New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards - Ethics Standards for Neutral Arbitrators in Contractual Arbitration, A

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A New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards

Ethics Standards for Neutral Arbitrators in Contractual Arbitration

I. INTRODUCTION

In deciding to arbitrate, parties supposedly make the conscious choice to waive their right to public trial and due process of law in hopes of gaining a more efficient, less expensive dispute resolution. Parties make this waiver without the expectation that they are also waiving their rights to fairness or an impartial fact finder. However, it is not uncommon for the losing party to sue to have the arbitration award vacated based on claims that an arbitrator failed to disclose relationships or interests pertaining to the arbitration or parties therein. Generally, courts have been reluctant to vacate arbitration awards based on arbitrator bias.

The California legislature and judicial council have taken steps to stop arbitrator bias before it starts. The state's legislature and judicial council directed their light to shine upon potential partialities proposed neutral arbitrators may have in arbitration proceedings. In its "Ethics Standards for Neutral Arbitrators in Contractual Arbitration," which became effective July 1, 2002, the California Judicial Council ("CJC") propounded new disclosure rules for neutral arbitrators before it starts. The state's legislature and judicial council directed their light to shine upon potential partialities proposed neutral arbitrators may have in arbitration proceedings.

3. "[T]he mood is one of reluctance to set aside arbitration awards for failure of the arbitrator to disclose a relationship with a party." Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983).
4. The legislature enacted legislation requiring the Judicial Council to create and enact ethics standards. Cal. Code of Civ. P. § 1281.5 states:
   Beginning July 1, 2002, a person serving as a neutral arbitrator pursuant to arbitration agreement shall comply with the ethics standards for arbitrators adopted by the Judicial Council pursuant to this section. The Judicial Council shall adopt ethical standards for all neutral arbitrators effective July 1, 2002. These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter. The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualification, acceptance of gifts, and establishment of future professional relationships.
5. See supra n. 1.
7. The California Judicial Council is given its authority in the California state constitution. The CJC is the policymaking body of the California courts. Calif. Const. Art. VI, § 6. Also, the California court system is the largest state system in the country <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR62-02.HTM> (accessed Mar. 6, 2003). California Supreme Court Chief Justice George chairs the CJC. Folberg stated:
   [George] "appointed a 19 person 'Blue Ribbon Panel of Experts on Arbitration Ethics' to assist the Council in its task. The panel consisted of professional arbitrators, judges, consumer
that require disclosure in fourteen main matters. The matters range from disclosure of family and financial relationships with a party to disclosure of the proposed arbitrator's service as a dispute resolution neutral in a prior case involving one of the parties. Jay Folberg, chair of the panel that made recommendations to the Judicial Council, stated, "[T]he political momentum that resulted in the mandate to the Judicial Council was the result of public concern about the proliferation of predispute arbitration clauses in consumer, health care, and employment contracts."

On December 13, 2002, the CJC approved its first set of changes to the ethics standards. Many of the amendments were made to the disclosure requirements. On December 16, 2002, the CJC issued a press release stating, "The changes are designed to improve the clarity of the standards and to minimize the burden associated with compliance while maintaining the appropriate ethical obligations." Most of the main body of this Note was written prior to the CJC changes to the standards. All of the commentary from commentators was in response to the original standards, which became effective in July 2002. Because the changes to the standards were mainly for clarity and not content, the commentary is still relevant. This Note will quote both the original CJC ethics standards and the changed standards.

The new rules, which give the Judicial Council greater oversight in arbitration proceedings, have already received an unwelcome greeting from some arbitrators and members of the securities industries. Additionally, the New York Stock Exchange and the National Association for Securities Dealers filed suit against the CJC in federal court seeking a declaratory judgment that they are exempt from the ethics standards. Yet, many consumers and critics of mandatory arbitrations are welcoming the rules. In fact, it is likely that other states will begin to welcome disclosure standards similar to those California has adopted. Complaining consumers and employees forced into arbitration are likely to lead other state
legislatures to review the arbitration process. States will probably feel that the need for unbiased arbitration outweighs the burdens the disclosure requirements place on arbitrators.

Although the current CJC ethics rules consist of seventeen standards and several subsections "intended to guide the conduct of arbitrators," this Note will focus only on the disclosure requirements. The Note will also compare the CJC standards with disclosure rules that provider organizations have previously enacted.

II. LEGAL HISTORY AND BACKGROUND

Although the option to arbitrate disputes has been around since the nation's founding, courts generally refused to specifically enforce agreements to arbitrate. With the passage of the Federal Arbitration Act ("FAA") of 1925, Congress legislatively overturned courts' refusals to enforce the agreements. The FAA applies to arbitrations where the parties agree to arbitrate their disputes in a contract. Professor Jean Stemlight stated: "When Congress passed the FAA in 1925, it intended only to require federal courts to accept arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power."

In the 1970s, overflowing court dockets prompted courts to allow arbitrations to replace trials in order to lighten court loads. Over the last two decades, corporations have included mandatory binding arbitration clauses in agreements

17. CJC Stand. 1(a). The standards are: 1. Purpose, intent and construction; 2. Definitions; 3. Application and effective date; 4. Duration of duty; 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, bequest or favor; 12. Duties and limitations regarding future professional relationships or employment; 13. Conduct of proceeding; 14. Ex parte communication; 15. Confidentiality; 16. Compensation; 17. Marketing. CJC Stand. 1-17. CJC Stand. 8 and CJC Stand. 9 were added with the changes the CJC approved on Dec. 13, 2002. However, major portions of the content of the added standards were mostly taken from Orig. CJC Stand. 7(b)(12) and Orig. CJC Stand. 7(d) and (b)(5). None of the original standards were deleted. See Orig. CJC Stand. 1-15.


21. Riskin states, "At one time, United States courts would not enforce such an agreement until the arbitrator had issued the award. This meant parties could withdraw from a proceeding at any time prior to the award if they thought they were going to lose. Arbitration proponents secured the passage of federal and state statutes changing the rules." Riskin, supra n. 18, at 218.

22. 9 U.S.C. §§1-16.


24. Reynolds Holding, Private Justice: Millions are Losing their Legal Rights: Supreme Court forces disputes from court to arbitration - a system with no laws, San Francisco Chron. (Oct. 7, 2001) (one article in a newspaper series detailing specific conflicts of interests between parties and arbitrators in mandatory arbitrations that have caused some consumers to distrust arbitration and highlighting the views of opponents to mandatory arbitration). Reuben states, "Initially reflecting Chief Justice Warren Burger's concerns about the case load of the federal courts and the quality of the justice they dispensed, the U.S. Supreme Court issued a series of opinions over the next decade and one-half that, in sum, took an expansive and forceful view of the FAA as a reflection of the national policy favoring arbitration." Reuben, supra n. 2, at 978.
they make with the public and other corporations. In the 1980s and 1990s, companies began to enter arbitration agreements with consumers and employees, whereas before arbitration was mostly a phenomenon of business-to-business contracts. This is important because previous arbitration agreements were mostly voluntary and between two businesses. Professor Stemlight states, "Despite consumers' and other little guys' protests that they were unaware they were signing away their day in court, courts are upholding the clauses on the ground that Congress has declared arbitration the preferred method of dispute resolution." Additionally, the Supreme Court has spent much of the last two decades enforcing such clauses.


Although arbitration has become widespread, the first and only case in which the Supreme Court addressed arbitrator bias is Commonwealth Coatings Corp. v. Continental Cas. Co. The case arises under the FAA. In this case, the "neutral" arbitrator in a tripartite arbitration over a contracting dispute did not disclose that the prime contractor, who the petitioner was suing, was one of his regular customers. Although the prime contractor had not patronized the "neutral" arbitrator for about a year preceding the arbitration proceeding, the contractor and arbitrator had a "repeated and significant" relationship for four of five years. The relationship included projects involved in the arbitration proceeding. When

27. Id.
28. Id. at 638-39.
29. See Circuit City Stores Inc. v. Adams, 532 U.S. 105 (2001) (holding that the FAA applies to all employees with interstate commerce workers being the only category exempt); Moses H. Cone Meml. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 941 (1983) (stating that issues concerning arbitration should be decided in favor of arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that an age discrimination case must go to arbitration, the Court strayed from its previous view that civil rights issues were too important for arbitration).
32. Commonwealth., 393 U.S. at 145.
33. FAA §10 addresses grounds for vacating an arbitration award. In relevant part, it states:
   (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
   (1) where the award was procured by corruption in the arbitrators, or undue means;
   (2) where there was evident partiality or corruption in the arbitrators, or either of them
   (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
   (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
34. Commonwealth., 393 U.S. at 146.
35. Id.
36. Id.
37. Id.
the arbitration award favored the prime contractor, the petitioner challenged the award in court. 38 The petitioner did not charge that the arbitrator acted fraudulently or with bias. 39 The only charge was the prime contractor's and the arbitrator's failure to disclose their business and financial relationship. 40 The trial and appellate courts refused to set aside the award. 41 However, the Supreme Court reversed the holding in a plurality 42 decision. 43

