

**Proposed Rule 1-710.<sup>1</sup> Member as Temporary Judge, Referee, or Court-Appointed Arbitrator.<sup>2</sup>**

(A) A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.

**Discussion:<sup>3</sup>**

[1] This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.

[2] Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.

[3] Rule 1-710 is not intended to apply to a member serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See rule 1-720.<sup>4</sup>

**ENDNOTES**

---

<sup>1</sup> As voted by the RRC at the 5/7/2004 Meeting, rule 1-710 has been bifurcated into two rules: (1) rule 1-710, which applies to temporary judges, referees and court-appointed arbitrators; and (2) new rule 1-720, which applies to all other third party neutrals, including non-court connected (private) arbitrators.

<sup>2</sup> **Drafters' Note:** Although the Commission requested that the drafters prepare two rules, one for temporary judges and referees, and one for third party neutrals as defined in Model Rule 2.4, the reference to "*court-appointed* arbitrator" (emphasis added) was left in rule 1-710 as the history of that rule reflects the Supreme Court's preference that lawyers appointed by courts in *adjudicative* capacities be subject to discipline under the rules of professional conduct for failure to adhere to Canon D of the California Code of Judicial Ethics. *Private* arbitrators, as well as lawyers serving in mediations and settlement conferences are covered under new proposed rule 1-720 on third-party neutrals (TPN's).

<sup>3</sup> Discussion ¶¶. 1 & 2 are identical to the current Discussion paragraphs in rule 1-710.

<sup>4</sup> **Drafters' Note:** Because we were asked to include in rule 1-720 (on TPN's) a cross-reference to the fact that temporary judges and referees (and also, court-appointed arbitrators) are covered under rule 1-710, a cross-reference to rule 1-720 has been added here.

**Proposed New Rule 1-720.<sup>1</sup> Member as Third-Party Neutral.**

(A) A member<sup>2</sup> serves as a third-party neutral when the member assists two or more persons who are not clients of the member to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the member to assist the parties to resolve the matter.

(B) A member serving as a third-party neutral shall inform unrepresented parties that the member is not representing them. When the member knows or reasonably should know that a party does not understand the member's role in the matter, the member shall explain the difference between the member's role as a third-party neutral and a member's role as one who represents a client.<sup>3</sup>

(C) A member serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.4 [confidentiality], 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.<sup>4</sup>

(D) A member serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with Standards 5 [general duty], 6 [duty to refuse appointment], **(7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed],)**<sup>5</sup> 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

*Discussion:*

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, **lawyers** often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process.<sup>1</sup>

[2] The role of a third-party neutral is not unique to **lawyers**, although, in some court-connected contexts, only **lawyers** are allowed to serve in this role or to handle certain types of cases. In performing this role, the **lawyer** may be subject to court rules or other law that apply either to third-party neutrals generally or to **lawyers** serving as third-party neutrals. **Lawyer**-neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.<sup>2</sup> See Discussion paragraphs [6] and [7].

[3] Unlike nonlawyers who serve as third-party neutrals, **lawyers** serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a **lawyer's** service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (B) requires a **lawyer**-neutral to inform unrepresented parties that the **lawyer** is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the **lawyer** should inform unrepresented parties of the important differences between the **lawyer's** role as third-party neutral and a **lawyer's** role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. ~~The extent of disclosure required under this paragraph will depend on the particular parties~~

[4] A **lawyer** who serves as a third-party neutral subsequently may be asked to serve as a **lawyer** representing a client in the same matter. ~~The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.~~<sup>1</sup> Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. *Cho v. Superior Court* (1995) 39 Cal. App.4th 113, 45 Cal.Rptr.2d 863 (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct and the State Bar Act. ~~When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.~~<sup>2</sup>

[6] Paragraph (C) is intended to permit the State Bar to discipline a member who fails to comply with certain enumerated Judicial Council mediator Standards whenever the member is serving as a third-party neutral in a mediation or settlement conference.<sup>3</sup>

[7] Paragraph (D) is intended to permit the State Bar to discipline a member who fails to comply with certain enumerated Judicial Council arbitration ethics Standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the member is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.<sup>4</sup>

[8] Nothing in rule 1-720 shall be deemed to limit the applicability of any other rule or law.

[9] Rule 1-720 is not intended to apply to temporary judges, referees or court-appointed arbitrators. *See* rule 1-710.

## ENDNOTES

**1** As voted by the RRC at the 5/7/2004 Meeting, rule 1-710 has been bifurcated into two rules: (1) rule 1-710, which applies to temporary judges, referees and court-appointed arbitrators; and (2) new rule 1-720, which applies to all other third party neutrals, including non-court connected (private) arbitrators. New rule 1-720 keeps many of the provisions of proposed rule 1-710 that has previously been discussed by the RRC, so this draft is denominated Draft 3.

Drafters' Note: Although the Commission requested that the drafters prepare two rules, one for temporary judges and referees, and one for third party neutrals as defined in Model Rule 2.4, the reference to "court-appointed arbitrator" (emphasis added) was left in rule 1-710 as the history of that rule reflects the Supreme Court's preference that lawyers appointed by courts in adjudicative capacities be subject to discipline under the rules of professional conduct for failure to adhere to Canon D of the California Code of Judicial Ethics. Private arbitrators, as well as lawyers serving in mediations and settlement conferences are covered under new proposed rule 1-720 on third-party neutrals (TPN's).

**2 Issue:** Should "member" or "lawyer" be used in this rule? Note that paragraph (A) is identical to ABA MR 2.4(a), except that "member" has been substituted for "lawyer."

**Drafters' Recommendation:** Although "member" has been used in this draft, it is preferable to use "lawyer" in this rule. The Discussion sections, below, make little sense if "member" is used instead of "lawyer".

**3** Paragraph (B) is identical to ABA MR 2.4(b), except that "member" has been substituted for "lawyer."

**4** As requested by the Commission at its 5/7/2004 meeting, paragraph (C) of rule 1-710, Draft 2.1, has been retained in this rule. Paragraph (C) is applicable to mediators, etc., regardless of whether they have been selected by the parties' agreement or appointed by the court.

