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INVITATION TO COMMENT

SPR11-02

Title	Action Requested
Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration	Review and submit comments by Monday, June 20, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend standards 2,3,7, and 8	January 1, 2012
Proposed by	Contact
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Summary

This is a proposal for amendments to the Ethics Standards for Neutral Arbitrators in Contractual Arbitration in response to recent appellate court decisions concerning these standards. Among other things, these amendments would codify the holdings in cases 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, would require new disclosures if an arbitrator was disciplined by a professional licensing agency, and would 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.

Discussion

Background

Code of Civil Procedure section 1281.85 required the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations under an arbitration agreement. 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.¹ The standards shall address the disclosure of interests, relationships, or affiliations that

¹ That is, chapter 2 (of title 9), Enforcement of Arbitration Agreements (Code Civ. Proc., §§ 1281–1281.96). Disclosure and disqualification requirements in this chapter are set out in sections 1281.9, 1281.91, and 1281.95.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

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.

In April 2002, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration.² As provided in Code of Civil Procedure section 1281.85, all persons serving as neutral arbitrators under an arbitration agreement are required to comply with these ethics standards.

Since the Judicial Council adopted these ethics standards, there have been several appellate court decisions involving their application in various circumstances. Some of the amendments to the standards proposed in this invitation to comment are intended to conform the standards to case law. Others are intended to modify or clarify the standards in light of case law. In addition, the Judicial Council has received some suggestions for modifying the standards, which have been incorporated into this invitation to comment.

The proposed amendments are discussed below and shown in the attachment. In addition, in the attachment, each amendment is followed by drafters' notes describing the proposed change. These notes are intended only to help readers understand these proposed amendments and will not be included in the final version of the standards presented to the Judicial Council for adoption.

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 119) held that the federal Securities Exchange Act preempts application of the California ethics standards to arbitrators for the National Association of Securities Dealers (NASD). The courts concluded that 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, this proposal revises standard 3, which addresses the application of the standards, and its accompanying comment to explicitly exempt arbitrators serving in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the SEC under federal law.³

² The full text of the standards is available at: www.courts.ca.gov/xbcr/cc/ethics_standards_neutral_arbitrators.pdf.

³ These same changes were previously circulated for public comment in late 2005, along with a request for comments on all the standards.

Disclosure of professional discipline

In 2010, 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 he had been publically censured by the Commission on Judicial Performance. Because the standards do not currently require disclosure of such professional discipline, the court based its determination on whether, under the particular facts of the case, the 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.

The attached proposal would add a new requirement, separate from the requirement for disclosures relating to the arbitrator's impartiality, that an arbitrator disclose to the parties if he or she was publically disciplined by a professional licensing or disciplinary agency or if he or she resigned membership in the licensing agency while disciplinary charges were pending. This is similar to existing requirements that mediators serving in court-connected mediation programs for general civil cases report such matters to the court (see Cal. Rules of Court, rule 3.856(c)) and that members of the State Bar of California report such matters to the State Bar (see Bus. & Prof. Code, § 6068(o)).

Comments would be particularly appreciated on whether this additional disclosure obligation is necessary given that information about this type of public professional discipline and information about a professional's licensing status is generally easily accessible on the Internet or by telephone.

Disclosure of relationships with a lawyer in the arbitration

Also in 2010, in *Johnson v. Gruma Corporation* (9th Cir. 2010) 614 F.3d 1062, the United States Court of Appeals, Ninth Circuit 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 or has had with a lawyer for a party, the attached proposal would make the following changes to standard 7:

- Move the current provision relating to the arbitrator's past association in the practice of law with a lawyer in the arbitration out of standard 7(d)(8) (which relates to professional relationships the arbitrator or a member of the arbitrator's immediate family has or has had with a party or a lawyer in the arbitration) and into 7(d)(2) (which relates to family

relationships with a lawyer in the arbitration). Moving this provision up to 7(d)(2)(B) ensures that it appears in the first location in which readers might logically look for it.

- Expand 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 should eliminate any doubt about whether these relationships must be disclosed.
- Remove the introductory language about other professional relationships from standard 7(d)(8) and place it in its own separate subdivision: proposed standard 7(d)(9). Placing this provision in its own subdivision should 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.