In a four-judge plurality opinion written by Justice Black, the Court vacated the arbitration award because of the undisclosed business relationship between the neutral arbitrator and the prime contractor. 44 The Court compared the arbitration at issue to a court proceeding. 45 It stated that a court's judgment would be subject to challenge if a litigant showed that the trier of fact had a relationship similar to that between the arbitrator and party in Commonwealth which went undisclosed. 46 The Court also compared arbitrators to federal judges. 47 It quoted a judicial canon, which stated that a judge should avoid actions that might "reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct." 48 It used this canon in conjunction with Rule 18 of the American Arbitration Association's rules, which requested arbitrators to disclose "circumstances likely to create a presumption of bias," 49 to find that "any tribunal permitted by law to try cases and controversies be unbiased but also must avoid even the appearance of bias." 50 The Court added: we should "be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." 51 The Court found that the undisclosed relationship constituted "evident partiality" in violation FAA Section 10. 52

Justice White, joined by Justice Marshall, concurred in the plurality's decision, but made it clear that arbitrators do not have to be held to the same "standards of judicial decorum of Article III judges," or any other judges. 53 The justices added that a business relationship between a party and an arbitrator does not automatically disqualify the arbitrator if both parties to the arbitration are informed of the relationship before the proceeding, or if the parties are unaware but the relationship is "trivial." 54 The concurring justices further stated that it will

38. Id.
39. Id. at 147.
40. Id.
41. Id. at 146.
43. Id. at 150.
44. Id. at 147.
45. Id. at 148.
46. Id.
47. Id.
48. Id. at 150.
49. Id. at 149.
50. Id. at 150.
51. Id. at 149.
52. Id. at 147.
53. Id. at 150.
54. Id.
not be difficult for courts to distinguish between relationships that are significant enough to vacate an award and those that are not if arbitrators "err on the side of disclosure."\textsuperscript{55}

In \textit{Ceriale v. AMCO Ins. Co.},\textsuperscript{56} the California Court of Appeals stated that California courts have adopted the \textit{Commonwealth} view that arbitrators are required to "disclose to the parties any dealings that might create an impression of possible bias."\textsuperscript{57} It also stated that it is unnecessary to vacate every arbitration award in which the arbitrator and a party's lawyer had some contact.\textsuperscript{58} The court said the issue is "not whether any of these people might actually be biased; the question is whether 'a person aware of the facts might reasonably entertain a doubt that the [arbitrator] would be able to be impartial' given the circumstances of the case."\textsuperscript{59}

\textbf{B. Evident Partiality}

The \textit{Commonwealth} plurality opinion emphasized that FAA §10 authorizes an award to be vacated "where it was 'procured by corruption, fraud, or undue means' or (w)here there was evident partiality"\textsuperscript{60} . . . in the arbitrators."\textsuperscript{61} The Court used this language to infer that Congress wanted impartial arbitrations.\textsuperscript{62} Many state and federal courts have decided cases challenging arbitration awards on the existence or nonexistence of evident partiality.\textsuperscript{63} The party challenging the award has the burden to prove that a reasonable person would conclude that the arbitrator was partial to the opposing party.\textsuperscript{64} One commentator states: "To

\textsuperscript{55} \textit{Commonwealth.}, 393 U.S. at 152. In the dissent, Justice Fortas wrote, "I agree that failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias. But where there is no suggestion that the nondisclosure was calculated, and where the complaining party disclaims any imputation of partiality, bias, or misconduct, the presumption clearly is overcome." \textit{Id.} at 154.

\textsuperscript{56} 55 Cal. Rptr. 685 (1996).

\textsuperscript{57} \textit{Id.} at 688 (quoting \textit{Commonwealth.}, 393 U.S. at 149).

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} at 689 (quoting Betz v. Pankow, 39 Cal. Rptr. 2d 107, 110 n. 3 (1995)).

\textsuperscript{60} "Read literally, [FAA] section 10(b) would require proof of actual bias (evident partiality)." \textit{Merit Ins. Co. v. Leatherby Ins. Co.}, 714 F.2d 673, 681 (7th Cir. 1983). Additionally, evident partiality consists of facts that "reasonably create an impression of partiality." Appearance of partiality is insufficient, and it does not matter whether the partiality is disclosed or undisclosed. Thomas H. Oehmke, \textit{Commercial Arbitration}, vol. 3, § 145:04 (Rev. ed., West 2002) [hereinafter Oehmke, \textit{Commercial Arbitration}].

\textsuperscript{61} \textit{Commonwealth.}, 393 U.S. at 147 (quoting 9 U.S.C. § 10).

\textsuperscript{62} \textit{Id.} at 148.

\textsuperscript{63} \textit{See Goldfinger v. Lisker}, 500 N.E.2d 857 (N.Y. 1986) (finding evident partiality where an arbitrator communicated with a party to help the party resolve doubts about the credibility of his claim); \textit{Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.}, 146 F.3d 1309 (11th Cir. 1998) (holding that evident partiality did not exist where there was no actual conflict of interest and the arbitrator was unaware of information that might cause a reasonable person to believe there was a conflict of interest); \textit{Mantle v. Upper Deck Co.}, 956 F. Supp. 719 (N.D. Tex. 1997) (refusing to vacate arbitration award due to arbitrator's failure to disqualify himself where evident partiality did not exist).

\textsuperscript{64} Where "actual bias might be present yet impossible to prove . . . a man of average probity might reasonably be suspected of partiality, maybe the language of [FAA] section 10(b) can be stretched to require disqualification. But the circumstances must be powerfully suggestive of bias . . ." \textit{Merit}, 714 F.2d at 681.

\textsuperscript{65} Oehmke, \textit{Commercial Arbitration}, supra n. 60, at § 145:04.
vacate an arbitration award on the theory that undisclosed facts evidence an arbitrator's partiality, the challenging party first must establish that these undisclosed facts create a reasonable impression of partiality, and then must show that the arbitrator's alleged partiality is direct, definite, and capable of demonstration, rather than remote, uncertain, and speculative.\footnote{Id.} In ANR Coal Co. v. Cogentrix of North Carolina, Inc.,\footnote{173 F.3d 493 (4th Cir. 1999).} the United States Court of Appeals for the Fourth Circuit stated that the courts must examine the following four factors in determining whether there is evident partiality:

1. the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding;
2. the directness of the relationship between the arbitrator and the party he is alleged to favor;
3. the connection of that relationship to the arbitration;
4. the proximity in time between the relationship and the arbitration proceeding.\footnote{Id. at 500.}

Evident partiality is examined on a case-by-case basis, and the burden on the challenging party is "onerous."\footnote{Oehmke, Commercial Arbitration, supra n. 60, at § 145:04 (citing Mantle, 956 F. Supp. at 729).} Because evident partiality is a high standard, Judge Posner has stated that the grounds for disqualifying an arbitrator under the FAA are narrower than both the American Arbitration Association's Code of Ethics for Arbitrators\footnote{The AAA and the ABA prepared the Code of Ethics for Arbitrators in Commercial Disputes in 1977 to help maintain high standards and confidence in the arbitration process. See AAA & ABA, The Code of Ethics for Arbitrators in Commercial Disputes <http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPlsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\code.html> (accessed Mar. 1, 2003).} and the disqualification standards to which judges are held.\footnote{Id. at 1062.}

C. Arbitrators vs. Judges

In addition to discussing evident partiality, Justice Black cited a judicial canon on impartiality to express his point that arbitrators are to be unbiased.\footnote{Merit, 714 F.2d at 681.} However, the Commonwealth concurring opinion was explicit in distinguishing between judges and arbitrators.\footnote{Id. at 150.} In Merit, Judge Posner stated, "The ethical obligations of arbitrators can be understood only by reference to the fundamental differences between adjudication by arbitrators and adjudication by judges and
The differences exist although "arbitrators are commonly referred to as private judges." Two significant differences between arbitrators and judges are that parties to arbitration select arbitrators, and arbitrators are generally chosen because of their expertise in the subject matter of the arbitration. Judge Posner emphasized these points, stating:

Courts are coercive, not voluntary agencies, and the American people's traditional fear of government oppression has resulted in a judicial system in which impartiality is prized above expertise. Thus, people who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter.

Judge Posner added that parties who choose to arbitrate accept a "tradeoff between impartiality and expertise." In fact, arbitrators are not required to be lawyers or judges or have any legal training. However, it is because of these differences that Justice Black stated, "we should, if anything, be even more scrupulous to safeguard impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."

