

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT

SPR13-01

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| Title | Action Requested |
| Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration | Review and submit comments by Monday, June 19, 2013 |
| Proposed Rules, Forms, Standards, or Statutes | Proposed Effective Date |
| Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration | January 1, 2014 |
| Proposed by | Contact |
| Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair | Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov |

Executive Summary and Origin

This proposal would amend the Ethics Standards for Neutral Arbitrators in Contractual Arbitration in response to recent appellate court decisions concerning these standards and suggestions received from attorneys, arbitrators, and others. Among other things, these amendments would: (1) codify the holdings in cases on the inapplicability of the standards to arbitrators in securities arbitrations and on the time for disclosures when an arbitrator is appointed by the court; (2) require new disclosures about financial relationships between an administering arbitration provider and a party or attorney in the arbitration 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 obtain the consent of the parties in a pending arbitration before accepting an offer or employment from a party or attorney for a party in that arbitration and (5) prohibit arbitrators from soliciting a particular case or caseload for themselves or for a closed panel of which they are a member.

Background

Code of Civil Procedure section 1281.85 required the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations under an arbitration agreement. This section also established parameters for the scope and content of the ethics standards:

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 These proposals are circulated for comment purposes only.

These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter.^[1] The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.

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

Since the Judicial Council adopted these ethics standards, there have been several appellate court decisions involving their application in various circumstances. The Judicial Council has also received suggestions for amending the standards.

Application to arbitrators in securities arbitrations

In 2005, both the California Supreme Court in *Jevne v. Superior Court* ((2005) 35 Cal.4th 935) and the United States Court of Appeals for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* ((9th Cir. 2005) 400 F.3d 119) held that the federal Securities Exchange Act preempts application of the California ethics standards to arbitrators for the National Association of Securities Dealers (NASD). The courts concluded that NASD arbitrators are governed by arbitration rules that were approved by the U.S. Securities and Exchange Commission (SEC) under federal law and that the California standards relating to disqualification are in conflict with the SEC-approved rules.

Disclosure of professional discipline

In 2010, in *Haworth v. Superior Court of Los Angeles* (2010) 50 Cal.4th 372, the California Supreme Court considered whether an arbitrator was obligated to disclose that he had been publically censured by the Commission on Judicial Performance. Because the standards do not currently require disclosure of such professional discipline, the court had to base its determination on whether, under the particular facts of the case, the public censure was required to be disclosed under the general standard requiring disclosure of matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.

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

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

Disclosure of relationships with a lawyer in the arbitration

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

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 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. 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 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.

Initial and subsequent disclosures

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

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

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 of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party,³ 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. 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.

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. 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.

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 particular case or caseload 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.

³ 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.

Prior Circulation

An earlier version of this proposal was developed by the Administrative Office of the Courts and circulated for public comment between April 21 and June 20, 2011. Eleven individuals or organizations submitted comments on that earlier proposal. Three commentators agreed with the proposal, one agreed with the proposal if modified, two did not agree with the proposal, and five did not indicate a position on the proposal as a whole but provided input on various aspects of the proposal. Portions of the proposal were modified in response to these public comments and a revised proposal was presented to the Judicial Council on February 28, 2012.⁴ The Judicial Council decided that the proposal should be considered by one of its advisory committees and the proposal was referred to the Civil and Small Claims Advisory Committee.

The Civil and Small Claims Advisory Committee formed a working group that considered the proposal that had been presented to the Judicial Council as well as some additional suggestions that had been submitted to the Judicial Council regarding the ethics standards. The working group and the full Civil and Small Claims Advisory Committee developed the attached revised proposal. This revised proposal contains all of the same amendments to standards 2 and 3 and most of the same amendments to standards 7 and 8 as were contained in the earlier proposal. It also contains some new proposed amendments to standards 7, 12, 16, and 17. Those portions of the attached proposal that were part of the proposal that previously circulated for public comment and presented to the Judicial Council and those portions that are new are identified below.

The Proposal

To respond to court decisions concerning the Ethics Standards for Neutral Arbitrators in Contractual Arbitration and to address identified concerns or problems with the standards, the Civil and Small Claims Advisory Committee is proposing amendments to these standards. Some of the proposed amendments are intended to conform the 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. The proposed amendments are discussed below and shown in the attachment. In addition, in the attachment, each amendment is followed by drafters' notes describing the proposed change. These notes are intended only to help readers understand these proposed amendments and will not be included in the final version of the standards presented to the Judicial Council for adoption.

Application to arbitrators in securities arbitrations

To reflect the court decisions holding that the federal Securities Exchange Act preempts application of the California ethics standards to arbitrators for the National Association of Securities Dealers, this proposal revises standard 3, which addresses the application of the

⁴ The February 2012 report to the Judicial Council can be accessed at: <http://www.courts.ca.gov/documents/jc-20120228-itemJ.pdf>.

standards, and its accompanying comment to explicitly exempt arbitrators serving in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the SEC under federal law. This proposed amendment was included in the proposal circulated for public comment in 2011.⁵

Disclosure of professional discipline

To address the gap in the standards identified in *Haworth v. Superior Court of Los Angeles*, *supra*, the attached proposal would add a new provision, separate from the requirement for disclosures relating to the arbitrator's impartiality, requiring arbitrators to disclose to the parties 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;
- 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 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 judicial officers:

- Arbitrators serving in securities arbitrations under the Financial Industry Regulatory Authority (FINRA) rules are currently required to disclose information about professional discipline to the parties in those arbitrations;⁶
- Mediators serving in court-connected mediation programs for general civil cases must report to the court if they have been subject to professional discipline;⁷
- Members of the State Bar of California must report such disciplinary matters to the State Bar;⁸ and
- Prospective judges are required to disclose such information to the Governor before they are appointed as superior court judges.⁹

⁵ These same changes were also previously circulated for public comment in late 2005, along with a request for comments on all the standards.

⁶ 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.

⁷ 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.

⁸ 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.

