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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 25, 2013

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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

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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.<sup>1</sup> 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

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<sup>1</sup> 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 Administrative 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.<sup>2</sup> 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.<sup>3</sup> 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

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<sup>2</sup> 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](http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf).

<sup>3</sup> 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.<sup>4</sup> The goals of requiring compliance with these ethics standards included ensuring that parties can have confidence in the integrity and fairness of private arbitrators.<sup>5</sup> 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.<sup>6</sup>

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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<sup>4</sup> 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.”

<sup>5</sup> 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.”

<sup>6</sup> 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).<sup>7</sup> 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

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<sup>7</sup> 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.<sup>8</sup>

### **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.<sup>9</sup> 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.<sup>10</sup> 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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<sup>8</sup> These same changes were also previously circulated for public comment in late 2005, along with a request for comments on all the standards.

<sup>9</sup> 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.

<sup>10</sup> 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;<sup>11</sup>
- Mediators serving in court-connected mediation programs for general civil cases must report to the court if they have been subject to professional discipline;<sup>12</sup>
- Members of the State Bar of California must report such disciplinary matters to the State Bar,<sup>13</sup> and
- Prospective judges are required to disclose such information to the Governor before they are appointed as superior court judges.<sup>14</sup>

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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<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> See *Application for Appointment as Judge of the Superior Court* at [http://www.gov.ca.gov/docs/Judicial\\_application\\_Worksheet.txt](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,<sup>15</sup> 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

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<sup>15</sup> 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,<sup>16</sup> 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.

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<sup>16</sup> 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**

**Hon. Ramona G. See, Co-Chair**  
Judge of the Superior Court of California,  
County of Los Angeles

**Mr. Jay Folberg, Co-Chair**  
JAMS

**Mr. Kevin Baker**  
Deputy Chief Counsel  
Assembly Judiciary Committee

**Mr. William B. Baker, P.E.**  
Civil Engineer, Arbitrator/Mediator

**Hon. Helen Bendix**  
Judge of the Superior Court of California,  
County of Los Angeles

**Mr. Saul Bercovitch**  
The State Bar of California

**Hon. Lorna H. Brumfield**  
Judge of the Superior Court of California,  
County of Kern

**Mr. Harry W. R. Chamberlain II**  
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**Mr. Richard Chernick**  
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**Hon. Ronni B. MacLaren**  
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**Mr. James Madison**  
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**Mr. William T. Tanner**  
Directing Attorney  
Legal Aid Society of Orange County

**Mr. Gene Wong**  
Chief Counsel  
Office of the Senate President Pro Tempore

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:

1 **Standard 2. Definitions**

2  
3 As used in these standards:

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

6  
7 (1) \* \* \*

8  
9 (2) Where the context includes events or acts occurring before an appointment is  
10 final, “arbitrator” and “neutral arbitrator” include a person who has been served  
11 with notice of a proposed nomination or appointment. For purposes of these  
12 standards, “proposed nomination” does not include nomination of persons by a  
13 court under Code of Civil Procedure section 1281.6 to be considered for  
14 possible selection as an arbitrator by the parties or appointment as an arbitrator  
15 by the court.

16  
17 **(b)–(n) \* \* \***

18  
19 **(o)** “Member of the arbitrator’s extended family” means the parents, grandparents, great-  
20 grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts,  
21 nephews, and nieces of the arbitrator or the arbitrator’s spouse or domestic partner or  
22 the spouse or domestic partner of such person.

23  
24 **(p)–(s) \* \* \***

25  
26  
27 **Standard 3. Application and effective date**

28  
29 **(a)** \* \* \*

30  
31 **(b)** These standards do not apply to:

32  
33 (1) Party arbitrators, as defined in these standards; or

34  
35 (2) Any arbitrator serving in:

36  
37 (A) An international arbitration proceeding subject to the provisions of title  
38 9.3 of part III of the Code of Civil Procedure;

39  
40 (B) A judicial arbitration proceeding subject to the provisions of chapter 2.5 of  
41 title 3 of part III of the Code of Civil Procedure;

- 1  
2 (C) An attorney-client fee arbitration proceeding subject to the provisions of  
3 article 13 of chapter 4 of division 3 of the Business and Professions Code;  
4  
5 (D) An automobile warranty dispute resolution process certified under  
6 California Code of Regulations title 16, division 33.1 or an informal  
7 dispute settlement procedure under Code of Federal Regulations title 16,  
8 chapter 1, part 703;  
9  
10 (E) An arbitration of a workers' compensation dispute under Labor Code  
11 sections 5270 through 5277;  
12  
13 (F) An arbitration conducted by the Workers' Compensation Appeals Board  
14 under Labor Code section 5308;  
15  
16 (G) An arbitration of a complaint filed against a contractor with the  
17 Contractors State License Board under Business and Professions Code  
18 sections 7085 through 7085.7; ~~or~~  
19  
20 (H) An arbitration conducted under or arising out of public or private sector  
21 labor-relations laws, regulations, charter provisions, ordinances, statutes,  
22 or agreements; or  
23  
24 (I) An arbitration proceeding governed by rules adopted by a securities self-  
25 regulatory organization and approved by the United States Securities and  
26 Exchange Commission under federal law.  
27

28 (c) The following persons are not subject to the standards or to specific amendments to  
29 the standards in certain arbitrations:  
30

- 31 (1) Persons who are serving in arbitrations in which they were appointed to serve as  
32 arbitrators before July 1, 2002, are not subject to these standards in those  
33 arbitrations.  
34  
35 (2) Persons who are serving in arbitrations in which they were appointed to serve as  
36 arbitrators before January 1, 2003, are not subject to standard 8 in those  
37 arbitrations.  
38  
39 (3) Persons who are serving in arbitrations in which they were appointed to serve as  
40 arbitrators before July 1, 2014, are not subject to the amendments to standards  
41 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014 in those arbitrations.  
42  
43

1 **Comment to Standard 3**

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

8  
9 Subdivision (b)(2)(I) is intended to implement the decisions of the California Supreme Court in *Jevne v.*  
10 *Superior Court* ((2005) 35 Cal.4th 935) and of the United States Court of Appeals for the Ninth Circuit in  
11 *Credit Suisse First Boston Corp. v. Grunwald* ((9th Cir. 2005) 400 F.3d 1119).  
12

13  
14 **Standard 7. Disclosure**

15  
16 **(a) Intent**

17  
18 This standard is intended to identify the matters that must be disclosed by a person  
19 nominated or appointed as an arbitrator. To the extent that this standard addresses  
20 matters that are also addressed by statute, it is intended to include those statutory  
21 disclosure requirements, not to eliminate, reduce, or otherwise limit them.  
22

23 **(b) General provisions**

24 For purposes of this standard:

25  
26 (1) \* \* \*

27  
28 (2) *Offers of employment or professional relationship*

29  
30 (A) Except as provided in (B), if an arbitrator has disclosed to the parties in an  
31 arbitration that he or she will entertain offers of employment or of  
32 professional relationships from a party or lawyer for a party while the  
33 arbitration is pending as required by subdivision (b) of standard 12, the  
34 arbitrator is not also required under this standard to disclose to the parties  
35 in that arbitration any such offer from a party or lawyer for a party that he  
36 or she subsequently receives or accepts while that arbitration is pending.  
37

38  
39 (B) In a consumer arbitration, if an arbitrator has disclosed to the parties that  
40 he or she will entertain offers of employment or of professional  
41 relationships from a party or lawyer for a party while the arbitration is  
42 pending as required by subdivision (b) of standard 12 and has informed  
43 the parties in the pending arbitration about any such offer and the  
44 acceptance of any such offer as required by subdivision (d) of standard 12,  
45 the arbitrator is not also required under this standard to disclose that offer  
46 or the acceptance of that offer to the parties in that arbitration.