D. Arbitration vs. Litigation

The differences between judges and arbitrators coincide with the differences between litigation and arbitration. In choosing arbitration over trial, parties generally waive their rights to be tried according to the requirements of the rules of evidence and civil procedure. Parties also waive their right to appeal because most arbitration awards are final. Generally, arbitration's strength is that it is an informal process. However, this strength may also be its weakness. Some concerns over arbitration arise as to "the impartiality of the neutral, equality of treatment of parties, the ability of the parties to participate in a meaningful way, the potential for arbitration to exacerbate power imbalances, and the transparency and rationality of the process itself." Because "minimal constitutional
procedural safeguards" are absent in arbitration and other forms of alternative dispute resolution, arbitration has not yet become a "safe" environment for binding dispute resolution . . . .85

E. Concerns over Arbitration

Despite potential concerns regarding mandatory arbitration, courts, including the Supreme Court,86 routinely enforce arbitration awards.87 In Moses H. Cone Meml. Hosp v. Mercury Constr. Corp.,88 the Court discusses enforcing arbitration agreements. It held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."89 Additionally, the Court stated, "A further--but less important--reason not to vacate an arbitration award is that the entire process must be started anew, which is often not the case with courts."90 Court reluctance to vacate arbitration awards may be due to questions about the challenging party's motives.91 The concern is that "a challenge to an arbitrator's independence or impartiality can be no more than a delaying tactic or an improper attempt to influence the composition of the arbitral tribunal or, later in the process, a cynical effort to evade the finality of an unfavorable award."92

Despite courts' reasons for upholding awards, enforcement of arbitration awards has failed to comfort mandatory arbitration opponents and consumers who battle against corporations in arbitration.93 One commentator stated, "ADR has not yet earned its legitimacy as a fair and impartial means of dispute resolution, either within the bar or with the public at large."94 Several commentators have found that "voluntary use" of alternative dispute resolution is low and fails to reach its goal of decreased expenses.95 Law professors, lawyers, and judges have expressed discomfort with mandatory arbitration and court reluctance to vacate awards. Paul Carrington, a professor at Duke University School of Law, has expressed belief that the Supreme Court "rewrote the statute [FAA] as a service to corporations that don't like jury trials."96 Additionally, Montana Supreme Court Justice Terry Trieweiler stated that court enforcement of arbitration awards demonstrates "an all too frequent preoccupation on the part of federal judges with their own caseloads and a total lack of consideration for the rights of

85. Id. at 984.
86. In enforcing arbitration awards, the Supreme Court has comforted itself in "its presumption that arbitration represents only a change in forum, not a change in substantive rights of the parties." Reuben, supra n. 2, at 1070 (citing Gilmer, 500 U.S. at 26).
87. See infra n. 90 (giving one reason that courts may choose to enforce arbitration awards).
89. Id. at 24-25.
90. Huber, supra n. 75, at 922.
91. Id.
93. See Holding, supra n. 24. (citing a San Francisco Chronicle article, which discusses some commentators opposition to mandatory arbitration).
94. Reuben, supra n. 2, at 983-84.
95. Id. at 981 (citing Dr. Deborah Hensler, Address at the Stanford Law School, The Mysteries of ADR (Stanford Center on Conflict and Negotiation, Feb. 11, 1997)).
96. Holding, supra n. 24. See also Sternlight, supra n. 23, at 644-74 (discussing reasons the Supreme Court began enforcing mandatory arbitration agreements and awards).
individuals." Generally, the concern is over mandatory arbitration in the consumer and employment contexts.98

There is also some concern that parties, known as repeat players, who have participated in more than one arbitration proceeding will be favored over parties, known as "one shot" players, who participate in arbitration for the first, and sometimes only, time.99 Repeat players have several advantages including:

[T]he benefit of experience for purposes of changing how to structure the next transaction, and the ability to develop expertise, cultivate informal continuing relationships with institutional incumbents, develop a reputation and credibility with the neutral, influence rules through lobbying and other uses of resources, play for precedent and favorable future rules, and absorb both actual and symbolic defeats.100

Where repeat players are advantaged, "one shot" players are disadvantaged. "One shot" players go into arbitration proceedings:

Having more at stake in a given dispute, being more interested in immediate rather than long-term gain, being more risk adverse, having less interest in precedent and favorable rules, being unable to form continuing relationships with courts or institutional representatives, being unable to use experience to structure similar transactions, and having less reliable access to special advocates.101

F. California Legislature Takes on Arbitration

In 2001, the California legislature passed and Gov. Gray Davis signed Senate Bill 475 requiring the California Judicial Council to create and enact ethics standards for neutral arbitrators.102 The bill was in response to concern that Gov. Davis, California Supreme Court Chief Justice Ronald M. George, and state

97. Id. Trieweiler also stated, "[m]andatory arbitration allows corporations to undermine the whole system by which we hold them accountable . . . . Everyday it becomes more pervasive, and more oppressive." Id. Further, the final article in San Francisco Chronicle's October 2001 series about mandatory arbitration emphasizes dissatisfaction with bench decisions enforcing arbitration awards. The article examines whether judges' interests in being hired as arbitrators influences their rulings while on the bench. Commentators hold conflicting views. Former Los Angeles Superior Court judge and current arbitrator Eli Chemow stated that judges who seek arbitration appointments are "more polite and respectful" because they know that impolite or disrespectful behavior will keep them from gaining arbitration business. However, Judge Anthony Kline, a California state appellate court judge, stated that lawyers are understandably "worried about the objectivity of judges who seek assignments they think will enhance their chance of finding a job as a private arbitrator." Id.
98. See Stemlight, supra n. 23, at 637-712 (discussing the Supreme Court's preference for binding arbitration, and the evolution of arbitration from business-to-business agreements to business-to-employee and business-to-consumer mandated agreements).
100. Id. (quoting Marc Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limits of Change, 9 L. & Socy. Rev. 95 (1974)).
101. Id.

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Senator Martha Escutia, the bill’s author, shared "that the Legislature must take a serious look at the growing use of private judges and how that growing use raises questions of fairness and the creation of a dual justice system that favors the wealthy litigant over the poor litigant."\textsuperscript{103} California is the first state to enact such ethical standards.\textsuperscript{104}

Despite numerous responses from commentators in favor of and against the proposed standards, the CJC’s "Ethic Standards for Neutral Arbitrators in Contractual Arbitration" went into effect on July 1, 2002. When the standards were enacted, the CJC accepted a commentator’s recommendations that the standards be reviewed after a year.\textsuperscript{105} As stated above, the CJC approved the first changes to the standards on Dec. 13, 2002.\textsuperscript{106}

After the original standards were enacted in July 2002, the New York Stock Exchange (“NYSE”) and the National Association for Securities Dealers (“NASD”) filed suit in federal court seeking exemption from the standards.\textsuperscript{107} They sought a declaratory judgment exempting them from following the CJC ethics standards on the basis that the standards are preempted by federal law.\textsuperscript{108} The NYSE and NASD said that the standards required "onerous" disclosure, and "extensive federal oversight already exists via the Federal Arbitration Act."\textsuperscript{109} However, the U.S. District Court for the Northern District of California dismissed the suit based on its ruling that the CJC and its individual members are immune from suit under the Eleventh Amendment to the U.S. Constitution.\textsuperscript{110}

The court opinion stated that the CJC’s enactment of the standards was legal although the policy it enacted is “potentially subject to preemption by, thus limitation under, federal law. Federal law may prevent particular applications of the ethical standards, but the creation of those standards was not itself a prohibited


\textsuperscript{104}. Folberg, supra n. 7, at 5.


\textsuperscript{106}. See supra n. 12.

\textsuperscript{107}. Loretta Kalb, California’s Tough New Rules in Securities Cases Put Arbitration on Hold, The Sacramento Bee (Sacramento, Cal.) (Aug. 21, 2002). When the CJC standards went into effect the NYSE and NASD decided to stop all arbitration proceedings in California, forcing parties to leave the state for arbitration hearings. However, the two securities organizations took heed to then SEC Chairman Harvey Pitt’s written request that the organizations continue arbitration proceedings in California. Staff Reporters, NYSE, NASD to Comply With SEC Request to Resume Arbitrations, ADRWorld.com <http://www.adrworld.com/opendocument.asp?Doc=dHNezLnKSt> (last updated Sept. 11, 2002). Yet, the NASD proposed and the SEC approved a plan in which NASD member companies would be required to waive the CJC disclosure standards if investors make such a request. “The new requirement will be in effect for six months or until a federal court in California decides whether NASD and the NYSE are exempt from the ethics standards, according to the association.” Staff Reporters, SEC Approves Plan to Waive California Code in NASD Arbitrations, ADRWorld.com <http://www.adrworld.com/opendocument.asp?Doc=V4ii1Exq2Hl> (last updated Oct. 3, 2002).

\textsuperscript{108}. NASD Dispute Resolution, 232 F.Supp.2d at 1055.

\textsuperscript{109}. Id. A federal judge dismissed the case NASD and the NYSE brought against the CJC. ADRWorld.com reported, “Senior Judge Samuel Conti of the U.S. District Court for the Northern District of California said the council and its members are entitled to the full immunity from suit provided by the Eleventh Amendment, throwing out the suit . . . " Staff Reporters, Judge Dismisses Case Against California Arbitrator Ethics Rules, ADRWorld.com <http://www.adrworld.com/opendocument.asp?Doc=91LVDOm2tO> (last updated Nov. 14, 2002).

