Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: February 28, 2012

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

Rules, Forms, Standards, or Statutes Affected
Amend standards 2, 3, 7, and 8

Recommended by
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Agenda Item Type
Action Required

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July 1, 2012

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Executive Summary

All persons serving as neutral arbitrators under an arbitration agreement are required to comply with ethics standards adopted by the Judicial Council under Code of Civil Procedure section 1281.85. The Administrative Office of the Courts recommends amendments to these ethics standards in response to recent appellate court decisions concerning the standards. Among other things, these amendments would: codify the holdings in cases on the inapplicability of the standards to arbitrators in securities arbitrations and on the time for disclosures when an arbitrator is appointed by the court; require new disclosures if an arbitrator has been publicly disciplined by a professional or occupational disciplinary agency or licensing board; and 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.

Recommendation

The Administrative Office of the Courts (AOC) recommends that the Judicial Council amend standards 2, 3, 7, and 8 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, effective July 1, 2012, as follows:

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

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

3. Amend standard 7 to:
   - Clarify that standard 7 governs both initial disclosures (those made before final appointment of an arbitrator) and supplemental disclosures (those made after the initial disclosures have been made);
   - In response to case law, clarify that arbitrators must disclose if their spouse or domestic partner was associated in the practice of law with a lawyer in the arbitration within the preceding two years;
   - Also in response to case law, clarify that the standards include a separate obligation to disclose professional relationships between an arbitrator or an arbitrator's family members and party or a lawyer for a party in the arbitration that are not specifically covered by other subparts of standard 7(d);
   - Add a new requirement that arbitrators disclose whether:
     - They were disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board;
     - They resigned their membership in the State Bar or another professional or occupational licensing agency or board while disciplinary charges were pending; or
     - Within the preceding 10 years other public discipline was imposed on them by a professional or occupational disciplinary agency or licensing board; and

- Make other nonsubstantive clarifying changes.

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

5. Amend standard 8 to:
   - 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;
   - Clarify that disclosures relating to relationships with provider organizations must be made as part of the initial disclosure; and
   - Make the language of this standard consistent with the proposed amendments to the introductory sentence of standard 7, which clarify the application of that standard to both initial and supplemental disclosures.

The text of the proposed standards is attached at pages 18–28.

Previous Council Action

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

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

representatives; and practicing arbitrators—to review and provide input on drafts of the ethics standards for arbitrators prepared by the AOC. In April 2002, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration developed by the AOC in consultation with the Blue Ribbon Panel.[2] At that time, the council also directed the AOC to recirculate the adopted standards for public comment. The council amended the standards in December 2002 based on the additional public comments received. The standards have not been amended since then.

Rationale for Recommendation

Background

As noted above, in 2001 the Legislature enacted Code of Civil Procedure section 1281.85 which required the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations under an arbitration agreement, i.e. arbitrators in private, contractual arbitrations. Among the concerns that motivated this legislation was the fact that these private arbitrators, while subject to fairly detailed statutory disclosure requirements, were not subject to any comprehensive set of mandatory ethics standards like the Code of Judicial Ethics provisions that apply to arbitrators in the judicial arbitration program.[3] The goals of requiring compliance with these ethics standards included ensuring that parties can have confidence in the integrity and fairness of private arbitrators.[4] Both to provide parties with a remedy and to encourage compliance with the disclosure requirements in the arbitration statutes and the standards, in this same legislation, the Legislature also clarified that a private arbitrator's failure to disclose in a timely fashion a ground for disqualification of which the arbitrator was then aware is a ground for vacation of an arbitrator's award.[5]

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

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

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

[5] With regard to this provision, the Assembly Judiciary Committee report on the bill stated: "Vacation of an arbitrator's award is the only mechanism for enforcement of the arbitrator's duties. . . . This provision appears appropriate not only to provide a remedy to consumers, who are often forced into private arbitration and who have suffered the arbitrator's non-disclosure, but equally important to provide arbitrators with an incentive to self-regulate. As the author explains, this self-regulation incentive is central to the purpose of the bill, given the continuing absence of any other public oversight of the arbitration industry. As the U.S. Supreme Court has

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

Since the Judicial Council adopted these standards, there have been several appellate court decisions addressing their application in various circumstances. Some of the amendments to the standards recommended in this report are intended to conform the standards to this case law. Others are intended to modify or clarify the standards in light of case law. In addition, the AOC has received some suggestions for modifying the standards that are being recommended for adoption. As noted below in the section on comments, the AOC sought input on these proposed amendments from the former members of the Blue Ribbon Panel who assisted in the development of the current 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 1119 held that the federal Securities Exchange Act preempts application of the California ethics standards to arbitrators for the National Association of Securities Dealers (NASD).[6] The courts concluded that NASD arbitrators are governed by arbitration rules that were approved by the U.S. Securities and Exchange Commission (SEC) under federal law and that the California standards relating to disqualification are in conflict with the SEC-approved rules.

To reflect these court decisions, this report recommends revising standard 3, which addresses the application of the standards, and its accompanying comment to explicitly exempt arbitrators serving in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the SEC under federal law.[7]

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commented 'we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. (*Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).)' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended August 20, 2001, p. 8)

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

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

Disclosure of public professional discipline

In *Haworth v. Superior Court of Los Angeles* (2010) 50 Cal.4th 372, the California Supreme Court considered whether an arbitrator was obligated to disclose that he had been publically censured by the Commission on Judicial Performance.[8] Because neither the California Arbitration Act nor the arbitrator ethics standards currently specifically require disclosure of such professional discipline, the court based its determination on whether, under the particular facts of the case, that public censure was a matter that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.[9] Based on a variety of factors, including that the conduct that was the basis of the public censure was directed at courts staff, not litigants, was not the same type of conduct that was the subject of the arbitration, and had occurred 15 years before the arbitration took place, the court held that disclosure of the public censure was not required under the general impartiality standard.

To help support the broad goals of the ethics standards— to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process—the AOC recommends adding a new requirement, separate from the requirement for disclosures relating to the arbitrator's impartiality, that an arbitrator make disclosures to the parties about certain public professional disciplinary actions. Specifically, arbitrators would be required to disclose if they had been disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board or if they resigned membership in the State Bar or another licensing agency or board while disciplinary charges were pending. They would also be required to disclose any other public discipline imposed on them by a professional or occupational disciplinary agency or licensing board within the preceding 10 years.

The information that this provision would require to be disclosed to the parties is similar to information that individuals applying for appointment as a superior court judge must provide to the Governor (see *Application for Appointment as Judge of the Superior Court* at

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

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

www.gov.ca.gov/docs/Judicial_application_Worksheet.pdf),[10] that members of the State Bar of California must report to the State Bar (see Bus. & Prof. Code, § 6068(o)),[11] and that mediators serving in court-connected mediation programs for general civil cases must report to the court (see Cal. Rules of Court, rule 3.856(c)).[12] 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 to whom information about professional discipline can be reported. 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 recommended amendment would require that the information about public professional discipline be disclosed to the parties.