1  
2 (3) \* \* \*

3  
4 (c) **Time and manner of disclosure**

5  
6 (1) Initial disclosure

7  
8 Within ~~ten~~ 10 calendar days of service of notice of the proposed nomination or  
9 appointment, a proposed arbitrator must disclose to all parties in writing all  
10 matters listed in subdivisions (d) and (e) of this standard of which the arbitrator  
11 is then aware.

12  
13 (2) Supplemental disclosure

14  
15 If an arbitrator subsequently becomes aware of a matter that must be disclosed  
16 under either subdivision (d) or (e) of this standard, the arbitrator must disclose  
17 that matter to the parties in writing within 10 calendar days after the arbitrator  
18 becomes aware of the matter.

19  
20 (d) **Required disclosures**

21  
22 ~~A person who is nominated or appointed as an arbitrator~~ A proposed arbitrator or  
23 arbitrator must disclose all matters that could cause a person aware of the facts to  
24 reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be  
25 impartial, including, but not limited to, all of the following:

26  
27 (1) *Family relationships with party*

28  
29 The arbitrator or a member of the arbitrator's immediate or extended family is:

30  
31 (A) A party;

32  
33 (B) ~~a party's~~ The spouse or domestic partner, of a party; or

34  
35 (C) An officer, director, or trustee of a party.

36  
37 (2) *Family relationships with lawyer in the arbitration*

38  
39 (A) Current relationships

40  
41 The arbitrator, or the spouse, former spouse, domestic partner, child,  
42 sibling, or parent of the arbitrator or the arbitrator's spouse or domestic  
43 partner is:

44  
45 (A)(i) A lawyer in the arbitration;

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

2  
3                    ~~(C)~~(iii) Currently associated in the private practice of law with a lawyer in  
4                    the arbitration.

5  
6                    (B) Past relationships

7  
8                    The arbitrator or the arbitrator’s spouse or domestic partner was associated  
9                    in the private practice of law with a lawyer in the arbitration within the  
10                   preceding two years.

11  
12                   (3) *Significant personal relationship with party or lawyer for a party*

13  
14                   The arbitrator or a member of the arbitrator’s immediate family has or has had a  
15                   significant personal relationship with any party or lawyer for a party.

16  
17                   (4) *Service as arbitrator for a party or lawyer for party*

18  
19                   (A) The arbitrator is serving or, within the preceding five years, has served:

20  
21                   (i) As a neutral arbitrator in another prior or pending noncollective  
22                   bargaining case involving a party to the current arbitration or a  
23                   lawyer for a party.

24  
25                   (ii) As a party-appointed arbitrator in another prior or pending  
26                   noncollective bargaining case for either a party to the current  
27                   arbitration or a lawyer for a party.

28  
29                   (iii) As a neutral arbitrator in another prior or pending noncollective  
30                   bargaining case in which he or she was selected by a person serving  
31                   as a party-appointed arbitrator in the current arbitration.

32  
33                   (B)–(C) \* \* \*

34  
35                   (5) *Compensated service as other dispute resolution neutral*

36  
37                   The arbitrator is serving or has served as a dispute resolution neutral other than  
38                   an arbitrator in another pending or prior noncollective bargaining case involving  
39                   a party or lawyer for a party and the arbitrator received or expects to receive any  
40                   form of compensation for serving in this capacity.

41  
42                   (A) Time frame

43  
44                   For purposes of this paragraph (5), “prior case” means any case in which  
45                   the arbitrator concluded his or her service as a dispute resolution neutral  
46                   within two years before the date of the arbitrator’s proposed nomination or



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

3  
4 (B)-(C) \* \* \*

5  
6 (6) *Current arrangements for prospective neutral service*

7  
8 Whether the arbitrator has any current arrangement with a party concerning  
9 prospective employment or other compensated service as a dispute resolution  
10 neutral or is participating in or, within the last two years, has participated in  
11 discussions regarding such prospective employment or service with a party.

12  
13 (7) *Attorney-client relationship*

14  
15 Any attorney-client relationship the arbitrator has or has had with a party or  
16 lawyer for a party. Attorney-client relationships include the following:

17  
18 (A) An officer, a director, or a trustee of a party is or, within the preceding two  
19 years, was a client of the arbitrator in the arbitrator's private practice of  
20 law or a client of a lawyer with whom the arbitrator is or was associated in  
21 the private practice of law;

22  
23 (B) In any other proceeding involving the same issues, the arbitrator gave  
24 advice to a party or a lawyer in the arbitration concerning any matter  
25 involved in the arbitration; and

26  
27 (C) The arbitrator served as a lawyer for or as an officer of a public agency  
28 which is a party and personally advised or in any way represented the  
29 public agency concerning the factual or legal issues in the arbitration.

30  
31 (8) *Employee, expert witness, or consultant relationships*

32  
33 The arbitrator or a member of the arbitrator's immediate family is or, within the  
34 preceding two years, was an employee of or an expert witness or a consultant  
35 for a party or for a lawyer in the arbitration.