\textsuperscript{110}. NASD Dispute Resolution, 232 F.Supp.2d at 1066.
For this reason, the court stated, cases are typically filed against agents who enforce the law rather than policymakers who draft the law.\textsuperscript{111} Although the court stated that the CJC and its members may not be sued, it stated that the standards may be contested in court in another way.\textsuperscript{112} It stated, "[B]ecause the state law depends upon private implementation, Plaintiffs will be unable to find a government defendant to sue, and will have no choice but to wait for other parties to assert these argument as defenses against vacatur of an arbitrator award."\textsuperscript{113} The court also found that the NASD and NYSE had standing to sue because of their arguments that "they will incur substantial recordkeeping costs, create conflict with their internal rules, and potentially lose the service of many of their arbitrators," or "ignore the California standards and risk engaging in voidable arbitrations."\textsuperscript{114} The court stated that these are "concrete" injuries to satisfy the injury-in-fact requirement for a party to have standing.\textsuperscript{115} While the case with the NASD and NYSE was pending, the California legislature proposed six more bills for arbitration reform.\textsuperscript{116} The governor signed five of the six bills.\textsuperscript{117} ADR News Staff Reporters stated:

The consumer arbitration reform bills include:

-AB2656, which would require arbitration providers involved in consumer arbitrations to collect and publish a range of data, including the names of non-consumer parties, the arbitrators and their fees, and the outcome of the case. The bill was amended in the Senate at the request of the arbitration organizations to provide that no liability would attach for the information collected and published.

-AB2574, which would prohibit an arbitration provider from administering a consumer arbitration if it has or had, within the past year, a financial interest in a party or an attorney for a party, or if the party or an attorney for a party has or had a financial interest in the arbitration provider in the preceding year.

-AB2915, which would prohibit an arbitration provider from administering cases when the arbitration clause contains a "loser pays" provision, and require an arbitration provider to waive fees for indigent claimants. The bill was amended in the Senate to clarify that this waiver would not prevent providers from shifting fees to non-consumer parties.

\textsuperscript{111} Id. at 1065.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1066.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 1062.
\textsuperscript{116} Id. at 1062-63.
\textsuperscript{118} See Bill Information, \texttt{<http://www.leginfo.ca.gov/bilinfo.html>} (last accessed Oct. 31, 2002) (AB 3029 was vetoed).
-AB 3029, which as originally introduced would have prohibited arbitration providers from administering arbitrations if they provided consulting, management, or other business services to a party to the arbitration, or if they solicited ADR business from a party to the arbitration. The bill was amended substantially by the Senate at the request of the American Arbitration Association ("AAA"), Judicial Arbitration and Mediation Services ("JAMS"), and Community Dispute Resolution Center ("CDRC"), and now would require disclosure of possible conflicts of interest and provide for the disqualification of an arbitration provider for failing to comply with the requirements.

-AB 3030, which as originally introduced would have limited the civil immunity of arbitration providers. The bill also was substantially amended by the Senate to require an ADR provider to forfeit administrative fees for violating the provisions of the other consumer arbitration bills.

-AB 2504, which would disqualify judges who have discussed serving as a dispute resolution neutral for a party to [the instant case. It would also require arbitrators to disclose any facts that could lead to questions about their impartiality.]

III. COMPARING DISCLOSURE RULES

Several arbitration organizations have adopted ethics guidelines for arbitrators to follow "regarding ethical issues that may arise during or related to the arbitration process." The general purpose of the guidelines is to hold arbitration proceedings to high standards, and to help ensure confidence in the arbitration process. Much similarity exists between these purposes and the CJC's purpose in its ethics standards for neutral arbitrators. The California standards are intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process. This section will compare the CJC's arbitrator disclosure requirements with those of the JAMS, the National Academy of Arbitrators ("NAA"), and the Revised Uniform Arbitration Act of 2002 ("RUAA").

119. Staff Reporters, supra n. 117.
122. CJC Stand.1(a).
123. JAMS is an organization that provides arbitrators to parties seeking arbitration. JAMS, Who We Are <http://jamsadr.com/who_we_are.asp> (last accessed Feb. 27, 2003).
124. NAA is an organization that provides arbitrators to parties seeking to settle disputes in arbitration. NAA <http://www.naarb.org> (last accessed Feb. 27, 2003).
125. Revised Uniform Arbitration Act of 2002 <http://www.law.upenn.edu/bll/ulc/uarba/arb00pss.pdf> (last accessed Nov. 11, 2002). "More than two-thirds of the states have enacted statutes, modeled after the Uniform Arbitration Act, that govern the validity and enforceability of arbitration agreements. Riskin, supra n. 18, at 3. Although not included in this Note, the five sets of due process
American Arbitration Association and the American Bar Association joint rules ("AAA standards") will also be compared.126

All five sets of standards discuss disclosure of conflicts of interest, or information that could reasonably raise questions about impartiality, that are "known" to arbitrators,127 or of which they are "aware."128 The standards vary on whether disclosure "should" occur, or whether it is required to occur. The NAA states that arbitrators "must" disclose possible conflicts of interests or facts that raise impartiality questions. Similarly, the RUAA states that arbitrators "shall" disclose such information. However, it is unclear whether the JAMS and AAA standards for disclosure are optional or required. JAMS states that arbitrators "should" disclose.129 JAMS later adds that disclosure is an "obligation" that "requires" continuous disclosure.130 Likewise, AAA repeatedly uses the word "should" in the first two subsections of its disclosure canon. In its third subsection, in contrast, AAA states that disclosure is an "obligation" that "requires" continuous disclosure.131 Like the NAA and RUAA standards, the CJC makes it clear that arbitrators "must" disclose facts that may reasonably cause impartiality questions.132 The CJC, AAA, and RUAA standards all request or require arbitrators to seek information about relationships or situations that might reasonably affect their impartiality.133 Neither JAMS nor NAA make such a request.134

126. Quantitatively, CJC's disclosure requirements are more lengthy and detailed than any of the other set of standards discussed. In one of the seven canons, the AAA sets out five subsections about disclosures arbitrators must make. See AAA Code, Canon II. In the fifth of its ten standards, JAMS uses eight subsections to address disclosure and conflicts of interest. See JAMS Guidelines (V). The NAA and RUAA use five and six main subsections respectively to lay out their disclosure requirements. See NAA, Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, American Arbitration Association and Federal Mediation and Conciliation Service <http://www.naarb.org/ethics.html#g> (last accessed Oct. 31, 2002) [hereinafter NAA Code]. See also RUAA §12. However, in the seventh of seventeen standards, the CJC lays out fourteen subsections to address disclosures neutral arbitrators are required to make. See CJC Stand. 7(d). Many of CJC's Standard 7's fourteen subsections on disclosure have further subsections to detail the extent of the required disclosures, and other disclosure requirements are also listed in Standards 8 and 9. Id.

127. See NAA Code 2(B)(4); RUAA §12(b).

128. See CJC Stand. 7(d); JAMS Guidelines (V)(A). AAA requires arbitrators to "make a reasonable effort to inform themselves." AAA Code, Canon II (B). The AAA rules do not use the language "known" or "aware." Id.

129. JAMS Guidelines (V)(A), (B), (C) and (D).

130. JAMS Guidelines (V)(D).

131. Id. at (V)(C).

132. CJC Stand. 7(d).

133. AAA Code, Canon II (B) states that arbitrators "should make a reasonable effort to inform themselves" of relationships and interests that may appear to affect their impartiality. RUAA §12(a) states that arbitrators are to make a "reasonable inquiry" into facts that might reasonably affect impartiality. CJC Stand. 9(a) states that arbitrators must "make a reasonable effort to inform himself or herself of any matters" that might cause reasonable questions of impartiality.

134. See JAMS Guidelines (V); NAA Code 2(B).
A. Relationship Disclosure

What should, shall, and must "reasonably" be disclosed varies from one set of standards to the next. Such variance can be seen in the context of disclosure of personal and professional relationships. JAMS states that arbitrators should not "attempt to be secretive" about social or professional relationships, but it adds that disclosure is unnecessary "unless some feature of a particular relationship might reasonably appear to impair impartiality." Likewise, the NAA states that arbitrators must not be "secretive," but it adds that disclosure of personal or professional relationships is not necessary "unless some feature of a particular relationship might reasonably appear to impair impartiality." Unlike JAMS, the NAA explicitly requires disclosure of current or past professional relationships where the arbitrator is "being considered for an appointment or has been tentatively designated to serve" with a company or union in the arbitration proceedings. The NAA standards state, "The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements), or any other pertinent form of managerial, financial, or immediate family interest in the company involved." Such detailed disclosure of professional relationships is not mentioned in the JAMS standards.

