

## **Model Rules of Professional Conduct**

## **Model Rules of Professional Conduct**

### *Counselor*

### **Rule 2.4 Lawyer Serving As Third-Party Neutral**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer 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 lawyer to assist the parties to resolve the matter.

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

### *Counselor*

### **Rule 2.4 Lawyer Serving As Third-Party Neutral - Comment**

[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 that is either selected by the parties or mandated by a court.

[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 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.

[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 involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[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.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. 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.

**Rule 2.4 Lawyer as Third-Party Neutral (Proposal D2)<sup>1</sup>**

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer 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 a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.
- (c) A lawyer serving as a third-party neutral shall perform such activities in a manner that promotes respect and confidence in the legal profession.<sup>2</sup>
- (d) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards of conduct for compliance with paragraph (c) of this Rule. The standards formulated and adopted by the Board, as from time to time amended by the Board, shall be effective and binding on all lawyers. In formulating such standards, the Board may consider: the Judicial Council Standards for Mediators in Court Connected Mediation Programs; the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration; any statutes or Rules of Court concerning the conduct of a third party neutral; and any other relevant law. To the

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<sup>1</sup> Like Proposal C, Proposal D2 places both the mediation and arbitration standards at the end of the rule, similar to the Standards found in current rules 1-400 and 4-100. However, the drafters do not contemplate that the standards in this rule should create presumptions in the same way as in those other rules. This version also makes the same revisions as found in Version A, i.e., redrafting the rule so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) the rule is not applicable, under new paragraph (e), to securities-related arbitrations.

Unlike Proposal C, which includes the actual language of the mediation and arbitration standards at the end of the rule, Proposal D2 follows the approach of Proposal A by incorporating by reference the adopted standards in the “Standards” section of the rule.

<sup>2</sup> Current rule 4-100 uses Board adopted standards to particularize the general requirement in paragraph (B)(3) that a lawyer maintain complete records of all client trust funds and property. To parallel the structure of rule 4-100, proposed paragraph (c) of Rule 2.4 sets forth a general duty of a lawyer when acting as a third-party neutral.

extent that the Board may determine that a Judicial Council standard or other law establishes an appropriate standard, the Board may adopt that standard by a reference that incorporates it.<sup>3</sup>

- (e) This rule does not apply where a lawyer is serving as a neutral arbitrator in an arbitration conducted pursuant to rules adopted by a securities self-regulatory organization which has been approved by the United States Securities and Exchange Commission.

*Comment*

[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, neutral 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 that is either selected by the parties or mandated by a court.

[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. Whether or not a particular Judicial Council standard provision is adopted by the State Bar pursuant to paragraph (d) and used as a disciplinary standard does not alter a lawyer's obligation to comply with all of the standards when, for example, a lawyer is subject to all of the mediation standards as a result of that lawyer's participation in a court connected mediation program.<sup>4</sup>

[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-

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<sup>3</sup> Proposed paragraph (d) is intended to do two things: (1) authorize the Board to adopt binding standards; and (2) clarify that the Board's action to adopt a standard may be accomplished by incorporating by reference a Judicial Council standard or other provision.

<sup>4</sup> This additional sentence clarifies that Judicial Council standards fully apply to lawyers who are subject to them, even though only selected standards might be adopted by the Board for disciplinary purposes.

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.

[4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. *In re Scott* (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Paragraph (c) states the general duty of a lawyer serving as a third-party neutral. Paragraph (d) authorizes the Board of Governors of the State Bar to adopt specific standards of conduct for compliance with the general duty in paragraph (c). Paragraph (c) and the Board's standards are intended to enhance public protection and promote compliance in the alternative dispute resolution context by setting high standards of professional conduct for lawyers serving as third-party neutrals.<sup>5</sup>

[[5] Paragraph (d) provides that if the Board determines that a Judicial Council standard or other law establishes an appropriate standard, the Board may adopt that standard by a reference that incorporates it. If a standard adopted by the Board through incorporation by reference subsequently is repealed by the governing body that first