Initial and subsequent 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 subsequent disclosures (those made anytime after the initial disclosures are made). Under standard 7(c), both initial and subsequent disclosures are required to include any matters listed in standards 7(d) and (e). The appellate briefs filed in the *Johnson v. Gruma Corporation*, however, appeared to reflect some confusion about whether the ethics standards address initial disclosures and about what matters must be disclosed in subsequent disclosures.

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

- Amend standard 7(c) to include separate headings identifying the requirements for initial and supplemental disclosures.
- Amend the references to 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 arbitrators (supplemental disclosures) as well.

In 2008, in *Jakks Pacific, Inc. v. Superior Court* (2008) 160 Cal.App.4th 596, the Court of Appeal also 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) is intended to reflect the holding in *Jakks*.

Other proposed changes

In addition to the amendments intended to address concerns raised by the appellate court decisions described above, the attached proposal includes 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 attached proposal includes an amendment designed to fill this gap.
- *Standard 3(b)(2)(D)*—The proposed 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 proposed amendment would delete an obsolete provision.
- *Comment to standard 7*—The proposed 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 both 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 to matters that arise because of things that happen during the course of an arbitration, such as when a party hires a new lawyer (as occurred in the *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 that 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 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.

Specific Comments Requested

We welcome comments on any of the changes included in this proposal. However, as noted above, we would particularly appreciate comments on whether it is necessary to add a new requirement that an arbitrator disclose to the parties if he or she was publically disciplined by a professional licensing or disciplinary agency or if he or she resigned membership in the licensing

agency while disciplinary charges were pending, given that information about this type of public professional discipline and information about a professional's licensing status is generally easily accessible on the Internet or by telephone.

In addition, we would appreciate comments on whether it would be helpful for the Judicial Council to develop a model disclosure checklist for arbitrators. We understand that many arbitration provider organizations have developed their own internal checklists or disclosure forms for their arbitrators.

Standards 2, 3, 7, and 8 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, of the California Rules of Court, would be amended, effective January 1, 2012, to read:

1 **Standard 2. Definitions**

2
3 As used in these standards:

4
5 **(a) Arbitrator and neutral arbitrator**

6
7 (1) “Arbitrator” and “neutral arbitrator” mean any arbitrator who is subject
8 to these standards and who is to serve impartially, whether selected or
9 appointed:

10
11 (A) Jointly by the parties or by the arbitrators selected by the parties;

12
13 (B) By the court, when the parties or the arbitrators selected by the
14 parties fail to select an arbitrator who was to be selected jointly by
15 them; or

16
17 (C) By a dispute resolution provider organization, under an agreement
18 of the parties.

19
20 (2) Where the context includes events or acts occurring before an
21 appointment is final, “arbitrator” and “neutral arbitrator” include a
22 person who has been served with notice of a proposed nomination or
23 appointment. For purposes of these standards, “proposed nomination”
24 does not include nomination by a court of persons under Code of Civil
25 Procedure section 1281.6 to be considered for possible selection as an
26 arbitrator by the parties or appointment as an arbitrator by the court.

27
28 **(b)–(n) * * ***

29
30 **(o)** “Member of the arbitrator’s extended family” means the parents,
31 grandparents, great-grandparents, children, grandchildren, great-
32 grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or
33 the arbitrator’s spouse or domestic partner or the spouse or domestic partner
34 of such person.

35
36 **(p)–(s) * * ***

37
38 **Drafters’ Notes:**

39
40 **Subdivision (a)(2).** The amendment to subdivision (a)(2) is meant to codify the court’s holding in
41 *Jakks Pacific, Inc. v. Superior Court* (2008) 160 Cal.App.4th 596 that, in the context of
42 requirements for disclosures by proposed neutral arbitrators, “nomination” is not the same as the
43 court’s “nomination” of a list of potential arbitrators for consideration by the parties under Code of
44 Civil Procedure section 1281.6.