36  
37 ~~(8)~~(9) *Other professional relationships*

38  
39 Any other professional relationship not already disclosed under paragraphs (2)-  
40 ~~(7)~~(8) that the arbitrator or a member of the arbitrator's immediate family has or  
41 has had with a party or lawyer for a party, including the following:

42  
43 ~~(A) The arbitrator was associated in the private practice of law with a lawyer in~~  
44 ~~the arbitration within the last two years.~~

1 ~~(B) The arbitrator or a member of the arbitrator's immediate family is or,~~  
2 ~~within the preceding two years, was an employee of or an expert witness~~  
3 ~~or a consultant for a party; and~~  
4

5 ~~(C) The arbitrator or a member of the arbitrator's immediate family is or,~~  
6 ~~within the preceding two years, was an employee of or an expert witness~~  
7 ~~or a consultant for a lawyer in the arbitration.~~  
8

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

10  
11 The arbitrator or a member of the arbitrator's immediate family has a financial  
12 interest in a party.  
13

14 ~~(10)~~(11) *Financial interests in subject of arbitration*

15  
16 The arbitrator or a member of the arbitrator's immediate family has a financial  
17 interest in the subject matter of the arbitration.  
18

19 ~~(11)~~(12) *Affected interest*

20  
21 The arbitrator or a member of the arbitrator's immediate family has an interest  
22 that could be substantially affected by the outcome of the arbitration.  
23

24 ~~(12)~~(13) *Knowledge of disputed facts*

25  
26 The arbitrator or a member of the arbitrator's immediate or extended family has  
27 personal knowledge of disputed evidentiary facts relevant to the arbitration. A  
28 person who is likely to be a material witness in the proceeding is deemed to  
29 have personal knowledge of disputed evidentiary facts concerning the  
30 proceeding.  
31

32 ~~(13)~~(14) *Membership in organizations practicing discrimination*

33  
34 The arbitrator's ~~membership in~~ is a member of any organization that practices  
35 invidious discrimination on the basis of race, sex, religion, national origin, or  
36 sexual orientation. Membership in a religious organization, an official military  
37 organization of the United States, or a nonprofit youth organization need not be  
38 disclosed unless it would interfere with the arbitrator's proper conduct of the  
39 proceeding or would cause a person aware of the fact to reasonably entertain a  
40 doubt concerning the arbitrator's ability to act impartially.  
41

42 ~~(14)~~(15) Any other matter that:

43  
44 (A) Might cause a person aware of the facts to reasonably entertain a doubt  
45 that the arbitrator would be able to be impartial;  
46

- 1 (B) Leads the proposed arbitrator to believe there is a substantial doubt as to  
2 his or her capacity to be impartial, including, but not limited to, bias or  
3 prejudice toward a party, lawyer, or law firm in the arbitration; or  
4  
5 (C) Otherwise leads the arbitrator to believe that his or her disqualification  
6 will further the interests of justice.  
7

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

10  
11 In addition to the matters that must be disclosed under subdivision (d), ~~an~~ a proposed  
12 arbitrator or arbitrator must also disclose:  
13

14 (1) Professional discipline

- 15  
16 (A) If the arbitrator has been disbarred or had his or her license to practice a  
17 profession or occupation revoked by a professional or occupational  
18 disciplinary agency or licensing board, whether in California or elsewhere.  
19 The disclosure must specify the date of the revocation, what professional  
20 or occupational disciplinary agency or licensing board revoked the license,  
21 and the reasons given by that professional or occupational disciplinary  
22 agency or licensing board for the revocation.  
23  
24 (B) If the arbitrator has resigned his or her membership in the State Bar or  
25 another professional or occupational licensing agency or board, whether in  
26 California or elsewhere, while public or private disciplinary charges were  
27 pending. The disclosure must specify the date of the resignation, what  
28 professional or occupational disciplinary agency or licensing board had  
29 charges pending against the arbitrator at the time of the resignation, and  
30 what those charges were.  
31  
32 (C) If within the preceding 10 years public discipline other than that covered  
33 under (A) has been imposed on the arbitrator by a professional or  
34 occupational disciplinary agency or licensing board, whether in California  
35 or elsewhere. “Public discipline” under this provision means any  
36 disciplinary action imposed on the arbitrator that the professional or  
37 occupational disciplinary agency or licensing board identifies in its  
38 publicly available records or in response to a request for information about  
39 the arbitrator from a member of the public. The disclosure must specify  
40 the date the discipline was imposed, what professional or occupational  
41 disciplinary agency or licensing board imposed the discipline, and the  
42 reasons given by that professional or occupational disciplinary agency or  
43 licensing board for the discipline.  
44  
45

1                   (2) Inability to conduct or timely complete proceedings

2  
3                   (1)(A) If the arbitrator is not able to properly perceive the evidence or properly  
4                   conduct the proceedings because of a permanent or temporary physical  
5                   impairment; and

6  
7                   (2)(B) Any constraints on his or her availability known to the arbitrator that will  
8                   interfere with his or her ability to commence or complete the arbitration in  
9                   a timely manner.

10  
11                   (f) **Continuing duty**

12  
13                   An arbitrator’s duty to disclose the matters described in subdivisions (d) and (e) of  
14                   this standard is a continuing duty, applying from service of the notice of the  
15                   arbitrator’s proposed nomination or appointment until the conclusion of the  
16                   arbitration proceeding.

17  
18                   **Comment to Standard 7**

19  
20                   This standard requires proposed arbitrators to disclose to all parties, in writing within 10 days of service  
21                   of notice of their proposed nomination or appointment, all matters they are aware of at that time that  
22                   could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would  
23                   be able to be impartial as well as those matters listed under subdivision (e). ~~and to disclose~~ This standard  
24                   also requires that if arbitrators subsequently become aware of any additional such matters, they must  
25                   make supplemental disclosures of these matters within 10 days of becoming aware of them. This latter  
26                   requirement is intended to address both matters existing at the time of nomination or appointment of  
27                   which the arbitrator subsequently becomes aware and new matters that arise based on developments  
28                   during the arbitration, such as the hiring of new counsel by a party.

29  
30                   Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator. It  
31                   provides the parties with the necessary information to make an informed selection of an arbitrator by  
32                   disqualifying or ratifying the ~~proposed~~ arbitrator following disclosure. See also standard 12, concerning  
33                   disclosure and disqualification requirements relating to concurrent and subsequent employment or  
34                   professional relationships between an arbitrator and a party or attorney in the arbitration. A party may  
35                   disqualify an arbitrator for failure to comply with statutory disclosure obligations (see Code Civ. Proc., §  
36                   1281.91(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of  
37                   which the arbitrator was then aware is a ground for *vacatur* of the arbitrator’s award (see Code Civ. Proc.,  
38                   § 1286.2(a)(6)(A)).

39  
40                   The arbitrator’s overarching duty under subdivision (d) of this standard, which mirrors the duty set forth  
41                   in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person  
42                   aware of the facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be  
43                   impartial. While the remaining subparagraphs of subdivision (d) require the disclosure of specific  
44                   interests, relationships, or affiliations, these are only examples of common matters that could cause a  
45                   person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.  
46                   The ~~absence of the particular fact that none of the~~ interests, relationships, or affiliations specifically listed  
47                   in the subparagraphs of (d) are present in a particular case does not necessarily mean that there is no  
48                   matter that could reasonably raise a question about the arbitrator’s ability to be impartial and that  
49                   therefore must be disclosed. Similarly, the fact that a particular interest, relationship, or affiliation present

1 in a case is not specifically enumerated in one of the examples given in these subparagraphs does not  
2 mean that it must not be disclosed. An arbitrator must make determinations concerning disclosure on a  
3 case-by-case basis, applying the general criteria for disclosure under ~~paragraph~~ subdivision (d): is the  
4 matter something that could cause a person aware of the facts to reasonably entertain a doubt that the  
5 arbitrator would be able to be impartial?  
6

