at below market rates or as volunteers.

V. Disclosure of Organizational Conflicts of Interest

a. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a *de facto* stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

[24] *See supra* note 7.

[25] *See, e.g.,* Employment Due Process Protocol, *supra* note 7; Consumer Due Process Protocol, *supra* note 7; and the Health Care Due Process Protocol, *supra* note 7. *See also Cole v. Burns Int'l Security Services,* 105 F.3d 1465 (D.C. Cir. 1997); *Engalla v. Kaiser Permanente Medical Group,* 15 Cal. 4th 951, 938 P. 2d 903, 64 Cal. Rptr. 2d 843 (1997).

b. The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.

Comment

Reflecting the field's longstanding reliance on reasonable disclosure to address the existence of interests or relationships which may effect fairness and impartiality,[26] this Principle imposes an independent duty of disclosure on the Organization to provide information about significant organizational relationships with a party or other participant to an ADR process. As with these Principles generally, the rule of reason is intended to apply to this provision.[27]

At issue is the potential for actual or perceived conflicts of interest involving ADR participants (such as, businesses, public institutions, and law firms) that have continuing professional, business or other relationships with the ADR Provider Organization. For example, an ADR Provider Organization may be under contract to an institutional party to provide a volume of ADR services; or a law firm may regularly choose a particular ADR Provider Organization to resolve disputes repeatedly, or represent a client or clients that does so; or a public institution may send most or all its employment disputes to a particular ADR Provider Organization by contract or *de facto* business relationship. Under this Principle, disclosure of such relationships between the Organization and repeat player parties or other repeat players to the other parties to the dispute would be required.

This Principle reflects the evolving concept of "organizational conflict and relationship."[28] Since ADR Provider Organizations perform functions which may have a direct or indirect impact on the dispute resolution process (in the creation of lists of neutrals for selection, scheduling or other administrative functions), concerns about organizational impartiality have begun to be raised by courts, policy makers and commentators.[29] While the drafters understand that this disclosure obligation may impose some additional costs, particularly for large ADR Provider Organizations, we believe that disclosure of organizational relationships and interests is critical to preserving user and public confidence in the independence and impartiality of ADR Provider Organizations and services.

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[26] *See ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes* (1977, under revision); *Commonwealth Coatings Corp. v. Continental Co.,* 393 U.S. 145, 151-52 (1968)(concurring opinion); Christopher Honeyman, *Patterns of Bias in Mediation,* J. of Dispute Resolution 141 (1985); CPR-Georgetown Commission on Ethics and Standards in ADR, *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral* (Final, 2002).

[27] As with Principle II, we recognize that the extent and form of disclosures advocated by this Principle will be different depending on the nature of the ADR Provider Organization and is subject to the rule of reason. *See generally* Principle II, Comment [2].

[28] For an analysis of recent case law and repeat player issues in ADR, *see generally Carrie Menkel-Meadow, Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR,* 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect,* 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues,* Currents 1, 15 (AAA, December 1988)("providers should recognize that an ongoing, close connection between a provider and regular user may be a source of concern to the incidental user who is drawn into an ADR process by a pre-dispute ADR clause in a contract of the other party's devising.") *See also* JAMS Conflicts Policy, addressing both organizational conflicts and individual conflicts.