⁹ See *Application for Appointment as Judge of the Superior Court* at http://www.gov.ca.gov/docs/Judicial_application_Worksheet.txt. Among many other things that must be disclosed on this application is information about (1) whether the applicant has ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or

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 that the information about public professional discipline be disclosed to the parties.

The proposal circulated for public comment in 2011 contained a similar proposed amendment. However, there are several differences between the earlier proposal and the current one, including:

- Except with respect to disbarments/license revocations or resignations with charges pending, the current proposal would limit the requirement to disclose discipline to public discipline that was imposed in the preceding 10 years;
- The current proposal would specify that the resignations that must be disclosed include those with either public or private charges pending; and
- The current proposal includes a definition of “public discipline” to aid in the application and interpretation of this new requirement.

Disclosure of relationships with a lawyer in the arbitration

To clarify that the ethics standards are intended to require disclosure of an arbitrator’s spouse’s prior association in the practice of law with a lawyer in the arbitration as well as other professional relationships that the arbitrator or a member of the arbitrator’s immediate family has or has had with a lawyer for a party, the attached proposal would make the following changes to standard 7:

- Move the current provision relating to the arbitrator’s past association in the practice of law with a lawyer in the arbitration out of standard 7(d)(8) (which relates to professional relationships the arbitrator or a member of the arbitrator’s immediate family has or has had with a party or a lawyer in the arbitration) and into 7(d)(2) (which relates to family relationships with a lawyer in the arbitration). Moving this provision up to 7(d)(2)(B) ensures that it appears in the first location where readers might logically look for it.
- Expand this provision to specifically address situations in which the arbitrator’s spouse or domestic partner had a past association in the practice of law with a lawyer in the arbitration.

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.

Explicitly listing such past relationships should eliminate any doubt about whether these relationships must be disclosed.

- Remove the introductory language about other professional relationships from standard 7(d)(8) and place it in its own separate paragraph: proposed standard 7(d)(9). Placing this provision in its own paragraph should emphasize that it establishes disclosure obligations distinct from and in addition to those established by the other provisions in standard 7(d). The existing provisions of 7(d)(8)(B) and (C) relating to disclosure of employee, expert witness, and consultant relationships would remain in standard 7(d)(8), but would be consolidated into a single provision.

These proposed amendments were included in the proposal circulated for public comment in 2011.

Disclosures relating to administering provider organizations

This proposal would reinstate the provisions previously removed from the standards 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. This proposed amendment was not included in the proposal circulated for public comment in 2011.

Initial and subsequent disclosures

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

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

The proposed amendment to standard 2(a)(2) is intended to reflect the holding in *Jakks* that it is the appointment of the arbitrator by a court under Code of Civil Procedure section 1281.6, 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..

These proposed amendments were included in the proposal circulated for public comment in 2011.

Offers of employment from parties or attorneys in a pending arbitration

To address concerns that the disclosure and ability to disqualify an arbitrator under standard 12(b) does not provide sufficient protection for 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, this proposal would amend standard 12 to require that, in consumer arbitrations, the arbitrator must obtain the informed consent of parties in a pending arbitration before accepting any offer of other employment from a party or attorney for a party in that arbitration.

This proposed amendment was not included in the proposal circulated for public comment in 2011. However, this requirement was included in the standards when they were initially adopted by the Judicial Council in April 2002. It was subsequently removed when the Judicial Council amended these standards in December 2002. One of the main reasons that it was removed from the standards was that, at that time, the disclosure and ability to disqualify an arbitrator under standard 12(b) was viewed as providing sufficient protection.

Arbitrator fees

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, 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 circulated for public comment in 2011.

Marketing

To address concerns that have been raised about the potential appearance of bias that may arise from this practice, this proposal would prohibit arbitrators from soliciting a particular case or caseload for themselves or for a closed panel of which they are a member. This proposed amendment was not included in the proposal circulated for public comment in 2011.

Other proposed changes

In addition to the amendments intended to address concerns raised by the appellate court decisions described above, the attached proposal includes several other amendments to the standards based primarily on suggestions received by the Judicial Council:

- *Standard 2(o)*—This provision, which defines extended family, currently covers spouses of an arbitrator's relatives, but does not specifically cover the domestic partners of these relatives. The attached proposal includes an amendment designed to fill this gap.
- *Standard 3(b)(2)(D)*—The proposed amendment to this provision would make a substantive change by exempting arbitrators serving in a type of automobile warranty arbitration

authorized by federal regulations. This program is similar to the automobile warranty and attorney-client fee arbitration programs already exempted in (b)(2)(D) and (b)(2)(C) in that, under the applicable regulations, the decisions rendered are not binding on the consumer party.

- *Standard 7(d)(5)*—This proposed amendment would delete an obsolete provision.
- *Comment to standard 7*—The proposed amendments to this comment would, among other things:
 - Correct cross-references to renumbered or relettered provisions;
 - Clarify that the requirement to make supplemental disclosures applies both to matters that existed at the time the arbitrator made his or her initial disclosures, but of which the arbitrator only subsequently became aware, and to matters that arise because of things that happen during the course of an arbitration, such as when a party hires a new lawyer (as occurred in the *Gruma* case); and
 - Clarify that just because a particular matter is not specifically listed among the examples of matters in standard 7(d) does not mean that it need not be disclosed; it still needs to be evaluated under the general disclosure standard.
- *Standard 8(a)*—This proposed amendment is intended to 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 websites 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 circulated for public comment in 2011.

Alternatives Considered

The committee 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 that 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.

The committee 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 and also inform the all parties at the time the arbitrator receives any such offer of employment.

The committee ultimately decided to propose the amendment described above that focuses on consumer arbitrations, rather than all arbitrations.

