

2015 Orange County Mediation Conference  
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# **The Integrity of the Process: Mediator Disclosures in Private and in Court-Connected Civil Case Mediation**

Presented by

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This highly interactive program will explore the often overlooked issue of mediator disclosure. Using a spirited hypothetical set of facts and with the California Rules of Court as a guide, human circumstances and case dynamics will be evaluated and weighed from the respective standpoints of the participants and the mediator. These standards, while deriving from requirements of court-connected programs, offer a comprehensive and practical framework for the examination of what is or is not good practice in the context of most mediation. Of interest to mediators, parties and attorneys, and having application to both private and court-connected mediation, this program is designed to spark thought and discussion as to mediator disclosure and its bearing on providing an impartial process, central to the integrity of mediation.

**Please note:** In order to follow and take part in the discussion, attendees should bring with them, a copy of the attached materials.

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Sources and Cases

Excerpt - Rules of Professional Conduct, rule 3-310

Excerpts - Model Standards of Conduct for Mediators

Rules of Court, rule 3.850 et seq.

Excerpt - Code of Civil Procedure, section 170.1

Excerpts - Evidence Code

Ethics Standards for Neutral Arbitrators in Contractual  
Arbitration, standard 7

## Sources and Cases

### Sources - Standards of Conduct for Mediators

#### Model Standards of Conduct for Mediators

American Arbitration Association - adopted September 8, 2005

American Bar Association - adopted August 9, 2005

Association for Conflict Resolution - adopted August 22, 2005

#### Standards of Practice for California Mediators

California Dispute Resolution Council

#### Uniform Mediation Act

Drafted by the National Conference of Commissioners on Uniform

State Laws - approved and recommended for enactment in all

States August of 2001

#### California Rules of Court: Rules of Conduct for Mediators in Court-

Connected Mediation Programs for Civil Cases - Rule 3.850 et seq.

### Cases - Discussed

*Furia v. Helm*, 111 Cal.App.4th 945, 4 Cal.Rptr.3d 357 (2003)

*Cassel v. Superior Court*, 51 Cal.4th, 119 Cal.Rptr.3d 437 (2011)

*Haworth v. Superior Court*, 50 Cal.4th 372, 112 Cal.Rptr.3d 853 (2010)

*Benjamin, Wells & Mazer v. Kors*, 195 Cal.App.4th 40, 125 Cal.Rptr.3d 469 (2011)

*Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*, 219 Cal.App.4th 1299, 162 Cal.Rptr.3d 597 (2013)

# Rules of Professional Conduct

## Rule 3-310 Avoiding the Representation of Adverse Interests

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(A) For purposes of this rule:

- (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
- (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;
- (3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- (2) The member knows or reasonably should know that:
  - (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
  - (b) the previous relationship would substantially affect the member's representation; or
- (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

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(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

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## **The Model Standards of Conduct for Mediators 2005**

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization (*footnotes have been omitted*).

### **Preamble**

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

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### **Note on Construction**

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

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These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

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## **STANDARD II. IMPARTIALITY**

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality

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C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

### **STANDARD III. CONFLICTS OF INTEREST**

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

# 2015 California Rules of Court

## Rule 3.850. Purpose and function

### (a) Standards of conduct

The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.

*(Subd (a) amended effective January 1, 2007.)*

### (b) Scope and limitations

These rules are not intended to:

- (1) Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;
- (2) Create a basis for challenging a settlement agreement reached in connection with mediation; or
- (3) Create a basis for a civil cause of action against a mediator.

*(Subd (b) amended effective January 1, 2007.)*

*Rule 3.850 amended and renumbered effective January 1, 2007; adopted as rule 1620 effective January 1, 2003.*

## Rule 3.851. Application

### (a) Circumstances applicable

The rules in this article apply to mediations in which a mediator:

- (1) Has agreed to be included on a superior court's list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program; or
- (2) Has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case within that court's mediation program. A mediator who is not on a superior court list or panel and who is selected by the parties is not "recommended, selected, or appointed" by the court within the meaning of this subdivision simply because the court approves the parties' agreement to use this mediator or memorializes the parties' selection in a court order.