[29] *See, e.g.,* Consumer Due Process Protocol, *supra* note 7, at 18 ("The consensus of the Advisory Committee was that the reality and perception of impartiality and fairness was as essential in the case of Independent ADR Institutions as it was in the case of individual Neutrals. . . . In the long term, ... the independence of administering institutions may be the greatest challenge of Consumer ADR.") In *Engalla v. Kaiser Permanente Medical Group, Inc.,* 15 Cal. 4th 951, 938 P 2d 903, 64 Cal. Rptr. 2d 843 (1997), the California Supreme Court strongly criticized the fairness and enforceability of Kaiser Permanente's mandatory malpractice self-administered arbitration program, and remanded the case for further factual consideration of claims of fraud. For an analysis of *Engalla*, *see* Carrie Menkel-Meadow, *California Court Limits Mandatory Arbitration,* 15 Alternatives 109 (September, 1997). While the suit filed by the family of the deceased lung cancer patient has since settled, the *Engalla* case has led to a comprehensive assessment and restructuring of the Kaiser arbitration process. *See* The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration, The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement (January 5, 1998). Kaiser has since hired an independent ADR provider organization to administer its formerly in-house program. *See* Justin Kelly, *Case Study Shows Consumer Confidence in Kaiser Arbitration Program,* adrworld.com, April 22, 2002; Davan Maharaj, *Kaiser Hires Outside to Oversee Arbitrations,* Los Angeles Times, November 11, 1998, at C11.

VI. Complaint and Grievance Mechanisms

ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

Comment

This Principle requires ADR Provider Organizations to establish and provide information about mechanisms for addressing grievances or problems with the Organization or individual neutral. Organizations should develop policies and procedures appropriate to their circumstances to provide this complaint review function.[30] The organizational oversight provided through these mechanisms is concerned primarily with complaints about the conduct of the neutral, or deficiencies in process and procedures used. The complaint and grievance mechanisms are not intended to provide an appeals process about the results or outcome of the ADR proceeding.

VII. Ethical Guidelines

a. ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.

b. ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.

Comment

[1] Absent a controlling statutory or professional code of ethics, this Principle directs the ADR Provider Organization to require its neutrals to adhere to a reputable code of conduct. The purpose of this Principle is to help ensure that neutrals affiliated with the ADR Provider Organization are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR. To this end, ADR Provider Organization should take reasonable steps on an ongoing basis to educate its neutrals about the controlling code and ethical issues in their practices. An ADR Provider Organization may elect to develop an internal code, which conforms to prevailing ethical norms, or to adopt one or more reputable external codes.[31]

[30] For example, an Organization may provide a complaint form, and/or designate an individual within the entity to receive and follow up on complaints. Another Organization may develop a more formal procedure for filing, investigating and resolving complaints. *See, e.g.,* JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. In some states, disciplinary bodies have been established to review the conduct of state-certified ADR neutrals. For example, the Florida Mediator Qualifications Board was established by the Florida Supreme Court to govern the discipline of state-certified mediators in Florida. In the federal courts, the Northern District of California recently modified its local rules to provide that any complaint alleging a violation of ADR rules should be presented in writing and under seal directly to the U.S. Magistrate Judge who oversees the ADR programs in that court. (Local rule, effective May 2000).

[31] For examples of codes of conduct developed by an ADR provider organization, *see* JAMS's Ethical Guidelines for Mediators, Ethical Guidelines for Arbitrators, and the JAMS Conflicts Policy addressing both organizational and individual conflicts issues. *See* Principle V, Disclosure of Organizational Conflicts of Interest, *supra*. In addition, JAMS designated a senior executive as the organization's arbiter of service complaints, and has developed procedures for handling ethics-based complaints against panelists. *See* JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. *See also* Principle VI, Complaint and Grievance Mechanisms, *supra*.

[2] As the numbers of ADR Provider Organizations increase, it is particularly important that Organizations attend to issues of their own managerial, administrative and financial integrity. To this end, ADR Provider Organizations should consider adopting ethical guidelines for employees or other individuals associated with the Organizations who provide ADR management or administrative services, addressing such issues as impartiality and fair treatment in ADR administration, privacy and confidentiality, and limitations on gifts and financial interests or relationships.[32]

VIII. False or Misleading Communications

An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

Comment

As providers of neutral dispute resolution services, ADR Provider Organizations should be vigilant in avoiding false or misleading statements about their services, processes or outcomes. With ADR Provider Organizations assuming greater prominence in the delivery of ADR, it is important that organizations take care not to foster unrealistic public expectations about their services, processes or results.