1 **Subdivision (o).** The amendment to subdivision (o) is meant to fill a gap in the standard, which
2 currently covers spouses of an arbitrator's relatives, but does not specifically cover the domestic
3 partners of these relatives.
4
5

6 **Standard 3. Application and effective date**
7

8 (a) Except as otherwise provided in this standard and standard 8, these standards
9 apply to all persons who are appointed to serve as neutral arbitrators on or
10 after July 1, 2002, in any arbitration under an arbitration agreement, if:

11
12 (1) The arbitration agreement is subject to the provisions of title 9 of part III
13 of the Code of Civil Procedure (commencing with section 1280); or

14
15 (2) The arbitration hearing is to be conducted in California.
16

17 (b) These standards do not apply to:

18
19 (1) Party arbitrators, as defined in these standards; or

20
21 (2) Any arbitrator serving in:

22
23 (A) An international arbitration proceeding subject to the provisions of
24 title 9.3 of part III of the Code of Civil Procedure;

25
26 (B) A judicial arbitration proceeding subject to the provisions of
27 chapter 2.5 of title 3 of part III of the Code of Civil Procedure;

28
29 (C) An attorney-client fee arbitration proceeding subject to the
30 provisions of article 13 of chapter 4 of division 3 of the Business
31 and Professions Code;

32
33 (D) An automobile warranty dispute resolution process certified under
34 California Code of Regulations title 16, division 33.1 or an
35 informal dispute settlement procedure under Code of Federal
36 Regulations title 16, chapter 1, part 703;

37
38 (E) An arbitration of a workers' compensation dispute under Labor
39 Code sections 5270 through 5277;

40
41 (F) An arbitration conducted by the Workers' Compensation Appeals
42 Board under Labor Code section 5308;
43

- (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) 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. 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.

Comment to Standard 3

With the exception of standard 8, 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).

Drafters’ Notes:

Subdivision (b)(2)(D). The amendment to this provision would make a substantive change by exempting arbitrators serving in a type of automobile warranty arbitration program authorized by federal regulation. This program is similar to the automobile warranty and attorney-client fee arbitration programs already exempted in (b)(2)(D) and (b)(2)(C) because the decisions rendered in informal dispute settlement procedures established under Code of Federal Regulations title 16, chapter 1, part 703 are not binding on the consumer party.

Subdivision (b)(2)(I). This proposed new provision and the accompanying amendment to the comment are the same changes that were circulated for public comment in 2005 and are intended to recognize the case law relating to the preemption of the standards for arbitrators serving in the security industry arbitration programs governed by rules approved by the SEC.

1 **Standard 7. Disclosure**

2
3 (a)–(b) * * *

4
5 (c) **Time and manner of disclosure**

6
7 (1) Initial disclosure

8
9 Within ten calendar days of service of notice of the proposed nomination
10 or appointment, a proposed arbitrator must disclose to all parties in
11 writing all matters listed in subdivisions (d) and (e) of this standard of
12 which the arbitrator is then aware.

13
14 (2) Supplemental disclosure

15
16 If an arbitrator subsequently becomes aware of a matter that must be
17 disclosed under either subdivision (d) or (e) of this standard, the
18 arbitrator must disclose that matter to the parties in writing within 10
19 calendar days after the arbitrator becomes aware of the matter.

20
21 (d) **Required disclosures**

22
23 ~~A person who is nominated or appointed as an arbitrator~~ A proposed arbitrator
24 or arbitrator must disclose all matters that could cause a person aware of the
25 facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able
26 to be impartial, including all of the following:

27
28 **Drafters' Notes:**

29 The proposed amendments to subdivision (c) and the introductory sentence of subdivision (d) are
30 intended to clarify that standard 7 governs both initial disclosures (those made before final
31 appointment of an arbitrator) and supplemental disclosures (those made after the initial
32 disclosures have been made).

33
34
35 (1) *Family relationships with party*

36
37 The arbitrator or a member of the arbitrator's immediate or extended
38 family is a party, a party's spouse or domestic partner, or an officer,
39 director, or trustee of a party.

40
41 (2) *Family relationships with lawyer in the arbitration*

42
43 (A) Current relationships

44
45 The arbitrator, or the spouse, former spouse, domestic partner,
46 child, sibling, or parent of the arbitrator or the arbitrator's spouse
47 or domestic partner is:

1
2 ~~(A)~~(i) A lawyer in the arbitration;
3

4 ~~(B)~~(ii) The spouse or domestic partner of a lawyer in the
5 arbitration; or
6

7 ~~(C)~~(iii) Currently associated in the private practice of law with a
8 lawyer in the arbitration.
9

10 (B) Past relationships

11 The arbitrator or the arbitrator’s spouse or domestic partner was
12 associated in the private practice of law with a lawyer in the
13 arbitration within the preceding two years.
14