**5 Drafters' Note:** Paragraph (D) has been added as a complement to previously-drafted paragraph (C), which applies to mediators and settlement neutrals. Paragraph (D) applies only to neutral arbitrators appointed by contractual agreement; court-appointed arbitrators are covered under rule 1-710. Reference is made to specific standards in the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("Arbitration Standards"). Aspirational and general provisions have not been included in the listing. Standards in bold within the parentheses re disclosure have also been included in the rule for consideration of their inclusion in the rule. The drafters believed that these standards related to disclosure obligations are confusing and that their violation should not necessarily subject lawyers governed by these arbitration standards to discipline. *See* Standards 7-9 of the accompanying Arbitration Standards.

**6** Discussion ¶. [1] is identical to MR 2.4, cmt. [1], except that the following phrase at the end of the last sentence has been deleted: "that is either selected by the parties or mandated by a court" to avoid the implication that court-appointed arbitration is covered by the rule.

**7** The drafters substituted the third sentence in Discussion ¶.2 for the following sentence in MR 2.4, cmt. [2]: "Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct

for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.”

**8 Drafters’ Note:** The last sentence of MR 2.4, cmt. [3] has been redacted as surplusage.

**9 Drafters’ Note:** California has no provision analogous to MR 1.12, which governs conflicts of interest involving a former judge, arbitrator, mediator or other third-party neutral, law clerk thereto. Instead, the drafters have substituted a reference to *Cho v. Superior Court*. Although this case involved a judge who went into private practice, the concept is similar (thus the use of “Cf.” rather than “See”).

**10 Drafters’ Note:** Reference to “the State Bar Act” has been added. Reference to specific rules that California does not have were deleted. Reference to Cal. Rule 5-200 (“Trial Conduct”) and B&P Code § 6068(d) could be included, but it is not warranted. The purpose of the redacted sentence is to direct a lawyer to the appropriate rules when dealing with a tribunal (3.3) vs. dealing with a third person (4.1). There is no direct counterpart to MR 4.1 in California. The first sentence of Discussion ¶. [5] adequately covers the purpose of the paragraph, i.e., to remind lawyers that when they serve as lawyers in an alternative dispute resolution process, they are regulated by the RPC’s and State Bar Act.

**11** Discussion ¶. [6] is the second sentence of Discussion ¶. [1] in Draft 2.1 of previously-considered rule 1-710 (prior to bifurcation).

**12** Discussion ¶. [7] has been added to explain the inclusion of paragraph (D).

**M E M O R A N D U M**

**DATE:** June 14, 2004

**TO:** Members, Commission for the Revision of the Rules of Professional Conduct

**FROM:** Randall Difuntorum, Staff Counsel

**SUBJECT:** Agenda Item II.D Consideration of Rule 1-710

---

Provided among your materials for the subject agenda item is an August 30, 2002 memorandum from COPRAC to the State Bar ADR Committee offering comments on the then proposed *Ethics Standards for Neutral Arbitrators in Contractual Arbitration* ("Standards") that were distributed by the Judicial Council with an invitation for public comment. In large part, COPRAC's comment focuses on Standard 7 (re Disclosure).

In preparing to discuss this agenda item, the codrafters ask that you review the COPRAC comment and Standards 7 to 9 and be ready to share your position on whether Standards 7 to 9 should be included in paragraph (D) of proposed new rule 1-720.

Please feel free to call me at (415) 538-2161 if you have any questions.

---

**MEMORANDUM**

**TO:** STATE BAR COMMITTEE ON ALTERNATE DISPUTE RESOLUTION (“ADR COMMITTEE”)  
**FROM:** STATE BAR COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT (COPRAC)  
**RE:** JUDICIAL COUNCIL’S MAY 16 INVITATION TO COMMENT: ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION (“STANDARDS”)  
**DATE:** AUGUST 30, 2002  
**CC:** RANDALL DIFUNTORUM, DIRECTOR, PROFESSIONAL COMPETENCE, STATE BAR OF CALIFORNIA

---

**INTRODUCTION**

COPRAC has developed the following comments in response to the Judicial Council of California’s renewed Invitation to Comment on the Standards for Neutral Arbitrators in Contractual Arbitration (the “Standards”). We provide them to you in the hope that you will find them useful in formulating your own comments to the Judicial Council.

We believe that our collective experience in drafting and interpreting the conflicts rules for lawyers gives us some perspective on striking an appropriate balance between rules requiring full disclosure and the burden and unintended consequences that overly broad rules can have. For this reason, we have focused our comments on Standard 7 (Disclosure) and Standard 10 (Duties and limitations regarding future professional relationships or employment).

We support fully the general purpose of the standards as stated in Standard 1. The importance of “public confidence in the integrity and fairness of the process” cannot be underestimated. Nevertheless, COPRAC is concerned that the standards as written are very dense and somewhat overwhelming. The extensive use of defined terms is likely to lead to confusion, because a reader must expend quite a lot of effort to comprehend how the defined terms interact with the disclosure rules themselves. We urge that an effort be undertaken to make these very complex standards more user-friendly and accessible. We offer some specific ideas below, but our sense of the current document is that the Standards have been revised extensively to accommodate public comment and might therefore benefit from a top-to-bottom review to see if the substantive provisions can be expressed more simply.

From a substantive standpoint, we urge consideration of whether the Standards are so onerous that they might defeat the judicially recognized goal of arbitration, which is to provide dispute resolution in a more streamlined, less expensive and quicker form than the courts can provide. According to an article in the July 17, 2002, Los Angeles Times, the New York Stock Exchange and the National Association of Securities Dealers have already announced that they are ceasing to provide arbitration panels in California, based on the claim that the new standards are too burdensome. Not only might overly broad standards discourage arbitrators and arbitration providers from operating in California, but the prospect of court challenges to arbitration awards founded on claims of lack of compliance with the Standards looms large as defeating the finality and

efficiency of arbitration. As the ADR Committee is no doubt well aware, state and federal courts sharply limit review of arbitration awards to avoid having litigious parties defeat the benefits of arbitration. It seems to us that the very detailed Standards provide ample fodder for litigious parties to resist and obstruct enforcement of legitimate arbitration awards.