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.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal reasonably achieve the stated purpose?
- Is the language of the proposed amendment to standard 17 sufficiently clear? In particular, is the meaning of “solicitation” and “caseload” in this amendment clear or should these terms be defined?
- Are the limitations that would be established by the proposed amendment to standard 17 necessary to protect against bias or the appearance of bias by arbitrators?
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration would be amended, effective January 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
10 appointment is final, “arbitrator” and “neutral arbitrator” include a
11 person who has been served with notice of a proposed nomination or
12 appointment. For purposes of these standards, “proposed nomination”
13 does not include nomination of persons by a court under Code of Civil
14 Procedure section 1281.6 to be considered for possible selection as an
15 arbitrator by the parties or appointment as an arbitrator by the court.
16

17 **(b)–(n) * * ***

18
19 **(o)** “Member of the arbitrator’s extended family” means the parents,
20 grandparents, great-grandparents, children, grandchildren, great-
21 grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or
22 the arbitrator’s spouse or domestic partner or the spouse or domestic partner
23 of such person.
24

25 **(p)–(s) * * ***

26
27 **Drafters’ Notes:**¹⁰

28
29 **Subdivision (a)(2).** The amendment to subdivision (a)(2) is meant to codify the court’s holding in
30 *Jakks Pacific, Inc. v. Superior Court* (2008) 160 Cal.App.4th 596 that, in the context of
31 requirements for disclosures by proposed neutral arbitrators, “nomination” is not the same as the
32 court’s “nomination” of a list of potential arbitrators for consideration by the parties under Code of
33 Civil Procedure section 1281.6.
34

35 **Subdivision (o).** The amendment to subdivision (o) is meant to fill a gap in the standard, which
36 currently covers spouses of an arbitrator’s relatives, but does not specifically cover the domestic
37 partners of these relatives.
38
39
40

¹⁰ Drafters’ Notes are included in this invitation to comment following the proposed amendments to each subdivision of the Ethics Standards to help explain the changes that are being proposed; they are not part of the proposed standards and will not appear in any standards ultimately adopted by the Judicial Council.

1 **Standard 3. Application and effective date**

2
3 (a) * * *

4
5
6 (b) These standards do not apply to:

7
8 (1) Party arbitrators, as defined in these standards; or

9
10 (2) Any arbitrator serving in:

11
12 (A) An international arbitration proceeding subject to the provisions of
13 title 9.3 of part III of the Code of Civil Procedure;

14
15 (B) A judicial arbitration proceeding subject to the provisions of
16 chapter 2.5 of title 3 of part III of the Code of Civil Procedure;

17
18 (C) An attorney-client fee arbitration proceeding subject to the
19 provisions of article 13 of chapter 4 of division 3 of the Business
20 and Professions Code;

21
22 (D) An automobile warranty dispute resolution process certified under
23 California Code of Regulations title 16, division 33.1 or an
24 informal dispute settlement procedure under Code of Federal
25 Regulations title 16, chapter 1, part 703;

26
27 (E) An arbitration of a workers' compensation dispute under Labor
28 Code sections 5270 through 5277;

29
30 (F) An arbitration conducted by the Workers' Compensation Appeals
31 Board under Labor Code section 5308;

32
33 (G) An arbitration of a complaint filed against a contractor with the
34 Contractors State License Board under Business and Professions
35 Code sections 7085 through 7085.7; ~~or~~

36
37 (H) An arbitration conducted under or arising out of public or private
38 sector labor-relations laws, regulations, charter provisions,
39 ordinances, statutes, or agreements; or

40
41 (I) An arbitration proceeding governed by rules adopted by a
42 securities self-regulatory organization and approved by the United
43 States Securities and Exchange Commission under federal law.

1
2 (c) * * *

3
4 **Comment to Standard 3**

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

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

15
16 **Drafters' Notes:**

17
18 **Subdivision (b)(2)(D).** The amendment to this provision would make a substantive change by
19 exempting arbitrators serving in a type of automobile warranty arbitration program authorized by
20 federal regulation. This program is similar to the automobile warranty and attorney-client fee
21 arbitration programs already exempted in (b)(2)(D) and (b)(2)(C) because the decisions
22 rendered in informal dispute settlement procedures established under Code of Federal
23 Regulations title 16, chapter 1, part 703 are not binding on the consumer party.

24
25 **Subdivision (b)(2)(I).** This proposed new provision and the accompanying amendment to the
26 comment are the same changes that were circulated for public comment in 2005 and are
27 intended to recognize the case law relating to the preemption of the standards for arbitrators
28 serving in the security industry arbitration programs governed by rules approved by the SEC.
29

30
31 **Standard 7. Disclosure**

32
33 (a) **Intent**

34
35 This standard is intended to identify the matters that must be disclosed by a
36 person nominated or appointed as an arbitrator. To the extent that this
37 standard addresses matters that are also addressed by statute, it is intended to
38 include those statutory disclosure requirements, not to eliminate, reduce, or
39 otherwise limit them.
40

41 (b) **General provisions**

42 For purposes of this standard:

43
44 (1) * * *

45
46 (2) *Offers of employment or professional relationship*
47
48

1 If an arbitrator has disclosed to the parties in an arbitration that he or she
2 will entertain offers of employment or of professional relationships from
3 a party or lawyer for a party while the arbitration is pending as required
4 by subdivision (b) of standard 12 and, in a consumer arbitration, has
5 informed the parties in the pending arbitration about any such offer and
6 sought their consent as required by subdivision (d) of standard 12, the
7 arbitrator is not also required to disclose that offer to the parties in that
8 arbitration under this standard ~~any such offer from a party or lawyer for~~
9 ~~a party that he or she subsequently receives or accepts while that~~
10 ~~arbitration is pending.~~

11
12 (3) * * *

13
14 **Drafters' Notes:**

15 The proposed amendments to subdivision (b) are intended to clarify that disclosure of an offer of
16 employment from a party or attorney for a party in a pending arbitration is not required under
17 standard 7 if an arbitrator complies with the proposed new obligation under standard 12 for
18 arbitrators in consumer arbitrations to obtain the informed consent of parties in a pending
19 arbitration before accepting an offer of other employment from a party or attorney for a party in
20 that arbitration.