15
16 **Drafters’ Notes:**

17 The amendments to subdivision (d)(2) are intended to address the decision of the Ninth Circuit
18 Court of Appeals in *Johnson v. Gruma Corporation* ((2010) 614 F.3d 1062). That decision held
19 that, under the standards, when a party hired a new lawyer during the arbitration, the arbitrator
20 was not required to disclose that his wife had in the past been a partner in the same law firm as
21 this newly hired lawyer. The proposed amendments would do two things:
22

- 23 1. Move the current provision relating to the arbitrator having been associated in the practice of
24 law with a lawyer in the arbitration within the past two years out of (d)(8) (which relates to
25 professional relationships the arbitrator or a member of the arbitrator’s immediate family has
26 or has had with a party or a lawyer in the arbitration) and into (d)(2) (which relates to family
27 relationships with a lawyer in the arbitration). While this provision could logically be placed in
28 either subdivision, because (d)(2) already addresses situations in which the arbitrator is
29 currently associated in the practice of law with a lawyer in the arbitration, readers may expect
30 that past relationships of this type would also be addressed in the same subdivision. Moving
31 this provision up to (d)(2) ensures that it appears in the first location in which readers might
32 logically look for it.
33
- 34 2. Expand this provision to specifically include the arbitrator’s spouse or domestic partner
35 having been associated in the practice of law with a lawyer in the arbitration —the situation
36 addressed in *Gruma*. This type of relationship is arguably already covered by the general
37 overarching requirement that the arbitrator disclose “all matters that could cause a person
38 aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able
39 to be impartial” (introductory paragraph of (d) and current (d)(14)), the requirement to
40 disclose “[a]ny other professional relationship not already disclosed under paragraphs (2)–(7)
41 that . . . a member of the arbitrator’s immediate family has or has had with a . . . lawyer for a
42 party” (current (d)(8)), and the requirement to disclose if “a member of the arbitrator’s
43 immediate family is or, within the preceding two years, was an employee of . . . a lawyer in
44 the arbitration” ((d)(8)(C)). However, because (d)(2) specifically addresses situations in which
45 members of the arbitrator’s family are currently associated in the practice of law with a lawyer
46 in the arbitration, readers might expect that this standard would also specifically address past
47 relationships of this type if they were intended to be covered. Explicitly listing such past
48 relationships eliminates any doubt about whether these relationships must be disclosed.
49
50
51

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

2
3 The arbitrator or a member of the arbitrator's immediate family has or
4 has had a significant personal relationship with any party or lawyer for a
5 party.
6

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

8
9 (A) The arbitrator is serving or, within the preceding five years, has
10 served:

11
12 (i) As a neutral arbitrator in another prior or pending
13 noncollective bargaining case involving a party to the current
14 arbitration or a lawyer for a party.
15

16 (ii) As a party-appointed arbitrator in another prior or pending
17 noncollective bargaining case for either a party to the current
18 arbitration or a lawyer for a party.
19

20 (iii) As a neutral arbitrator in another prior or pending
21 noncollective bargaining case in which he or she was
22 selected by a person serving as a party-appointed arbitrator in
23 the current arbitration
24

25 (B)–(C) * * *

26
27 (5) *Compensated service as other dispute resolution neutral*

28
29 The arbitrator is serving or has served as a dispute resolution neutral
30 other than an arbitrator in another pending or prior noncollective
31 bargaining case involving a party or lawyer for a party and the arbitrator
32 received or expects to receive any form of compensation for serving in
33 this capacity.
34

35 (A) Time frame

36
37 For purposes of this paragraph (5), "prior case" means any case in
38 which the arbitrator concluded his or her service as a dispute
39 resolution neutral within two years before the date of the
40 arbitrator's proposed nomination or appointment, ~~but does not~~
41 ~~include any case in which the arbitrator concluded his or her~~
42 ~~service before January 1, 2002.~~
43

44 (B)–(C) * * *

1 **Drafters' Notes:**

2 The amendment to (d)(5), which requires arbitrators to disclose prior service as a dispute
3 resolution neutral other than an arbitrator, deletes an obsolete provision. Subpart (A) defines
4 "prior case" for purposes of this provision as "any case in which the arbitrator concluded his or
5 her service as a dispute resolution neutral within two years before the date of the arbitrator's
6 proposed nomination or appointment, *but does not include any case in which the arbitrator*
7 *concluded his or her service before January 1, 2002.*" (Emphasis added.) The last clause in this
8 provision was included because, at the time this standard was adopted in 2002, arbitrators had
9 not necessarily been keeping the records about their service as a dispute resolution neutral that
10 would be required to make the disclosures required under (d)(5) and so disclosures of such
11 service concluded before 2002 were not required. Because the standard only requires disclosure
12 of service in cases concluded within the preceding two years, this provision is no longer
13 necessary.
14
15