In our view, the drafting and substantive issues compound the risk of extensive litigation over arbitration awards by increasing the chance that the Standards might be misunderstood and misinterpreted by parties and judges. Any such uncertainty inevitably leads to litigation. As a result, we believe that the benefits served by Standard 7's disclosure requirements as currently drafted are outweighed by their potential burden. In the remainder of this report, we discuss some of the specific standards and definitions which seem problematic to us.

## **STANDARD 7: DISCLOSURE**

### *Introduction: General Concerns with the Expansive Scope of Standard 7's Disclosure Requirements*

The Comment to Standard 7 states that 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.*" (emphasis added). Section 1281.9 also already requires disclosure of "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial." The Comment to Standard 7 states that the arbitrator's duty under the standard "mirrors" the duty set forth in section 1281.9 and that the more specific requirements set forth in Standard 7 are simply "examples of common matters" that could lead to a reasonable doubt that the proposed arbitrator would be able to be impartial.

### *Specific Examples of Concerns with Standard 7's Expansive Scope*

We are not confident that the very expansive scope of specific requirements in Standard 7 are all necessary to avoid reasonable doubt concerning an arbitrator's neutrality. In the following paragraphs, we discuss some specific examples.

#### 1. An Internal Contradiction Between Standards 7(b) and 7(d); Proposed Solution of Limiting Disclosures to Actual Knowledge

Standard 7(b) requires disclosure of an extended family member's relationship with a party to the arbitration but Standard 7(d) provides that an arbitrator can comply with this rule by signing a declaration showing that the arbitrator has made inquiry to people living in his or her household. From a policy standpoint, the rules seem internally contradictory in stating first that even rather attenuated relationships could detract from the arbitrator's neutrality but then limiting the arbitrator's duty to inquire rather sharply if the arbitrator signs a declaration attesting that the arbitrator has asked his or her immediate household about those relationships. We think the rule would be much more clear, and more consistent in purpose, if the rule stated that the arbitrator must disclose his or her *actual knowledge* of family relationships and perhaps impose a duty on the arbitrator to inquire of the members of his or her immediate household concerning such relationships. This approach would in our view be superior because the policy goal of the Standards and the Standards' actual operation in daily practice would be consistent. Further, arbitrators would be relieved of preparing boilerplate paperwork in each matter, a result we believe should be avoided.

Rule 3-310(B) of the California Rules of Professional Conduct provides a useful analogy. That rule requires an attorney to disclose to his or her client various relationships and interests which could cause the client to doubt the lawyer's objectivity and loyalty. The commentary to Rule 3-310(B) specifies that the lawyer's disclosure obligation concerning the relationships and interests of the lawyer's colleagues is based on the lawyer's actual knowledge and does not require an investigation, for instance, of personal relationships that every other lawyer at the lawyer's firm might have. (The lawyer, of course, must disclose his or her *own* relationships and interests that the lawyer actually knows about *or* reasonably should know about.) The Standards would be greatly simplified, and impose a more reasonable burden, if they relied on a comparable actual knowledge standard to define the arbitrator's disclosure requirements concerning relationships and interests of persons other than the arbitrator. In like fashion, the Standards could specify that the arbitrator be required to conduct a "reasonable inquiry" of the arbitrator's own financial interest in the arbitration. Likewise, it would be a reasonable burden to ask the arbitrator to inquire of his or her immediate family living in his or her household before concluding that he or she does not have actual knowledge standard that requires a disclosure. However, an actual knowledge is more appropriate for relationships and interests of other persons who have some relationship to the arbitrator.

## 2. Onerous Expansion of the Duty of "Reasonable Inquiry"

We are concerned that Standard 7 expands the duty of "reasonable inquiry" applying to financial interests pursuant to Code of Civil Procedure section 170.1(a) (3) to "all matters that must be disclosed" by an arbitrator. This represents a significant expansion of the disclosure requirements imposed upon judges under Code of Civil Procedure Section 170.1. For example, the fact that the arbitrator has or had at one time a close friendship with a lawyer now in the law firm representing one of the parties would not by itself lead a reasonable person to doubt that the arbitrator would be able to be impartial if that particular lawyer were not involved in the arbitration. Yet the standards require the arbitrator to inform himself or herself of the names of *all* the lawyers -- partners and associates -- affiliated with each law firm representing a party to the arbitration.

We do not believe arbitrators can reasonably be expected to track the fact that a lawyer with whom the arbitrator previously had some kind of relationship when the lawyer worked at Firm No. 1 has now joined Firm No. 2, which represents a party in an arbitration. Compliance with this rule would require the arbitrator to maintain elaborate lists of perhaps hundreds of individuals and to monitor when each of those individuals moves from one firm to another. Further, this highly unusual feature of the Standards is not at all easy to discern from the Standards without close study. An arbitrator will only appreciate the scope of this duty by first noting the expansive (and not intuitive) definition of "lawyer for a party" in Standard 2(*h*) and then keeps that definition in mind -- along with some 16 other defined terms -- as the arbitrator reads through the complicated disclosure rules of Standard 7. In other words, we think that the Standards are not only unduly broad in this respect from a substantive standpoint but also structured in such a way as to make compliance very difficult.

COPRAC also questions why the Standards apparently draw a distinction between a lawyer "in the arbitration" and a lawyer "for a party." No such distinction is discernable in the statute. We suggest that the standards could be made more simple and easier to understand if this distinction were eliminated. The benefit of drawing this distinction is not clear to us. In our experience, rules such as the Standards will be easier to understand if they incorporate a few defined

terms and concepts consistently and minimize the number of subtle and elaborate distinctions which persons subject to the rules must understand in order to maintain compliance.