*(Subd (a) amended effective January 1, 2010; previously amended effective January 1, 2007, and January 1, 2009.)*

### (b) Application to listed firms

If a court's panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with the rules in this article when they are notified by the court or the parties that the firm was selected from the court list to mediate a general civil case within that court's mediation program.

*(Subd (b) amended effective July 1, 2007; previously amended effective January 1, 2007.)*

### **(c) Time of applicability**

Except as otherwise provided in these rules, the rules in this article apply from the time the mediator agrees to mediate a case until the end of the mediation in that case.

*(Subd (c) amended effective January 1, 2007.)*

### **(d) Inapplicability to judges**

The rules in this article do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

*(Subd (d) amended effective January 1, 2007.)*

### **(e) Inapplicability to settlement conferences**

The rules in this article do not apply to settlement conferences conducted under rule 3.1380.

*(Subd (e) amended effective January 1, 2007.)*

*Rule 3.851 amended effective January 1, 2010; adopted as rule 1620.1 effective January 1, 2003; previously amended and renumbered effective January 1, 2007; previously amended effective July 1, 2007, and January 1, 2009.*

#### **Advisory Committee Comment**

**Subdivision (d).** Although these rules do not apply to them, judicial officers who serve as mediators in their courts' mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination.

## **Rule 3.852. Definitions**

As used in this article, unless the context or subject matter requires otherwise:

- (1) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
- (2) "Mediator" means a neutral person who conducts a mediation.
- (3) "Participant" means any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the parties.
- (4) "Party" means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.

*Rule 3.852 amended and renumbered effective January 1, 2007; adopted as rule 1620.2 effective January 1, 2003.*

#### **Advisory Committee Comment**

The definition of "mediator" in this rule departs from the definition in Evidence Code section 1115(b) in that it does not include persons designated by the mediator to assist in the mediation or to communicate with a participant in preparation for the mediation. However, these definitions are applicable only to these rules of conduct and do not limit or expand mediation confidentiality under the Evidence Code or other law.

The definition of "participant" includes insurance adjusters, experts, and consultants as well as the parties and their attorneys

## **Rule 3.853. Voluntary participation and self-determination**

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

- (1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;
- (2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and
- (3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

*Rule 3.853 amended and renumbered effective January 1, 2007; adopted as rule 1620.3 effective January 1, 2003.*

#### **Advisory Committee Comment**

Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case.

After informing the parties of their choices and the consequences of those choices, a mediator can invoke a broad range of approaches to assist the parties in reaching an agreement without offending the principles of voluntary participation and self-determination, including (1) encouraging the parties to continue participating in the mediation when it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted and (2) suggesting that a party consider obtaining professional advice (for example, informing an unrepresented party that he or she may consider obtaining legal advice). Conversely, examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in the mediation after the party has told the mediator that he or she wishes to terminate the mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, using abusive language, and threatening to make a report to the court about a party's conduct at the mediation.

### **Rule 3.854. Confidentiality**

#### **(a) Compliance with confidentiality law**

A mediator must, at all times, comply with the applicable law concerning confidentiality.

#### **(b) Informing participants of confidentiality**

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.

#### **(c) Confidentiality of separate communications; caucuses**

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

#### **(d) Use of confidential information**

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

*Rule 3.854 renumbered effective January 1, 2007; adopted as rule 1620.4 effective January 1, 2003.*

#### **Advisory Committee Comment**

**Subdivision (a).** The general law concerning mediation confidentiality is found in Evidence Code sections 703.5 and 1115-1128 and in cases interpreting those sections. (See, e.g., *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155; and *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240.)