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

By establishing a clear disclosure requirement, this amendment should reduce uncertainty for arbitrators and parties about what professional disciplinary actions must be disclosed, avoid some protracted litigation over whether such actions should have been disclosed under the general impartiality standard,[13] support the finality of arbitration awards, and enhance public confidence in the integrity of private arbitrators and the arbitration process.

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[10] This application requires those seeking judicial appointment to provide information about (1) whether they have ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group; and (2) whether as a member of any organization, or as a holder of any office or license, they have 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.

[11] 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.

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

[13] We note that the *Haworth* case went two times from the superior court, to the Court of Appeal, to the Supreme Court before it was finally resolved, four years after the arbitration award was initially rendered and the petition to vacate the award was initially filed.

Disclosure of relationships with a lawyer in the arbitration

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

To clarify that the ethics standards are intended to require disclosure of an arbitrator's spouse's prior association in the practice of law with a lawyer in the arbitration as well as other professional relationships that the arbitrator or a member of the arbitrator's immediate family has or has had with a lawyer for a party, this report recommends making 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 that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or a lawyer in the arbitration) and into 7(d)(2) (which relates to family relationships with a lawyer in the arbitration). While this provision could logically be placed in either subdivision, because 7(d)(2) already addresses situations in which the arbitrator is currently associated in the practice of law with a lawyer in the arbitration, readers may expect that past relationships of this type would also be addressed in the same subdivision. Moving this provision up to 7(d)(2)(B) ensures that it appears in the first location in which readers might logically look for it.

- Expand this provision to specifically address situations in which the arbitrator's spouse or domestic partner had a past association in the practice of law with a lawyer in the arbitration. Explicitly listing such past relationships should eliminate any doubt about whether these relationships must be disclosed.

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

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 *Johnson v. Gruma Corporation*, however, reflect some confusion about whether the ethics standards address initial disclosures and about what matters must be disclosed in subsequent disclosures.

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

- Amend standard 7(c) to include separate headings identifying the requirements for initial and supplemental disclosures; and

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

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

Other proposed changes

In addition to the amendments that address concerns raised by the appellate court decisions described above, this report recommends several other amendments to the standards based primarily on suggestions received by the AOC:

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

Standard 3(b)(2)(D). The recommended amendment to this provision would make a substantive change by exempting arbitrators serving in a type of automobile warranty arbitration authorized by federal regulations. This program is similar to the automobile warranty and attorney-client fee

arbitration programs already exempted in (b)(2)(D) and (b)(2)(C) in that, under the applicable regulations, the decisions rendered are not binding on the consumer party.

Standard 7(d)(5). This recommended amendment would delete an obsolete provision. Standard 7(d)(5)(A) defines "prior case" for purposes of this provision as "any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002." The last clause in this provision was included because, at the time this standard was adopted in 2002, arbitrators had not necessarily been keeping the records about their service as dispute resolution neutrals who would be required to make the disclosures required under (d)(5), and so disclosures of such service concluded before 2002 were not required. Because the standard only requires disclosure of service in cases concluded within the preceding two years, this provision is no longer necessary.

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

- Correct cross-references to renumbered or relettered provisions;

- Clarify that the requirement to make supplemental disclosures applies to matters that existed at the time the arbitrator made his or her initial disclosures but of which the arbitrator only subsequently became aware and also to matters that arise because of developments during the course of an arbitration, such as when a party hires a new lawyer (as occurred in the *Johnson v. Gruma* case); and

- Clarify that just because a particular matter is not specifically listed among the examples of matters in standard 7(d) does not mean that it need not be disclosed; it still needs to be evaluated under the general disclosure standard.

Standard 8(a). This recommended amendment is intended to clarify that if an arbitrator is relying on information from a provider organization's website to make required disclosures under this standard, the web address of the provider organization must be provided in the arbitrator's initial disclosure statement.

Comments, Alternatives Considered, and Policy Implications

Comments

A draft of this proposal was sent to the former members of the Blue Ribbon Panel of Experts on Arbitrator Ethics who assisted in the development of the current standards. Several of these former members provided feedback on the draft, including suggesting that the proposal include a

new requirement regarding disclosure of public professional discipline. The draft proposal was revised in response to this input.

The revised proposal was circulated for public comment between April 21 and June 20, 2011, as part of the regular spring 2011 comment cycle. Eleven individuals or organizations submitted comments on this 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. The full text of the comments received and the AOC's responses are set out in the attached comment chart at pages 29–50. The main substantive comments and responses are discussed below.

Disclosure of professional discipline

The proposal that was circulated for public comment recommended adding a requirement that an arbitrator disclose to the parties if he or she was publicly disciplined by a professional licensing or disciplinary agency or if he or she resigned membership in the licensing agency while disciplinary charges were pending. Almost all the substantive comments received focused on this proposed amendment to the standards.

Addition of requirement in general. The invitation to comment specifically sought comments on whether it is necessary to add a requirement that arbitrators disclose public professional discipline given that information about public professional discipline and information about a professional's licensing status is generally accessible on the Internet or by telephone. Eight commentators responded to this request for input; five commentators supported adding this requirement, two commentators (the two who expressed disagreement with the proposal) opposed adding this requirement to the standards; and one did not specifically indicate whether he supported adding such a requirement but provided input on the language of the proposed provision.

The commentators who supported adding a requirement that arbitrators disclose public professional discipline, including the Alternative Dispute Resolution Committee of the State Bar of California, the California Dispute Resolution Council, and the Superior Court of San Diego County, generally expressed the view that the burden to disclose information about public professional discipline should be placed on the arbitrator, rather than requiring parties, who may be unrepresented and unsophisticated and may not know that such information is publically available, to discover this information. Several of these commentators suggested that disclosure of this information will serve to protect the parties and the integrity of the arbitration process.

The California Judges Association opposed adding a requirement that arbitrators disclose public professional discipline on the basis that disclosure requirements for arbitrators should be the same as disclosure requirements for a sitting judge and judges are not required to disclose

information about professional discipline to parties under Code of Civil Procedure section 170.1. While there are similarities between neutral arbitrators in contractual arbitration and sitting judges, there are also important differences that warrant distinctions in what must be disclosed to parties. For example, unlike judges, neutral arbitrators in contractual arbitration are typically paid by the parties who appear before them. To address concerns these arbitrators might favor parties or attorneys who have previously been a source of business to them, the California Arbitration Act and the ethics standards for neutral arbitrators require extensive disclosures about prior service as a private arbitrator or other dispute resolution neutral for a party or lawyer for party in the arbitration, including information about the results of the cases arbitrated to conclusion. Judges are not similarly required to disclose information about prior cases in which the parties or lawyers in a case have appeared before them.