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<sup>5</sup> Proposed Comment [4] offers guidance to lawyers who might not understand or appreciate the role of the State Bar in establishing normative standards for an activity that is not regarded as the unauthorized practice of law when performed by a non-lawyer. While the *Scott* case might be read superficially as a moral turpitude case, a careful reading will teach lawyers that the Supreme Court can resort to standards of conduct not promulgated by the State Bar or the Supreme Court in finding violations that warrant State Bar discipline. In the *Scott* case, the Supreme Court said that the lawyer's actions "were in clear contravention" of Canon 3C(1)(a) of the Code of Judicial Conduct and "other canons of ethics." At the time of the *Scott* case, the judicial canons were not yet formally adopted by the Supreme Court as disciplinary rules. Lawyers who read the *Scott* case will find that it quotes *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 890, 538 P.2d 229, 123 Cal.Rptr. 101, which in turn quotes *People v. Turner* (1850) 1 Cal. 143, 150, and in all the Supreme Court recognizes its "inherent power [to] discipline an attorney for conduct 'either in or out of (his) profession' which shows him to be unfit to practice." Thus, the State Bar's role in adopting standards is twofold: (1) the Rule 2.4 standards help the Supreme Court define when a lawyer/third-party neutral engages in conduct that demonstrates the requisite lack of fitness to practice; and (2) like the trust account record keeping standards, the Rule 2.4 standards promote lawyer compliance by fleshing-out an otherwise broadly stated duty.

promulgated it, then that Board standard shall be deemed to be repealed, as of the effective date of the repeal of the referenced standard. If a standard adopted by the Board through incorporation by reference subsequently is amended by the governing body that first promulgated it, or if a new standard is added, the Board should act promptly to consider whether to adopt the amended or new standard.]<sup>6</sup>

[6] 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. 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.)

[7] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct and the State Bar Act.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

## **STANDARDS**

**Pursuant to Rule 2.4(d), the Board of Governors of the State Bar adopted the following standards of conduct for compliance with Rule 2.4(c), effective \_\_\_\_\_.**

- (1) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 3.855 [impartiality, conflicts of interest, disclosure, and withdrawal], 3.856(b) and (d) [truthful representation of background; assessment of skills; withdrawal], and 3.858 [marketing] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.

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<sup>6</sup> Comment [5] suggests how to deal with repeals, amendments and additions to the Judicial Council and other standards that are incorporated by reference. This was a concern that was raised during the 1/26 & 1/27/07 meeting. The comment is bracketed because the drafters are seeking specific input from the Commission on whether this issue should be addressed in the rule.

**RRC – Rule 2.4 [1-720]**  
**Draft 5D.2 (3/6/2007) – CLEAN**  
**March 16, 2007 Meeting – Agenda Item III.D.**

- (2) A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 3.854 [confidentiality] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.
- (3) A lawyer serving as a third-party neutral in any mediation or any settlement conference conducted as part of a court-connected ADR program shall also comply with Rule 3.859 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.
- (4) A lawyer 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], 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], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.
- (5) A lawyer serving as a neutral arbitrator in a court-connected ADR program shall also comply with standard 16 [compensation] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

**McCurdy, Lauren**

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Monday, February 26, 2007 7:25 AM  
**To:** McCurdy, Lauren; Difuntorum, Randall  
**Cc:** Ignazio J. Ruvolo; Kurt Melchior; Kevin Mohr  
**Subject:** RRC - 1-720 [2.4] - Agenda Item III.D. - Rule Drafts 5A, 5B & 5C (Alternative Versions)

Greetings Lauren:

I've attached the following that Nace and I worked on putting together, in Word and PDF:

1. Redline of Draft 5A, comparing it to the public comment draft and incorporating revisions suggested at the January 2007 meeting.
2. Redline of Draft 5B, comparing it to the public comment draft and incorporating revisions suggested at the January 2007 meeting.
3. Redline of Draft 5C, comparing it to the public comment draft and incorporating revisions suggested at the January 2007 meeting.

**Some comments:**

1. At the January 2007 meeting, the drafters were asked to prepare different versions of the rule:
  - (1) With just paragraphs (a) and (b) [i.e., MR 2.4]
  - (2) With the mediation and arbitration standards in a comment.
  - (3) With the mediation and arbitration standards in the rule.
  - (4) With the same incorporation by reference approach we have taken, but making other revisions approved at the meeting.
  - (5) With the mediation and arbitration standards as Standards similar to current rules 1-400 and 4-100.