AAA states that arbitrators should disclose personal, social, and business relationships. Disclosure should be made regarding an arbitrator's personal relationships with a party to the proceeding, a party's lawyer, or a witness. Arbitrators should also disclose relationships their family members, employers, or associates have with a party, a party's lawyer, or a witness. Similarly, the RUAA requires arbitrators to disclose relationships they have with parties to the proceedings, parties' lawyers, witnesses, and other arbitrators. It does not state any such requirements for disclosure of relationships that arbitrators' family members or employers may have with those connected to the arbitration proceeding. Likewise, neither JAMS nor the NAA suggest that arbitrators disclose relationships that their family members or employers have with parties in the arbitration proceeding.

The CJC standards are more detailed than any of the above stated standards in regard to relationship disclosures. The CJC standards are also the most broad.

135. All five sets of standards refer to facts that might "reasonably" affect arbitrators' impartiality, or that a "reasonable" person might consider to affect impartiality. See CJC Stand. 7(d); JAMS Guidelines (V)(A), (B); NAA Code (B)(3); AAA Code, Canon II A(2); RUAA §12 (a).
137. NAA Code 2(B)(3)(a).
138. NAA Code 2(B)(1).
139. NAA Code 2(B)(1)(a).
140. See JAMS Guidelines (V).
141. NAA Code (A)(2).
142. Id.
143. RUAA §12(a)(2). The RUAA disclosure standards were created using the 1977 version of the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes as a primary model. Id. at cmt. 2.
144. RUAA §12(a)(2).
145. See JAMS Guidelines (V); NAA Code 2(B).
146. See CJC Stands. 7, 8 and 9.
The CJC not only requires arbitrators to disclose their familial, personal, and professional relationships with parties and attorneys in the proceeding, but it also requires them to disclose personal and professional relationships their "extended family" has or had with people or organizations connected to the arbitration proceeding.

Unlike the other sets of standards, CJC specifically requires disclosure of attorney-client relationships the arbitrator has had with a party's lawyer, officer, director, trustee, or the party itself within two years preceding the arbitration. Other professional relationships that an arbitrator, or members of the arbitrator's "immediate family," has had within the two years preceding the arbitration proceedings must also be disclosed. Additionally, relationships in which the arbitrator, or the arbitrator's immediate family, has been an employee of, expert witness for, or consultant for a party to the arbitration, or a party's lawyer, must be disclosed. Furthermore, arbitrators must also disclose their associations in the private practice of law with lawyers in the arbitration proceeding.

In regard to consumer arbitration proceedings, arbitrators are required to disclose relationships between the dispute resolution provider they were selected through and parties to the proceedings. The standards require disclosure of "[a]ny significant past, present, or currently expected financial or professional relationship or affiliation between the dispute resolution provider organization and a party or lawyer in the arbitration." The standards also require nominated arbitrators to disclose financial relationships and affiliations they have with provider organizations with the exclusion of case referrals.

Other than CJC standards, the AAA and NAA standards are the only standards that attempt to give broad disclosure rules. AAA states that

147. CJC Stands. 7(d)(1), (2), (3), and (7).
148. Arbitrators can satisfy the requirement to disclose their extended families' and spouses' relationships with parties in the arbitration proceeding by declaring in writing that they have sought information about relationships from their immediate and extended family, as well as members of their household. CJC Stand. 9(b). This requirement is also satisfied when arbitrators have disclosed "all the information pertaining to these relationships" within their knowledge. Id. at 7(d)(1).
149. CJC Stand. 9(b).
150. CJC Stand. 7(d)(7).
151. CJC Stand. 7(d)(8).
152. CJC Stand. 7(d)(8)(B) and (C).
153. CJC Stand. 7(d)(8)(A).
154. Consumer arbitration means "an arbitration conducted under a predispute arbitration provision contained in a contract" that is with a consumer party, was drafted "by or on behalf of the nonconsumer party," or where "the consumer party was required to accept the arbitration provision in the contract." CJC Stand. 2(d). "Consumer arbitration' excludes arbitration proceedings conducted under or arising out of public sector labor-relations laws, regulations, charter provisions, ordinances, statutes or agreements." Id. Further, consumer parties includes individuals who seek or acquire, including by lease, "any goods or services primarily for personal, family, or household purposes including, but not limited to financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code." Id. at 7(e)(1). Consumer parties also include individuals with medical malpractice claims subject to arbitration agreements, employees or applicants for employment in cases arising out of or relating to employment, those who are healthcare service plan enrollees, subscribers, or insureds. Id. at 7(e)(2) and (4).
155. CJC Stand. 8(b).
156. CJC Stand. 8(b)(1).
157. CJC Stand. 8(e)(1).
158. See AAA Code, Canon II (1977); NAA Code 2(B) (2000).
arbitrators should disclose "financial, business, professional, family or social relationships." These standards are a distant second to the CJC relationship disclosure requirements because AAA is not specific about the types of familial and professional relationships that are to be disclosed. While the NAA does not give the broad laundry list that AAA gives, its standards go into detail about disclosure of professional relationships.  

B. Financial and Personal Interests Disclosure

As with the requirements for relationship disclosures, the five sets of standards vary on their requirements for disclosure of financial and personal interests. However, the variations are relatively minute with the exception of the CJC standards. The AAA standards simply state that potential arbitrators should disclose "any direct or indirect financial or personal interest in the outcome of the arbitration." Similarly, the RUAA requires disclosure of "financial or personal interest in the outcome of the arbitration proceeding." The NAA states that disclosure must be made of any "pertinent pecuniary interest." The variations among these three sets of standards are very slight.

CJC's standards for disclosing financial and personal interests are not as simply stated as those in the above three sets of standards. CJC requires disclosure of financial interests where "the arbitrator or a member of the arbitrator's immediate family" has a financial interest in a party to the arbitration, or in the subject matter of the arbitration. It also requires disclosure in situations where the arbitration results could substantially affect an interest of the arbitrator or a member of the arbitrator's immediate family. The CJC standards do not specifically address disclosure in regard to financial and personal interests in consumer arbitration. However, they do require arbitrators to disclose financial relationships and affiliations between the provider organization and a party or lawyer to the arbitration, and between arbitrator and provider organization. JAMS does not specifically address disclosure of financial and personal interests.

C. Consequences of Failure to Disclose

All of the standards, with the exception of the NAA standards, state the duty to disclose begins when the proposed arbitrator is nominated and extends throughout the course of the arbitration proceedings. The comment to CJC Standard 7 states that arbitrators who fail to disclose within the required time face the grounds of disqualification, or vacatur of the arbitration award. Under the

159. AAA Code, Canon II (A)(2).
160. NAA Code 2(B)(1).
161. AAA Code, Canon II (A)(1).
163. NAA Code 2(B)(1).
164. CJC Stand. 7(d)(9) and (10).
165. CJC Stand. 7(d)(11).
166. CJC Stand. 8.
167. See JAMS Guidelines (V)(D) (2002); RUAA § 12(b) (2000); AAA Code, Canon II(C); CJC Stand. 7(f).
168. CJC Stand. 7 cmt.
RUAA, failure to disclose is grounds for vacating the award the arbitrator gave.\textsuperscript{169} The RUAA is the only set of standards to state consequences for nondisclosure.

D. Disclosure Requirements Specific Only to the CJC Standards

The CJC disclosure requirements are unique from the other four sets of disclosure standards discussed in this Note in several ways. As discussed above, the CJC standards are more detailed than the other standards. The CJC standards cover almost all, if not all, types of disclosure that the other standards require. One exception is that the CJC disclosure standards explicitly state that they only apply to noncollective bargaining cases.\textsuperscript{170} Yet, the CJC standards go beyond the typical disclosures mentioned in the other standards. For example, the CJC dedicates a standard to disclosures arbitrators must make specifically in consumer arbitrations.\textsuperscript{171} This standard mainly states requirements that arbitrators must make about provider organization's relationships and affiliations with parties or lawyers in the arbitration.\textsuperscript{172} It also gives disclosure requirements for relationships between arbitrators and provider organizations.\textsuperscript{173} This is the only one of the five sets of standards discussed in this Note that requires arbitrators to make disclosures about the provider organizations' relationships and affiliations.\textsuperscript{174} The distinction between consumer arbitrations and other arbitrations is not the only difference between CJC standards and other standards. The CJC standards also require proposed arbitrators to disclose their services as a neutral arbitrator, in a pending, present, or past case within the preceding five years, in a noncollective bargaining arbitration that involves a party or lawyer to the current arbitration.\textsuperscript{175} When more than five cases exist within five years, the arbitrator must give a summary stating "the total number of 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."\textsuperscript{176} These disclosures are in line with arbitrator disclosure requirements under the California Code of Civil Procedure Section 1281.9(a)(4).\textsuperscript{177} Additionally, arbitrators must disclose their services as compensated dispute resolution neutrals, other than arbitrators, in previous or