## **Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal**

### **(a) Impartiality**

A mediator must maintain impartiality toward all participants in the mediation process at all times.

### **(b) Disclosure of matters potentially affecting impartiality**

- (1) A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include:
  - (A) Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and
  - (B) The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.
- (2) 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 applicable court rules or statutes.

*(Subd (b) amended effective January 1, 2007.)*

### **(c) Proceeding if there are no objections or questions concerning impartiality**

Except as provided in (f), 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.

*(Subd (c) amended effective January 1, 2007.)*

### **(d) Responding to questions or concerns concerning impartiality**

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 (f), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.

*(Subd (d) amended effective January 1, 2007.)*

### **(e) Withdrawal or continuation upon party objection concerning impartiality**

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.

### **(f) Circumstances requiring mediator recusal despite party consent**

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:

- (1) The mediator cannot maintain impartiality toward all participants in the mediation process; or

- (2) Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.

*Rule 3.855 amended and renumbered effective January 1, 2007; adopted as rule 1620.5 effective January 1, 2003.*

#### **Advisory Committee Comment**

**Subdivision (b).** This subdivision is intended to provide parties with information they need to help them determine whether a mediator can conduct the mediation impartially. A mediator's overarching duty under this subdivision is to make a "reasonable effort" to identify matters that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially, and to inform the parties about those matters. What constitutes a "reasonable effort" to identify such matters varies depending on the circumstances, including whether the case is scheduled in advance or received on the spot, and the information about the participants and the subject matter that is provided to the mediator by the court and the parties.

The interests, relationships, and affiliations that a mediator may need to disclose under (b)(1)(A) include: (1) prior, current, or currently expected service as a mediator in another mediation involving any of the participants in the present mediation; (2) prior, current, or currently expected business relationships or transactions between the mediator and any of the participants; and (3) the mediator's ownership of stock or any other significant financial interest involving any participant in the mediation. Currently expected interests, relationships, and affiliations may include, for example, an intention to form a partnership or to enter into a future business relationship with one of the participants in the mediation.

Although (b)(1) specifies interests, relationships, affiliations, and matters that are grounds for disqualification of a judge under Code of Civil Procedure section 170.1, these are only examples of common matters that reasonably could raise a question about a mediator's ability to conduct the mediation impartially and, thus, must be disclosed. The absence of particular interests, relationships, affiliations, and section 170.1 matters does not necessarily mean that there is no matter that could reasonably raise a question about the mediator's ability to conduct the mediation impartially. A mediator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under (b)(1).

Attorney mediators should be aware that under the section 170.1 standard, they may need to make disclosures when an attorney in their firm is serving or has served as a lawyer for any of the parties in the mediation. Section 170.1 does not specifically address whether a mediator must disclose when another member of the mediator's dispute resolution services firm is providing or has provided services to any of the parties in the mediation. Therefore, a mediator must evaluate such circumstances under the general criteria for disclosure under (b)(1)-that is, is it a matter that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially?

If there is a conflict between the mediator's obligation to maintain confidentiality and the mediator's obligation to make a disclosure, the mediator must determine whether he or she can make a general disclosure of the circumstance without revealing any confidential information, or must decline to serve.

### **Rule 3.856. Competence**

#### **(a) Compliance with court qualifications**

A mediator must comply with experience, training, educational, and other requirements established by the court for appointment and retention.

#### **(b) Truthful representation of background**

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.

#### **(c) Informing court of public discipline and other matters**

A mediator must also inform the court if:

- (1) Public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency;
- (2) The mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending;
- (3) A felony charge is pending against the mediator;
- (4) The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or

- (5) There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.

**(d) Assessment of skills; withdrawal**

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.

*Rule 3.856 renumbered effective January 1, 2007; adopted as rule 1620.6 effective January 1, 2003.*

**Advisory Committee Comment**

**Subdivision (d).** No particular advanced academic degree or technical or professional experience is a prerequisite for competence as a mediator. Core mediation skills include communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner.