3. Standard 7(b)(2) (Family relationships with lawyer in the arbitration) and 7(b) (11) (Knowledge of disputed facts)

Subsection 7(b)(2)(A) further muddies the water by defining a third class of lawyers involved in arbitrations beyond a lawyer “for a party” and a lawyer “in the arbitration.” This subsection employs a special definition of “a lawyer in the arbitration” that is applicable only for this particular paragraph of the Standards. We do not understand why the Standards need to contain a special definition concerning lawyers who “personally advised or *in any way* represented” a public agency “concerning the factual or legal issues in the arbitration.” The additional complexity added by this subsection seems unnecessarily confusing, plus the meaning of “factual and legal issues in the arbitration” is not clear to us. This could arguably apply to representation of a public agency on the same abstract legal issue, whereas we assume the definition is meant to refer to particular legal matters. We recommend that this definition be deleted altogether and instead allow the general rules to serve their purpose. Alternatively, if there is a policy reason why representation of public agencies must be treated differently, perhaps there should be a special section devoted to that topic rather than inserting this concept into the middle of the more generally applicable rules.

We also note that Standard 7(b)(2) requires investigation into the knowledge of the arbitrator’s “extended family” and “former spouse” and that the arbitrator cannot satisfy this requirement simply by filing a declaration stating that the arbitrator has made inquiries in his or her own household (Standard 7(d)(1)). Thus, to comply with this rule, the arbitrator would have to make a “reasonable inquiry” of his or her entire extended family concerning whether any of them had ever “served as a lawyer for or as an officer of a public agency [and] personally advised or in any way represented the public agency concerning the factual or legal issues in the arbitration.” This list would include:

- the arbitrator’s former spouse,
- parents,
- grandparents,
- great-grandparents,
- children,
- grandchildren,
- great-grandchildren,
- siblings,
- aunts, uncles,
- nephews, or nieces,

- the spouses of any of the above, and
- the extended family of the arbitrator’s current spouse or domestic partner.

Moreover, under subsection 7(b) (11), the proposed arbitrator is required to inform himself or herself as to each extended family member's possible knowledge of disputed facts relevant to the arbitration. Standard 7(d)(1) does not permit the arbitrator to satisfy this requirement by inquiry in the arbitrator’s immediate household.

We believe that such inquiry of extended family members is not reasonable. The nature of the questions that would have to be posed to a potentially large group of individuals could undermine not only the efficiency but the privacy of contractual arbitration as well. To require arbitrators to contact family members and former spouses from whom he or she may be estranged seems personally intrusive to the arbitrator and his or her family and of little value. An actual knowledge standard would make this process much more reasonable and less unduly burdensome.

13. Standard 7(b) (3) (Significant personal relationship with lawyer or party)

This subsection requires that the arbitrator investigate whether a member of his or her immediate family has had a “significant personal relationship” with any party or a lawyer for a party. Faced with such a duty, the arbitrator would first have to determine whether a personal relationship was “significant.” Standard 2(q) defines this term as including “a close personal friendship.” No further guidance is offered on the meaning of either “significant personal relationship” or “close personal friendship.” Thus, the arbitrator would likely be left with the decision of (1) disclosing a seemingly casual personal connection with either a party or lawyer for a party to the arbitration (which includes every lawyer currently affiliated with the lawyer actually working on the arbitration), or (2) taking the chance that in hindsight this contact would be deemed to constitute a “significant personal relationship,” thereby leading to the overturning of an arbitration award for failure to disclose. We note that for an arbitrator to comply with this rule, the members of his or her immediate family will need to review a roster of each law firm participating in the arbitration, which seems unreasonable and unnecessary to us. Here again, a standard based on the arbitrator’s actual knowledge would be more practical.

14. Standard 7(b) (12) (Information about provider organizations in consumer arbitrations)

Standard 7(b) (12) places an extra burden on the arbitrator that is potentially unworkable. This standard calls for the arbitrator to disclose whether the arbitration provider organization has prior or contractual relationships with the non-consumer party. It seems to us that this duty to disclose should fall on the organization, not the arbitrator. Standard 7(b)(12) (D) seems particularly unworkable. Here again, the rules are unnecessarily complex in our view when they could be written in a much more simple manner. Why impose an unreasonable burden on the arbitrator to provide information and then mitigate that unnecessary burden by providing that the neutral can avoid it by filling out boilerplate paperwork in each matter? Standard 7(b)(12)(F). The straightforward approach is to place the duty on the provider organization.

## 15. Continuing duty

The Standards provide that the obligation of the arbitrator to inform himself or herself and to make disclosures are “continuing” duties, “applying from service of the notice of the arbitrator’s proposed nomination or appointment until the conclusion of the arbitration proceeding.” By contrast, a judge, under section 170.1 is obliged to inform himself or herself only of his or her personal and fiduciary interests and those of his or her spouse and minor children living in the household. Given the very extensive nature of disclosures and investigation required under the current version of the Standards, this continuing duty multiplies the difficulty arbitrators will have in complying with this rule. If the Standards were to contain an actual knowledge rule, then a continuing duty to disclose matters within the arbitrator’s actual knowledge would be more reasonable and practical.

### **STANDARD 10: FUTURE PROFESSIONAL RELATIONSHIPS OR EMPLOYMENT**

In addressing “future professional relationships” or employment of the arbitrator, Standard 10(d) draws a distinction between consumer arbitration and other types of contractual arbitration covered by the Standards. While there is no Comment accompanying Standard 10, the purpose of this distinction appears to be the creation of greater protection for participants in arbitrations that arise out of a contract of adhesion. We note, however, that the definition of “consumer contracts” does not incorporate any established legal standards but instead refers to situations where a consumer was “required to accept” an arbitration provision. Standard 2(d)(3). We think that language is vague and will lead to litigation. We recommend adopting established legal doctrines when possible rather than creating new standards which will inevitably be disputed and lead to litigation.

We wonder whether the restrictions on arbitrators “entertaining” offers of employment are too broad and overly complicated. An arbitrator who wishes to “entertain” offers of employment or new professional relationships must disclose that intent under Standard 10(b) and may be disqualified by a party based on that disclosure. (Under Standard 10(b), the arbitrator who has no intention of “entertaining” future professional relationships or employment must affirmatively declare this lack of intent.) This “disclosure of intent” requirement extends to offers to serve as a “dispute resolution neutral” in another case. Whether “entertaining” offers of employment would include membership in a professional arbitration organization such as the American Arbitration Association or JAMS is unclear. If the standard contemplates that such membership is tantamount to a willingness to “entertain” offers of future employment, this disclosure requirement would seemingly be triggered in nearly every arbitration.

