Written Comments Received for
|February 28, 2012, Judicial Council Business Meeting

Name and Title	Affiliation	Topic	Date of Receipt	Page No.
1. Early Langley, President	California Court Reporters Association	Judicial Branch Report to the Legislature: FY 2010-11 Court Reporter Fees and Expenditures, Item F	2/17/12	2
2. Mr. Cliff Palefsky, Attorney	California Employment Lawyers Association	Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Item J	3/1/12	3-5

CCRA
California Court Reporters Association
Advancing our profession for over 100 years.

February 24, 2012

Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

Attn: Chief Justice Tani Cantil-Sakauye

Dear Chief Justice:

On behalf of the California Court Reporters Association, I wish to bring to your attention that we question the Judicial Branch Report to the California Legislature regarding Court Reporter Fees Collected and Expenditures for Court Reporter Services for the fiscal year 2010-11.

The Judicial Council has reported to the public that there were over 1.1 million civil cases filed in 2011. The amount of fees collected under Government Code sections 68086(a)(1) and 68986.1 is reported as a little over $34 million. We do not believe this is a correct accounting of monies collected.

In addition, the report states that the Administrative Office of the Courts has utilized a time percentage estimate based on a time study survey from 2003. Such reliance would not be based on a realistic picture of activities in our trial courts today and we question the method used to calculate these figures.

Early Langley

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March 1, 2012

Nancy Carlisle
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Dear Nancy,

I am very appreciative for having had the opportunity to address the Council on the subject of enhancements to the present Ethics Standards for Neutral Arbitrators in Contractual Arbitrations. At the request of the Chief Justice I am submitting a summary of suggestions for improvements and changes to the Standards. These are provided in summary form but I am available to provide additional information, support or clarification of any of these recommendations at your request. I would be grateful if you would forward this letter on to the appropriate interested parties.

Provider disclosures-The Providers play a critical role in the arbitration process. They create the rules, select the overall panel of arbitrators, create the shorter list of arbitrators for the parties to strike, in certain cases actually appoint the arbitrator and rule on challenges for cause. However, the current rules are deficient in certain respects. First they do not require the Providers to disclose whether or not they have an economic interest in or relationship with the parties and attorneys. The original Standard 8 indicates that such a disclosure obligation was not necessary because the Providers were not permitted to administer cases where such a relationship exists. The situation involving the National Arbitration Forum highlights the shortcomings of that thinking. As has been widely reported, a venture fund that bought the collection agencies that were using the National Arbitration Forum secretly bought the National Arbitration Forum and took great efforts to hide that ownership. As a result of a Congressional investigation and lawsuits by the Attorney General of Minnesota and the City Attorney of San Francisco, the NAF has been precluded from conducting consumer arbitrations and employment arbitrations in California for several years. More significantly, the NAF did not make the disclosure of that ownership conflict and continued to administer the cases. Additionally, the NAF generally refused to make the disclosures required by California law and took the position that the FAA preempted California law. Therefore, we strongly urge that the Providers be required to disclose any such interest or relationship with the parties or lawyers. Additionally, we suggest that the Providers be required to make available to the public and parties the identities of the true owners of their organizations so that the parties can conduct their own investigation and determination of

potential conflicts. Finally, and very importantly, there needs to be some way for Provider organizations to be disqualified when conflicts exist. Presently, the only remedy available to the parties is to disqualify an individual arbitrator after disclosures are made. However, when the conflict affects the Provider there is no efficient means to disqualify the Provider and go to an alternative forum. It obviously makes no sense for a party to have to go through the list and disqualify each arbitrator seriatim.