A mediator must consider and weigh a variety of issues in order to assess whether his or her level of skill, knowledge, and ability is sufficient to make him or her effective in a particular mediation. Issues include whether the parties (1) were involved or had input in the selection of the mediator; (2) had access to information about the mediator's background or level of skill, knowledge, and ability; (3) have a specific expectation or perception regarding the mediator's level of skill, knowledge, and ability; (4) have expressed a preference regarding the style of mediation they would like or expect; or (5) have expressed a desire to discuss legal or other professional information, to hear a personal evaluation of or opinion on a set of facts as presented, or to be made aware of the interests of persons who are not represented in mediation

**Rule 3.857. Quality of mediation process**

**(a) Diligence**

A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free of other commitments.

**(b) Procedural fairness**

A mediator must conduct the mediation proceedings in a procedurally fair manner. "Procedural fairness" means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.

**(c) Explanation of process**

In addition to the requirements of rule 3.853 (voluntary participation and self-determination), rule 3.854(a) (confidentiality), and (d) of this rule (representation and other professional services), at or before the outset of the mediation the mediator must provide all participants with a general explanation of:

- (1) The nature of the mediation process;
- (2) The procedures to be used; and
- (3) The roles of the mediator, the parties, and the other participants.

*(Subd (c) amended effective January 1, 2007.)*

**(d) Representation and other professional services**

A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

**(e) Recommending other services**

A mediator may recommend the use of other services in connection with a mediation and may recommend particular providers of other services. However, a mediator must disclose any related personal or financial interests if recommending the services of specific individuals or organizations.

**(f) Nonparticipants' interests**

A mediator may bring to the attention of the parties the interests of others who are not participating in the mediation but who may be affected by agreements reached as a result of the mediation.

**(g) Combining mediation with other ADR processes**

A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring.

**(h) Settlement agreements**

Consistent with (d), a mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the mediator confines the assistance to stating the settlement as determined by the parties.

*(Subd (h) amended effective January 1, 2007.)*

**(i) Discretionary termination and withdrawal**

A mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including when he or she suspects that:

- (1) The mediation is being used to further illegal conduct;
- (2) A participant is unable to participate meaningfully in negotiations; or
- (3) Continuation of the process would cause significant harm to any participant or a third party.

**(j) Manner of withdrawal**

When a mediator determines that it is necessary to suspend or terminate a mediation or to withdraw, the mediator must do so without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants.

*Rule 3.857 amended and renumbered effective January 1, 2007; adopted as rule 1620.7 effective January 1, 2003.*

**Advisory Committee Comment**

**Subdivision (c).** The explanation of the mediation process should include a description of the mediator's style of mediation.

**Subdivision (d).** Subject to the principles of impartiality and self-determination, and if qualified to do so, a mediator may (1) discuss a party's options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about how to adhere to the law or on what position the participant should take in light of that opinion.

One question that frequently arises is whether a mediator's assessment of claims, defenses, or possible litigation outcomes constitutes legal advice or the practice of law. Similar questions may arise when accounting, architecture, construction, counseling, medicine, real estate, or

other licensed professions are relevant to a mediation. This rule does not determine what constitutes the practice of law or any other licensed profession. A mediator should be cautious when providing any information or opinion related to any field for which a professional license is required, in order to avoid doing so in a manner that may constitute the practice of a profession for which the mediator is not licensed, or in a manner that may violate the regulations of a profession that the mediator is licensed to practice. A mediator should exercise particular caution when discussing the law with unrepresented parties and should inform such parties that they may seek independent advice from a lawyer.

**Subdivision (i).** Subdivision (i)(2) is not intended to establish any new responsibility or diminish any existing responsibilities that a mediator may have, under the Americans With Disabilities Act or other similar law, to attempt to accommodate physical or mental disabilities of a participant in mediation.