\textsuperscript{169} RUAA § 12(c).
\textsuperscript{170} CJC Stand. 7(b)(1).
\textsuperscript{171} CJC Stand. 8.
\textsuperscript{172} CJC Stand. 8(b)(1).
\textsuperscript{173} CJC Stand. 8(c).
\textsuperscript{174} See CJC Stand. 8.
\textsuperscript{175} CJC Stand. 7(d)(4)(A).
\textsuperscript{176} CJC Stand. 7(d)(4)(C).
\textsuperscript{177} Under the CA Civ. Proc. Code Ann. § 1281.9(a)(4) (West 2002), arbitrators must disclose: The names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any. In order to preserve confidentiality, it shall be sufficient to give the name of any party not a party to the pending arbitration as 'claimant' or 'respondent' if the party is an individual and not a business or corporate entity.
pending noncollective bargaining cases where a party or lawyer in the current arbitration is involved, and "the arbitrator . . . expects to receive any form of compensation for serving in this capacity." In regard to such cases, the proposed arbitrators must disclose the parties' names who were involved in each of the previous or pending cases. They must also disclose the name of the lawyer who is involved, or "whose current associate is involved," in the prior or pending case in addition to being an attorney in the current arbitration, name information about their compensation as dispute resolution neutrals, and the number of cases where they acted as dispute resolution neutrals. Additionally, the arbitrators must disclose the type of non-arbitrator dispute resolution neutral in which they acted. Disclosure is required where "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." The CJC requires that an arbitrator disclose personal knowledge, or an extended family member's personal knowledge, of "disputed evidentiary facts relevant to the arbitration." Arbitrators must also disclose their memberships in organizations that practice "individuous discrimination on the basis of race, sex, religion, national origin, or sexual orientation." In a "catchall" subsection, the CJC standards require an arbitrator to disclose "any matter" that would (a) reasonably cause questions as to the arbitrator's impartiality from a person aware of the facts; (b) cause the arbitrator to substantially question his or her own ability to be impartial, especially due to "bias or prejudice toward a party, lawyer, or law firm in the arbitration;" or (c) cause the arbitrator to "believe that his or her disqualification will further the interests of justice." The contents of Standard 12 are also unique to the CJC standards. Under this standard, potential arbitrators have ten days within the service of notice of their proposed nomination or appointment to make a written disclosure to all parties of their intentions to "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." This disclosure, like those stated in Standards 7 and 8, is a continuing duty.

178. These disclosures must be made for cases where the arbitrator served as another dispute resolution neutral in cases two years preceding the date of the arbitrator's proposed nomination or appointed, with the exception of cases concluded before January 1, 2002. CJC Standard 7(d)(5)(A) (2002).
179. CJC Stand. 7(d)(5).
180. CJC Stand. 7(d)(5)(B)(i).
181. CJC Stand. 7(d)(5)(B)(i).
182. CJC Stand. 7(d)(5)(B)(ii).
183. CJC Stand. 7(d)(5)(B)(iii).
184. CJC Stand. 7(d)(12).
185. CJC Stand. 7(d)(13).
186. CJC Stand. 7(d)(14).
187. CJC Stand. 12(b).
188. CJC Stand. 12(c).
The CJC Ethics Standards are radical. They set out arbitrator rules that no other state has stepped out to give. The issue is whether the size of the step California took was too big, too small or just right. For the most part, the Judicial Council's step was just right. However, the new ethics standards do make arbitrators their "brother's keeper" in many aspects. This section will comment on whether arbitrators should carry this responsibility. The commentators' remarks mentioned in this section were made previous to the December 2002 approved changes for the ethics standards.

The CJC was wise to state that its ethics standards establish the "minimum" requirements for arbitrator disclosure, meaning that the standards set a floor, rather than a ceiling, for proper disclosure. Prof. Jay Folberg, chair of the nineteen-member Blue Ribbon Panel that advised the CJC, stated that the panelists and standard drafters were in agreement that the standards "should be written as minimum requirements rather than as aspirational goals." The panel and drafters sought to give the ethics standards the "force of law" that "standards promulgated by voluntary associations and private entities" do not have. The assertion that the requirements are "minimal" will help consumers meet the heavy burden of "evident partiality" under the FAA. Because there are definite things that arbitrators must disclose, arbitrators and prevailing parties will not be able to assert that the mere appearance of bias is insufficient. They will be forced to "err on the side of disclosure."

Although Standard 7 was enacted, many commentators and some panel members preferred to err against disclosure on some of the issues the ethics standards address. Generally, commentators stated that the disclosure

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189. "Californians like to think of our state as a trend setter or prototype of what's new and coming your way. Others may see it as the laboratory for weird and bad ideas." Folberg, supra n. 7 at 8.
191. CJC Stand. 1(a).
192. Folberg, supra n. 7, at 6.
193. Id. This assessment is on target with Judge Posner's decision in Merit. Judge Posner stated, "[a]lthough we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity under section 10 of the United States Arbitration Act [FAA] and Rule 60(b) of the Federal Rules of Civil Procedure. The arbitration rules and code do not have the force of law." 714 F.2d at 680.
194. See Commonwealth., 393 U.S. at 152.
requirements in Standard 7 are "overly long, complex, and burdensome." The Apr. 9, 2002 report to the standards stated:

These commentators suggested that the standard's length and complexity made it difficult to understand, would discourage compliance, and would create traps for the unwary in the form of late requests for disqualifications and motions to vacate the arbitrator's award based on inadvertent failures to comply with these disclosure requirements. Ultimately, these commentators suggested, this would result in undermining the stability of the arbitration process. Commentators also suggested that the number and detail of the disclosure requirements would discourage compliance, result in arbitrators spending too much time trying to make disclosures, and discourage arbitrators from taking on small cases.

In the report, the CJC staff stated that many commentators objected to disclosure rules that already existed in statute but were restated in the rules. This increased the original Standard 7's length. However, the staff found it necessary to compile all disclosure requirements in one place so that parties and arbitrators would not have to search several different locations for the requirements. Currently, the disclosure requirements are spread over Standards 7, 8 and 9. Additionally, Standard 12 states a brief disclosure requirement. Despite the commentators' complaints, it was a prudent move to compile all disclosure requirements in one document. The compilation of the statutory disclosure requirements and the new standards the CJC adopted into one document, the CJC's ethics standards, will help prevent arbitrators from arguing that either the statute or the standards were incomplete. Arbitrators will not be able to argue that they could not have reasonably known there were more rules in another location. The compilation of the disclosure rules will prevent petty arguments in litigation and make it easier for arbitrators to do their jobs.

While some commentators worried about the standards being too burdensome, others wanted more requirements added. For example, Alan J.

197. Id. The report directs readers to comments made by Keith Maurer, Assistant General Counsel for National Arbitration Forum; Hon. Richard P. Byrne, retired judge; Alan L. Cohen, Deputy General Counsel, Council of Better Business Bureaus, Inc.; Hon. Winslow Christian, retired judge and chair of the ethics committee for the College of Commercial Arbitrators; Hon. Charles W. Froehlich, retired judge; Ruth V. Glick, president of the Cal. Dispute Res. Council; Sharon Lybeck Hartmann, an independent administrator for Kaiser Mandatory System for Disputes with Members; Professor Roger Haydock, California Western School of Law; Fred Hiestand, General Counsel at Civil Justice Assn. of Cal.; Bruce E. Meyerson, attorney; Donald S. Sherwyn, of Law Offices of Donald S. Sherwyn; Hon. Harlan K. Veal, retired judge. Id.
198. Id. at 26-27.
199. CJC Stand. 7, Cmt to Stand. 7.
201. See CJC Stands. 7, 8 and 9 (detailing the disclosures prospective arbitrators must make).
202. CJC Stand. 12(b) states, "[i]n 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 the 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 lawyer for a party, including offers to serve as a dispute resolution neutral in another case."
Mayer recommended that the original Standard 7 explicitly state that "former judges must disclose routine disqualifications under CCP [Cal. Code of Civ. P.] §170.6" and that a "neutral must reveal prior subject matter competence." The staff and panel rejected this recommendation stating that the original Standard 7(b)'s language requiring arbitrators to disclose "any matters that could cause a person aware of the facts to reasonably entertain a doubt" about the proposed arbitrator's impartiality would cover Mayer's suggestions if the situation arose. Additionally, Nancy Pervini felt that disclosure should be required "as to any fact that may give rise to a doubt," not just for facts that might cause reasonable entertainment of doubts. Correctly, the staff rejected this recommendation. It stated that the original Standard 7(b)(12) requires the "appropriate level of disclosure to consumers." Some commentators, such as Pervini and NYSE General Counsel Richard P. Bernard, made recommendations that were heavily weighted to favor their industries, constituencies, and clients. However, whether the commentators wanted deletions or additions, the staff and panel were fair in addressing commentators' objections to the standards. It seems as if the staff and panel were able to address commentator concerns objectively without naively giving in to recommendations from commentators. Some of the commentator suggestions were adopted, and the standards were amended to reflect some recommendations. Continuation of commentary on the new rules may reflect in further amendments to the standards. Although the staff originally suggested that the standards be reviewed and subject to amendments after one year, the first set of changes have already been approved.