As indicated in the comment from the California Judges Association, sitting judges are not required to disclose information about professional discipline to parties in cases before them. However, as noted above, prospective judges are required to disclose such information to the Governor before they are appointed as superior court judges. Among many other things that must be disclosed on the application for appointment to the superior court is information about (1) whether the applicant has ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group; and (2) whether, as a member of any organization or as a holder of any office or license, the applicant has been suspended or otherwise disqualified or had such license suspended or revoked; been reprimanded, censured or otherwise disciplined; or had any charges, formal or informal, made or filed against them. Unlike judges, private arbitrators are not public officers whose potential appointment is reviewed by a public official or body such as the Governor, the Judicial Nominees Evaluation Commission of the State Bar of California, or the Commission on Judicial Appointments. Thus there is no public official or body that can receive information about public professional discipline and weigh that in determining whether an individual can appropriately serve as an arbitrator. Arbitrators are generally selected by the parties. To reflect this fundamental difference between arbitrators and judges, this proposed amendment would require arbitrators to disclose information about public professional discipline to the parties. As noted by the Orange County Bar Association in its comments, 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.[14]

[14] The FINRA arbitrator disclosure 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. This checklist may be accessed at: http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009442.pdf .

The other opposition to adding a requirement that arbitrators disclose public professional discipline came in a joint comment submitted by several individuals involved in various ADR organizations. Citing the recent California Supreme Court decision in *Haworth v. Superior Court of Los Angeles* discussed above, these individuals suggested that the proposed provision regarding disclosure of public professional discipline would require arbitrators to disclose remote and, in the Supreme Court's view, irrelevant public discipline. As discussed above, however, the Supreme Court's decision in *Haworth* was not a general determination that information about public professional discipline is irrelevant to the ethics of arbitrators. In *Haworth*, the Supreme Court analyzed whether, in the absence of a specific provision in the statutes or ethics standards requiring disclosure of professional discipline, the particular disciplinary action that had been imposed on the arbitrator/retired judge should have been disclosed under the general requirement that an arbitrator disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The court's holding was that disclosure was not required under that general standard relating to impartiality. The amendment recommended in this report would add a specific requirement for the disclosure of public professional discipline that is separate from the disclosures relating to impartiality and is designed to assist parties in assessing other characteristics, such as integrity, that may be important to the parties selecting an arbitrator.

These commentators also raised concerns about blanket disclosure requirements creating unnecessary embarrassment and unwarranted invasion of the proposed arbitrator's privacy. However, the only information that arbitrators would be required to disclose under this proposed amendment is information that the relevant professional or occupational disciplinary agency or licensing board already determined should be made public. In deciding whether to impose public discipline, these entities will have analyzed the person's conduct and determined that it is serious enough to warrant letting the public know about the conduct.

Based on the public comments, the AOC considered not recommending the addition of a new requirement that arbitrators disclose public professional discipline. The factors that support not adding such a requirement to the ethics standards include:

- The current differences between requirements for disclosure to parties for sitting judges and private arbitrators would not be increased, which might make compliance with these disclosure requirements easier for retired judges serving as arbitrators;

- Arbitrators are already required to disclose any professional discipline that the arbitrator believes could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;

- Parties in an arbitration can access information about public professional discipline imposed on an arbitrator by contacting the appropriate professional or occupational disciplinary agency or licensing board for profession of which the arbitrator is or was a member;

- The length and complexity of the disclosure requirements for arbitrators would not be increased; and

- Arbitrators and arbitration provider organizations would not need to modify their disclosure checklists or practices to include this new requirement.

The factors that support adding such a requirement in the ethics standards include:

- Requiring disclosure by arbitrators will place the burden of obtaining/sharing information about public professional discipline on the person who is most knowledgeable about whether any such discipline has been imposed, rather than on parties, including self-represented parties, who may be unaware of the complete professional background of an arbitrator or lack knowledge about how to access information about public professional discipline;

- The parties who must decide who will serve as a neutral arbitrator in their case will receive disclosures about public professional discipline imposed on the arbitrator that are consistent with disclosures that currently must be made by potential judges, attorneys, and mediators in court-connected mediation programs to the public officials or body that determines whether individuals can serve in those capacities and to parties in securities arbitrations conducted under FINRA rules. This should improve public confidence in the integrity of private arbitrators and the arbitration process; and

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

Evaluating these factors, the AOC concluded that the factors supporting inclusion of a requirement for disclosure of public professional discipline in the ethics standards outweigh the factors that support not including it and this report therefore recommends amending the standards to include such a requirement.

Disclosure of old disciplinary actions. As circulated for public comment, the proposal would have required an arbitrator to disclose any public discipline, regardless of when the disciplinary action took place. Several commentators suggested that this proposed requirement was too broad and that there should be a cutoff for discipline that was imposed in the remote past. The California Dispute Resolution Council specifically suggested setting a 5- or 10-year cutoff for most professional discipline but requiring disclosure of disbarments or the equivalent in other professions regardless of how long ago they occurred. In response to these comments, the proposal has been revised to require disclosure of disbarment or license revocations and of resignations with charges pending regardless of when they occurred but to limit disclosure of other public discipline to that imposed within the preceding 10 years.

Identifying what disciplinary actions must be disclosed. As circulated for public comment, the proposal would have required an arbitrator to disclose "if public discipline has been imposed on the arbitrator by any public disciplinary or professional licensing entity." Several commentators raised concerns about what was meant by the terms "public discipline" and "public disciplinary or professional licensing entity." Some expressed concerns that this language might be read to include disciplinary actions by entities other than the State Bar or equivalent professional licensing agencies. In response to these comments, the proposal has been revised to:

- Replace the term "public disciplinary or professional licensing entity" with the term "professional or occupational disciplinary agency or licensing board, whether in California or elsewhere." This new language is taken directly from Business and Professions Code section 6068(o), which articulates the duty of attorneys to disclose professional discipline to the State Bar of California. This language should clarify the intent to require disclosure only of professional disciplinary action and should be familiar to those arbitrators who are State Bar members;

- Include a definition of "public discipline" as disciplinary action imposed on the arbitrator that the professional or occupational disciplinary agency or licensing board identifies in its publicly available records or in response to a request for information about the arbitrator from a member of the public.

Family relationships with party. The Superior Court of San Diego County suggested that the language for disclosure of "family relationships with party" (standard 7(d)(1)) should mirror the

language for disclosure of "family relationships with lawyer in the arbitration" (standard 7(d)(2)) because the differences in the language create unnecessary ambiguity. There are both substantive and nonsubstantive differences in the language and structure of standards 7(d)(1) and (2). Substantively, these two standards require disclosures about the relationships of different sets of family members.[15] These substantive differences reflect substantive differences in the disclosure requirements established by statute.[16] In the ethics standards originally adopted by the Judicial Council in April 2002, for the purpose of simplifying the standards, the predecessor to standard 7(d)(2) used broader language similar to that in standard 7(d)(1).[17] The council subsequently amended this language in December 2002 so that the standards would more closely track the statutory language from which they were derived. This proposal does not recommend revisiting that policy decision at this time. However, the proposal has been revised to include nonsubstantive amendments to standard 7(d)(1) that make its structure more closely mirror that of standard 7(d)(2) and therefore should make the standards easier to understand.

Disclosure checklist. The invitation to comment specifically sought input on whether it would be helpful for the Judicial Council to develop a model disclosure checklist for arbitrators. Four commentators responded to this request for input, and all supported the development of a model checklist. Resources permitting, the AOC will work on this project next year.