16 (6) *Current arrangements for prospective neutral service*

17
18 Whether the arbitrator has any current arrangement with a party
19 concerning prospective employment or other compensated service as a
20 dispute resolution neutral or is participating in or, within the last two
21 years, has participated in discussions regarding such prospective
22 employment or service with a party.
23

24 (7) *Attorney-client relationships*

25
26 Any attorney-client relationship the arbitrator has or has had with a party
27 or lawyer for a party. Attorney-client relationships include the
28 following:
29

30 (A) An officer, a director, or a trustee of a party is or, within the
31 preceding two years, was a client of the arbitrator in the arbitrator's
32 private practice of law or a client of a lawyer with whom the
33 arbitrator is or was associated in the private practice of law;
34

35 (B) In any other proceeding involving the same issues, the arbitrator
36 gave advice to a party or a lawyer in the arbitration concerning any
37 matter involved in the arbitration; and
38

39 (C) The arbitrator served as a lawyer for or as an officer of a public
40 agency which is a party and personally advised or in any way
41 represented the public agency concerning the factual or legal issues
42 in the arbitration.
43

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

45
46 The arbitrator or a member of the arbitrator's immediate family is or,
47 within the preceding two years, was an employee of or an expert witness
48 or a consultant for a party or for a lawyer in the arbitration.

1
2 ~~(8)~~(9) *Other professional relationships*

3
4 Any other professional relationship not already disclosed under
5 paragraphs (2)–~~(7)~~(8) that the arbitrator or a member of the arbitrator’s
6 immediate family has or has had with a party or lawyer for a
7 party, ~~including the following:~~

8
9 ~~(A) The arbitrator was associated in the private practice of law with a~~
10 ~~lawyer in the arbitration within the last two years.~~

11
12 ~~(B) The arbitrator or a member of the arbitrator’s immediate family is~~
13 ~~or, within the preceding two years, was an employee of or an~~
14 ~~expert witness or a consultant for a party; and~~

15
16 ~~(C) The arbitrator or a member of the arbitrator’s immediate family is~~
17 ~~or, within the preceding two years, was an employee of or an~~
18 ~~expert witness or a consultant for a lawyer in the arbitration.~~

19
20 **Drafters’ Notes:**

21 The amendments to (d)(8) and the proposed addition of (d)(9) are also intended to address the
22 decision of the Ninth Circuit Court of Appeals in *Johnson v. Gruma Corporation* ((2010) 614 F.3d
23 1062). The proposed amendments would do two things:

- 24
25 1. Move the current provision relating to the arbitrator having been associated in the practice of
26 law with a lawyer in the arbitration out of (d)(8) and into (d)(2). As explained in the drafters’
27 notes to (d)(2), moving this provision up to (d)(2) ensures that it appears in the first location in
28 which readers might logically look for it.
29
30 2. Separate the provisions relating to employment, expert witness, and consulting relationships
31 from the general requirement to disclose professional relationships between the arbitrator
32 and the arbitrator’s immediate family and a party or a lawyer for a party. This should reduce
33 any questions about whether the standards include a separate obligation to disclose
34 professional relationships not already covered by other subparts of 7(d).
35

36
37 ~~(9)~~(10) *Financial interests in party*

38
39 The arbitrator or a member of the arbitrator’s immediate family has a
40 financial interest in a party.