7 Code of Civil Procedure section 1281.85 specifically requires that the ethics standards adopted by the  
8 Judicial Council address the disclosure of interests, relationships, or affiliations that may constitute  
9 conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity.  
10 Section 1281.85 further provides that the standards “shall be consistent with the standards established for  
11 arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and  
12 disqualification requirements established by this chapter [chapter 2 of title 9 of part III, Code of Civil  
13 Procedure, sections 1281–1281.95].”  
14

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

- 21 • Requiring arbitrators to ~~disclose~~ make supplemental disclosures to the parties regarding any  
22 matter about which they become aware after the time for making an initial disclosure has expired,  
23 within 10 calendar days after the arbitrator becomes aware of the matter (subdivision ~~(c)~~).
- 24 • Expanding required disclosures about the relationships or affiliations of an arbitrator’s family  
25 members to include those of an arbitrator’s domestic partner (subdivisions (d)(1) and (2); see also  
26 definitions of immediate and extended family in standard 2).
- 27 • Requiring arbitrators, in addition to making statutorily required disclosures regarding prior  
28 service as an arbitrator for a party or attorney for a party, to disclose both prior services both as a  
29 neutral arbitrator selected by a party arbitrator in the current arbitration and prior compensated  
30 service as any other type of dispute resolution neutral for a party or attorney in the arbitration  
31 (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)~~(C)~~(A)(iii) and (5)).
- 32 • If a disclosure includes information about five or more cases, requiring arbitrators to provide a  
33 summary of that information (subdivisions (d)(4)(C) and (5)(C).
- 34 • Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or,  
35 within the preceding two years, was an employee, expert witness, or consultant for a party or a  
36 lawyer in the arbitration (subdivisions (d)(8) ~~(A) and (B)~~).
- 37 • Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an  
38 interest that could be substantially affected by the outcome of the arbitration (subdivision  
39 ~~(d)(11)~~(12)).  
40

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

- 43 • Requiring arbitrators to disclose membership in organizations that practice invidious  
44 discrimination on the basis of race, sex, religion, national origin, or sexual orientation  
45 (subdivision (d)~~(13)~~(14)).  
46

- 1 • Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to practice  
2 a profession or occupation revoked by a professional or occupational disciplinary agency or  
3 licensing board, resigned membership in the State Bar or another licensing agency or board while  
4 disciplinary charges were pending, or had any other public discipline imposed on him or her by a  
5 professional or occupational disciplinary agency or licensing board within the preceding 10 years  
6 (subdivision (e)(1)). The standard identifies the information that must be included in such a  
7 disclosure; however, arbitrators may want to provide additional information to assist parties in  
8 determining whether to disqualify an arbitrator based on such a disclosure.
- 9 • Requiring the arbitrator to disclose any constraints on his or her availability known to the  
10 arbitrator that will interfere with his or her ability to commence or complete the arbitration in a  
11 timely manner (subdivision ~~(e)~~(e)(2)).
- 12 • Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of  
13 matters that were not known at the time of nomination or appointment but that become known  
14 afterward (subdivision ~~(e)~~(f)).

15  
16 It is good practice for an arbitrator to ask each participant to make an effort to disclose any matters that  
17 may affect the arbitrator’s ability to be impartial.  
18

19  
20 **Standard 8. Additional disclosures in consumer arbitrations administered by a provider**  
21 **organization**  
22

23 **(a) General provisions**  
24

25 (1) *Reliance on information provided by provider organization*  
26

27 Except as to the information in (c)(1), an arbitrator may rely on information  
28 supplied by the administering provider organization in making the disclosures  
29 required by this standard only if the provider organization represents that the  
30 information the arbitrator is relying on is current through the end of the  
31 immediately preceding calendar quarter. If the information that must be  
32 disclosed is available on the Internet, the arbitrator may comply with the  
33 obligation to disclose this information by providing in the disclosure statement  
34 required under standard 7(c)(1) the Internet address of the specific web page at  
35 which the information is located and notifying the party that the arbitrator will  
36 supply hard copies of this information upon request.  
37

38 (2) *Reliance on representation that not a consumer arbitration*  
39

40 An arbitrator is not required to make the disclosures required by this standard if  
41 he or she reasonably believes that the arbitration is not a consumer arbitration  
42 based on reasonable reliance on a consumer party’s representation that the  
43 arbitration is not a consumer arbitration.  
44  
45

1           **(b) Additional disclosures required**  
2

3           In addition to the disclosures required under standard 7, in a consumer arbitration as  
4           defined in standard 2 in which a dispute resolution provider organization is  
5           coordinating, administering, or providing the arbitration services, a ~~person~~ proposed  
6           arbitrator who is nominated or appointed as an arbitrator on or after January 1, 2003  
7           must disclose the following within the time and in the same manner as the disclosures  
8           required under standard 7(c)(1):  
9

10          (1) *Relationships between the provider organization and party or lawyer in*  
11             *arbitration*  
12

13           Any significant past, present, or currently expected financial or professional  
14           relationship or affiliation between the administering dispute resolution provider  
15           organization and a party or lawyer in the arbitration. Information that must be  
16           disclosed under this standard includes:  
17

18           (A) The provider organization has a financial interest in a party.  
19

20           ~~(A)~~(B) A party, a lawyer in the arbitration, or a law firm with which a lawyer in  
21           the arbitration is currently associated is a member of or has a financial  
22           interest in the provider organization.  
23

24           ~~(B)~~(C) Within the preceding two years the provider organization has received a  
25           gift, bequest, or favor from a party, a lawyer in the arbitration, or a law  
26           firm with which a lawyer in the arbitration is currently associated.  
27

28           ~~(C)~~(D) The provider organization has entered into, or the arbitrator currently  
29           expects that the provider organization will enter into, an agreement or  
30           relationship with any party or lawyer in the arbitration or a law firm with  
31           which a lawyer in the arbitration is currently associated under which the  
32           provider organization will administer, coordinate, or provide dispute  
33           resolution services in other noncollective bargaining matters or will  
34           provide other consulting services for that party, lawyer, or law firm.  
35

36           ~~(D)~~(E) The provider organization is coordinating, administering, or providing  
37           dispute resolution services or has coordinated, administered, or provided  
38           such services in another pending or prior noncollective bargaining case in  
39           which a party or lawyer in the arbitration was a party or a lawyer. For  
40           purposes of this paragraph, “prior case” means a case in which the dispute  
41           resolution neutral affiliated with the provider organization concluded his  
42           or her service within the two years before the date of the arbitrator’s  
43           proposed nomination or appointment, but does not include any case in  
44           which the dispute resolution neutral concluded his or her service before  
45           July 1, 2002.  
46

1 (2) *Case information*

2  
3 If the provider organization is acting or has acted in any of the capacities  
4 described in paragraph (1)~~(D)~~(E), the arbitrator must disclose:

- 5  
6 (A) The names of the parties in each prior or pending case and, where  
7 applicable, the name of the attorney in the current arbitration who is  
8 involved in the pending case or who was involved in the prior case;  
9  
10 (B) The type of dispute resolution services (arbitration, mediation, reference,  
11 etc.) coordinated, administered, or provided by the provider organization  
12 in the case; and  
13  
14 (C) In each prior case in which a dispute resolution neutral affiliated with the  
15 provider organization rendered a decision as an arbitrator, a temporary  
16 judge appointed under article VI, § 4 of the California Constitution, or a  
17 referee appointed under Code of Civil Procedure sections 638 or 639, the  
18 date of the decision, the prevailing party, the amount of monetary  
19 damages awarded, if any, and the names of the parties' attorneys.  
20

21 (3) *Summary of case information*

22  
23 If the total number of cases disclosed under paragraph (1)~~(D)~~(E) is greater than  
24 five, the arbitrator must also provide a summary of these cases that states:

- 25  
26 (A) The number of pending cases in which the provider organization is  
27 currently providing each type of dispute resolution services;  
28  
29 (B) The number of prior cases in which the provider organization previously  
30 provided each type of dispute resolution services;  
31  
32 (C) The number of such prior cases in which a neutral affiliated with the  
33 provider organization rendered a decision as an arbitrator, a temporary  
34 judge, or a referee; and  
35  
36 (D) The number of prior cases in which the party to the current arbitration or  
37 the party represented by the lawyer in the current arbitration was the  
38 prevailing party.  
39

40 (c) **Relationship between provider organization and arbitrator**

41  
42 If a relationship or affiliation is disclosed under ~~paragraph~~ subdivision (b), the  
43 arbitrator must also provide information about the following:

- 44  
45 (1) Any financial relationship or affiliation the arbitrator has with the provider  
46 organization other than receiving referrals of cases, including whether the



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

3  
4 (2) The provider organization’s process and criteria for recruiting, screening, and  
5 training the panel of arbitrators from which the arbitrator in this case is to be  
6 selected;

7  
8 (3) The provider organization’s process for identifying, recommending, and  
9 selecting potential arbitrators for specific cases; and

10  
11 (4) Any role the provider organization plays in ruling on requests for  
12 disqualification of the arbitrator.

13  
14 (d) \* \* \*

15  
16 **Comment to Standard 8**

17  
18 This standard only applies in consumer arbitrations in which a dispute resolution provider organization is  
19 administering the arbitration. Like standard 7, this standard expands upon the existing statutory  
20 disclosure requirements. Code of Civil Procedure section 1281.95 requires arbitrators in certain  
21 construction defect arbitrations to make disclosures concerning relationships between their employers or  
22 arbitration services and the parties in the arbitration. This standard requires arbitrators in all consumer  
23 arbitrations to disclose any financial or professional relationship between the administering provider  
24 organization and any party, attorney, or law firm in the arbitration and, if any such relationship exists,  
25 then the arbitrator must also disclose his or her relationship with the dispute resolution provider  
26 organization. This standard ~~does not~~ requires an arbitrator to disclose if the provider organization has a  
27 financial interest in a party or lawyer in the arbitration or if a party or lawyer in the arbitration has a  
28 financial interest in the provider organization because even though provider organizations are prohibited  
29 under Code of Civil Procedure section 1281.92 from administering any consumer arbitration where any  
30 such relationship exists.

31  
32 **Subdivision (b).** Currently expected relationships or affiliations that must be disclosed include all  
33 relationships or affiliations that the arbitrator, at the time the disclosure is made, expects will be formed.  
34 For example, if the arbitrator knows that the administering provider organization has agreed in concept to  
35 enter into a business relationship with a party, but they have not yet signed a written agreement  
36 formalizing that relationship, this would be a “currently expected” relationship that the arbitrator would  
37 be required to disclose.

38  
39  
40 **Standard 12. Duties and limitations regarding future professional relationships or**  
41 **employment**

42  
43 (a) **Offers as lawyer, expert witness, or consultant**

44  
45 From the time of appointment until the conclusion of the arbitration, an arbitrator  
46 must not entertain or accept any offers of employment or new professional  
47 relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer  
48 for a party in the pending arbitration.

1  
2 **(b) Offers for ~~other~~ employment or professional relationships other than as a**  
3 **lawyer, expert witness, or consultant**  
4

5 (1) In addition to the disclosures required by standards 7 and 8, within ten calendar  
6 days of service of notice of the proposed nomination or appointment, a proposed  
7 arbitrator must disclose to all parties in writing if, while that arbitration is  
8 pending, he or she will entertain offers of employment or new professional  
9 relationships in any capacity other than as a lawyer, expert witness, or  
10 consultant from a party or a lawyer for a party, including offers to serve as a  
11 dispute resolution neutral in another case.  
12

13 (2) If the arbitrator discloses that he or she will entertain such offers of employment  
14 or new professional relationships while the arbitration is pending:  
15

16 (A) In consumer arbitrations, the disclosure must also state that the arbitrator  
17 will inform the parties as required under (d) if he or she subsequently  
18 receives an offer while that arbitration is pending.  
19

20 (B) In all other arbitrations, the disclosure must also state that the arbitrator  
21 will not inform the parties if he or she subsequently receives an offer  
22 while that arbitration is pending.  
23

24 (3) A party may disqualify the arbitrator based on this disclosure by serving a  
25 notice of disqualification in the manner and within the time specified in Code of  
26 Civil Procedure section 1281.91(b).  
27

28 **(c) Acceptance of offers under (b) prohibited unless intent disclosed**  
29

30 If an arbitrator fails to make the disclosure required by subdivision (b) of this  
31 standard, from the time of appointment until the conclusion of the arbitration the  
32 arbitrator must not entertain or accept any such offers of employment or new  
33 professional relationships, including offers to serve as a dispute resolution neutral.  
34

35 **(d) Required notice of offers under (b)**  
36

37 If, in the disclosure made under subdivision (b), the arbitrator states that he or she  
38 will entertain offers of employment or new professional relationships covered by (b),  
39 the arbitrator may entertain such offers. However, in consumer arbitrations, from the  
40 time of appointment until the conclusion of the arbitration, the arbitrator must inform  
41 all parties to the current arbitration of any such offer and whether it was accepted as  
42 provided in this subdivision.  
43

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

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

6  
7           (2) If the arbitrator fails to inform the parties of an offer or an acceptance as  
8           required under (1), that constitutes a failure to comply with the arbitrator’s  
9           obligation to make a disclosure required under these ethics standards.

10  
11           (3) If an arbitrator has informed the parties in a pending arbitration about an offer  
12           as required under (1):

13  
14           (A) Receiving or accepting that offer does not, by itself, constitute corruption  
15           in or misconduct by the arbitrator;

16  
17           (B) The arbitrator is not also required to disclose that offer or its acceptance  
18           under standard 7; and

19  
20           (C) The arbitrator is not subject to disqualification under standard 10(a)(2),  
21           (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of  
22           that offer.