Alternatives Considered

In addition to the alternatives suggested in the public comments, the AOC also considered the following:

Not recommending any amendments to the standards. The option of not recommending adoption of any changes to the ethics standards at this time was considered. 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

[15] Standard 7(d)(1) requires disclosures about an arbitrator's "immediate or extended family" while standard 7(d)(2) requires disclosures about an arbitrator's "spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator's spouse or domestic partner."

[16] Standard 7(d)(1) is derived primarily from Code of Civil Procedure section 170.1(a)(4), which, in conjunction with Code of Civil Procedure section 1281.9, requires disclosure if the arbitrator or the spouse of the arbitrator, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party to the proceeding or an officer, director, or trustee of a party. Standard 7(d)(2) is primarily derived from Code of Civil Procedure section 170.1(a)(5), which requires disclosure if a lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the arbitrator or the arbitrator's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

[17] Note that under the authority of Code of Civil Procedure section 1281.85, the ethics standard adopted by the Judicial Council "may expand but may not limit the disclosure and disqualification requirements established by this chapter , " i.e., chapter 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95. Therefore the council cannot narrow the scope of the existing statutory disclosure requirements concerning family relationships with either a party or a lawyer in the arbitration; it can only mirror or expand these disclosure requirements.

relationships between an arbitrator's spouse and a lawyer in the arbitration and the case law concerning these disclosures. The AOC 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.

Effective date of amendments. The proposal that was circulated for public comment indicated that the standards would be amended effective January 1, 2012. Because this proposal is being presented to the Judicial Council at a later meeting than originally anticipated and to give arbitrators and arbitrator provider organizations additional time to learn about the changes to the ethics standards and to update their existing disclosure checklists and practices, the AOC is recommending that the effective date of these amendments, if adopted by the Judicial Council, be July 1, 2012.

Implementation Requirements, Costs, and Operational Impacts

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

Attachments

1. Ethics Standards for Neutral Arbitrators in Contractual Arbitration, standards 2, 3, 7, and 8, at pages 18–28
2. Comment Chart, at pages 29–50

Standards 2, 3, 7, and 8 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration are amended, effective July 1, 2012, to read:

Standard 2. Definitions

As used in these standards:

(a) Arbitrator and neutral arbitrator

(1) "Arbitrator" and "neutral arbitrator" mean any arbitrator who is subject to these standards and who is to serve impartially, whether selected or appointed:

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

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

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

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

(b)–(n) * * *

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

(p)–(s) * * *

Comment to Standard 2

Subdivision (a). The definition of "arbitrator" and "neutral arbitrator" in this standard is intended to include all arbitrators who are to serve in a neutral and impartial manner and to exclude unilaterally selected arbitrators. The second sentence in subdivision (a)(2) is meant to codify the court's holding in *Jakks Pacific, Inc. v. Superior Court* (2008) 160 Cal.App.4th 596 that, in the context of requirements for disclosures by proposed neutral arbitrators, "nomination" is not the same as the court's "nomination" of a list of potential arbitrators for consideration by the parties under Code of Civil Procedure section 1281.6.

Subdivisions (l) and (m). * * *

Subdivision (p)(2). * * *

Other terms that may be pertinent to these standards are defined in Code of Civil Procedure section 1280.

Standard 3. Application and effective date

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

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

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

(b) These standards do not apply to:

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

(2) Any arbitrator serving in:

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

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

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

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

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

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

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

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

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

(c) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards in those arbitrations. Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to standard 8 in those arbitrations.

Comment to Standard 3

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

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

Standard 7. Disclosure

(a)–(b) * * *

(c) Time and manner of disclosure

(1) *Initial disclosure*

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

(2) *Supplemental disclosure*

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

(d) Required disclosures

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

(1) *Family relationships with party*

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

(A) ~~a~~ A party~~.~~;

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

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

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

(A) Current relationships

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

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

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

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

(B) Past relationships

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

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

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

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

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

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

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

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

(B)–(C) * * *

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

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

(A) Time frame

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

(B)–(C) * * *

(6) *Current arrangements for prospective neutral service*

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

(7) *Attorney-client relationship*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Professional discipline or i~~I~~nability to conduct or timely complete proceedings

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

(1) *Professional discipline*

(A) If the arbitrator has been disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere;

(B) If the arbitrator has resigned his or her membership in the State Bar or another professional or occupational licensing agency or board, whether in California or elsewhere, while disciplinary charges were pending; or

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

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

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

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

(f) Continuing duty

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

Comment to Standard 7

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

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

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

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

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

- Requiring arbitrators to ~~disclose~~ make supplemental disclosures to the parties regarding any matter about which they become aware after the time for making an initial disclosure has expired, within 10 calendar days after the arbitrator becomes aware of the matter (subdivision ~~(f)~~(c)).

- Expanding required disclosures about the relationships or affiliations of an arbitrator's family members to include those of an arbitrator's domestic partner (subdivisions (d)(1) and (2); see also definitions of immediate and extended family in standard 2).

- Requiring arbitrators, in addition to making statutorily required disclosures regarding prior service as an arbitrator for a party or attorney for a party, to disclose both prior services ~~both~~ as a neutral arbitrator selected by a party arbitrator in the current arbitration and prior compensated service as any other type of dispute resolution neutral for a party or attorney in the arbitration (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)~~(C)~~(A)(iii) and (5)).

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

- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or, within the preceding two years, was an employee, expert witness, or consultant for a party or a lawyer in the arbitration (subdivision~~s~~ (d)(8) ~~(A) and (B))~~.

- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an interest that could be substantially affected by the outcome of the arbitration (subdivision (d)~~(11)~~(12)).

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

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

- Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, resigned membership in the State Bar or another a licensing agency or board while disciplinary charges were pending, or had any other public discipline imposed on him or her by a professional or occupational disciplinary agency or licensing board within the preceding 10 years (subdivision (e)(1)).

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

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

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

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

(a) General provisions

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

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

(2) * * *

(b) Additional disclosures required

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

(1)–(3) * * *

(c)–(d) * * *

SPR11-02

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

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

	Commentator	Position	Comment	AOC Response
1.	ADR Committee State Bar of California By Laurel Kaufer, Chair	NI	As an initial matter, the ADR Committee supports the expansion of the exemptions to the disclosure requirements to include arbitration proceedings governed by rules adopted by a securities self-regulating organization and arbitrators serving in automobile warranty programs. These exemption expansions are appropriate as they conform with court decisions (in the case of securities arbitrations) and include programs similar to those already exempted (in the case of automobile warranty programs). We also support various other changes made in the proposal, including the requirement that initial and supplemental disclosures be required, and the reorganization of the language of the ethics standards to highlight disclosure requirements. Comments are specifically requested on whether arbitrators should be required to disclose professional discipline, specifically discipline that has been imposed on the arbitrator by any public disciplinary or professional licensing authority, or if the arbitrator has resigned his or her membership in the State Bar or other professional organization while disciplinary charges were pending. The ADR Committee believes that such disclosure should be required. The burden of disclosure should be placed upon the arbitrator, rather than the burden of discovery on the parties. Our view is that the availability of disciplinary information by telephone or over	The commentator's support for these changes is noted. This input is appreciated.