Standard 10(c) clarifies that “entertaining” an offer of employment or new professional relationship does not include “acceptance” of an offer. However, Standard 10(c) also implies that in non-consumer arbitrations, once the intent to entertain such offers is disclosed, the arbitrator may then accept the offer of employment without further disclosure and without obtaining the informed consent of the parties. This might encourage parties in non-consumer arbitrations to disqualify an arbitrator based on a 10(b) disclosure. We wonder if, in all arbitrations, informed consent of the parties should be required before acceptance of any offers of employment or new professional relationships by the arbitrator with parties to the arbitration. We think it would

be favorable to have one standard which applies to all arbitrations, because that would simplify the rules significantly.

## **CONCLUSION**

We support the general purpose of the Judicial Council's standards and agree that it is critical that parties who participate in arbitrations feel that the arbitrator is qualified and neutral. We are also well aware of how difficult it is to craft rules such as the Standards and offer the above comments as constructive suggestions which we hope that the ADR Committee will find helpful in formulating comments to assist the Judicial Council in examining the Standards.

**These comments are from the State Bar of California Standing Committee on Professional Responsibility and Conduct. They do not constitute the position of the State Bar of California or its Board of Governors. The Board of Governors is free to submit its own comment on behalf of the State Bar of California.**

**DIVISION VI. Ethics Standards for Neutral Arbitrators in Contractual Arbitration**

**Standard 1. Purpose, intent, and construction**

(a) These standards are adopted under the authority of Code of Civil Procedure section 1281.85 and establish the minimum standards of conduct for neutral arbitrators who are subject to these standards. They are intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process.

(b) For arbitration to be effective there must be broad public confidence in the integrity and fairness of the process. Arbitrators are responsible to the parties, the other participants, and the public for conducting themselves in accordance with these standards so as to merit that confidence.

(c) These standards are to be construed and applied to further the purpose and intent expressed in subdivisions (a) and (b) and in conformance with all applicable law.

(d) These standards are not intended to affect any existing civil cause of action or create any new civil cause of action.

**Comment to Standard 1**

Code of Civil Procedure section 1281.85 provides that, beginning July 1, 2002, a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics

standards for arbitrators adopted by the Judicial Council pursuant to that section.

While the grounds for vacating an arbitration award are established by statute, not these standards, an arbitrator's violation of these standards may, under some circumstances, fall within one of those statutory grounds. (See Code Civ. Proc., § 1286.2.) 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).)

Violations of other obligations under these standards may also constitute grounds for vacating an arbitration award under section 1286.2(a)(3) if "the rights of the party were substantially prejudiced" by the violation.

While vacatur may be an available remedy for violation of these standards, these standards are not intended to affect any civil cause of action that may currently exist nor to create any new civil cause of action. These standards are also not intended to establish a ceiling on what is considered good practice in arbitration or to discourage efforts to educate arbitrators about best practices.

## **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.

**(b)** “Applicable law” means constitutional provisions, statutes, decisional law, California Rules of Court, and other statewide rules or regulations that apply to arbitrators who are subject to these standards.

**(c)** “Conclusion of the arbitration” means the following:

(1) When the arbitrator is disqualified or withdraws or the case is settled or dismissed before the arbitrator makes an award, the date on which the arbitrator’s appointment is terminated;

(2) When the arbitrator makes an award and no party makes a timely application to the arbitrator to correct the award, the final date for making an application to the arbitrator for correction; or

(3) When a party makes a timely application to the arbitrator to correct the award, the date on which the arbitrator serves a corrected award or a denial on each party, or the date on which denial occurs by operation of law.

(d) “Consumer arbitration” means an arbitration conducted under a predispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below. “Consumer arbitration” excludes arbitration proceedings conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.

(1) The contract is with a consumer party, as defined in these standards;

(2) The contract was drafted by or on behalf of the nonconsumer party; and

(3) The consumer party was required to accept the arbitration provision in the contract.

(e) “Consumer party” is a party to an arbitration agreement who, in the context of that arbitration agreement, is any of the following:

(1) An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code;

(2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the

meaning of section 106 of the Insurance Code;

(3) An individual with a medical malpractice claim that is subject to the arbitration agreement; or

(4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

**(f)** "Dispute resolution neutral" means a temporary judge appointed under article VI, section 21 of the California Constitution, a referee appointed under Code of Civil Procedure section 638 or 639, an arbitrator, a neutral evaluator, a special master, a mediator, a settlement officer, or a settlement facilitator.

**(g)** "Dispute resolution provider organization" and "provider organization" mean any nongovernmental entity that, or individual who, coordinates, administers, or provides the services of two or more dispute resolution neutrals.

**(h)** "Domestic partner" means a domestic partner as defined in Family Code section 297.

**(i)** "Financial interest" means a financial interest within the meaning of Code of Civil Procedure section 170.5.

**(j)** "Gift" means a gift as defined in Code of Civil Procedure section 170.9(1).

**(k)** “Honoraria” means honoraria as defined in Code of Civil Procedure section 170.9(h) and (i).

**(l)** “Lawyer in the arbitration” means the lawyer hired to represent a party in the arbitration.

**(m)** “Lawyer for a party” means the lawyer hired to represent a party in the arbitration and any lawyer or law firm currently associated in the practice of law with the lawyer hired to represent a party in the arbitration.

**(n)** “Member of the arbitrator’s immediate family” means the arbitrator’s spouse or domestic partner and any minor child living in the arbitrator’s household.

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

**(p) [Party]**

(1) “Party” means a party to the arbitration agreement:

(A) Who seeks to arbitrate a controversy pursuant to the agreement;

(B) Against whom such arbitration is sought; or

(C) Who is made a party to such arbitration by order of a court or

the arbitrator upon such party's application, upon the application of any other party to the arbitration, or upon the arbitrator's own determination.

(2) "Party" includes the representative of a party, unless the context requires a different meaning.

(q) "Party-arbitrator" means an arbitrator selected unilaterally by a party.

(r) "Private practice of law" means private practice of law as defined in Code of Civil Procedure section 170.5.