See 1/26 & 1/27/07 KEM Meeting Notes, III.I, at ¶. 27.g.

2. We prepared the following rule versions for consideration by the Commission:
  - a. Version A of retains the same basic approach as in the public comment draft, i.e., incorporation of the arbitration and mediation standards by reference, but it has been revised so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) under new paragraph (g) that the arbitration standard on compensation applies only to court-connected ADR; and (3) the rule is not applicable, under new paragraph (h), to securities-related arbitrations. See (4), above.
  - b. Version B incorporates both the mediation standards and the arbitration standards into the body of the rule itself. It also makes the same revisions as found in Version A, i.e.,

redrafting the rule so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) under new paragraph (g) that the arbitration standard on compensation applies only to court-connected ADR; and (3) the rule is not applicable, under new paragraph (h), to securities-related arbitrations. See (3), above.

c. Version C places both the mediation and arbitration standards at the end of the rule, similar to the Standards found in current rules 1-400 and 4-100. However, the drafters do not contemplate that the standards in this rule should create presumptions in the same way as in those other rules. This version also makes the same revisions as found in Version A, i.e., redrafting the rule so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) under new paragraph (g) that the arbitration standard on compensation applies only to court-connected ADR; and (3) the rule is not applicable, under new paragraph (h), to securities-related arbitrations. See (5).

3. To cut down on the amount of paper, we are attaching only the redline versions.
4. We did not prepare a rule similar to rule 2.4. See (1), above. That could be done easily enough. We are seeking some guidance from the Commission on which version of the attached, if any, they favor.
5. We did not prepare a rule incorporating the mediation and arbitration standards into the comment as requested in (2), above. We felt that the "look" of such a rule would be nearly identical to the approach of including the mediation and arbitration standards as Standards. And we like trees.
6. Of the two versions attached that actually include the mediation and arbitration standards, our preference is Version C, adding the arbitration standards as Standards. Version B is very difficult to read -- one could easily get lost in either the mediation or arbitration standards and overlook paragraphs (d), (e), (g) and (h).
7. If the Commission were of a mind to include the arbitration and mediation standards in the rule itself, there is another possibility we discussed: Two rules, one addressing mediators, the other arbitrators. We did not pursue this, in part because it would diverge too far from the Model Rules. On the other hand, such a divergence may be justified if California has indeed advanced far beyond other jurisdictions in its provision and regulation of ADR services as we were advised at the January 2007 meeting.

As usual, if you have any questions, please ask. Thanks,

Kevin

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2/28/2007

**Rule 2.4 Lawyer as Third-Party Neutral (Proposal A)<sup>1</sup>**

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer 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 a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.
- (c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules ~~1620.53.855~~ [impartiality, conflicts of interest, disclosure, and withdrawal], ~~3.8561620.6~~(b) and (d) [truthful representation of background; assessment of skills; withdrawal], ~~and 3.8581620.8~~ [marketing]; ~~and 1620.9 [compensation and gifts]~~ of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.
- (d) A lawyer serving as a third-party neutral in a mediation shall also comply with Rule ~~3.8541620.4~~ [confidentiality] of the Judicial Council Standards for Mediators in Court Connected Mediation Programsthose Standards.
- (e) A lawyer serving as a third-party neutral in any mediation or any settlement conference conducted as part of a court-connected ADR program shall also comply with Rule 3.859 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.
- ~~(d)~~(f) A lawyer 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

<sup>1</sup> This version A retains the same basic approach as in the public comment draft, i.e., incorporation of the arbitration and mediation standards by reference, but it has been revised so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) under new paragraph (g) that the arbitration standard on compensation applies only to court-connected ADR; and (3) the rule is not applicable, under new paragraph (h), to securities-related arbitrations.

be disclosed], 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.

(g) A lawyer serving as a neutral arbitrator in a court-connected ADR program shall also comply with standard 16 [compensation] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

(h) This rule does not apply where a lawyer is serving as a neutral arbitrator in an arbitration conducted pursuant to rules adopted by a securities self-regulatory organization which has been approved by the United States Securities and Exchange Commission.