21
22
23 **(c) Time and manner of disclosure**

24
25 **(1) *Initial disclosure***

26
27 Within ~~ten~~ 10 calendar days of service of notice of the proposed
28 nomination or appointment, a proposed arbitrator must disclose to all
29 parties in writing all matters listed in subdivisions (d) and (e) of this
30 standard of which the arbitrator is then aware.

31
32 **(2) *Supplemental disclosure***

33
34 If an arbitrator subsequently becomes aware of a matter that must be
35 disclosed under either subdivision (d) or (e) of this standard, the
36 arbitrator must disclose that matter to the parties in writing within 10
37 calendar days after the arbitrator becomes aware of the matter.

38
39 **Drafters' Notes:**

40 The proposed amendments to subdivision (c) are part of the amendments intended to clarify that
41 standard 7 governs both initial disclosures (those made before final appointment of an arbitrator)
42 and supplemental disclosures (those made after the initial disclosures have been made).

43
44
45 **(d) Required disclosures**

46
47 ~~A person who is nominated or appointed as an arbitrator~~ A proposed arbitrator
48 or arbitrator must disclose all matters that could cause a person aware of the

1 facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able
2 to be impartial, including, but not limited to, all of the following:

3
4 **Drafters' Notes:**

5 The proposed amendments to this subdivision are intended to do two things:

- 6
7 • The proposed amendment to the first line of subdivision (d) is part of the amendments
8 intended to clarify that standard 7 governs both initial disclosures (those made before final
9 appointment of an arbitrator) and supplemental disclosures (those made after the initial
10 disclosures have been made).
11
12 • The proposed amendment to the last line of subdivision (d) is intended to clarify that matters
13 that must be disclosed under subdivision (2) are not limited to the specific interests,
14 relationships, or affiliations listed in the subparagraphs of subdivision (d); the listed items are
15 only examples of common matters that could cause a person aware of the facts to
16 reasonably entertain a doubt that the arbitrator would be able to be impartial.
17

18
19 (1) *Family relationships with party*

20
21 The arbitrator or a member of the arbitrator's immediate or extended
22 family is:

23
24 (A) A party;

25
26 (B) ~~a party's~~ The spouse or domestic partner, of a party; or

27
28 (C) An officer, director, or trustee of a party.
29

30 **Drafters' Notes:**

31 The amendments to subdivision (d)(1) are intended to make this provision easier to read and
32 understand; no substantive change is intended.
33

34
35 (2) *Family relationships with lawyer in the arbitration*

36
37 (A) Current relationships

38
39 The arbitrator, or the spouse, former spouse, domestic partner,
40 child, sibling, or parent of the arbitrator or the arbitrator's spouse
41 or domestic partner is:

42
43 ~~(A)~~(i) A lawyer in the arbitration;

44
45 ~~(B)~~(ii) The spouse or domestic partner of a lawyer in the
46 arbitration; or

47
48 ~~(C)~~(iii) Currently associated in the private practice of law with a
49 lawyer in the arbitration.

1
2 (B) Past relationships
3

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

8 **Drafters’ Notes:**

9 The amendments to subdivision (d)(2) are intended to address the decision of the Ninth Circuit
10 Court of Appeals in *Johnson v. Gruma Corporation* ((2010) 614 F.3d 1062). That decision held
11 that, under the standards, when a party hired a new lawyer during the arbitration, the arbitrator
12 was not required to disclose that his wife had in the past been a partner in the same law firm as
13 this newly hired lawyer. The proposed amendments would do two things:
14

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

42
43 (3) *Significant personal relationship with party or lawyer for a party*
44

45 The arbitrator or a member of the arbitrator’s immediate family has or
46 has had a significant personal relationship with any party or lawyer for a
47 party.
48

49 (4) *Service as arbitrator for a party or lawyer for party*
50

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

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

(B)–(C) * * *

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

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

(A) Time frame

For purposes of this paragraph (5), “prior case” means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator’s proposed nomination or appointment, ~~but does not include any case in which the arbitrator concluded his or her service before January 1, 2002.~~

(B)–(C) * * *

Drafters’ Notes:

The amendment to (d)(5), which requires arbitrators to disclose prior service as a dispute resolution neutral other than an arbitrator, deletes an obsolete provision. Subparagraph (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.*” (Emphasis added.) 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 a dispute resolution neutral that 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.

1
2 (6) *Current arrangements for prospective neutral service*
3

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

10 (7) *Attorney-client relationship*
11

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

- 16 (A) An officer, a director, or a trustee of a party is or, within the
17 preceding two years, was a client of the arbitrator in the arbitrator's
18 private practice of law or a client of a lawyer with whom the
19 arbitrator is or was associated in the private practice of law;
20
21 (B) In any other proceeding involving the same issues, the arbitrator
22 gave advice to a party or a lawyer in the arbitration concerning any
23 matter involved in the arbitration; and
24
25 (C) The arbitrator served as a lawyer for or as an officer of a public
26 agency which is a party and personally advised or in any way
27 represented the public agency concerning the factual or legal issues
28 in the arbitration.
29

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

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

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

38 Any other professional relationship not already disclosed under
39 paragraphs (2)–~~(7)~~(8) that the arbitrator or a member of the arbitrator's
40 immediate family has or has had with a party or lawyer for a
41 party, ~~including the following:~~
42

- 43 ~~(A) The arbitrator was associated in the private practice of law with a~~
44 ~~lawyer in the arbitration within the last two years.~~
45

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

4
5 ~~(C) The arbitrator or a member of the arbitrator's immediate family is~~
6 ~~or, within the preceding two years, was an employee of or an~~
7 ~~expert witness or a consultant for a lawyer in the arbitration.~~

8
9 **Drafters' Notes:**

10 The amendments to (d)(8) and the proposed addition of (d)(9) are also intended to address the
11 decision of the Ninth Circuit Court of Appeals in *Johnson v. Gruma Corporation* ((2010) 614 F.3d
12 1062). The proposed amendments would do two things:

- 13
- 14 • Move the current provision relating to the arbitrator having been associated in the practice of
15 law with a lawyer in the arbitration out of (d)(8) and into (d)(2). As explained in the drafters'
16 notes to (d)(2), moving this provision up to (d)(2) ensures that it appears in the first location
17 where readers might logically look for it.
 - 18
 - 19 • Separate the provisions relating to employment, expert witness, and consulting relationships
20 from the general requirement to disclose professional relationships between the arbitrator
21 and the arbitrator's immediate family and a party or a lawyer for a party. This should reduce
22 any questions about whether the standards include a separate obligation to disclose
23 professional relationships not already covered by other subparts of standard 7(d).
- 24
25

26 ~~(9)~~(10) *Financial interests in party*

27
28 The arbitrator or a member of the arbitrator's immediate family has a
29 financial interest in a party.