41
42 ~~(10)~~(11) *Financial interests in subject of arbitration*

43
44 The arbitrator or a member of the arbitrator’s immediate family has a
45 financial interest in the subject matter of the arbitration.
46
47

1 (~~11~~)(12) *Affected interest*

2
3 The arbitrator or a member of the arbitrator’s immediate family has an
4 interest that could be substantially affected by the outcome of the
5 arbitration.
6

7 (~~12~~)(13) *Knowledge of disputed facts*

8
9 The arbitrator or a member of the arbitrator’s immediate or extended
10 family has personal knowledge of disputed evidentiary facts relevant to
11 the arbitration. A person who is likely to be a material witness in the
12 proceeding is deemed to have personal knowledge of disputed
13 evidentiary facts concerning the proceeding.
14

15 (~~13~~)(14) *Membership in organizations practicing discrimination*

16
17 The arbitrator’s membership in any organization that practices invidious
18 discrimination on the basis of race, sex, religion, national origin, or
19 sexual orientation. Membership in a religious organization, an official
20 military organization of the United States, or a nonprofit youth
21 organization need not be disclosed unless it would interfere with the
22 arbitrator’s proper conduct of the proceeding or would cause a person
23 aware of the fact to reasonably entertain a doubt concerning the
24 arbitrator’s ability to act impartially.
25

26 (~~14~~)(15) Any other matter that:

- 27
28 (A) Might cause a person aware of the facts to reasonably entertain a
29 doubt that the arbitrator would be able to be impartial;
30
31 (B) Leads the proposed arbitrator to believe there is a substantial doubt
32 as to his or her capacity to be impartial, including, but not limited
33 to, bias or prejudice toward a party, lawyer, or law firm in the
34 arbitration; or
35
36 (C) Otherwise leads the arbitrator to believe that his or her
37 disqualification will further the interests of justice.
38

39 (e) **Professional discipline or inability to conduct or timely complete**
40 **proceedings**

41
42 In addition to the matters that must be disclosed under subdivision (d), ~~an~~ a
43 proposed arbitrator or arbitrator must also disclose:
44
45

1 (1) Professional discipline

2
3 (A) If public discipline has been imposed on the arbitrator by any
4 public disciplinary or professional licensing entity; or

5
6 (B) If the arbitrator has resigned his or her membership in the State
7 Bar or another professional licensing agency while disciplinary
8 charges were pending.

9
10 (2) Inability to conduct or timely complete proceedings

11
12 ~~(1)~~(A) If the arbitrator is not able to properly perceive the evidence or
13 properly conduct the proceedings because of a permanent or
14 temporary physical impairment; and

15
16 ~~(2)~~(B) Any constraints on his or her availability known to the arbitrator
17 that will interfere with his or her ability to commence or complete
18 the arbitration in a timely manner.

19
20 **Drafters' Notes:**

21 The proposed amendments to subdivision (e) would do two things:

- 22
23 1. The amendments to the introductory sentence would help clarify that standard 7 governs both
24 initial and supplemental disclosures.
25
26 2. The proposed new subdivision (e)(1) would add a new obligation to disclose either if the
27 arbitrator was publically disciplined by a professional licensing or disciplinary agency or if the
28 arbitrator resigned membership in the licensing agency while disciplinary chargers were
29 pending. This new provision is intended to address the type of situation that was at issue in
30 *Haworth v. Superior Court of Los Angeles* (2010) 50 Cal.4th 372, in which an arbitrator did
31 not disclose that he had previously been publically censured by the Commission on Judicial
32 Performance.

33
34
35 (f) **Continuing duty**

36
37 An arbitrator's duty to disclose the matters described in subdivisions (d) and
38 (e) of this standard is a continuing duty, applying from service of the notice of
39 the arbitrator's proposed nomination or appointment until the conclusion of
40 the arbitration proceeding.

41
42 **Comment to Standard 7**

43
44 This standard requires proposed arbitrators to disclose to all parties, in writing within 10 days of
45 service of notice of their proposed nomination or appointment, all matters they are aware of at
46 that time that could cause a person aware of the facts to reasonably entertain a doubt that the
47 proposed arbitrator would be able to be impartial. ~~and to disclose~~ This standard also requires that
48 if arbitrators subsequently become aware of any additional such matters, they must make
49 supplemental disclosures of these matters within 10 days of becoming aware of them. This latter

1 requirement is intended to address both matters present at the time of nomination or appointment
2 of which the arbitrator subsequently becomes aware and new matters that arise based on
3 developments during the arbitration, such as the hiring of new counsel by a party.
4