(s) "Significant personal relationship" includes a close personal friendship.

**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.

Subdivisions (l) and (m). Arbitrators should take special care to note that there are two different terms used in these standards to refer to lawyers who represent parties in the arbitration. In particular, arbitrators should note that the term "lawyer for a party" includes any lawyer or law firm currently associated in the practice of law with the lawyer hired to represent a party in the arbitration.

Subdivision (p)(2). While this provision generally permits an arbitrator to provide required information or notices to a party's attorney as that party's representative, a party's attorney should not be treated as a "party" for purposes of identifying matters that an arbitrator must disclose under standards 7 or 8, as those standards contain separate, specific requirements concerning the disclosure of relationships with a party's attorney.

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;

(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.

(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.

#### **Standard 4. Duration of duty**

(a) Except as otherwise provided in these standards, an arbitrator must comply with these ethics standards from acceptance of appointment until the conclusion of the arbitration.

(b) If, after the conclusion of the arbitration, a case is referred back to the arbitrator for reconsideration or rehearing, the arbitrator must comply with these ethics standards from the date the case is referred back to the arbitrator until the arbitration is again concluded.

#### **Standard 5. General duty**

An arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process. He or she must maintain impartiality toward all participants in the arbitration at all times.

#### **Comment to Standard 5**

This standard establishes the overarching ethical duty of arbitrators. The remaining standards should be construed as establishing specific requirements that implement this overarching duty in particular situations.

Maintaining impartiality toward all participants during all stages of the arbitration is central to upholding the integrity and fairness of the arbitration. An arbitrator must perform his or her duties impartially, without bias or prejudice, and must not, in performing these duties, by words or conduct manifest partiality, bias, or prejudice, including but not limited to partiality, bias, or prejudice based upon race, sex, religion, national origin, disability, age, sexual

orientation, socioeconomic status, or the fact that a party might select the arbitrator to serve as an arbitrator in additional cases. After accepting appointment, an arbitrator should avoid entering into any relationship or acquiring any interest that might reasonably create the appearance of partiality, bias, or prejudice. An arbitrator does not become partial, biased, or prejudiced simply by having acquired knowledge of the parties, the issues or arguments, or the applicable law.

### **Standard 6. Duty to refuse appointment**

Notwithstanding any contrary request, consent, or waiver by the parties, a proposed arbitrator must decline appointment if he or she is not able to be impartial.

### **Standard 7. Disclosure**

**(a) [Intent]** This standard is intended to identify the matters that must be disclosed by a person nominated or appointed as an arbitrator. To the extent that this standard addresses matters that are also addressed by statute, it is intended to include those statutory disclosure requirements, not to eliminate, reduce, or otherwise limit them.

**(b) [General provisions]** For purposes of this standard:

(1) (*Collective bargaining cases excluded*) The terms “cases” and “any arbitration” do not include collective bargaining cases or arbitrations conducted under or arising out of collective bargaining agreements between employers and employees or between their respective representatives.

(2) (*Offers of employment or professional relationship*) If an arbitrator has disclosed to the parties in an arbitration that he or she

will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12, the arbitrator is not required to disclose to the parties in that arbitration any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending.

(3) (*Names of parties in cases*) When making disclosures about other pending or prior cases, in order to preserve confidentiality, it is sufficient to give the name of any party who is not a party to the pending arbitration as “claimant” or “respondent” if the party is an individual and not a business or corporate entity.

**(c) [Time and manner of 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. 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 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 party, a party's spouse or domestic partner, or an officer, director, or trustee of a party.

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

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

or

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

(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) [Case information] If the arbitrator is serving or has served in any of the capacities listed under (A), he or she must disclose:

(i) The names of the parties in each prior or pending case and, where applicable, the name of the attorney representing the party in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case.

(ii) The results of each prior case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

(C) [Summary of case information] If the total number of the

cases disclosed under (A) is greater than five, the arbitrator must provide a summary of these cases that states:

- (i) The number of pending cases in which the arbitrator is currently serving in each capacity;
- (ii) The number of prior cases in which the arbitrator previously served in each capacity;
- (iii) The number of prior cases arbitrated to conclusion; and
- (iv) The number of such prior cases in which the party to the current arbitration, the party represented by the lawyer for a party in the current arbitration or the party represented by the party-arbitrator in the current arbitration was the prevailing party.

(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) [Case information] If the arbitrator is serving or has served in any of the capacities listed under this paragraph (5), he or she must disclose:

(i) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case;

(ii) The dispute resolution neutral capacity (mediator, referee, etc.) in which the arbitrator is serving or served in the case; and

(iii) In each such case in which the arbitrator rendered a decision as a temporary judge or referee, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

(C) [Summary of case information] If the total number of cases disclosed under this paragraph (5) is greater than five, the arbitrator must also provide a summary of the cases that

states:

- (i) The number of pending cases in which the arbitrator is currently serving in each capacity;
- (ii) The number of prior cases in which the arbitrator previously served in each capacity;
- (iii) The number of prior cases in which the arbitrator rendered a decision as a temporary judge or referee; and
- (iv) The number of such prior cases in which the party to the current arbitration or the party represented by the lawyer for a party in the current arbitration was the prevailing party.

(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 relationships*) 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) (*Other professional relationships*) Any other professional relationship not already disclosed under paragraphs (2)-(7) 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) (*Financial interests in party*) The arbitrator or a member of the arbitrator's immediate family has a financial interest in a party.

(10) (*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) (*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) (*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) (*Membership in organizations practicing discrimination*) The arbitrator's membership in 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) 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) [Inability to conduct or timely complete proceedings]** In addition to the matters that must be disclosed under subdivision (d), an arbitrator must also disclose:

(1) 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) 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 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 and to disclose any additional such matters within 10 days of becoming aware of them.

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 10, 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 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 (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 interests, relationships, or affiliations listed in the subparagraphs 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. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under paragraph (d).

Code of Civil Procedure section 1281.85 specifically requires that the ethical 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 to the parties 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)).