30
31 ~~(10)~~(11) *Financial interests in subject of arbitration*

32
33 The arbitrator or a member of the arbitrator's immediate family has a
34 financial interest in the subject matter of the arbitration.

35
36 ~~(11)~~(12) *Affected interest*

37
38 The arbitrator or a member of the arbitrator's immediate family has an
39 interest that could be substantially affected by the outcome of the
40 arbitration.

41
42 ~~(12)~~(13) *Knowledge of disputed facts*

43
44 The arbitrator or a member of the arbitrator's immediate or extended
45 family has personal knowledge of disputed evidentiary facts relevant to
46 the arbitration. A person who is likely to be a material witness in the
47 proceeding is deemed to have personal knowledge of disputed
48 evidentiary facts concerning the proceeding.

1
2 ~~(13)~~(14) *Membership in organizations practicing discrimination*

3
4 The arbitrator's ~~membership in~~ is a member of any organization that
5 practices invidious discrimination on the basis of race, sex, religion,
6 national origin, or sexual orientation. Membership in a religious
7 organization, an official military organization of the United States, or a
8 nonprofit youth organization need not be disclosed unless it would
9 interfere with the arbitrator's proper conduct of the proceeding or would
10 cause a person aware of the fact to reasonably entertain a doubt
11 concerning the arbitrator's ability to act impartially.
12

13 ~~(14)~~(15) Any other matter that:

- 14
15 (A) Might cause a person aware of the facts to reasonably entertain a
16 doubt that the arbitrator would be able to be impartial;
17
18 (B) Leads the proposed arbitrator to believe there is a substantial doubt
19 as to his or her capacity to be impartial, including, but not limited
20 to, bias or prejudice toward a party, lawyer, or law firm in the
21 arbitration; or
22
23 (C) Otherwise leads the arbitrator to believe that his or her
24 disqualification will further the interests of justice.
25

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

28
29 In addition to the matters that must be disclosed under subdivision (d), ~~an~~ a
30 proposed arbitrator or arbitrator must also disclose:
31

32 (1) *Professional discipline*

- 33
34 (A) If the arbitrator has been disbarred or had his or her license to
35 practice a profession or occupation revoked by a professional or
36 occupational disciplinary agency or licensing board, whether in
37 California or elsewhere;
38
39 (B) If the arbitrator has resigned his or her membership in the State
40 Bar or another professional or occupational licensing agency or
41 board, whether in California or elsewhere, while public or private
42 disciplinary charges were pending; or
43
44 (C) If within the preceding 10 years public discipline other than that
45 covered under (A) has been imposed on the arbitrator by a
46 professional or occupational disciplinary agency or licensing

1 board, whether in California or elsewhere. “Public discipline”
2 under this provision means any disciplinary action imposed on the
3 arbitrator that the professional or occupational disciplinary agency
4 or licensing board identifies in its publicly available records or in
5 response to a request for information about the arbitrator from a
6 member of the public.

7
8 (2) Inability to conduct or timely complete proceedings

9
10 ~~(1)~~(A) If the arbitrator is not able to properly perceive the evidence or
11 properly conduct the proceedings because of a permanent or
12 temporary physical impairment; and

13
14 ~~(2)~~(B) Any constraints on his or her availability known to the arbitrator
15 that will interfere with his or her ability to commence or complete
16 the arbitration in a timely manner.

17
18 **Drafters’ Notes:**

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

- 20
21 • The amendments to the introductory sentence are part of the amendments intended to clarify
22 that standard 7 governs both initial and supplemental disclosures.
23
24 • The proposed new subdivision (e)(1) would add a new obligation for arbitrators to disclose if:
25 ○ They were disbarred or had their license to practice a profession or occupation revoked
26 by a professional or occupational disciplinary agency or licensing board;
27 ○ They resigned their membership in the State Bar or another professional or occupational
28 licensing agency or board while disciplinary charges were pending; or
29 ○ Within the preceding 10 years other public discipline was imposed on them by a
30 professional or occupational disciplinary agency or licensing board.

31
32 This new provision is intended to address the type of situation that was at issue in *Haworth*
33 *v. Superior Court of Los Angeles* (2010) 50 Cal.4th 372, in which an arbitrator did not
34 disclose that he had previously been publically censured by the Commission on Judicial
35 Performance.

36
37
38 **(f) Continuing duty**

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

44
45 **Comment to Standard 7**

46
47 This standard requires proposed arbitrators to disclose to all parties, in writing within 10 days of
48 service of notice of their proposed nomination or appointment, all matters they are aware of at
49 that time that could cause a person aware of the facts to reasonably entertain a doubt that the
50 proposed arbitrator would be able to be impartial as well as those matters listed under subdivision

1 ~~(e). and to disclose~~ This standard also requires that if arbitrators subsequently become aware of
2 any additional such matters, they must make supplemental disclosures of these matters within 10
3 days of becoming aware of them. This latter requirement is intended to address both matters
4 existing at the time of nomination or appointment of which the arbitrator subsequently becomes
5 aware and new matters that arise based on developments during the arbitration, such as the hiring
6 of new counsel by a party.