	Commentator	Position	Comment	AOC Response
			the Internet is not sufficient; not every party (particularly self-represented parties) will know that such information is publically available. Once disclosed, the parties have the opportunity to consider whether the discipline is relevant or disqualifying. In our view, thorough disclosures serve to protect the consumer and the integrity of the arbitration process. We note, however, two related issues with respect to the proposed changes to the ethics standards. First, the proposed rule does not define "public discipline" and the precise scope of that term may not be entirely clear. For example, under the Rules of Procedure of the State Bar of California, Rule 5.127(C) provides that a "private reproval imposed before a State Bar Court proceeding begins is part of the member's official State Bar membership records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page." But under Rule 5.127(D) a "private reproval imposed on a member after the initiation of a State Bar Court proceeding is part of the member's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page." It is not clear whether a private reproval under Rule 5.127(D) would fall within the scope of the required disclosure. The ADR Committee has not looked at the rules or procedures of other disciplinary or professional licensing authorities, but similar issues may exist.	In response to this and other comments, the proposal has been revised to include a definition of "public discipline."

	Commentator	Position	Comment	AOC Response
			Second, the proposed rule does not define "public disciplinary authority". With respect to attorneys (including retired judges), it may be understood that the "public disciplinary" body means the State Bar. Does it also include other regulatory bodies, such as the Securities and Exchange Commission, which under certain circumstances has the authority to publically discipline a lawyer? *See*, SEC Rule of Practice 102(e). Furthermore, at least some arbitrators are not attorneys, and it is unclear what a "public disciplinary authority" is for those arbitrators. We accordingly suggest either defining "public disciplinary authority" or deleting that phrase entirely, as it would appear that a "professional licensing authority" is more clearly defined and would encompass most if not all forms of public discipline. Finally, we support the development of a model checklist to be provided by the Judicial Council. We believe that such a checklist would standardize disclosures and provide the best assurance that arbitrators properly disclose.	In response to this and other comments, the proposal has been revised to use language from Business and Professions Code section 6068(o): "professional or occupational disciplinary agency or licensing board, whether in California or elsewhere." This language has been in this statute since 1986 (see Stats.1986, c. 475, § 2) and should be familiar to those arbitrators who are members of the State Bar of California. This input is appreciated.
2.	California Judges Association By Jordan Posamentier, Legislative Counsel	N	This proposal would modify the Ethics Standards for Neutral Arbitrators in Contractual Arbitration by requiring an arbitrator to disclose to the parties if he or she was publicly disciplined by a professional licensing or disciplinary agency or if he or she resigned membership in the licensing agency while disciplinary charges were pending. The	As noted by the commentator, there are similarities between neutral arbitrators in contractual arbitration and sitting judges and, in fact, under both Code of Civil Procedure section 1281.9 and the ethics standards, an arbitrator must disclose the existence of any ground specified in Section 170.1 for disqualification of a judge. However, there are also important differences

	Commentator	Position	Comment	AOC Response
			California Judges Association opposes this recommendation. Disclosure requirements for an arbitrator should be the same as disclosure requirements for a sitting judge. They are similarly situated neutrals, and as such should not be held to different disclosure requirements. Because a sitting judge need not disclose past professional discipline unless relevant under Code of Civil Procedure section 170.1(6)(A), an arbitrator should not either.	between judges and contractual arbitrators. Among other things, arbitrators are not public officers whose potential appointment is reviewed by a public official or body, like the Governor, the Judicial Nominees Evaluation Commission of the State Bar of California, or the Commission on Judicial Appointments. Arbitrators are generally selected by the parties. In addition, arbitrators' decisions are generally not subject to review for factual or legal error and there is no public body, like the Commission on Judicial Performance, that can discipline arbitrators for ethics violations. This makes the parties' initial choice of who will serve as an arbitrator critical. In recognition of these differences, the existing disclosure obligations of arbitrators under both the Code of Civil Procedure and the ethics standards are different from the disclosure obligations of sitting judges. For example, neutral arbitrators are required to make extensive disclosures about prior service as a private arbitrator or other dispute resolution neutral for a party or lawyer for a party in the arbitration, including information about the results of the cases arbitrated to conclusion. Judges are not similarly required to disclose information about prior cases in which the parties or lawyers in a case have appeared before them. This proposal would require arbitrators to disclose to parties information about public professional discipline that sitting judges are not required to disclose to parties in cases before them. However, individuals who wish to be appointed as judges are required to disclose such information to the

	Commentator	Position	Comment	AOC Response
				Governor. Among many other things that must be disclosed on the application for appointment to the superior court is information about (1) whether the applicant has ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee or other professional group; and (2) whether as a member of any organization, or as a holder of any office or license, the applicant has been suspended, or otherwise disqualified, or had such license suspended or revoked; been reprimanded, censured or otherwise disciplined; or had any charges, formal or informal, made or filed against them. Similarly, members of the State Bar of California must disclose to the State Bar, among other things, the imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere, and mediators serving in court-connected mediation programs for civil cases must disclose to the court, among other things, if public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency. Because there is no public officer or body that screens applicants who wish to serve as arbitrators in contractual arbitration or determines their eligibility to serve, the AOC is recommending that arbitrators in contractual arbitration disclose similar information about public professional discipline to the parties who are generally responsible for deciding who will serve as the arbitrator in their

	Commentator	Position	Comment	AOC Response
				arbitration. While this requirement would place a new, affirmative obligation on arbitrators to disclose this information to parties, the only information that arbitrators would be required to disclose is information that the Commission on Judicial Performance, State Bar, or other professional or occupational disciplinary agency or licensing board has already determined should be made public. In deciding whether to impose public discipline, these entities will have analyzed the person's conduct and determined that that it is serious enough to warrant letting the public know about the conduct. Based on other comments, the proposal has been revised so that, among other things, the language of this disclosure obligation more closely mirrors that for attorneys under Business and Professions Code section 6068(o) and a definition of public discipline has been added.
3.	Hon. Daniel Hanlon, John Warnlof and Peter Mankin Walnut Creek	N	We write to you to oppose that portion of SPR11-02 requiring a proposed arbitrator to disclose, "if (A) public discipline has been imposed on the arbitrator by any public disciplinary or professional licensing entity; or (B) if the arbitrator has resigned his or her membership in the State Bar or any professional licensing agency while disciplinary charges were pending." (Ethics Standard 7(e)(1)(A) and (B)).FN1	Please see the response to the comments of the California Judges Association above.