## **Rule 3.858. Marketing**

### **(a) Truthfulness**

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.

### **(b) Representations concerning court approval**

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.

### **(c) Promises, guarantees, and implications of favoritism**

In marketing his or her mediation services, a mediator must not:

- (1) Promise or guarantee results; or
- (2) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.

### **(d) Solicitation of business**

A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

*Rule 3.858 renumbered effective January 1, 2007; adopted as rule 1620.8 effective January 1, 2003.*

#### **Advisory Committee Comment**

**Subdivision (d).** This rule is not intended to prohibit a mediator from accepting other employment from a participant while a mediation is pending, provided that there was no express solicitation of this business by the mediator and that accepting that employment does not contravene any other provision of these rules, including the obligations to maintain impartiality, confidentiality, and the integrity of the process. If other employment is accepted from a participant while a mediation is pending, however, the mediator may be required to disclose this to the parties under rule 3.855.

This rule also is not intended to prohibit a mediator from engaging in general marketing activities. General marketing activities include, but are not limited to, running an advertisement in a newspaper and sending out a general mailing (either of which may be directed to a particular industry or market).

## **Rule 3.859. Compensation and gifts**

### **(a) Compliance with law**

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

### **(b) Disclosure of and compliance with compensation terms**

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.

**(c) Contingent fees**

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

*(Subd (c) amended effective January 1, 2007.)*

**(d) Gifts and favors**

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.

*Rule 3.859 amended and renumbered effective January 1, 2007; adopted as rule 1620.9 effective January 1, 2003.*

**Advisory Committee Comment**

**Subdivision (b).** It is good practice to put mediation fee agreements in writing, and mediators are strongly encouraged to do so; however, nothing in this rule is intended to preclude enforcement of a compensation agreement for mediation services that is not in writing.

**Subdivision (d).** Whether a gift, bequest, or favor "might reasonably raise a question concerning the mediator's impartiality" must be determined on a case-by-case basis. This subdivision is not intended to prohibit a mediator from accepting other employment from any of the participants, consistent with rule 3.858(d).

**Rule 3.860. Attendance sheet and agreement to disclosure**

**(a) Attendance sheet**

In each mediation to which these rules apply under rule 3.851(a), the mediator must request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers; retain the attendance sheet for at least two years; and submit it to the court on request.

*(Subd (a) amended effective January 1, 2007.)*

**(b) Agreement to disclosure**

The mediator must agree, in each mediation to which these rules apply under rule 3.851(a), that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry.

*(Subd (b) amended effective January 1, 2011; previously amended effective January 1, 2007.)*

*Rule 3.860 amended effective January 1, 2011; adopted as rule 1621 effective January 1, 2006; previously amended and renumbered effective January 1, 2007.*

# CODE OF CIVIL PROCEDURE

170.1. (a) A judge shall be disqualified if any one or more of the following are true:

(1) (A) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(B) A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.

(2) (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

(B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3) (A) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

(B) A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(i) A spouse or minor child living in the household has a financial interest.

(ii) The judge or the spouse of the judge is a fiduciary who has a financial interest.

(C) A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6) (A) For any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

(B) Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification.

(7) By reason of permanent or temporary physical impairment, the

judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

. . .

**EVIDENCE CODE**  
**DIVISION 6. WITNESSES**  
**CHAPTER 1. COMPETENCY - SECTION 700-704**

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

**DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED  
BY EXTRINSIC POLICIES**  
**CHAPTER 2. MEDIATION - SECTION 1115-1128**

1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

# 2015 California Rules of Court

## 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*

- (A) Except as provided in (B), 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 also required under this standard 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.
- (B) In a consumer arbitration, if an arbitrator has disclosed to the parties 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 and has informed the parties in the pending arbitration about any such offer and the acceptance of any such offer as required by subdivision (d) of standard 12, the arbitrator is not also required under this standard to disclose that offer or the acceptance of that offer to the parties in that arbitration.