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

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

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

47
48 Code of Civil Procedure section 1281.9 already establishes detailed requirements concerning
49 disclosures by arbitrators, including a specific requirement that arbitrators disclose the existence
50 of any ground specified in Code of Civil Procedure section 170.1 for disqualification of a judge.
51 This standard does not eliminate or otherwise limit those requirements; in large part, it simply

1 consolidates and integrates those existing statutory disclosure requirements by topic area. This
2 standard does, however, expand upon or clarify the existing statutory disclosure requirements in
3 the following ways:
4

- 5 • Requiring arbitrators to ~~disclose~~ make supplemental disclosures to the parties regarding
6 any matter about which they become aware after the time for making an initial disclosure
7 has expired, within 10 calendar days after the arbitrator becomes aware of the matter
8 (subdivision ~~(f)~~(c)).
9
 - 10 • Expanding required disclosures about the relationships or affiliations of an arbitrator's
11 family members to include those of an arbitrator's domestic partner (subdivisions (d)(1)
12 and (2); see also definitions of immediate and extended family in standard 2).
13
 - 14 • Requiring arbitrators, in addition to making statutorily required disclosures regarding
15 prior service as an arbitrator for a party or attorney for a party, to disclose both prior
16 services ~~both~~ as a neutral arbitrator selected by a party arbitrator in the current arbitration
17 and prior compensated service as any other type of dispute resolution neutral for a party
18 or attorney in the arbitration (e.g., temporary judge, mediator, or referee) (subdivisions
19 (d)(4)~~(C)~~(A)(iii) and (5)).
20
 - 21 • If a disclosure includes information about five or more cases, requiring arbitrators to
22 provide a summary of that information (subdivisions (d)(4)(C) and (5)(C)).
23
 - 24 • Requiring the arbitrator to disclose if he or she or a member of his or her immediate
25 family is or, within the preceding two years, was an employee, expert witness, or
26 consultant for a party or a lawyer in the arbitration (subdivisions (d)(8) ~~(A)~~ and (B)).
27
 - 28 • Requiring the arbitrator to disclose if he or she or a member of his or her immediate
29 family has an interest that could be substantially affected by the outcome of the
30 arbitration (subdivision (d)~~(11)~~(12)).
31
- 32 ~~If a disclosure includes information about five or more cases, requiring arbitrators to provide~~
33 ~~a summary of that information~~ (subdivisions (d)(4) and (5)).
34
- 35 • Requiring arbitrators to disclose membership in organizations that practice invidious
36 discrimination on the basis of race, sex, religion, national origin, or sexual orientation
37 (subdivision (d)~~(13)~~(14)).
38
 - 39 • Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to
40 practice a profession or occupation revoked by a professional or occupational disciplinary
41 agency or licensing board, resigned membership in the State Bar or another licensing
42 agency or board while disciplinary charges were pending, or had any other public
43 discipline imposed on him or her by a professional or occupational disciplinary agency or
44 licensing board within the preceding 10 years (subdivision (e)(1)).
45
 - 46 • Requiring the arbitrator to disclose any constraints on his or her availability known to the
47 arbitrator that will interfere with his or her ability to commence or complete the
48 arbitration in a timely manner (subdivision ~~(d)~~(e)(2)).
49

- 1 • Clarifying that the duty to make disclosures is a continuing obligation, requiring
2 disclosure of matters that were not known at the time of nomination or appointment but
3 that become known afterward (subdivision ~~(e)~~(f)).
4

5 It is good practice for an arbitrator to ask each participant to make an effort to disclose any
6 matters that may affect the arbitrator's ability to be impartial.
7

8 **Drafters' Notes:**

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

- 10
- 11 • They reflect the proposed amendments to the text of the standard that are intended to clarify
12 its application to both initial and supplemental disclosures.
13
 - 14 • They clarify that the supplemental disclosure requirement applies both to matters that existed
15 at the time the arbitrator made his or her initial disclosures, but of which the arbitrator only
16 subsequently became aware, and also to matters that arise because of things that happen
17 during the course of an arbitration, such as when a party hires a new lawyer (as occurred in
18 the *Gruma* case);
19
 - 20 • They clarify that just because a particular matter is not among the examples of matters
21 specifically listed in 7(d) does not mean that it need not be disclosed—it still needs to be
22 evaluated under the general disclosure standard;
23
 - 24 • In the portion of the comment discussing additions to the preexisting statutory disclosure
25 requirements, the proposed amendments reflect the proposed amendments to the standard
26 and would put the provisions discussed in numeric order; and
27
 - 28 • They correct several cross-referencing errors, update other cross-references to reflect the
29 proposed amendments to the standard, and make other nonsubstantive clarifying changes.
30

31

32 **Standard 8. Additional disclosures in consumer arbitrations administered by a**
33 **provider organization**
34

35 **(a) General provisions**
36

37 **(1) *Reliance on information provided by provider organization***
38

39 Except as to the information in (c)(1), an arbitrator may rely on
40 information supplied by the administering provider organization in
41 making the disclosures required by this standard only if the provider
42 organization represents that the information, including any information
43 that is required to be published under Code of Civil Procedure section
44 1291.96, is current as of the most recent quarter. If the information that
45 must be disclosed is available on the Internet, the arbitrator may comply
46 with the obligation to disclose this information by providing in the
47 disclosure statement required under standard 7(c)(1) the Internet address
48 of the specific web page at which the information is located and
49 notifying the party that the arbitrator will supply hard copies of this
50 information upon request.