	Commentator	Position	Comment	AOC Response
			FN1 - If adopted, it would seem more appropriate to place this disclosure requirement in Ethics Standard 7(d), not in Ethics Standard 7(e) that is restricted to matters that would cause an arbitrator to be unable to conduct or timely complete proceedings. The undersigned are current members of the State Bar ADR Committee. Justice Hanlon is also the Chair of the California Judges Association ADR Committee. Peter Mankin and John Warnlof are also current members of the Contra Costa County Superior Court ADR Advisory Committee and the Contra Costa County ADR Section Bar Board of Directors. Mr. Warnlof prepared the initial Arbitrator's Disclosure Worksheet for the American Arbitration Association. The opinions expressed herein are made by the undersigned as individuals and not on behalf of any organization or committee of which they are currently members. **Current Applicable Disclosure Requirements.** C.C.P. Section 1281.9(a) requires that an arbitrator "shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial..." This requirement is repeated in Ethics Standard 7(d)(14)(A) that an arbitrator must disclose "any other matter that ... might cause a person aware of the facts to reasonably	

	Commentator	Position	Comment	AOC Response
			entertain a doubt that the mediator would be able to be impartial." **Haworth v. Superior Court of Los Angeles (50 Ca1.4th 372, 12 Cal.Rptr.3d 853(2010)).** The *Haworth* decision is the genesis for SPRll-02. In 1996, after 13 years on the bench, a retired judge/proposed arbitrator was publically censured for the following conduct: Between 1990 and October 27, 1992, [the proposed arbitrator], on several occasions, made sexual suggestive remarks to and asked sexually explicit questions of female staff members; referred to a staff member using crude and demeaning names and descriptions and an ethnic slur; referred to a fellow jurist's physical attributes in a demeaning manner, and mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse. The proposed arbitrator did not disclose the 1996 public censure in connection with his selection to serve as the neutral arbitrator in a woman's medical malpractice action against her cosmetic surgeon. In seeking to vacate the adverse arbitration award, the woman contended that the proposed arbitrator should have disclosed the public censure. The trial court vacated the award. The Court of Appeal denied the surgeon's petition for writ of mandamus to reinstate the award. The Supreme Court reversed, finding that C.C.P. Section 1281.9(a)	The Supreme Court's decision in *Haworth* was not a general determination that information about public professional discipline is irrelevant to the ethics of arbitrators. In *Haworth,* the Supreme Court analyzed whether, in the absence of a specific provision in the statutes or ethics standards requiring disclosure of professional discipline, this particular disciplinary action should have been disclosed by the arbitrator under the general requirement that an arbitrator disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The court's holding was that disclosure was not required under that standard relating to impartiality. This report recommends adding a specific requirement for the disclosure of public professional discipline that is separate from the disclosures relating to impartiality and is designed to assist parties in assessing other characteristics that may be important to an arbitrator, such as integrity. In addition, in response to this and other comments regarding remote disciplinary action, the proposal has been revised to require disclosure of disbarment or license revocations and resignations with charges pending regardless of when they occurred, but to limit disclosure of other public discipline to that which was imposed within the preceding 10 years.

	Commentator	Position	Comment	AOC Response
			did not require the proposed arbitrator to disclose the public censure. The Supreme Court discussed in some detail the conduct upon which the public censure was based and concluded, *inter alia*, as follows: A person aware of all circumstances of [the proposed arbitrator's] public censure ... could not reasonably entertain a doubt concerning his ability to be fair to female litigants even at the time his misconduct involving court personnel took place. Even less so could a reasonable person conclude that [the proposed arbitrator] was unaffected by the discipline imposed and could not be fair to female litigants at the time of the arbitration proceeding - at least in the absence of any evidence of gender bias on his part in the intervening 10 years following the public censure. SPR11-02 would require the proposed arbitrator in *Haworth* to disclose a remote and, in the Supreme Court's view, irrelevant public censure. **Benjamin Weill & Mazer v. Kors (11 C.D.O.S. 5355, filed May 5, 2011.** In this recent decision, Division Two of the First Appellate District examined the scope of C.C.P. Section 1281.9(a)(2) and Ethic Standard 7(d)(14)(A). The court held that, in an attorney-client fee dispute arbitration, the proposed arbitrator was required to disclose: (1) that his	This case does not appear to necessitate any changes to the ethics standards for neutral arbitrators.

	Commentator	Position	Comment	AOC Response
			practice focused on the professional responsibility of lawyers and law firms; (2) that his business litigation background and extensive experience with unique issues and dynamics involved in claims against lawyers allowed him to provide effective representation of his clients which include some of the nation's largest law firms; and, (3) that his experience in defending attorneys and his deep knowledge of the law governing lawyers, allowed him to provide practical solutions to lawyers who fact ethical dilemmas. The court concluded that had this disclosure been made, then a reasonable person would doubt whether the proposed arbitrator's "dependence on business from lawyers and law firms sued by former clients would prevent him from taking the side of a client in a fee dispute with a former firm, because doing so might "put at risk" his ability to secure business from the lawyers and law firms whose business he solicits." **Automatic Public Reproval.** As an example, the undersigned are advised that an attorney receiving a second DUI conviction is subject to automatic public reproval. There appears to be little, if any, connection between disclosing such discipline and a proposed arbitrator's ability to be impartial in a matter having nothing to do with drunk driving. Disclosure requirements of Section 1281.9 and the Ethical Standards focus on a proposed arbitrator's **impartiality** and not with the quality or moral character of the proposed arbitrator. Certainly	As noted above, this report recommends adding a specific requirement for the disclosure of public professional discipline that is separate from the disclosures relating to impartiality and is designed to assist parties in assessing other characteristics that may be important to an arbitrator. The only information that arbitrators would be required to disclose under this requirement is information that the relevant professional or occupational disciplinary agency or licensing board has already determined should be made public. In deciding whether to impose public discipline, these entities

	Commentator	Position	Comment	AOC Response
			those qualities are important in choosing an arbitrator, but it is doubtful that the proposed mandatory disclosure requirements are the best way to obtain such information. Disclosure should be limited to matters that are relevant to a proposed arbitrator's ability to be impartial. In consumer arbitrations, blanket public disclosure requirements should not be used to create unnecessary embarrassment and unwarranted invasion of the proposed arbitrator's privacy. An unintended consequence of such required disclosure may be, depending on the nature of the conduct disclosed, loss of respect for the arbitrator and a weakening of the proposed arbitrator's ability to effectively carry out his role in a pending arbitration. **Model Arbitration Disclosure Worksheet.** In closing, although the undersigned oppose adopting a blanket public discipline disclosure requirement, they strongly support a Model Arbitration Disclosure Worksheet, including a suggestion to the proposed arbitrator to disclose all relevant public discipline, and a recommendation to attorneys and parties to check with the State Bar or other applicable licensing organization regarding public disciplinary matters involving a proposed arbitrator.	will have analyzed the person's conduct and determined that it is serious enough to warrant letting the public know about the conduct. Because the Supreme Court has determined that drunk driving convictions are sufficiently relevant to an individual's ability to serve as an attorney that they warrant public censure, information about a public censure imposed based on such convictions may be relevant to the individual's suitability to serve as an arbitrator. This input is appreciated.
4.	Robert A. Holtzman	NI	I will address only proposed Standard 7, subpart (e)(1). As to the balance I am neutral or supportive. Please consider the following:	