#### (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.

*(Subd (b) amended effective July 1, 2014.)*

### (c) Time and manner of disclosure

#### (1) *Initial disclosure*

Within 10 calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing all matters listed in subdivisions (d) and (e) of this standard of which the arbitrator is then aware.

#### (2) *Supplemental disclosure*

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

*(Subd (c) amended effective July 1, 2014.)*

**(d) Required disclosures**

A proposed arbitrator or arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial, including, but not limited to, all of the following:

(1) *Family relationships with party*

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

- (A) A party;
- (B) The spouse or domestic partner of a party; or
- (C) An officer, director, or trustee of a party.

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

(A) *Current relationships*

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

- (i) A lawyer in the arbitration;
- (ii) The spouse or domestic partner of a lawyer in the arbitration; or
- (iii) Currently associated in the private practice of law with a lawyer in the arbitration.

(B) *Past relationships*

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

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

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

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

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

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

(B) *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.

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

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

(9) *Other professional relationships*

Any other professional relationship not already disclosed under paragraphs (2)-(8) that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or lawyer for a party.

(10) *Financial interests in party*

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

(11) *Financial interests in subject of arbitration*

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

(12) *Affected interest*

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

(13) *Knowledge of disputed facts*

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

proceeding is deemed to have personal knowledge of disputed evidentiary facts concerning the proceeding.

(14) *Membership in organizations practicing discrimination*

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

(15) *Any other matter that:*

- (A) Might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;
- (B) Leads the proposed arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration; or
- (C) Otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice.

*(Subd (d) amended effective July 1, 2014.)*

**(e) Other required disclosures**

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

(1) *Professional discipline*

- (A) If the arbitrator has been disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. The disclosure must specify the date of the revocation, what professional or occupational disciplinary agency or licensing board revoked the license, and the reasons given by that professional or occupational disciplinary agency or licensing board for the revocation.
- (B) If the arbitrator has resigned his or her membership in the State Bar or another professional or occupational licensing agency or board, whether in California or elsewhere, while public or private disciplinary charges were pending. The disclosure must specify the date of the resignation, what professional or occupational disciplinary agency or licensing board had charges pending against the arbitrator at the time of the resignation, and what those charges were.
- (C) If within the preceding 10 years public discipline other than that covered under (A) has been imposed on the arbitrator by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. "Public discipline" under this provision means any disciplinary action imposed on the arbitrator that the professional or occupational disciplinary agency or licensing board identifies in its publicly available records or in response to a request for information about the arbitrator from a member of the public. The disclosure must specify the date the discipline was imposed, what professional or occupational disciplinary agency or licensing board imposed the discipline, and the reasons given by that professional or occupational disciplinary agency or licensing board for the discipline.

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

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

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

*(Subd (e) amended effective July 1, 2014.)*

**(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.

*Standard 7 amended effective July 1, 2014.*

**Comment to Standard 7**

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

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

The arbitrator's overarching duty under subdivision (d) of this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. While the remaining subparagraphs of subdivision (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The fact that none of the interests, relationships, or affiliations specifically listed in the subparagraphs of (d) are present in a particular case does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator's ability to be impartial and that therefore must be disclosed. Similarly, the fact that a particular interest, relationship, or affiliation present in a case is not specifically enumerated in one of the examples given in these subparagraphs does not mean that it must not be disclosed. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under subdivision (d): is the matter something that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial?

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

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

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

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

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

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

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

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

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

Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, resigned membership in the State Bar or another licensing agency or board while disciplinary charges were pending, or had any other public discipline imposed on him or her by a professional or occupational disciplinary agency or licensing board within the preceding 10 years (subdivision (e)(1)). The standard identifies the information that must be included in such a disclosure; however, arbitrators may want to provide additional information to assist parties in determining whether to disqualify an arbitrator based on such a disclosure.

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

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

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