1
2 (2) *Reliance on representation that not a consumer arbitration*

3
4 An arbitrator is not required to make the disclosures required by this
5 standard if he or she reasonably believes that the arbitration is not a
6 consumer arbitration based on reasonable reliance on a consumer party's
7 representation that the arbitration is not a consumer arbitration.
8

9 **Drafters' Notes:**

10 The proposed amendments to subdivision (a) are intended to do two things:

- 11
- 12 • Provide that an arbitrator may only rely on information from a provider organization's website
13 to make required disclosures under this standard if the provider organization represents that
14 the information on that website is current as of the most recent quarter. This provision reflects
15 the requirement in Code of Civil Procedure section 1291.96 that provider organizations post
16 quarterly information on the consumer arbitrations they have administered.
17
 - 18 • Clarify that if an arbitrator is relying on information from a provider organization's website to
19 make required disclosures under this standard, the web address of the provider organization
20 must be provided in the arbitrator's initial disclosure statement. This is important because
21 there are time limits specified for the submission of that disclosure statement.
22

23 **(b) Additional disclosures required**

24
25 In addition to the disclosures required under standard 7, in a consumer
26 arbitration as defined in standard 2 in which a dispute resolution provider
27 organization is coordinating, administering, or providing the arbitration
28 services, a ~~person~~ proposed arbitrator who is nominated or appointed as an
29 arbitrator on or after January 1, 2003 must disclose the following within the
30 time and in the same manner as the disclosures required under standard
31 7(c)(1):
32

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

35
36 Any significant past, present, or currently expected financial or
37 professional relationship or affiliation between the administering dispute
38 resolution provider organization and a party or lawyer in the arbitration.
39 Information that must be disclosed under this standard includes:
40

41 (A) The provider organization has a financial interest in or relationship
42 with a party.

43
44 ~~(A)~~(B) A party, a lawyer in the arbitration, or a law firm with which a
45 lawyer in the arbitration is currently associated is a member of or
46 has a financial interest in or relationship with the provider
47 organization.
48

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

5
6 ~~(C)~~(D) The provider organization has entered into, or the arbitrator
7 currently expects that the provider organization will enter into, an
8 agreement or relationship with any party or lawyer in the
9 arbitration or a law firm with which a lawyer in the arbitration is
10 currently associated under which the provider organization will
11 administer, coordinate, or provide dispute resolution services in
12 other noncollective bargaining matters or will provide other
13 consulting services for that party, lawyer, or law firm.

14
15 ~~(D)~~(E) The provider organization is coordinating, administering, or
16 providing dispute resolution services or has coordinated,
17 administered, or provided such services in another pending or prior
18 noncollective bargaining case in which a party or lawyer in the
19 arbitration was a party or a lawyer. For purposes of this paragraph,
20 “prior case” means a case in which the dispute resolution neutral
21 affiliated with the provider organization concluded his or her
22 service within the two years before the date of the arbitrator’s
23 proposed nomination or appointment, but does not include any
24 case in which the dispute resolution neutral concluded his or her
25 service before July 1, 2002.

26
27 **Drafters’ Notes:**

28 The proposed amendments to subdivision (b) would do several things:

- 29
- 30 • Make the language of this provision consistent with the proposed amendments to the
31 introductory sentence of standard 7, which clarify the application of that standard to both
32 initial and supplemental disclosures;
 - 33
 - 34 • Clarify that these disclosures relating to relationships with provider organizations must be
35 made as part of the initial disclosure; and
 - 36
 - 37 • Specifically require that arbitrators in arbitrations that are administered by a provider
38 organization disclose whether that provider organization has a financial interest in or
39 relationship with a party or whether a party or lawyer in the arbitration has a financial interest
40 in or relationship with the provider organization. The obligation to make such disclosures was
41 previously deleted from the standards because Code of Civil Procedure section 1281.92
42 prohibits provider organizations from administering any consumer arbitration where such
43 relationship exists. The obligation to disclose such relationships would be re-introduced to the
44 standards in recognition of the failure of at least one large provider organization to comply
45 with section 1281.92.
 - 46
 - 47
 - 48

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

22
23 (3) *Summary of case information*

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

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

42
43 (c) **Relationship between provider organization and arbitrator**

44
45 If a relationship or affiliation is disclosed under ~~paragraph~~ subdivision (b), the
46 arbitrator must also provide information about the following:

- 1
2 (1) Any financial relationship or affiliation the arbitrator has with the
3 provider organization other than receiving referrals of cases, including
4 whether the arbitrator has a financial interest in the provider
5 organization or is an employee of the provider organization;
6
7 (2) The provider organization’s process and criteria for recruiting,
8 screening, and training the panel of arbitrators from which the arbitrator
9 in this case is to be selected;
10
11 (3) The provider organization’s process for identifying, recommending, and
12 selecting potential arbitrators for specific cases; and
13
14 (4) Any role the provider organization plays in ruling on requests for
15 disqualification of the arbitrator.

16
17 (d) * * *

18
19 **Comment to Standard 8**

20
21 This standard only applies in consumer arbitrations in which a dispute resolution provider
22 organization is administering the arbitration. Like standard 7, this standard expands upon the
23 existing statutory disclosure requirements. Code of Civil Procedure section 1281.95 requires
24 arbitrators in certain construction defect arbitrations to make disclosures concerning relationships
25 between their employers or arbitration services and the parties in the arbitration. This standard
26 requires arbitrators in all consumer arbitrations to disclose any financial or professional
27 relationship between the administering provider organization and any party, attorney, or law firm
28 in the arbitration and, if any such relationship exists, then the arbitrator must also disclose his or
29 her relationship with the dispute resolution provider organization. This standard ~~does not~~ requires
30 an arbitrator to disclose if the provider organization has a financial interest in a party or lawyer in
31 the arbitration or if a party or lawyer in the arbitration has a financial interest in the provider
32 organization because even though provider organizations are prohibited under Code of Civil
33 Procedure section 1281.92 from administering any consumer arbitration where any such
34 relationship exists.
35

36 **Subdivision (b).** Currently expected relationships or affiliations that must be disclosed include all
37 relationships or affiliations that the arbitrator, at the time the disclosure is made, expects will be
38 formed. For example, if the arbitrator knows that the administering provider organization has
39 agreed in concept to enter into a business relationship with a party, but they have not yet signed a
40 written agreement formalizing that relationship, this would be a “currently expected” relationship
41 that the arbitrator would be required to disclose.
42

43 **Drafters’ Notes:**

44 The proposed amendments to the comment are intended to reflect the proposed amendment to
45 subdivision (b) above.
46
47
48

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

3
4 **(a) Offers as lawyer, expert witness, or consultant**

5
6 From the time of appointment until the conclusion of the arbitration, an
7 arbitrator must not entertain or accept any offers of employment or new
8 professional relationships as a lawyer, an expert witness, or a consultant from
9 a party or a lawyer for a party in the pending arbitration.