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

	Commentator	Position	Comment	AOC Response
			1. Proposed Subpart (2e)(1) directly conflicts with *Haworth v. Superior Court*, 50 Cal.4th 372 (2010). Whether the Supreme Court decision was correct or incorrect, I question whether the authority of the Judicial Council to issue or amend the Standards extends to overruling the Supreme Court on a matter on which it has spoken. This, more properly, is the role of the legislature.	The AOC respectfully disagrees that the recommended amendment conflicts with the Supreme Court's decision in *Haworth.* In that case, the court analyzed whether, in the absence of a specific provision in the statutes or ethics standards requiring disclosure of professional discipline, this particular disciplinary action should have been disclosed by the arbitrator under the general requirement that an arbitrator disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The court's holding was that disclosure was not required under that standard relating to impartiality. This report recommends adding a specific requirement for the disclosure of public professional discipline that is separate from the disclosures relating to impartiality and is designed to assist parties in assessing other characteristics that may be important to an arbitrator, such as integrity. The Judicial Council has the authority to amend the standards to address this issue under Code of Civil Procedure section 1281.85, which broadly tasked the council with adopting ethics standards for neutral arbitrators, not just standards relating to arbitrators' impartiality.
			2. To the extent that a standard dealing with this subject is warranted, the fact that the information may be available by telephone or on the internet is not a reason for rejecting it. The need -- to the extent it may exist -- is to make information available to the unsophisti-cated parties who lack the skill or resources to	This input is appreciated.

	Commentator	Position	Comment	AOC Response
			seek it out. The others can help themselves. 3. The proposed rule is overbroad in that it is unlimited both as to subject-matter and as to time. The overarching obligation is to disclose matters that might cause a reasonable party to question impartiality, not to provide an unexpurgated biography. Youthful indiscretions having no bearing on present mindset should remain beyond the pale. As a perhaps extreme example, let us suppose a student was disciplined by a school board for smoking pot on campus during the 1960's. This may be public discipline by a public disciplinary entity but no good reason exists for requiring a prospective arbitrator to drag it out fifty years later each time he or she is nominated. 4. It would also apply, in my view unfairly, where public discipline has been imposed as part of an agreement wherein there is no finding or admission of culpability.	In response to this and other comments, the proposal has been revised to: • Require disclosure of disbarment or license revocations and of resignations with charges pending regardless of when they occurred, but to limit disclosure of other public discipline to that which was imposed within the preceding 10 years; and • Use language from Business and Professions Code section 6068(o): "professional or occupational disciplinary agency or licensing board, whether in California or elsewhere" which should make it clearer that this provision only requires disclosure of professional discipline. The AOC respectfully disagrees that it would be unfair to require disclosure of public discipline imposed as part of an agreement. Individuals generally weigh the likelihood of being found culpable and having discipline imposed when entering into an agreement to accept professional discipline. The fact that public discipline is imposed, whether through an adjudicatory or negotiated process, indicates that the relevant professional or occupational disciplinary agency or licensing board concluded that the person's conduct is serious enough to warrant letting the public know about the conduct An arbitrator would also be free to provide parties with supplemental information to clarify the nature of any such agreed-upon discipline.

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	Commentator	Position	Comment	AOC Response
5.	Orange County Bar Association By John Hueston, President	A	It is urged that professional disciplinary disclosures be required of arbitrators in contractual arbitration, and that the requirement be set forth at subd. (d) of Standard 7. The inclusion of such disclosures is both necessary and appropriate, as issues of censure, resignation and revocation in the context of licensure or regulation, have definite bearing on the determination of impartiality, perhaps providing insight as to such things as an arbitrator's character or disposition. In support of the proposal, the attendant discussion analogizes these disclosures to those required of mediators in court-connected programs or of members of the State Bar. More relevant as they relate directly to the selection of a neutral, however, are those disclosure requirements imposed by the FINRA forum on its arbitrators. In addition to an extensive Disclosure Report, arbitrators in each case complete and provide to the parties, a Disclosure Checklist which includes among its 33 questions, 4 devoted to an examination of professional licenses (held or denied), their types, issuing jurisdictions, and their status, with written explanation and clarification of answers then required. Requirements such as those of FINRA, serve to illustrate the relevance and importance that instances of professional discipline have to the determination of impartiality. The proposal, however, views these disclosures as "separate	This input is appreciated. However, information about public discipline imposed on an arbitrator is not associated only with an arbitrator's ability to be impartial. It is also helpful in assessing other characteristics that may be important in selecting an arbitrator, such as the individual's integrity. This report therefore recommends that this disclosure requirement not be placed within the provisions relating to disclosures associated with the arbitrator's impartiality, but in a separate provision.

	Commentator	Position	Comment	AOC Response
			from the requirement for disclosures relating to the arbitrator's impartiality," and sets them forth apart from those disclosures of Standard 7 associated with the overarching concept of impartiality, fundamental to the role and function of a neutral. To accord these disclosures their proper weight, it is strongly suggested that the proposed "Professional discipline" disclosures be moved from Standard 7 subd. (e), and incorporated at subd. (d). As well, placement of these disclosures at subd. (d) appears more consistent with the nature of the analysis made by, and the decision of, the California Supreme Court in *Haworth*. In light of the importance of issues of professional discipline, discovery either by way of internet or telephone should not be left to the parties, some of whom may be unrepresented. The making of such independent inquiry may not occur to some or may be a luxury for others. It is believed overly optimistic given the rampant misinformation, misspelling, malfunctioning, and varying levels of research capabilities among search engines and users to say that this type of information is "easily accessible" online. Silence on the part of an arbitrator who knows best his or her professional history, could send parties into unbounded, forever searches, perhaps for nonexistent information. Similarly then, to suggest that information is "easily accessible" by telephone is to suggest the equally unworkable. A party having little, if any,	 This input is appreciated.

	Commentator	Position	Comment	AOC Response
			indication of whom or where to call would have a limited chance of success given the number and variety of licensing bodies, agencies, entities, and jurisdictions, all suffering ever-increasing budgetary constraints.	
6.	Public Policy Committee California Dispute Resolution Council By James Madison, Chair	NI	The Public Policy Committee of the California Dispute Resolution Council ("CDRC") has reviewed the above-described proposals and is pleased to submit the following comments: SPR11-02. This proposal is to amend Standards 2, 3, 7 and 8 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations. a. The CDRC supports: (1) The proposed definitional changes in Standards 2(a)(2) and 2(o). (2) The additions in Standards 3(b)(D)and (I) to the exemptions from the Standards for arbitrations governed by the rules of a securities self regulating organization, which reflects the effect of decisional law, and those arising out of informal dispute resolution efforts pursuant to 16 C.F.R. 703, which is consistent with the non-binding nature of such processes. (3) The revisions to Standards 7(c) and (d) to clarify the time for making supplemental disclosures.	 The commentator's support for these changes is noted. The commentator's support for these changes is noted. The commentator's support for these changes is noted.