5 Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator.
6 It provides the parties with the necessary information to make an informed selection of an
7 arbitrator by disqualifying or ratifying the ~~proposed~~ arbitrator following disclosure. See also
8 standard 12, concerning disclosure and disqualification requirements relating to concurrent and
9 subsequent employment or professional relationships between an arbitrator and a party or
10 attorney in the arbitration. A party may disqualify an arbitrator for failure to comply with
11 statutory disclosure obligations (see Code Civ. Proc., § 1281.91(a)). Failure to disclose, within
12 the time required for disclosure, a ground for disqualification of which the arbitrator was then
13 aware is a ground for *vacatur* of the arbitrator’s award (see Code Civ. Proc., § 1286.2(a)(6)(A)).
14

15 The arbitrator’s overarching duty under this standard, which mirrors the duty set forth in Code of
16 Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware
17 of the facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be
18 impartial. While the remaining subparagraphs of subdivision (d) require the disclosure of specific
19 interests, relationships, or affiliations, these are only examples of common matters that could
20 cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able
21 to be impartial. The absence of the particular fact that none of the interests, relationships, or
22 affiliations specifically listed in the subparagraphs of (d) are present in a particular case does not
23 necessarily mean that there is no matter that could reasonably raise a question about the
24 arbitrator’s ability to be impartial and that therefore must be disclosed. Similarly, the fact that a
25 particular interest, relationship, or affiliation present in a case is not specifically enumerated in
26 one of the examples given in these subparagraphs does not mean that it must not be disclosed. An
27 arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the
28 general criteria for disclosure under subdivision (d): is the matter something that could cause a
29 person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be
30 impartial. For example, (d)(2) specifies that an arbitrator must disclose if his or her spouse was in
31 the private practice of law with a lawyer in the arbitration within the preceding two years, but if
32 the arbitrator’s spouse had been in the private practice of law with the lawyer in the arbitration for
33 30 years until 3 years before, a person aware of that fact might reasonably entertain a doubt that
34 the arbitrator would be able to be impartial and therefore that fact should be disclosed.
35

36 Code of Civil Procedure section 1281.85 specifically requires that the ethical standards adopted
37 by the Judicial Council address the disclosure of interests, relationships, or affiliations that may
38 constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution
39 neutral entity. Section 1281.85 further provides that the standards “shall be consistent with the
40 standards established for arbitrators in the judicial arbitration program and may expand but may
41 not limit the disclosure and disqualification requirements established by this chapter [chapter 2 of
42 title 9 of part III, Code of Civil Procedure, sections 1281–1281.95].”
43

44 Code of Civil Procedure section 1281.9 already establishes detailed requirements concerning
45 disclosures by arbitrators, including a specific requirement that arbitrators disclose the existence
46 of any ground specified in Code of Civil Procedure section 170.1 for disqualification of a judge.
47 This standard does not eliminate or otherwise limit those requirements; in large part, it simply
48 consolidates and integrates those existing statutory disclosure requirements by topic area. This
49 standard does, however, expand upon or clarify the existing statutory disclosure requirements in
50 the following ways:
51

- 1 • Requiring arbitrators to make supplemental disclosures to the parties regarding any matter
2 about which they become aware after the time for making an initial disclosure has expired,
3 within 10 calendar days after the arbitrator becomes aware of the matter (subdivision ~~(f)(c)~~).
4
- 5 • Expanding required disclosures about the relationships or affiliations of an arbitrator’s family
6 members to include those of an arbitrator’s domestic partner (subdivisions (d)(1) and (2); see
7 also definitions of immediate and extended family in standard 2).
8
- 9 • Requiring arbitrators, in addition to making statutorily required disclosures regarding prior
10 service as an arbitrator for a party or attorney for a party, to disclose both prior services ~~both~~
11 as neutral arbitrator selected by a party arbitrator in the current arbitration and prior
12 compensated service as any other type of dispute resolution neutral for a party or attorney in
13 the arbitration (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)~~(C)~~(A)(iii) and
14 (5)).
15
- 16 • If a disclosure includes information about five or more cases, requiring arbitrators to provide
17 a summary of that information (subdivisions (d)(4)(C) and (5)(C)).
18
- 19 • Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is
20 or, within the preceding two years, was an employee, expert witness, or consultant for a party
21 or a lawyer in the arbitration (subdivisions (d)(8) ~~(A)~~ ~~and (B)~~).
22
- 23 • Requiring the arbitrator to disclose if he or she or a member of his or her immediate family
24 has an interest that could be substantially affected by the outcome of the arbitration
25 (subdivision (d)~~(11)~~(12)).
26
- 27 ~~• If a disclosure includes information about five or more cases, requiring arbitrators to provide~~
28 ~~a summary of that information (subdivisions (d)(4) and (5)).~~
29
- 30 • Requiring arbitrators to disclose membership in organizations that practice invidious
31 discrimination on the basis of race, sex, religion, national origin, or sexual orientation
32 (subdivision (d)~~(13)~~(14)).
33
- 34 • Requiring the arbitrator to disclose if he or she was disciplined by professional licensing or
35 disciplinary agency or resigned membership in the licensing agency while disciplinary
36 charters were pending (subdivision (e)(1)).
37
- 38 • Requiring the arbitrator to disclose any constraints on his or her availability known to the
39 arbitrator that will interfere with his or her ability to commence or complete the arbitration in
40 a timely manner (subdivision ~~(d)~~(e)(2)).
41
- 42 • Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of
43 matters that were not known at the time of nomination or appointment but that become
44 known afterward (subdivision ~~(e)~~(f)).
45