The reporting of settlement rates and other measures of reporting by ADR Provider Organizations and individual neutrals raises concern. Settlement rates can be calculated in various ways and reflect various factors (including the number of cases, the difficulty of cases, the time frame for inclusion, and the definition of settlement). This Principle calls for disclosure of how the settlement rates and other key reporting measures (such as "number of cases") are determined when ADR Provider Organizations use these measures to market their services.

IX. Confidentiality

An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract.

a. ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction.
b. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization.
c. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.

[32] The American Arbitration Association recently adopted a Code of Ethics for Employees which addresses the ethical responsibilities of AAA employees in administering cases and other responsibilities. In the area of impartiality, for example, the Code provides, "[t]he appointment of neutrals to cases shall be based solely on the best interests of the parties." In the areas of Financial Transactions, the Code provides, *inter alia,* "[e]mployees shall avoid any financial or proprietary interest in contracts which the employee negotiates, prepares, authorizes or approves for the Association and shall not contract with family members." Additionally, the Code prohibits gifts to employees, stating: "Employees shall also observe the gift policy of the Association which prohibits the acceptance of gifts from neutrals, parties, advocates, vendors, or from firms providing services, regardless of the nature of the case or value of the intended gift." *Code of Ethics for Employees of the American Arbitration Association* (1998).

Comment

This Principle establishes the protection of confidentiality as a core obligation of the ADR Provider Organization. Given the varied sources of confidentiality protections, unsettled case law, and diverse regulatory efforts,[33] this Principle imposes a general obligation on the part of the ADR Provider Organization to establish, disclose and uphold governing confidentiality rules, whether set by party agreement, contract, policy or law. This Principle also makes it a core organizational obligation to communicate the Organization's confidentiality policies to neutrals and parties.[34]

[33] *See, e.g.,* Kathleen M. Scanlon, *Primer on Recent Developments in Mediation,* ADR Counsel In Box, No. 6, Alternatives (February 2001 and October 2001 Update)(overview of current ADR confidentiality policy, practice, case law and uncertainties)(October 2001 Update at www.cpradr.org, Members Only section); *Special Issue: Confidentiality in Mediation,* Disp. Resol. Mag., (Winter 1998) (for a review of policy issues and uncertainties, regulatory reforms, and case law); Christopher Honeyman, *Confidential, More or Less: The Reality, and Importance, of Confidentiality is Often Oversold by Mediators and the Profession,* Disp. Resol. Mag. 12, (Winter 1998); Proposed Model Rule 4.5.2 of the CPR-Georgetown Commission on Ethics and Standards in ADR's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); Uniform Mediation Act & Reporter's Notes (jointly drafted by National Conference of Commissioners on Uniform State Law and ABA Section of Dispute Resolution) (adopted and recommended for enactment in all states by NCCUSL at 2001 Annual Meeting on August 10-17, 2001; adopted by ABA House of Delegates in February 2002).

[34] For an example of a public ADR Provider Organization's statement of confidentiality policy and rules, *see* U.S. Institute for Environmental Conflict Resolution, Confidentiality Policy and Draft Rule (1999).

Appendix A: Taxonomy of ADR Provider Organizations [35]

I. Definition of "ADR Provider Organization"

See Definition and Comment in the Principles for ADR Provider Organizations, *supra* at 5-6.

II. Taxonomy of ADR Provider Organizations

ADR Provider Organizations come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve, and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals; and in their resources and management philosophies.

To help organize our understanding of this diverse and dynamic field, we believe it is useful to categorize ADR Provider Organizations according to (i) their organizational structures, (ii) the nature of their services and relationships with neutrals, and (iii) the nature of their relationships with users or consumers. The following discussion looks closely at each of these three main categories and tries to identify the major distinguishing factors in each area. We hope this discussion helps to provide a framework for understanding and guiding the diverse entities which manage or administer dispute resolution and conflict management services.