	Commentator	Position	Comment	AOC Response
			(4) The reorganization of Standards 7(d)(2)(A) and (B) to capture domestic partner relationships with a lawyer in the arbitration. However, the CDRC believes that the disclosure of family relationships should extend to the broader "lawyer for a party."	The Judicial Council previously considered when to use the narrower term "lawyer in the arbitration" or the broader term "lawyer for a party" in the ethics standards. Because of concerns about the practical burden it would place on arbitrators to try to make disclosures about associates of a lawyer representing a party in all circumstances, the council decided not to use the broader term "lawyer for a party" except where the term already appears in statute.
			(5) The deletion of obsolete language from Standard 7(d)(5).	The commentator's support for these changes is noted.
			(6) The clarification of professional relationships in Standards 7(d)(8) and (9). However, the CDRC believes that the disclosure obligation in Standard 7(d)(8) should be extended to the broader "lawyer for a party" instead of being limited to "lawyer in the arbitration."	Please see response to item (4) above.
			(7) The changes in the Comments to Standard 7 and also the changes in Standard 8.	The commentator's support for these changes is noted.
			b. The CDRC supports the concept of adding professional discipline to the list of specifically required disclosures, as in proposed Standard 7(e)(1). However, the CDRC has a number of concerns about the particular language. In particular, the CDRC is concerned about:	
			(1) The absence of any time limit on the disclosure of professional discipline. Time	In response to this and other comments, the proposal has been revised to require disclosure of

	Commentator	Position	Comment	AOC Response
			limits are associated with other specifically required disclosures. These reflect, among other factors, the attenuation of potential relevance with the passage of time. But for the arbitrator's comment in the Haworth award, for example, about the lack of need for a female to have multiple cosmetic surgeries, which the CDRC believes should have been regarded as evidencing a continuing bias, the CDRC questions any obligation to disclose discipline as far in the past as that involved in the Haworth case. The CDRC urges the adoption of some limiting time period, whether it be five or ten years. The CDRC would make an exception for the case of disbarment of a lawyer or its equivalent in other licensable professions and require disclosure of such discipline regardless of how long in the past it occurred.	disbarment or license revocations and of resignations with charges pending regardless of when they occurred, but to limit disclosure of other public discipline to that which was imposed within the preceding 10 years.
			(2) The vagueness of the terms "professional licensing entity" and "professional licensing agency." (a) If these terms include entities or agencies other than in California, that needs to be made clear. (b) If these terms include California occupational licensing agencies which impose discipline up to and including loss of license for other than behavior improprieties, such as, in the case of the Contractors State License Board, the economic inability to pay a judgment, that	In response to this and other comments, the proposal has been revised to use language from Business and Professions Code section 6068(o): "professional or occupational disciplinary agency or licensing board, whether in California or elsewhere." This language has been in this statute since 1986 (see Stats.1986, c. 475, § 2) and should be familiar to those arbitrators who are members of the State Bar of California.

	Commentator	Position	Comment	AOC Response
			should be made clear. (c) If these terms include governmental agencies that do not license individuals, that should be made clear. For example, the United States Patent Office, which arguably does not "license" an individual, but instead, as the CDRC understands the matter, "registers" one to practice before the Patent Office. Moreover, the SEC does not impose discipline administratively, but may seek a judicial decree restricting the activities of individual.	
			(3) The inconsistency between use of the term "entity" in proposed Standard 7(e)(1)(A) and "agency" in proposed 7(e)(1)(B). One or the other of these terms or both should be defined clearly so there will be no potential for controversy about a disclosure obligation. Moreover, the defined term or terms should be used consistently in both parts of the Standard.	In response to this comment, the proposal has been revised so that both subdivisions refer to an "agency" or "board."
			(4) The absence of a definition of what constitutes "public discipline." Does a "private reproval" by the State Bar, for example, constitute public discipline, because it is part of a member's records, even though it is not to be disclosed in response to an inquiry?	In response to this and other comments, the proposal has been revised to include a definition of "public discipline."
			(5) There is also some concern about whether any disciplinary action must be disclosed or whether, to be disclosable, the disciplinary action must relate to the matter involved in the pending arbitration. The issue is whether the	The recommended amendment does not limit the disclosure requirement to disciplinary actions relating to the matter involved in the pending arbitration.

	Commentator	Position	Comment	AOC Response
			risk of creating added controversy over the adequacy of disclosure from attempting to draft a distinction that would ease the burden on arbitrators is worth the effort. Apart from the foregoing, if the Judicial Council decides to develop a model disclosure checklist, the CDRC would be more than willing to make available the assistance of members who have been involved in the development of checklists utilized by ADR provider organizations.	This offer of assistance is appreciated.
7.	Hon. Ignazio J. Ruvolo Court of Appeal, First Appellate District, Division 4	A	I agree with all of the proposed changes (including the disclosure in new paragraph (e)). Also, although not in the current proposal, I suggest consideration be given to conforming the language in what will be (d)(15) to that in Canon 4 (c).	The commentator's support for these changes is noted. Because this suggestion was not addressed in the proposal that was circulated for public comment and because the Supreme Court is currently considering changes to the Code of Judicial Ethics, this suggestion will be considered at a later time.
8.	Superior Court of Los Angeles County	NI	This proposal will probably have little impact on the ADR Office and the courtroom staffs, as they will likely continue to rely on neutrals for required disclosures.	The minimal impact on court operations is noted.
9.	Superior Court of Monterey County By Minnie Monarque Director of Civil & Family Law Division	A	Agree with proposed changes.	The commentator's support for these changes is noted.
10.	Superior Court of Sacramento County By Robert Turner ASO II	NI	No specific comment.	No response required.

	Commentator	Position	Comment	AOC Response
	Research & Evaluation Division			
11.	Superior Court of San Diego County By Michael M. Roddy Executive Officer	AM	Suggested modifications and reasoning: (1) Language for disclosure of "*Family relationships with party"* should mirror to the extent applicable disclosure of *"Family relationships with lawyer in the arbitration"* as the current discrepancy in the language serves to create unnecessary ambiguity. (2) Comments were specifically requested on whether arbitrators must disclose professional discipline, specifically discipline that has been imposed on the arbitrator by any public disciplinary or professional licensing authority, or if the arbitrator has resigned his or her membership in the State Bar or other professional organization while disciplinary charges were pending. Such disclosure will serve to protect the consumer and the integrity of the process. The burden of the disclosure should be placed upon the arbitrator rather than on the parties to perform internet searches or other discovery in a vacuum. (3) Comments were also specifically requested as to whether a model checklist should be	In response to this comment, the proposal has been revised to include non-substantive amendments to standard 7(d)(1) "*Family relationships with party"* which make its structure more closely mirror that of standard 7(d)(2) *"Family relationships with lawyer in the arbitration."* Substantive changes to the provisions of standard 7(d)(1) are not being recommended, as the substantive differences in these standards reflect differences in statutory disclosure requirements concerning these relationships. This input is appreciated. This input is appreciated.

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	Commentator	Position	Comment	AOC Response
			developed. Yes – such a checklist would serve to standardize disclosures and would assist arbitrators in appropriately and uniformly making all disclosures.	

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