- 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 prior services both as neutral arbitrator selected by a party arbitrator in the current arbitration and 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) and (5)).
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or was an employee, expert witness, or consultant for a party or a lawyer in the arbitration (subdivisions (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)).
- 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)).
- 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)).
- 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)).

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 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) *(Reliance on representation that not a consumer arbitration)* An arbitrator is not required to make the disclosures required by this standard if he or she reasonably believes that the arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration.

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

(A) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of the provider organization.

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

(C) The provider organization has entered into, or the arbitrator currently expects that the provider organization will enter into, an agreement or relationship with any party or lawyer in

the arbitration or a law firm with which a lawyer in the arbitration is currently associated under which the provider organization will administer, coordinate, or provide dispute resolution services in other non-collective bargaining matters or will provide other consulting services for that party, lawyer, or law firm.

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

(2) (*Case information*) If the provider organization is acting or has acted in any of the capacities described in paragraph (1)(D), the arbitrator must disclose:

(A) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current

arbitration who is involved in the pending case or who was involved in the prior case;

(B) The type of dispute resolution services (arbitration, mediation, reference, etc.) coordinated, administered, or provided by the provider organization in the case; and

(C) In each prior case in which a dispute resolution neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge appointed under article VI, § 4 of the California Constitution, or a referee appointed under Code of Civil Procedure sections 638 or 639, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

(3) (*Summary of case information*) If the total number of cases disclosed under paragraph (1)(D) is greater than five, the arbitrator must also provide a summary of these cases that states:

(A) The number of pending cases in which the provider organization is currently providing each type of dispute resolution services;

(B) The number of prior cases in which the provider organization previously provided each type of dispute resolution services;

(C) The number of such prior cases in which a neutral affiliated

with the provider organization rendered a decision as an arbitrator, a temporary judge, or a referee; and

(D) The number of prior cases in which the party to the current arbitration or the party represented by the lawyer in the current arbitration was the prevailing party.

**(c) [Relationship between provider organization and arbitrator].** If a relationship or affiliation is disclosed under paragraph (b), the arbitrator must also provide information about the following:

(1) Any financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases, including whether the arbitrator has a financial interest in the provider organization or is an employee of the provider organization;

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

(3) The provider organization's process for identifying, recommending, and selecting potential arbitrators for specific cases; and

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

**(d) [Effective date]** The provisions of this standard take effect on January

1, 2003. Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to this standard in those pending arbitrations.

#### **Comment to Standard 8**

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

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

#### **Standard 9. Arbitrators’ duty to inform themselves about matters to be**

**disclosed**

**(a) [General duty to inform him or herself]** A person who is nominated or appointed as an arbitrator must make a reasonable effort to inform himself or herself of matters that must be disclosed under standards 7 and 8.

**(b) [Obligation regarding extended family]** An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships or other matters involving his or her extended family and former spouse that are required to be disclosed under standard 7 by:

- (1) Seeking information about these relationships and matters from the members of his or her immediate family and any members of his or her extended family living in his or her household; and
- (2) Declaring in writing that he or she has made the inquiry in (1).

**(c) [Obligation regarding relationships with associates of lawyer in the arbitration]** An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships with any lawyer associated in the practice of law with the lawyer in the arbitration that are required to be disclosed under standard 7 by:

- (1) Informing the lawyer in the arbitration, in writing, of all such relationships within the arbitrator's knowledge and asking the lawyer if the lawyer is aware of any other such relationships;
- (2) Declaring in writing that he or she has made the inquiry in (1) and

attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration.

**(d) [Obligation regarding service as a neutral other than an arbitrator before July 1, 2002]** An arbitrator can fulfill the obligation under this standard to inform himself or herself of his or her service as a dispute resolution neutral other than as an arbitrator in cases that commenced prior to July 1, 2002 by:

- (1) Asking any dispute resolution provider organization that administered those prior services for this information; and
- (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the provider organization.

**(e) [Obligation regarding relationships with provider organization]** An arbitrator can fulfill his or her obligation under this standard to inform himself or herself of the information that is required to be disclosed under standard 8 by:

- (1) Asking the dispute resolution provider organization for this information; and
- (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the provider organization.

**Comment to Standard 9**

This standard expands arbitrators existing duty of reasonable inquiry that applies with respect to financial interests under Code of Civil Procedure section 170.1(a)(3), to require arbitrators to make a reasonable effort to inform themselves about all matters that must be disclosed. This standard also clarifies what constitutes a reasonable effort by an arbitrator to inform himself or herself about specified matters, including relationships or other matters concerning his or her extended family and relationships with attorneys associated in the practice of law with the attorney in the arbitration (such as associates encompassed within the term “lawyer for a party”).

### **Standard 10. Disqualification**

**(a)** An arbitrator is disqualified if:

- (1) The arbitrator fails to comply with his or her obligation to make disclosures and a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91;
- (2) The arbitrator complies with his or her obligation to make disclosures within 10 calendar days of service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91;
- (3) The arbitrator makes a required disclosure more than 10 calendar days after service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in

Code of Civil Procedure section 1281.91; or

(4) A party becomes aware that an arbitrator has made a material omission or material misrepresentation in his or her disclosure and, within 15 days after becoming aware of the omission or misrepresentation and within the time specified in Code of Civil Procedure section 1281.91(c), the party serves a notice of disqualification that clearly describes the material omission or material misrepresentation and how and when the party became aware of this omission or misrepresentation; or

(5) If any ground specified in Code of Civil Procedure section 170.1 exists and the party makes a demand that the arbitrator disqualify himself or herself in the manner and within the time specified in Code of Civil Procedure section 1281.91(d).

**(b)** For purposes of this standard, “obligation to make disclosure” means an arbitrator’s obligation to make disclosures under standards 7 or 8 or Code of Civil Procedure section 1281.9.

**(c)** Notwithstanding any contrary request, consent, or waiver by the parties, an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially.