### *Comment*

[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, neutral 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 that is either selected by the parties or mandated by a court.

[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. See Comment [6] and Comment [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.

[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. 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.

[6] Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).

[7] Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

**Rule 2.4 Lawyer as Third-Party Neutral (Proposal B)<sup>1</sup>**

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer 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 a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.
- (c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with the following Judicial Council Rules of Conduct for Mediators in Court Connected Mediation Programs For Civil Cases: Rules 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.

**A. Impartiality, Conflicts of Interest, Disclosure, and Withdrawal [3.855]**

- (1) A mediator must maintain impartiality toward all participants in the mediation process at all times.
- (2) A mediator must disclose to the parties the existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.
- (3) A mediator’s duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as

<sup>1</sup> Version B incorporates both the mediation standards and the arbitration standards into the body of the rule itself. It also makes the same revisions as found in Version A, i.e., redrafting the rule so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) under new paragraph (g) that the arbitration standard on compensation applies only to court-connected ADR; and (3) the rule is not applicable, under new paragraph (h), to securities-related arbitrations.

practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by any applicable court rules or statutes.

- (4) Except as provided in (7) , if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator’s ability to conduct the mediation impartially, the mediator may proceed.
- (5) If, after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator’s ability to conduct the mediation impartially, the mediator must address the question or concern with the participants. Except as provided in (7), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.
- (6) In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant’s question or concern regarding the mediator’s ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or any local court rule or program guideline.
- (7) Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:
- (a) The mediator cannot maintain impartiality toward all participants in the mediation process; or
- (b) Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.

**B. Competence [3.856(b) and (d)]**

- (1) A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. Upon a request by any

party, a mediator must provide truthful information regarding his or her experience, training, and education.

- (2) A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

**C. Marketing [3.858]**

- (1) A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.
- (2) A mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.
- (3) In marketing his or her mediation services, a mediator must not:
- (a) Promise or guarantee results; or
  - (b) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.
- (4) A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

(d) A lawyer serving as a third-party neutral in a mediation shall also comply with ~~Rule 1620.4 [confidentiality]~~ of those Standards: the following:

**A. Confidentiality [3.854]**

- (1) A mediator must, at all times, comply with the applicable law concerning confidentiality.
- (2) At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(3) A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

(e) A lawyer serving as a third-party neutral in any mediation or any settlement conference conducted as part of a court-connected ADR program shall also comply with the following:

**A. Compensation and Gifts [3.859]**

(1) A mediator must comply with any applicable requirements concerning compensation established by statute or the court.

(2) Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation.

(3) The amount or nature of a mediator's fee must not be made contingent on the outcome of the mediation.

(4) A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning the mediator's impartiality.

~~(d)~~(f) A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the following standards of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration: 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], 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.

**A. 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.

**B. 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.

**C. 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 relationship

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

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

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

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

(8) 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.

**D. 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.

**E. 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; and

(2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration.

**(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.

F. **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.

**G. Standard 11 [duty to refuse gift, request, 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.

**H. 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.

**I. 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.

**J. 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.

**K. 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.

(g) A lawyer serving as a neutral arbitrator in a court-connected ADR program shall also comply with the following standard of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration:

**A. 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.

(h) This rule does not apply where a lawyer is serving as a neutral arbitrator in an arbitration conducted pursuant to rules adopted by a securities self-regulatory organization which has been approved by the United States Securities and Exchange Commission.

*Comment*

[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, neutral 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 that is either selected by the parties or mandated by a court.

[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. See Comment [6] and Comment [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.

[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. 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.

[6] Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).