A. ORGANIZATIONAL STRUCTURES

Nine distinguishing factors related to the organizational structure of ADR Provider Organizations were identified:

- Overall Organizational Status
- Overall Organizational Structure
- How Neutrals Are Listed
- How Neutrals Are Referred
- Organization's Role in Quality Control
- Organization's Stake in Dispute or Substantive Outcome
- Organization's Size
- Organization's Resources
- Organization's Operational Transparency

[35] CPR-Georgetown Commission member Charles Pou headed the Commission's effort to develop a taxonomy of ADR Provider Organizations, *see Principles for ADR Provider Organizations, supra* at note 1(hereinafter referred to as ADR Provider Principles). The Commission's goal in developing the taxonomy was to describe, group and provide a framework for analysis of the many different kinds of entities that fall within the rubric of ADR Provider Organization. Mr. Pou is the primary author of the taxonomy. Commission members Bryant Garth and Michael Lewis also contributed to its development. The Taxonomy committee also played the lead role in formulating the definition of ADR Provider Organization included in the ADR Provider Principles.

1. Organizational Status:
Court • Public regulatory agency • Public dispute resolution provider agency • Other public entity (State dispute resolution agency, University, Administrative support agency, Office of Administrative Law Judges, Shared neutrals program) • Quasi-public (*e.g.,* community dispute resolution programs) • Private not-for-profit • Self-regulatory entity • Private industry programs for intra-industry disputes, franchisee disputes, consumers, employees, clients • Private for-profit

A variety of different kinds of organizations currently provide dispute resolution services. In recent years, many public entities have been established, or extended their activities, to serve as ADR Provider Organizations. These include court-annexed systems individually or centrally managed by a judge or an administrator, programs run in-house by government agencies with regulatory duties, programs in government agencies that employ staff neutrals, shared neutrals programs, expedited government contracting vehicles, and activities at government, academic, or other public entities interested in conflict management. On the private side, Provider Organizations include private sector non-profit entities and for-profit entities. Some private groups also serve as contractors to assist public agencies or others wishing to employ ADR more effectively.

2. Organizational Structure:
Corporation • Limited liability company • Partnership • Franchise • Law firm • Membership organization • Other entities

A variety of structures are used to arrange the business or other dealings of private provider organizations, including corporations, limited liability companies, partnerships, franchises, law firms, and membership organizations.

3. How Neutrals Are Listed:
Pure clearinghouse • Selective listing (objective) • Selective listing (subjective)

The ADR Provider Organization may list all neutrals who provide required data and serve simply as a clearinghouse. Alternatively, it may employ objective criteria and list all who are found to comply; or it may selectively limit listed neutrals in explicitly or implicitly subjective ways.

4. How Neutrals Are Referred:
Nonselective • Random panel selection • Subjective panel selection • Party-identified panels • Assignor of neutral • Mixture

The Organization may refer all of its listed neutrals to users requesting a panel of neutrals, or all who meet users' stated criteria, or a randomly selected subset of responsive neutrals; alternately, it may subjectively select a panel, or a single neutral, from among those that it (or the parties) deems appropriate for a given case. Some organizations employ a mix of these referral or selection techniques.

5. Organization's Role in Quality Control:
Certification of listed neutrals • Qualifications and selection process • Conflicts check • Performance evaluation • Discipline • Training • No role

Some management entities certify or otherwise indicate that the neutrals to whom they refer cases or employ are qualified, or even superior. Others offer no warranties of qualifications beyond the general accuracy of the information they supply about potential neutrals. Whatever warranties or disclaimers are made, a variety of informal and formal approaches to quality control are used. These generally include one or more of the following: requiring affiliated neutrals to receive approved training courses; requiring neutrals to show that they have certain kinds of experience, training, or references; providing

ongoing in-service or other training and education to affiliated neutrals; offering informal, case-specific advice to neutrals; evaluating performance based on observation by the ADR Provider Organization's personnel or users' questionnaire responses; offering processes for receiving complaints, assessments, or other feedback from users; removing listed neutrals who, over time, are not selected by parties; and disciplining or removing neutrals who fail to meet ethical or other standards.