23  
24           (4) An arbitrator is not required to inform the parties in a pending arbitration about  
25           an offer under this subdivision if:

26  
27           (A) He or she reasonably believes that the pending arbitration is not a  
28           consumer arbitration based on reasonable reliance on a consumer party’s  
29           representation that the arbitration is not a consumer arbitration;

30  
31           (B) The offer is to serve as an arbitrator in an arbitration conducted under or  
32           arising out of public or private sector labor-relations laws, regulations,  
33           charter provisions, ordinances, statutes, or agreements; or

34  
35           (C) The offer is for uncompensated service as a dispute resolution neutral.

36  
37           **(d)(e) Relationships and use of confidential information related to the arbitrated case**

38  
39           An arbitrator must not at any time:

40  
41           (1) Without the informed written consent of all parties, enter into any professional  
42           relationship or accept any professional employment as a lawyer, an expert  
43           witness, or a consultant relating to the case arbitrated; or

44  
45           (2) Without the informed written consent of the party, enter into any professional  
46           relationship or accept employment in another matter in which information that

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

3  
4 **Comment to Standard 12**

5  
6 **Subdivision (d)(1).** A party may disqualify an arbitrator for failure to make required disclosures,  
7 including disclosures required by these ethics standards (see Code Civ. Proc., § 1281.91(a) and standard  
8 10(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which  
9 the arbitrator was then aware is also a ground for *vacatur* of the arbitrator’s award (see Code Civ. Proc., §  
10 1286.2(a)(6)(A)).

11  
12 **Subdivision (d)(4)(B).** The arbitrations identified under this provision are only those in which, under  
13 Code of Civil Procedure section 1281.85(b) and standard 3(b)(2)(H), the ethics standards do not apply to  
14 the arbitrator.

15  
16  
17 **Standard 16. Compensation**

- 18  
19 (a) An arbitrator must not charge any fee for services or expenses that is in any way contingent  
20 on the result or outcome of the arbitration.  
21  
22 (b) Before accepting appointment, an arbitrator, a dispute resolution provider organization, or  
23 another person or entity acting on the arbitrator’s behalf must inform all parties in writing  
24 of the terms and conditions of the arbitrator’s compensation. This information must include  
25 any basis to be used in determining fees; ~~and~~ any special fees for cancellation, research and  
26 preparation time, or other purposes; any requirements regarding advance deposit of fees;  
27 and any practice concerning situations in which a party fails to timely pay the arbitrator’s  
28 fees, including whether the arbitrator will or may stop the arbitration proceedings.

29  
30 **Comment to Standard 16**

31  
32 This standard is not intended to affect any authority a court may have to make orders with respect to the  
33 enforcement of arbitration agreements or arbitrator fees. It is also not intended to require any arbitrator or  
34 arbitration provider organization to establish a particular requirement or practice concerning fees or  
35 deposits, but only to inform the parties if such a requirement or practice has been established.

36  
37  
38 **Standard 17. Marketing**

- 39  
40 (a) An arbitrator must be truthful and accurate in marketing his or her services. An arbitrator  
41 may advertise a general willingness to serve as an arbitrator and convey biographical  
42 information and commercial terms of employment ~~and~~ but must not make any  
43 representation that directly or indirectly implies favoritism or a specific outcome. An  
44 arbitrator must ensure that his or her personal marketing activities and any activities carried  
45 out on his or her behalf, including any activities of a provider organization with which the  
46 arbitrator is affiliated, comply with this requirement.

1  
2 (b) An arbitrator must not solicit business from a participant in the arbitration while the  
3 arbitration is pending.  
4

5 (c) An arbitrator must not solicit appointment as an arbitrator in a specific case or specific  
6 cases.  
7

8 (d) As used in this standard, “solicit” means to communicate in person, by telephone, or  
9 through real-time electronic contact to any prospective participant in the arbitration  
10 concerning the availability for professional employment of the arbitrator in which a  
11 significant motive is pecuniary gain. The term solicit does not include: (1) responding to a  
12 request from all parties in a case to submit a proposal to provide arbitration services in that  
13 case; or (2) responding to inquiries concerning the arbitrator’s availability, qualifications,  
14 experience, or fee arrangements.  
15

#### 16 **Comment to Standard 17**

17

18 **Subdivision (b) and (c).** Arbitrators should keep in mind that, in addition to these restrictions on  
19 solicitation, several other standards contain related disclosure requirements. For example, under standard  
20 7(d)(4)-(6), arbitrators must disclose information about their past, current, and prospective service as an  
21 arbitrator or other dispute resolution for a party or attorney in the arbitration. Under standard 8(b)(1)(C)  
22 and (D), in consumer arbitrations administered by a provider organization, arbitrators must disclose if the  
23 provider organization has coordinated, administered, or provided dispute resolution services, is  
24 coordinating, administering, or providing such services, or has an agreement to coordinate, administer, or  
25 provide such services for a party or attorney in the arbitration. And under standard 12 arbitrators must  
26 disclose if, while an arbitration is pending, they will entertain offers from a party or attorney in the  
27 arbitration to serve as a dispute resolution neutral in another case.  
28

29 ~~This~~ These provisions is are not intended to prohibit an arbitrator from accepting another arbitration from  
30 a party or attorney in the arbitration while the first matter is pending, as long as the arbitrator complies  
31 with the provisions of standard 12 and there was no express solicitation of this business by the arbitrator.  
32

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

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
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	

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			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	

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
	Counsel JAMS		<p>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.</p> <p>See comments on specific provisions below.</p>	See responses to specific comments below.
9.	Judicate West By: Var Fox, Co-Founder Santa Ana, California	NI	<p>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: * * *</p> <p>Judicate West has great concerns about the purpose, need for and specific language used in the proposed amendments. * * *</p> <p>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</p>	



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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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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
16.	Thomas D. Weaver Tustin, California	AM	See comments on specific provisions below.	See responses to specific comments below.

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<b>Standard 2 – Definitions</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Judicate West By: Var Fox, Co-Founder Santa Ana, California	<p><b>Proposed Change to 2(o)</b></p> <p>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.</p>	<p>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.</p> <p>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</p>

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<b>Standard 2 – Definitions</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
		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: <ul style="list-style-type: none"> <li>• Standard 2(a)(2) regarding the nomination of an arbitrator.</li> <li>• Standard 2(o) including “domestic partner” as a member of arbitrator’s family</li> </ul>	No response required

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<b>Standard 3 – Application and effective date</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	<p>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: * * *</p> <ul style="list-style-type: none"> <li>• Standard 3(b)(2)(D) regarding the exclusion of automobile warranty dispute from the Standard.</li> <li>• Standard 3(b)(2)(I) regarding the preemption of SEC proceedings from state regulation.</li> </ul>	No response required
Hon Arnold H. Gold (ret.) Studio City	<p>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?</p> <p>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?]."</p>	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	<p><b>Application to Arbitrators in Securities Arbitrations</b> 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</p>	No response required

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**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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<b>Standard 3 – Application and effective date</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>standard seems to achieve the stated purpose. * * *</p> <p><b>Proposed Change to 3(b)(2)(D)</b>                      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. * * *</p> <p><b>Proposed Change to Standard 8(a)</b>                      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. * * *</p> <p><b>Offers of Employment from Parties or Attorneys in a Pending Arbitration</b> * * *</p> <p>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.</p>	<p>No response required</p> <p>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.</p>
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	<b>Implementation Time</b> 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

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<b>Standard 3 – Application and effective date</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
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.