[7] Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

**Rule 2.4 Lawyer as Third-Party Neutral (Proposal C)<sup>1</sup>**

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer 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 a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.
- (c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], and 1620.8 [marketing]; ~~and 1620.9 [compensation and gifts]~~ of the Judicial Council Standards for Mediators in Court Connected Mediation Programs, as set out below.
- (d) A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 1620.4 [confidentiality] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs, as set out below~~those Standards~~.
- (e) A lawyer serving as a third-party neutral in any mediation or any settlement conference conducted as part of a court-connected ADR program shall also comply with Rule 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs, as set out below.
- ~~(d)~~(f) A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7

<sup>1</sup> Proposal C places both the mediation and arbitration standards at the end of the rule, similar to the Standards found in current rules 1-400 and 4-100. However, the drafters do not contemplate that the standards in this rule should create presumptions in the same way as in those other rules. This version also makes the same revisions as found in Version A, i.e., redrafting the rule so that it provides (1) only certain mediation standards apply to all mediations and settlements, some apply only to mediations, and others apply only to court-connected mediations or settlements; (2) under new paragraph (g) that the arbitration standard on compensation applies only to court-connected ADR; and (3) the rule is not applicable, under new paragraph (h), to securities-related arbitrations.

[disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 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, as set out below.

- (g) A lawyer serving as a neutral arbitrator in a court-connected ADR program shall also comply with standard 16 [compensation] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration, as set out below.
- (h) This rule does not apply where a lawyer is serving as a neutral arbitrator in an arbitration conducted pursuant to rules adopted by a securities self-regulatory organization which has been approved by the United States Securities and Exchange Commission.

### *Comment*

[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, neutral 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 that is either selected by the parties or mandated by a court.

[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. See Comment [6] and Comment [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.

[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. 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.

[6] Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).

[7] Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

## **STANDARDS**

### **1. Standards Applicable To A Lawyer Serving As A Third-Party Neutral In Any Mediation Or Settlement Conference As Provided In Paragraph (c):**

#### **A. Impartiality, Conflicts of Interest, Disclosure, and Withdrawal [3.855]**

**Draft 5C (2/26/2007) – COMPARED TO Public Comment Draft**

- (1) A mediator must maintain impartiality toward all participants in the mediation process at all times.
- (2) A mediator must disclose to the parties the existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.
- (3) A mediator’s duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by any applicable court rules or statutes.
- (4) Except as provided in (7) , if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator’s ability to conduct the mediation impartially, the mediator may proceed.
- (5) If, after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator’s ability to conduct the mediation impartially, the mediator must address the question or concern with the participants. Except as provided in (7), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.
- (6) In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant’s question or concern regarding the mediator’s ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or any local court rule or program guideline.
- (7) Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:

- (a) The mediator cannot maintain impartiality toward all participants in the mediation process; or
- (b) Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.

**B. Competence [3.856(b) and (d)]**

- (1) A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. Upon a request by any party, a mediator must provide truthful information regarding his or her experience, training, and education.
- (2) A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

**C. Marketing [3.858]**

- (1) A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.
- (2) A mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.
- (3) In marketing his or her mediation services, a mediator must not:
  - (a) Promise or guarantee results; or
  - (b) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.
- (4) A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

**2. Standards Applicable To A Lawyer Serving As A Third-Party Neutral In A Mediation As Provided In Paragraph (d):**

**A. Confidentiality [3.854]**

- (1) A mediator must, at all times, comply with the applicable law concerning confidentiality.
- (2) At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.
- (3) A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

**3. Standards Applicable To A Lawyer Serving As A Third-Party Neutral In Any Mediation Or Any Settlement Conference Conducted As Part Of A Court-Connected ADR Program As Provided In Paragraph (e):**

**A. Compensation and Gifts [3.859]**

- (1) A mediator must comply with any applicable requirements concerning compensation established by statute or the court.
- (2) Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation.
- (3) The amount or nature of a mediator's fee must not be made contingent on the outcome of the mediation.
- (4) A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning the mediator's impartiality.

**4. Standards Applicable To A Lawyer Serving As A Neutral Arbitrator Pursuant To An Arbitration Agreement As Provided In Paragraph (f):**

**A. 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.

**B. 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.

**C. 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 relationship

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

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

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

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

(8) 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.

**D. 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.

**E. 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; and
- (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration.

**(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.

**F. 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.

**G. Standard 11 [duty to refuse gift, request, 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.

**H. 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.

**I. 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.

**J. 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.

**K. 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.

**5. Standards Applicable To A Lawyer Serving As A Neutral Arbitrator As Provided In Paragraph (d):**

**A. 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.