Stop administration?-As a result of various judicial decisions and contracts, in many types of consumer cases the company is obligated to pay the full cost of arbitration. Unfortunately, all too frequently, the company stops paying when they feel the arbitrator is not going their way on preliminary issues or even at the hearing itself. Several Providers actually stop administration and have even refused to release a completed award because of an outstanding bill. This is especially troubling because the Provider has it completely within their control to get deposits paid upfront or to otherwise assume the risks and costs of collection as all other businesses do. Accordingly, we recommend that among the disclosures the arbitrators and Providers make, they should be required to notify the parties whether they will complete the arbitration and assume responsibility for collection or stop administration if the company should refuse to pay the fees they are obligated to pay.

Marketing limitations-The competition in the ADR community has become intense. There is competition for neutrals and sitting judges and there is significant competition between Providers competing to be written into mandatory arbitration agreements. If arbitration was voluntary as it was always intended to be, the arbitrator would need the consent of both parties to be appointed. However, with the elimination of true consent, the present reality is that Providers only need the consent of the corporation who can write them into millions of agreements. As such, it is no longer necessary to market to individual consumers, employees or their attorneys. The original ABA/AAA Ethical Rules for Commercial Arbitrators permitted advertisements and solicitations of a general nature announcing availability. However, they expressly say it is unethical for arbitrators to solicit cases for themselves. Of course, if an arbitrator can't solicit cases for themselves they can't employ a marketing person to solicit cases on their behalf. Similarly, Providers should not be able to solicit all of a company's arbitrations for a closed panel. In light of the extraordinarily high hourly and daily rates being charged by arbitrators at the large Providers it is obvious that the firms are not competing on price. That of course leaves the nature and makeup of their panels as the primary distinguishing factor. We urge the Council to consider appropriate limitations on and perhaps require disclosure of the marketing and solicitation of cases beyond what is required by the present rule which essentially only requires that the solicitation be honest. We are aware of circumstances in the past where Providers have actually sent employees into insurance companies and other firms to review their caseloads and even make specific recommendations of neutrals to use for certain cases. We have been informed of a situation where a proposed specialized panel of arbitrators was shown to prospective users in advance in an effort to get their business. Those kinds of practices done either by the arbitrators or their agents should not be permitted.

Location of the rules-Unfortunately the Ethics Standards are very hard to find. They are referred to in the CCP but there is no indication in the Code where to find the Standards. We strongly urge that the Standards either be included in the CCP itself, have their location identified in the Code or require the Providers to make them available to the parties along with the other documentation they provide.

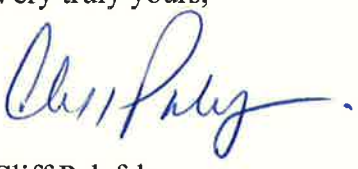
Lack of enforcement mechanisms-There presently isn't any mechanism available to citizens or attorneys to compel compliance with the CCP mandated disclosures. Because there is no real economic injury, standing is lacking under the present state of the law. Additionally, it would be very costly for any consumer or employee to have to finance a lawsuit to compel compliance in light of the greater resources of a company that is willing to flagrantly ignore their legal obligations. We strongly suggest creating standing for individuals to compel compliance with the posting and disclosure requirements and to provide for attorneys fees if they are successful.

Disclosure of additional employment-Presently, Standard 7(b) (2) actually says that an arbitrator can accept an offer of employment on another matter from a party in a pending arbitration without disclosing that new economic offer or relationship to the other side. Considering that additional business involves both ex parte contacts and significant financial consideration, it is entirely inconsistent with the required perception of neutrality for the arbitrator and one party to have those additional contacts and financial relationships during the pendency of the arbitration.

Checklist-We strongly support the development of model disclosure forms and it is essential that those forms include the disclosures under both Standards 7 and 8. We are aware of at least one major Provider who uses a form that only deals with Standard 7. We are also aware of smaller Providers that do not do any of the postings required by law. We suggest that any form disclosure checklist, in addition to addressing the required disclosures under Standards 7 and 8, also provide a link to the required website posting of consumer arbitration statistics, the identity of the owners of the Provider and perhaps a link to the Standards themselves.

Thank you very much for your consideration.

Very truly yours,



Cliff Palefsky