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
<p>ADR Services, Inc. By: Lucie Barron, President Los Angeles, California</p>	<p>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.</p> <p>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.</p> <p>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</p>	<p>Based on this and other comments, the committee revised the proposal to:</p> <ul style="list-style-type: none"> <li>• 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: <ul style="list-style-type: none"> <li>○ Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;</li> <li>○ 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</li> <li>○ The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</li> </ul> </li> <li>• 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.</li> <li>• Revise the initial disclosure requirement to separately address consumer arbitrations and other</li> </ul>



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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>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</p>	<p>arbitrations:</p> <ul style="list-style-type: none"> <li>○ 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</li> <li>○ In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers.</li> </ul>

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**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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	<p>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.</p> <p>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.</p>	
<p>California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California</p>	<p>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:</p> <p>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.</p>	<p>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.</p>

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<p>Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair</p>	<p>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.</p> <p>* * *</p> <p>The ADR Committee opposes the addition of Standard 12(d) - Informed consent required in consumer arbitrations before accepting offers.</p> <p>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</p>	<p>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:</p> <ul style="list-style-type: none"> <li>• Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;</li> <li>• 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</li> <li>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</li> </ul> <p>The committee has also revised the initial disclosure requirement to separately address consumer arbitrations and other arbitrations:</p> <ul style="list-style-type: none"> <li>• 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</li> </ul>

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	<p>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)</p> <p>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.</p> <p>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</p>	<ul style="list-style-type: none"> <li>• In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers.</li> </ul>

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	<p>the pending Kaiser matters in which he or she is serving as an arbitrator.</p> <p>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.</p> <p>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.</p> <p>In conclusion, this proposal was tried and rejected previously. The ADR Committee sees no new information that would justify its resurrection.</p>	

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<p>Consumer Attorneys of California By: Jacqueline Serna Associate Legislative Counsel</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>This amendment creates an illusory consent requirement and</p>	<p>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.</p>

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	does not allow parties to freely object to conflicts with their arbitrator.	
Ruth Glick Attorney at Law Burlingame, California	<p>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.</p> <p>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</p>	<p>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.</p>

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	<p>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.</p> <p>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).</p> <p>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</p>	<p>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.</p> <p>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</p>



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	<p>for many months so that overlapping cases might be more frequent than anticipated.</p> <p>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.</p>	<p>labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.</p>
<p>Hon Arnold H. Gold (ret.) Studio City</p>	<p>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.</p> <p>With respect to the proposed new <u>disclosure</u> requirement:</p> <p>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.</p> <p>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</p>	<p>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:</p> <ul style="list-style-type: none"> <li>• Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;</li> <li>• 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;</li> </ul>

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	<p>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.</p> <p>The proposed new <u>consent</u> requirement will wreak much mischief and is unnecessary:</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>and</p> <ul style="list-style-type: none"> <li>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</li> </ul>

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<p>JAMS By: Jay Welsh Executive Vice President, General Counsel JAMS</p>	<p><b>Offers of employment from parties in a pending arbitration.</b> 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 <i>in pro per</i> consumers and not to consumers represented by counsel. Clearly, counsel should be able to agree to the safe harbor concept.</p> <p>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.</p>	<p>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.</p>
<p>Judicate West By: Var Fox, Co-Founder Santa Ana, California</p>	<p><b>Offers of Employment from Parties or Attorneys in a Pending Arbitration</b> 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</p>	<p>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</p>

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	<p>informed consent.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>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:</p> <ul style="list-style-type: none"> <li>• Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;</li> <li>• 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</li> <li>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</li> </ul>

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	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	

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<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	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	<p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>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:</p> <ul style="list-style-type: none"> <li>• Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;</li> <li>• 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</li> <li>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</li> </ul>

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**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 (\*).

<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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?</p> <p>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.</p> <p>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 <i>pro bono</i> 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.</p> <p>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</p>	<p>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.</p>

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
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	<p>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.</p>	
<p>Office of the Independent Administrator By: Sharon Oxborough Independent Administrator Los Angeles, California</p>	<p>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.” * * *</p> <p><b>Standard 7(b)(2) Offers of employment or professional relationship</b> 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.</p>	<p>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:</p> <ul style="list-style-type: none"> <li>• Receiving or accepting that offer does not, by itself,</li> </ul>



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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
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	<p>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.)</p> <p><b>Standard 12 Duties and limitations regarding future professional relationships or employment</b>                      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.</p> <p>The rationale for the proposed change is, according to the Invitation to Comment, page 4,</p>	<p>constitute corruption in or misconduct by the arbitrator;</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</li> </ul>

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>“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.”</p> <p>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.</p> <p>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.</p>	

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
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	<p>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.</p> <p>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.</p>	

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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:</p> <ol style="list-style-type: none"><li>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.”</li><li>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.”</li><li>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.”</li><li>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”</li></ol>	<p>The committee respectfully disagrees with this suggestion. During the 30 days following service of an award, the arbitrator retains the authority to correct that</p>

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>standard 2(c)(1).) This makes no sense.</p> <p>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”?</p> <p>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.</p>	<p>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.</p> <p>Based on this and other comments, the committee has modified the proposal to identify the information that must be included in an arbitrator’s notice regarding an offer.</p> <p>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.</p>
<p>Orange County Bar Association By: Wayne R. Gross, President Newport Beach, California</p>	<p>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.</p>	<p>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.</p>
<p>Thomas D. Weaver Tustin, California</p>	<p>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</p>	<p>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</p>

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<b>Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment</b>		
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	<p>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.</p> <p>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.</p>	<p>a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment.</p> <p>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.</p>

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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
<p>Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair</p>	<p>Standard 7(c) - Time and manner of disclosure. The ADR Committee supports the proposed change.</p>	<p>No response required</p> <p>No response required</p> <p>No response required</p> <p>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</p>
	<p>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. * * *</p>	
	<p>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:</p>	
	<p>Standard 7(d)(1) - Family relationships with party.</p>	
	<p>Standard 7(d)(5) - Compensated service as other dispute resolution neutral. * * *</p>	
<p>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). * * *</p>	<p>No response required</p>	
<p>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</p>	<p>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</p>	