6. Organization's Stake in Dispute or Substantive Outcome:
None • Full party to dispute • Good will, future business • Membership organization • Non-profit mission • Administrative charge for matchmaking • Portion of neutral's fee • Other

Most ADR provider entities are explicitly independent and have no stake in the dispute. A few may be parties to cases for which they provide referrals, as in ADR programs that are managed internally by the private or public organization involved in the dispute (*e.g.,* an internally-managed corporate, university or governmental dispute resolution). Other ADR Provider Organizations may have some attenuated or perceived interest (programs using collateral duty or shared neutrals from the same, or another, agency). Some managing organizations provide ADR services as a public service, pursuant to a statutory mandate, as a means of improving or supplementing other services or activities, or as a way to fulfill other non-profit missions. Others provide services primarily in return for fees. Several other benefits may accrue to an ADR Provider Organization: service to members, good will that may influence other activities, or access to additional cases or clients.

7. Organization's Size:
Individual part-time solo • Individual full-time solo • Small entity • Large entity • Regional organization • National organization • International organization

ADR Provider Organizations may include a single individual for whom mediation, arbitration, or management or administrative services are a sideline, a full-time practitioner, a small specialized entity with several neutrals, a large entity that offers a diverse array of services and neutrals in several parts of the U.S., or a national or international organization with hundreds or thousands of available neutrals.

8. Organization's Resources:
Substantial paid staff and related resources devoted to program • Limited volunteer staff and few other resources

Staff and other resources available for operating a program vary dramatically and can have an impact on the nature and quality of services. A few providers devote no full-or part-time staff to their activities; they may, for example, use volunteers, simply provide a list of neutrals without more, or respond to requests on a "catch-as-catch can" basis. At the other extreme, some have substantial full-time staffs devoted to one or more provider roles (*e.g.,* setting standards for listing neutrals, admitting listed neutrals, furnishing panels, advising parties, assessing or disciplining listed neutrals).

9. Organization's Operational Transparency:
Opaque • Open decision making • Rules of procedure defining required competencies, disclosing standards and/or methods for selecting neutrals in individual cases

Some ADR Provider Organizations operate as black boxes, with little or no provision for oversight or openness; others are relatively more open and explicit about the processes by which neutrals are selected, assigned, and monitored; a few seek explicitly to assure openness and regularity via rules, standards, or methodologies.

B. ORGANIZATION'S SERVICES AND RELATIONSHIPS WITH NEUTRALS

Five key attributes of ADR Provider Organizations were identified in this area:

- Nature of Organization's Services
- Nature of Cases
- Nature of Process Assistance Furnished by Neutral
- Relation of Listed Neutrals to ADR Provider Organization
- Status of Neutral

1. Nature of Organization's Services:

Neutral who assists disputants • Clearinghouse list of available neutrals • Management service • Full service administration • Assignor of neutrals • Advisor • System design • Other consultant • Mixture

Some ADR Provider Organizations offer only certain limited kinds of neutral services; others offer a menu of ADR options, which may include training and consulting. A few operate purely as clearinghouses that do little beyond offering a list of neutrals for users to review, perhaps accompanied by a short brochure or generalized advice. Some court programs, for instance, simply maintain a binder containing resumes sent in by local neutrals. Many ADR Provider Organizations, however, offer a range of administrative, management, and consulting services, including helping parties select or design appropriate processes, finding suitable neutrals, and managing the case during the ADR process. Some Provider Organizations offer set management choices, while others offer parties tailored management (from full-service to self-administration) depending on the users' request. A few offer all of these neutral and management services, sometimes in settings where the Organization both manages a roster and provides neutrals' services for the same client.