**Comment to Standard 10**

Code of Civil Procedure section 1281.91 already establishes requirements concerning

disqualification of arbitrators. This standard does not eliminate or otherwise limit those requirements or change existing authority or procedures for challenging an arbitrator's failure to disqualify himself or herself. The provisions of subdivisions (a)(1), (2), and (5) restate existing disqualification procedures under section 1281.91; (b) and (d) when an arbitrator makes, or fails to make, initial disclosures or where a section 170.1 ground exists. The provisions of subdivisions (a)(3) and (4) clarify the requirements relating to disqualification based on disclosure made by the arbitrator after appointment or based on the discovery by the party of a material omission or misrepresentation in the arbitrator's disclosure.

**Standard 11. Duty to refuse gift, bequest, or favor**

**(a)** An arbitrator must not, under any circumstances, accept a gift, bequest, favor, or honoraria from a party or any other person or entity whose interests are reasonably likely to come before the arbitrator in the arbitration.

**(b)** From service of notice of appointment or appointment until two years after the conclusion of the arbitration, an arbitrator must not, under any circumstances, accept a gift, bequest, favor, or honoraria from a party or any other person or entity whose interests have come before the arbitrator in the arbitration.

**(c)** An arbitrator must discourage members of his or her family residing in his or her household from accepting a gift, bequest, favor, or honoraria that the arbitrator would be prohibited from accepting under subdivisions (a) or (b).

**(d)** This standard does not prohibit an arbitrator from demanding or

receiving a fee for services or expenses.

**Comment to Standard 11**

Gifts and favors do not include any rebate or discount made available in the regular course of business to members of the public.

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

**(a) [Offers as lawyer, expert witness, or consultant]** From the time of appointment until the conclusion of the arbitration, an arbitrator must not entertain or accept any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration.

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

**(c) [Acceptance of offers prohibited unless intent disclosed]** If an arbitrator fails to make the disclosure required by subdivision (b) of this standard, from the time of appointment until the conclusion of the arbitration the arbitrator must not entertain or accept any such offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral.

**(d) [Relationships and use of confidential information related to the arbitrated case]** An arbitrator must not at any time:

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

(2) Without the informed written consent of the party, enter into any professional relationship or accept employment in another matter in which information that he or she has received in confidence from a party by reason of serving as an arbitrator in a case is material.

### **Standard 13. Conduct of proceeding**

**(a)** An arbitrator must conduct the arbitration fairly, promptly, and diligently and in accordance with the applicable law relating to the conduct of arbitration proceedings.

**(b)** In making the decision, an arbitrator must not be swayed by partisan

interests, public clamor, or fear of criticism.

### **Comment to Standard 13**

Subdivision (a). The arbitrator's duty to dispose of matters promptly and diligently must not take precedence over the arbitrator's duty to dispose of matters fairly.

Conducting the arbitration in a procedurally fair manner includes conducting a balanced process in which each party is given an opportunity to participate. When one but not all parties are unrepresented, an arbitrator must ensure that the party appearing without counsel has an adequate opportunity to be heard and involved. Conducting the arbitration promptly and diligently requires expeditious management of all stages of the proceeding and concluding the case as promptly as the circumstances reasonably permit. During an arbitration, an arbitrator may discuss the issues, arguments, and evidence with the parties or their counsel, make interim rulings, and otherwise to control or direct the arbitration. This standard is not intended to restrict these activities.

The arbitrator's duty to uphold the integrity and fairness of the arbitration process includes an obligation to make reasonable efforts to prevent delaying tactics, harassment of any participant, or other abuse of the arbitration process. It is recognized, however, that the arbitrator's reasonable efforts may not successfully control all conduct of the participants.

For the general law relating to the conduct of arbitration proceedings, see chapter 3 of title 9 of part III of the Code of Civil Procedure, sections 1282–1284.2, relating to the conduct of arbitration proceedings. See also Code of Civil Procedure section 1286.2 concerning an arbitrator's unreasonable refusal to grant a continuance as grounds for *vacatur* of the award.

### **Standard 14. Ex parte communications**

**(a)** An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the

arbitrator outside the presence of all of the parties concerning a pending or impending arbitration, except as permitted by this standard, by agreement of the parties, or by applicable law.

**(b)** An arbitrator may communicate with a party in the absence of other parties about administrative matters, such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings, as long as the arbitrator reasonably believes that the communication will not result in a procedural or tactical advantage for any party. When such a discussion occurs, the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity to respond before making any final determination concerning the matter discussed.

**(c)** An arbitrator may obtain the advice of a disinterested expert on the subject matter of the arbitration if the arbitrator notifies the parties of the person consulted and the substance of the advice and affords the parties a reasonable opportunity to respond.

**Comment to Standard 14**

See also Code of Civil Procedure sections 1282.2(e) regarding the arbitrator's authority to hear a matter when a party fails to appear and 1282.2(g) regarding the procedures that must be followed if an arbitrator intends to base an award on information not obtained at the hearing.

**Standard 15. Confidentiality**

**(a)** An arbitrator must not use or disclose information that he or she

received in confidence by reason of serving as an arbitrator in a case to gain personal advantage. This duty applies from acceptance of appointment and continues after the conclusion of the arbitration.

**(b)** An arbitrator must not inform anyone of the award in advance of the time that the award is given to all parties. This standard does not prohibit an arbitrator from providing all parties with a tentative or draft decision for review or from providing an award to an assistant or to the provider organization that is coordinating, administering, or providing the arbitration services in the case for purposes of copying and distributing the award to all parties.

#### **Standard 16. Compensation**

**(a)** An arbitrator must not charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration.

**(b)** Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees and any special fees for cancellation, research and preparation time, or other purposes.

#### **Standard 17. Marketing**

**(a)** An arbitrator must be truthful and accurate in marketing his or her services and must not make any representation that directly or indirectly

implies favoritism or a specific outcome. An arbitrator must ensure that his or her personal marketing activities and any activities carried out on his or her behalf, including any activities of a provider organization with which the arbitrator is affiliated, comply with this requirement.

**(b)** An arbitrator must not solicit business from a participant in the arbitration while the arbitration is pending.

**Comment to Standard 17**

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

**Drafter's Notes**

Standards 1–17 implement Code of Civil Procedure section 1281.85, which requires the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations pursuant to an arbitration agreement. Among other things, they address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, the acceptance of gifts, the establishment of future professional relationships, ex-parte communication, fees, and marketing.