46 It is good practice for an arbitrator to ask each participant to make an effort to disclose any
47 matters that may affect the arbitrator’s ability to be impartial.
48

49 **Drafters’ Notes:**

50 The proposed amendments to the comment to standard 7 do several things:

- 1
- 2 1. They reflect the proposed amendments to the text of the standard that are intended to clarify
- 3 its application to both initial and supplemental disclosures.
- 4
- 5 2. They clarify that the supplemental disclosure requirement applies both to matters that existed
- 6 at the time the arbitrator made his or her initial disclosures, but of which the arbitrator only
- 7 subsequently became aware, and also to matters that arise because of things that happen
- 8 during the course of an arbitration, such as when a party hires a new lawyer (as occurred in
- 9 the *Gruma* case);
- 10
- 11 3. They clarify that just because a particular matter is not among the examples of matters
- 12 specifically listed in 7(d) does not mean that it need not be disclosed—it still needs to be
- 13 evaluated under the general disclosure standard;
- 14
- 15 4. In the portion of the comment discussing additions to the pre-existing statutory disclosure
- 16 requirements, the proposed amendments would put the provisions discussed in numeric
- 17 order; and
- 18
- 19 5. They correct several cross-referencing errors, update other cross-references to reflect the
- 20 proposed amendments to the standard, and make other non-substantive clarifying changes.
- 21
- 22

23 **Standard 8. Additional disclosures in consumer arbitrations administered by a**

24 **provider organization**

25

26 **(a) General provisions**

27

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

29

30 Except as to the information in (c)(1), an arbitrator may rely on

31 information supplied by the administering provider organization in

32 making the disclosures required by this standard. If the information that

33 must be disclosed is available on the Internet, the arbitrator may comply

34 with the obligation to disclose this information by providing in the

35 disclosure statement required under standard 7(c)(1) the Internet address

36 at which the information is located and notifying the party that the

37 arbitrator will supply hard copies of this information upon request.

38

39 (2) * * *

40

41 **(b) Additional disclosures required**

42

43 In addition to the disclosures required under standard 7, in a consumer

44 arbitration as defined in standard 2 in which a dispute resolution provider

45 organization is coordinating, administering, or providing the arbitration

46 services, a ~~person~~ proposed arbitrator who is nominated or appointed as an

47 arbitrator on or after January 1, 2003, must disclose the following within the

1 time and in the same manner as the disclosures required under standard
2 7(c)(1):

3
4 (1)–(3) * * *

5
6 (c)–(d) * * *

7
8 **Drafters' Notes:**

9
10 **Subdivision (a).** The proposed amendment to this subdivision is intended to clarify that if an
11 arbitrator is relying on information from a provider organization's website to make required
12 disclosures under this standard, the web address of the provider organization must be provided in
13 the arbitrator's initial disclosure statement. This is important because there are time limits
14 specified for the submission of that disclosure statement.

15
16 **Subdivision (b).** The proposed amendments to this subdivision would do two things:

- 17
18 1. Make the language of this provision consistent with the proposed amendments to the
19 introductory sentence of standard 7, which clarify the application of that standard to both
20 initial and supplemental disclosures; and
21
22 2. Clarify that these disclosures relating to relationships with provider organizations must be
23 made as part of the initial disclosure.
24

Item SPR11-02 Response Form

Title: **Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (amend standards 2,3,7, and 8)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.