2. Nature of Cases:

Number of parties (multiparty or two-party) • Complexity • Length • Subject matter (environmental/policy • civil enforcement • mass tort, insurance, product liability, or similar litigation • commercial/business conflicts • small claims litigation • workplace/employment • family • consumer • labor-management • neighborhood • other)

ADR Provider Organizations assist parties in cases that vary in size, complexity, length, and number of parties, as well as in their subject matter. A few Provider Organizations offer services for cases involving a wide array of settings or subjects. Other Provider Organizations tend to specialize by subject matter. For instance, some Organizations deal mainly with environmental matters; others tend to focus primarily on a broad range of business, commercial, employment and public disputes. Most public Provider Organizations—for example, entities managing court-annexed ADR programs, state-wide court management organizations, and user-specific entities (like the FDIC's roster of neutrals for litigation stemming from bank closings)—deal mostly, or exclusively, with the kinds of cases they were established to support, though this may encompass a broad array of subject areas.

3. Nature of Process Assistance Furnished by Neutral:

System design • Other consulting • Training • Facilitation • Mediation • Case evaluation • Binding arbitration • Private judging • Specialized expertise in specific subject area • Hybrid ADR Processes • Mixture

The ADR Provider Organization may refer listed neutrals who offer a range of ADR processes and related services. The neutral's roles may also range from a brief consultations to extended conflict resolution interventions. Training and design consulting assignments may also include short or longer tenures.

4. Relation of Listed Neutrals to Organization:
Independent • Contractors • Franchisee • Staff • Other

Some management organizations have few, or no, dealings with neutrals beyond listing them. Other organizations work primarily, or exclusively, with neutrals who are contractors, subcontractors, employees, members or franchisees. Several provider organizations require most of their listed neutrals to pay a fee.

5. Status of Neutral:
Private full-time professional neutral • Private part-time • Public collateral duty • Public full-time • Judicial officer • Lawyer • Other professionals

An ADR Provider Organization may offer services from private full-time or part-time dispute resolution practitioners, public full-time practitioners, private individuals who serve occasionally as neutrals, public employees who offer neutral services on a collateral duty basis, or judicial officers whose activities as neutrals may be related to official duties. Apart from their employment status, neutrals referred by a Provider Organization may also come from a variety of professional or other backgrounds (*e.g.,* lawyer, judge, engineer, environmental scientist, social worker, therapist, among others).

C. ORGANIZATION'S RELATIONSHIPS WITH USERS OR CONSUMERS

Two key factors were identified in this area:

- Characteristics of Parties or Representatives
- Organization's Prior Relationship with a User or Representative

1. Characteristics of Parties or Representatives:
Unsophisticated/vulnerable/pro se/novice parties or representatives • Experienced/ fully represented parties or representatives • Individual v. Organization • Individual v. Individual • Other

ADR Provider Organizations deal with a variety of users. Organizations handling neighborhood, consumer, or family cases may often deal with cases involving exclusively first-time participants or similarly unsophisticated users. In many court programs and other settings, the Provider Organization may deal with some parties who are novices on one side and well-represented organizations, or ones that have great experience with ADR processes, on the other. These and other Provider Organizations—particularly in large commercial or labor disputes—deal largely with sophisticated repeat players (as parties and/or representatives) on one or all sides.

2. Organization's Prior Relationship with a User or Representative:
None • Repeat contractor • Long-term contractor • Financial dealings • Other (*e.g.,* board member)

An ADR Provider Organization may have had no dealings with any party or representative; may have worked one or more times with a party or with both parties, or their representatives; or may have a long-term service contract or other relationship with one party or law firm. A Provider Organization may also have certain types of prior, ongoing, or intermittent professional relations with parties or representatives, such as providing training, consulting, or systems design services. In some instances, a Provider Organization may have financial, business, professional or personal dealings with a party or representative.

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