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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>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</p>	<p>disclosure standard.</p>



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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	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	<p><b>Initial and Subsequent Disclosures</b> 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.</p> <p>Again, since the information to be disclosed is not defined in this amendment, the method for satisfactory disclosure is completely undefined. * * *</p> <p><b>Standard 7d(5)</b> 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."</p>	<p>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, <i>including all of the following</i>” (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.</p> <p>No response required</p>

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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p><b>Proposed Change to Comment to standard 7</b>                      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?</p>	<p>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.</p>
<p>Luella Nelson                      Arbitrator/Mediator</p>	<p>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.</p> <p>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).</p>	<p>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</p>

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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>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</p>	<p>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.</p> <p>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.</p>

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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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 &amp; Howe, a boutique employer-side law firm. However, assume I have not had a case with anyone in DC&amp;H in the past year. Within that year, DC&amp;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 reassignment 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&amp;H law firm dissolution was bandied</p>	

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<b>Standard 7 – Disclosure - General</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.)</p> <p>Under the above scenario, the "Ethics" standards would require me to disclose my past cases with DC&amp;H if I served as an arbitrator in employment cases with Littler, Seyfarth, or Morrison -- even if none of the former DC&amp;H partners had any involvement in the new or pending cases, and even if I was personally unaware of the DC&amp;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.)</p>	

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<b>Standard 7(d)(2), (8) and (9) – Disclosure of family relationships with lawyer in the arbitration</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
<p>Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair</p>	<p>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:</p> <ul style="list-style-type: none"> <li>• Standard 7(d)(2) - Family relationships with lawyer in the arbitration.</li> <li>• Standard 7(d)(8) - Employee, expert witness, or consultant relationships.</li> </ul> <p>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).</p>	<p>No response required</p> <p>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.</p>

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<b>Standard 7(d)(2), (8) and (9) – Disclosure of family relationships with lawyer in the arbitration</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Judicate West By: Var Fox, Co-Founder Santa Ana, California	<p><b>Disclosure of Relationships with a Lawyer in the Arbitration</b> 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.</p> <p><b>Proposed Change to Standard 7(d)(8)</b> 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?</p>	<p>No response required</p> <p>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).”</p>

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<b>Standard 7(e)(1) – Disclosure of professional discipline</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
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	<p><b>Disclosure of Professional Discipline</b></p> <p>In <u>Haworth v. Superior Court of Los Angeles</u> (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.</p> <p>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</p>	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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<b>Standard 7(e)(1) – Disclosure of professional discipline</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>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</p>	<p>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.</p> <p>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.</p> <p>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: <a href="http://cjp.ca.gov/pub_discipline_and_decisions.htm">http://cjp.ca.gov/pub_discipline_and_decisions.htm</a>. 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</p>

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<b>Standard 7(e)(1) – Disclosure of professional discipline</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>proposed amendments, be the same for retired judges who work as neutrals, as they are on currently sitting Judges.</p> <p>The terms of this proposed amendment should be narrowly defined to address the concern brought up in <u>Haworth</u>, 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.</p>	<p>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.</p>

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<b>Standard 8(a) - Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
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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<b>Standard 8(a) - Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Judicate West By: Var Fox, Co-Founder Santa Ana, California	<p><b>Proposed Change to Standard 8(a)</b></p> <p>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.</p> <p>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.</p>	<p>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.</p>

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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
American Arbitration Association By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York	<p>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:</p> <p>“(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.)</p> <p>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.</p> <p>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</p>	<p>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.</p>

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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>During the drafting process, the Task Force also sent out drafts</p>	

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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	

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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>* * *</p> <p>For these reasons the AAA opposes the proposed amendments to Standards 8 and 17 in their entirety.</p>	
Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair	<p>The ADR Committee supports the following Standard 8 proposals without further comment:</p> <p>Standard 8(b) – Additional disclosures required.</p>	No response required
Ruth Glick Attorney at Law Burlingame, California	<p>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</p>	<p>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</p>



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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	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	<p>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 <b>or relationship</b> with a party” or where a party or lawyer has “a financial interest in <b>or relationship</b> with the provider organization.” “Financial interest,” yes; but not just any “relationship.” The disqualification contained in Section 1281.92 only applies to financial interests.</p> <p>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.</p> <p>Accordingly, the proposed Drafters’ Note set forth at lines 41 - 43 on page 27 of the Invitation to Comment needs to be revised.</p>	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	<b>Disclosures relating to administering provider organizations.</b>	Based on this and other comments, the committee has revised its proposal to remove the references to financial

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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Executive Vice President, General Counsel JAMS	<p>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</p> <ol style="list-style-type: none"> <li>1. Being written in as the arbitration provider in an agreement and</li> <li>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.</li> </ol>	<p>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.</p>
Judicate West By: Var Fox, Co-Founder Santa Ana, California	<p><b>Disclosures Relating to Administering Provider Organizations</b> 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,</p>	<p>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.</p>

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<b>Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	

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<b>Standard 16 - Compensation</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
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.

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<b>Standard 16 - Compensation</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Judicate West By: Var Fox, Co-Founder Santa Ana, California	<p><b>Arbitrator Fees</b> 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.</p> <p>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.</p>	No response required

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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
American Arbitration Association By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York	<p>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.</p> <p>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.</p> <p>For these reasons the AAA opposes the proposed amendments to Standards 8 and 17 in their entirety.</p>	<p>Based on this and other comments, the committee revised the proposed amendments to:</p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> <li>• Consolidate the language relating to marketing activities in subdivision (a).</li> </ul>

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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
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.

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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>specific case – the reference to “caseload” is not at all clear, particularly given what is specifically allowed under the Standard.</p> <p>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.</p>	
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.



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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
<p>JAMS By: Jay Welsh Executive Vice President, General Counsel JAMS</p>	<p><b>Our last comment relates to Standard 17(c) on Marketing.</b> 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.</p>	<p>Please see the response to the comments of the American Arbitration Association, above.</p>
<p>Judicate West By: Var Fox, Co-Founder Santa Ana, California</p>	<p><b>Marketing</b> 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.</p> <p>The first problem identified in this standard is that the wording used is too vague and ambiguous. The words “solicit”, “a</p>	<p>Please see the response to the comments of the American Arbitration Association, above.</p>

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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>particular case or caseload”, and “closed panel” are not defined.</p> <p>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.</p> <p>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.</p> <p>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</p>	

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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>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.</p> <p>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.”</p> <p>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.”</p> <p>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”?</p> <p>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,</p>	

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<b>Standard 17 - Marketing</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	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	<b>Standard 17 Marketing</b> 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.

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<b>Other</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
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.

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<b>Other</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	through, that is for sure.	
Luella Nelson Arbitrator/Mediator	<p>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 &amp; Conciliation Service and the California State Mediation &amp; 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.</p> <p>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.</p>	The committee would welcome specific suggestions for improving the ethics standards.