A. Consumer Arbitration Disclosure Regarding Providers

The greatest controversy in drafting the standards was over the original Standard 7(b)(12), now Standard 8, which pertains to consumer arbitrations.
This is the section of the disclosure standard where the CJC went from taking a step that was just right in size to taking too big of a step. The disclosure requirements in current CJC Standard 8 are burdensome. This section of the standards requires arbitrators to make disclosures concerning the provider organizations that hired the arbitrators. In commenting on the original Standard 7(b)(12), fifteen of the sixty-three commentators argued that:

This is an indirect and improper attempt to regulate providers. Legislative mandate does not direct attention to provider disclosures. This standard requires disclosure of matters within the province of providers, not neutrals. Such regulation should not be attempted indirectly but should be addressed directly by the legislature. 214

In response, the staff and panel stated:

"[T]his requirement is within the scope of the authority delegated to the Judicial Council by Code of Civil Procedure section 1281.85. . . . Existing law already imposes on arbitrators in certain arbitrations the obligation to disclose information about the administering provider organization's relationship with the parties and prior service for the parties; this standard expands" the statutory goal of ensuring a fair arbitration process. 215

However, the standard's expansion is too wide. Although the standard allows arbitrators to meet the disclosure requirement by disclosing the Internet address for matters that might cause reasonable doubt, 216 arbitrators should not be burdened with researching the provider organization's history with parties in each case the arbitrator adjudicates. Folberg stated that the CJC did not have authority to regulate provider organizations under the "charge" the legislature gave the CJC. 217 However, lack of authority to order provider organizations around does not justify the CJC ordering arbitrators to search for extra information on the providers. Providers may become burdened with too many written requests for conflicts of interest discovery from various arbitrators.

215. Id.
216. CJC Stand. 8(a)(1) and Orig. CJC Stand. 7(b)(12)(F). "Following some softening modifications, the council adopted provider-organization disclosures through the medium of the individual arbitrator." Folberg, supra n. 7, at 7. Folberg stated:
These modifications included: allowing disclosure by reference to the required information posted on the provider's web site; limiting provider case information to the prior two years; not requiring listing of prior cases administered for other lawyers in the appearing lawyer's firm; not requiring the arbitrator to amend provider related information disclosure as part of the arbitrator's continuing duty to inform; allowing the arbitrator to rely on information supplied by the provider organization; delaying the implementation of the required additional disclosures in consumer cases until January 1, 2003. Folberg, supra n. 7, at 15.
217Folberg, supra n. 7, at 6. "Although much of the criticism of arbitration focused on perceived conflicts of interests created by arbitration provider organizations, direct regulation of provider organizations was beyond the Judicial Council's legislative charge. Further, the council does not have general authority to regulate private organizations." Id.
Because arbitrators are not allowed to accept appointments without doing their best to make disclosures, this requirement could significantly slow the arbitration process down, or cause some arbitrators to lose their appointments to others. Arbitrators who arbitrate less frequently would lose out to arbitrators who regularly arbitrate and might have this information already at hand. This could make it difficult for new arbitrators to gain business.

B. Relationship Disclosures

Perhaps the most obvious "brother's keeper" responsibility that the standards place on arbitrators is the duty to disclose relationships that the arbitrators' family members may have with arbitration participants. Early drafts of the standards required disclosure of relationships with "close personal friends." This was changed to "significant personal relationships" after commentators stated that "close personal friends" was too broad. Attorney Bruce E. Meyerson stated: "A neutral would have to give relatives a list of players in every arbitration to see if any are good friends with anyone on the list." It seems that Meyerson feared that arbitrators would be required to be their "brother's keepers." Even with the change to "significant personal relationships," it is a large burden for arbitrators to have to disclose relationships other people have with arbitration participants. However, this burden is necessary for parties to feel that the arbitration proceeding is fair and impartial. The CJC did lighten the burden in the original Standard 7(d)(1) and the current CJC Standard 9(b). Current Standard 9 states that arbitrators can fulfill their duty to inform themselves of potential matters that must be disclosed concerning relationships that their extended family have, if they seek the information from immediate family members and extended family members living in their households. They must also declare in writing that they sought information about the relationships and disclosed all the information they have. Arbitrators should understand why parties want this information. Many businesses and other societal entities are against nepotism and romantic relationships between co-workers. In essence, these entities fear and have rebuked bias based on "significant personal relationships" between family members and significant others. Perhaps the principles behind these rebukes also apply to arbitration. Although these disclosure requirements may be difficult and burdensome, they are necessary.

C. Disclosing Previous Arbitration Service

The CJC's requirement that arbitrators disclose their previous service as an arbitrator in a proceeding involving a participant in the instant arbitration is likely to help cut down on the repeat player problem. Where the arbitrator has served
as arbitrator in more than five proceedings within the preceding five years, the arbitrator is required to give the parties to the current arbitration summaries of the previous arbitration results. Parties who receive these summaries will be able to make more informed decisions about the arbitrator's ability to be impartial. It is likely that this standard will help members of the general public win more arbitrations against employers, large corporations, insurance companies, and the like. This is because the current Standard 7(d)(4) gives one-shot players the power to stop repeat players from having the advantage of relationships with repeat arbitrators. The disclosure will give the parties a chance to choose arbitrators who are not too familiar with either of the parties. Many arbitrators are likely to be disqualified on this standard alone. Thus, arbitrators with prior connections and more experience may be rejected for less experienced arbitrators with fewer connections. This could be a good thing for beginning arbitrators, but it will only hurt them as they gain experience.

D. New Professional Relationships

There was also much objection to the original Standard 10 disclosures, and these disclosures are now listed in Standard 12. Standard 12 requires that arbitrators disclose plans to entertain offers for employment or new professional relationships with a party to the arbitration or a party's lawyer. Folberg stated: "The concern is the appearance of favoritism by booking additional business from one of the current participants." This concern is fair. A party should be notified if the arbitrator is negotiating or considering employment or business offers with another participant in the arbitration. Such a situation creates the "appearance of bias" that Commonwealth suggests arbitrators avoid. Commonwealth states that "arbitrators cannot sever all ties with the business world." However, it adds that "we can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."

225. CJC Stand. 7(d)(4)(C).
226. Commentator Kathryn Page of the Natl. Futures Assoc. stated, "Certain provisions may make it difficult to find qualified arbitrators, especially when a customer requests a Member panel with futures industry knowledge, and National Futures Association may have little choice but to move those cases out of California." Cal. Jud. Council Rpt. (Dec. 3, 2002), Summary of Comment 143. The staff responded:

The standards require arbitrators to disclose matters that might reasonably raise a question concerning their impartiality, but leave it to the parties to determine whether to disqualify an arbitrator based on such disclosures. Staff believes that parties who request a Member panel are unlikely to disqualify a proposed arbitrator simply because he or she has industry relationships, but believe these parties should receive the disclosures required by the standards so they can make an informed decision whether to do so. Id.

227. CJC Stand. 12(b).
228. Folberg, supra n. 7, at 7.
229. Commonwealth., 393 U.S. at 150.
230. Id. at 148.
231. Id at 149.
E. Other Responses and Possible Impact

Those in support of and opposed to California's new ethics standards may be wondering what impact the CJC standards will have on arbitrations across the country. The securities industry has expressed that the CJC standards are too burdensome on industry members. In fact, NYSE General Counsel Bernard recommended that original CJC Standard 7(b)(12), now Standard 8, regulating consumer arbitration "exclude already regulated securities exchange arbitrations." The staff report responded that it would not make that exemption because:

While the Self-Regulatory Organizations that administer these arbitration programs are subject to oversight by the Securities and Exchange Commission, the specific procedures of their dispute resolution programs, including any applicable ethics requirements, do not appear to be mandated by statute or government regulation. 232

Therefore, it should not be surprising that after the standards were enacted in July 2002, the NYSE and the NASD filed suit in federal court seeking exemption from the standards. 233

It seems that the securities industry fears the impact California's standards will have on other jurisdictions. Robert Clemente 234 questioned, "If we allow this to happen in California, is Arizona going to be next?" 235 Clemente's fears that other states might create rules similar to the CJC Standards are not unwarranted. Folberg stated, "The sentiment and concerns prompting these reforms are serious and not unique to California, they just took root in the California political soil earlier than elsewhere." 236 One might infer from Folberg's use of the word "earlier" that Folberg expects other jurisdictions to follow California's lead and adopt similar ethics standards. In fact, Folberg predicted that the new standards might lead provider organization to apply the standards nationwide. He wrote: "provider organizations may find that once they gear-up to satisfy the California disclosure requirements, they might as well implement the practices nationwide."