10
11 **(b) Offers for other employment or professional relationships**

12
13 In addition to the disclosures required by standards 7 and 8, within ten
14 calendar days of service of notice of the proposed nomination or appointment,
15 a proposed arbitrator must disclose to all parties in writing if, while that
16 arbitration is pending, he or she will entertain offers of employment or new
17 professional relationships in any capacity other than as a lawyer, expert
18 witness, or consultant from a party or a lawyer for a party, including offers to
19 serve as a dispute resolution neutral in another case. A party may disqualify
20 the arbitrator based on this disclosure by serving a notice of disqualification in
21 the manner and within the time specified in Code of Civil Procedure section
22 1281.91(b).

23
24 **(c) Acceptance of offers prohibited unless intent disclosed**

25
26 If an arbitrator fails to make the disclosure required by subdivision (b) of this
27 standard, from the time of appointment until the conclusion of the arbitration
28 the arbitrator must not entertain or accept any such offers of employment or
29 new professional relationships, including offers to serve as a dispute
30 resolution neutral.

31
32 **(d) Informed consent required in consumer arbitrations before accepting**
33 **offers**

34
35 If, in the disclosure made under subdivision (b), the arbitrator states that he or
36 she will entertain offers of employment or new professional relationships, the
37 arbitrator may entertain such offers. However, in consumer arbitrations, from
38 the time of appointment until the conclusion of the arbitration, the arbitrator
39 must not accept any such offers without the informed consent of all parties to
40 the current arbitration.

41
42 (1) Unless the arbitrator rejects the offer, within five days of receiving any
43 such offer, the arbitrator in a consumer arbitration must notify the parties
44 in writing of the offer and of the parties' right to object to the arbitrator
45 accepting that offer within seven days.

- 1 (2) If within seven days after the arbitrator serves this written notice, no
2 party objects to the arbitrator accepting the offer, the arbitrator may
3 accept it.
4
5 (3) If an arbitrator has informed the parties in a pending arbitration about an
6 offer and has sought the parties' consent as required by this subdivision,
7 the arbitrator is not also required to disclose that offer under standard 7.
8
9 (4) An arbitrator is not required to seek the parties' consent under this
10 subdivision if he or she reasonably believes that the arbitration is not a
11 consumer arbitration based on reasonable reliance on a consumer party's
12 representation that the arbitration is not a consumer arbitration.

13
14 **Drafters' Notes:**

15 This proposed new provision would require arbitrators in consumer arbitrations to obtain the
16 informed consent of parties in a pending arbitration before accepting any offer of other
17 employment from a party or attorney for a party in that arbitration.
18

19
20 **~~(d)~~(e) Relationships and use of confidential information related to the**
21 **arbitrated case**

22
23 An arbitrator must not at any time:

- 24
25 (1) Without the informed written consent of all parties, enter into any
26 professional relationship or accept any professional employment as a
27 lawyer, an expert witness, or a consultant relating to the case arbitrated;
28 or
29
30 (2) Without the informed written consent of the party, enter into any
31 professional relationship or accept employment in another matter in
32 which information that he or she has received in confidence from a party
33 by reason of serving as an arbitrator in a case is material.
34
35

36 **Standard 16. Compensation**
37

- 38 (a) An arbitrator must not charge any fee for services or expenses that is in any way
39 contingent on the result or outcome of the arbitration.
40
41 (b) Before accepting appointment, an arbitrator, a dispute resolution provider
42 organization, or another person or entity acting on the arbitrator's behalf must
43 inform all parties in writing of the terms and conditions of the arbitrator's
44 compensation. This information must include any basis to be used in determining
45 fees; ~~and~~ any special fees for cancellation, research and preparation time, or other
46 purposes; any requirements regarding advance deposit of fees; and any practice

1 concerning situations in which a party fails to timely pay the arbitrator's fees,
2 including whether the arbitrator will or may stop the arbitration proceedings.

3
4 **Comment to Standard 16**

5
6 This standard is not intended to affect any authority a court may have to make orders with respect
7 to the enforcement of arbitration agreements or arbitrator fees.

8
9 **Drafters' Notes:**

10 The proposed amendments to standard 16 and are intended to do two things:

- 11
- 12 • Ensure that parties receive additional information about arbitrator's fees, including information
13 about advance fee deposits and the arbitrator's practice when a party does not timely pay
14 fees, that may be important to selecting an appropriate arbitrator.
 - 15
 - 16 • Add a comment to clarify that this standard is not intended to affect any authority courts have
17 with regard to enforcing arbitration agreements or arbitrator fees.
 - 18

19
20 **Standard 17. Marketing**

- 21
- 22 (a) An arbitrator must be truthful and accurate in marketing his or her services and
23 must not make any representation that directly or indirectly implies favoritism or a
24 specific outcome. An arbitrator must ensure that his or her personal marketing
25 activities and any activities carried out on his or her behalf, including any activities
26 of a provider organization with which the arbitrator is affiliated, comply with this
27 requirement.
 - 28
 - 29 (b) An arbitrator must not solicit business from a participant in the arbitration while the
30 arbitration is pending.
 - 31
 - 32 (c) An arbitrator may advertise a general willingness to serve as an arbitrator and
33 convey biographical information and commercial terms of employment. However,
34 arbitrators must not solicit a particular case or caseload for themselves or for a
35 closed panel that they are a member of.
 - 36

37 **Comment to Standard 17**

38
39 **Subdivision (b).** This provision is not intended to prohibit an arbitrator from accepting another
40 arbitration from a party or attorney in the arbitration while the first matter is pending, as long as
41 the arbitrator complies with the provisions of standard 12 and there was no express solicitation of
42 this business by the arbitrator.

43
44 **Drafters' Notes:**

45 The proposed amendments to standard 17 and are intended to address concerns about the
46 potential appearance of bias that may arise if an arbitrator solicits business from an individual or
47 entity that ultimately would or might be one of the parties before that arbitrator.