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233. Kalb, supra n. 107. When the CJC standards went into effect the NYSE and NASD decided to stop all arbitration proceedings in California, forcing parties to leave the state for arbitration hearings. However, the two securities organizations took heed to then SEC Chairman Harvey Pitt's written request that the organizations continue arbitration proceedings in California. Staff Reporters, NYSE, NASD to Comply With SEC Request to Resume Arbitrations, ADRWorld.com <http://www.adrworld.com> (last updated Sept. 11, 2002). Yet, the NASD proposed and the SEC approved a plan in which NASD member companies would be required to waive the CJC disclosure standards if investors make such a request. "The new requirement will be in effect for six months or until a federal court in California decides whether NASD and the NYSE are exempt from the ethics standards, according to the association." Staff Reporters, SEC Approves Plan to Waive California Code in NASD Arbitrations, ADRWorld.com <http://www.adrworld.com> (last updated Oct. 3, 2002). See NASD Dispute Resolution, Inc., 232 F. Supp.2d 1055 (This is the citation for the U.S. District Court for the Northern District of California's opinion that was issued subsequent to NASD and NYSE filing suit). See also supra nn. 107-19 (summarizing the federal court opinion in NASD Dispute Resolution).
235. Id.
236. Folberg, supra n. 7, at 8.
and embrace the changes." Folberg also predicted that the standards will have a positive impact on arbitrators' business. He wrote: "The California Standards... may create more of a market for independent arbitrators, particularly in consumer cases where the disclosure requirements are most onerous for those affiliated with a national provider organization." Folberg might be a little too hopeful. If the securities industry has any power to influence other jurisdictions not to adopt similar ethics standards, then it is likely that it will exercise its influence. Then SEC Chairman Harvey Pitt stated: "the legitimate concerns of individual states should not threaten a consistent application of rules for a national system."

At least two provider organizations have responded to the CJC standards. Folberg reports: "JAMS... has enhanced its computerized information tracking system in order to comply with the California requirements. The [AAA]... has indicated that it may not be able to provide to its arbitrators the information that the standards and new law require for consumer arbitrations." This indicates that private ADR provider organizations will likely be split over application of California's new rules. Some, like JAMS, will be willing to work with the new standards. If these providers restructure and enhance their computer systems, then it will be easier for the organizations to apply the new standards nationally. It may become a burden for them to keep a separate computer system exclusively for California. Therefore, the securities industry may begin to feel pressure because other private organizations apply standards like those in California. However, the industry does have hope. It is possible that the standards may be overturned in suits against private parties in which defendants to the vacatur of an arbitration award assert that federal law preempts the ethics standards.

Since the standards were adopted in April 2002 and enacted in July 2002, commentators have been voicing their opinion of the impact the standards have already had. Many commentators suggest that the standards require that only material disclosures must be made. Louise Al. LaMothe stated, "Since the standards lack any materiality requirement, they simply give litigants an opportunity to delay the proceedings or worse, overturn an award." Some commentators worried that the disclosure standards give losing parties arbitrary reasons to appeal arbitration awards. M. Scott Donahey complained, "There is no requirement that a violation of the disclosure standards actually prejudice the

237. Id at 9.
238. Id.
240. Taking Sides: SEC should favor disclosure in California arbitration spat, 6 Investment News 36 (Sept. 16, 2002).
241. Folberg, supra n. 7, at 8.
242. See NASD Dispute Resolution, 232 F. Supp.2d at 1066 (stating, "[B]ecause the state law depends upon private implementation, Plaintiffs will be unable to find a government defendant to sue, and will have no choice but to wait for other parties to assert these arguments as defenses against the vacatur of an arbitration award.").
complaining party.” Var Fox stated: “The process may be defeated because of a non-prevailing party’s ability to attack the award based upon a failure to disclose unrelated merits of the case.” A materiality requirement might be helpful, but it would not eliminate the problems commentators are worried about. It would likely be difficult for the CJC to define “materiality” in a non-ambiguous way. Thus, a materiality requirement will not offer much relief.

Some commentators contend that the standards will have little effect on arbitrator disclosure. Fox stated: “Although most neutrals will make sure their credibility is maintained, rules, laws or regulations will not change the thought process of those who are exceptions.” Additionally, the State Bar Committee on Professional Responsibility and Conduct suggested that the standards be suspended. It stated: “The standards significantly reduce the finality of arbitration awards . . . . The lack of requirement that a technical failure to disclose affected impartiality of the arbitrator can work a serious injustice on the winning party . . . . The Judicial Council should suspend the operation of these standards – in particular Standards 7 & 10 – and undertake a far more measured examination of the problems they purport to solve.” The CJC Staff responded that it doesn’t believe that it is “appropriate or admissible” for the standards to be suspended. It added that the statute requiring the CJC to create the standards mandated that the standards go into effect on July 1, 2002. The CJC accepted commentators’ recommendations that the standards be periodically reviewed. The standards have already been amended, and new amendments will likely follow.

F. Changes Already Approved

As stated above, the CJC has approved changes to the ethics standards, specifically the original Standard 7 on disclosure. In a December 2002 press release, the CJC stated that it:

[a]pproved changes to its ethics standards for neutral arbitrators in contractual arbitration, in response to recently enacted laws and to public comments since the standards were adopted earlier this year [2002]. The changes are designed to improve the clarity of the standards and to minimize the burden associated with compliance while maintaining appropriate ethical obligations.

247. Id. at 166. Additionally, Hon. Eric E. Younger, of ADR Services, stated, “Escalating disclosure requirements will result in arbitrations being done by lower-quality people.” Id.
248. Id. at 146.
249. Id.
250. Id.
In regards to the changes, ADRWorld.com reported that under the changes there will be "separate conflict-of-interest disclosure requirements for arbitrators and arbitration service providers in consumer cases, and a duty for arbitrators to inform themselves about required disclosures." The article continues, "California lawmakers earlier this year [2002] approved a slate of bills that establish new requirements for arbitrators and arbitration service providers in consumer cases, and the Judicial Council amendments are designed in part to accommodate those bills."

It seems that the CJC wanted to delete some of the redundancies between the ethics standards and legislation. This is not only apparent by the deletion of the original Standard 7(b)(12), but, the CJC has also deleted references directing arbitrators to Cal. Code of Civ.P. Section 1281.5 throughout Standard 7. Instead, the details are spelled out, and there is less of a need to go to the statute to find out the necessary information for making disclosures.

For the most part, the changes in Standard 7 and the addition of the two more standards, Standards 8 and 9, are for clarification purposes. The disclosure requirements are more detailed, seemingly to eliminate confusion. For example, Standard 7 now states in its second paragraph that collective bargaining cases are excluded. In the original document, the fact that collective bargaining cases are excluded from the disclosure requirements was buried in then Standard 7(d)(2). Additionally, words have been added or deleted for clarification. For example, the word "compensated" is added to the disclosure requirement for an arbitrator's previous service as a dispute resolution neutral other than as an arbitrator.

Another change worth mentioning is that the disclosure for relationships with family members is less broad. "The amendments . . . narrow the standard's definition of family members for purposes of disclosure to only those covered under state law."

The new amendments do not drastically change the original document. It is likely that those who were pleased with the standards will continue to be pleased with the amended standards. It is also likely that those who were displeased with the original standards will continue to be displeased with the amended standards.

V. CONCLUSION

The California Judicial Council's ethics standards for arbitrators are too new to be sure just what impact they will have on arbitration in California and beyond. With one lawsuit already filed and dismissed, it is likely that the standards will

253. Supra n. 12.
254. Id.
255. CJC Stand. 7(b)(1).
256. CJC Stand. 7(d)(5).
257. The standards now state, "Member of the arbitrator's immediate family means the arbitrator's spouse or domestic partner and any minor child living in the arbitrator's household." CJC Stand. 2(n). Previously, the standards stated, "Member of the arbitrator's immediate family includes the arbitrator's spouse or domestic partner (as defined in Family Code § 297) and a minor child living in the arbitrator's household." CJC Stand. 2(m).
258. Supra n. 12. In the Dec. 3, 2002 report, the CJC staff stated that family members covered in the original standards were narrowed to cover only the family members that are specified in the Cal. Code of Civ. Proc. §121.85. Cal. Jud. Council Rpt. (Dec. 3, 2002), Summary of Comment 164.
make a significant mark on arbitration sooner than later. Although the disclosure rules will place additional burdens on arbitrators, they seem to detail requirements that a layperson would consider common sense concerning partiality. Here, the benefits outweigh the burdens. Yet, the outcry about the burden that the standards impose on arbitrators will probably continue. However, California is seldom discouraged by shouts of disapproval from neighbors who almost always jump on board. Thus, it is likely that other states will begin adopting similar disclosure rules for arbitrators. While the CJC Standards are likely to be successful in significantly reducing the amount of biased arbitrations, they probably will not ensure that all California arbitrations will be unbiased.

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