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Hon. Hannah-Beth Jackson
State Capitol
Room 2023
Sacramento, CA 95814-4900

Re: SB 1078

Dear Senator Jackson:

I write on behalf of the California Dispute Resolution Council (CDRC), of which I am a director at large and chair of the Legislation Committee. CDRC opposes SB 1078 and the purpose of this letter is to explain why it has taken this position.

CDRC was organized in 1994 to advocate for fair, accessible, and effective alternate dispute resolution processes before the legislature, state administrative agencies, and the courts. The membership of CDRC consists of individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 mediators and arbitrators in California. CDRC positions do not represent the views of any individual member.

SB 1078 intends to amend Section 12 of the Ethics Standards for Neutral Arbitrators that were promulgated by the Judicial Council. Section 12(b)(1) requires that a proposed arbitrator, within ten days of the notice of nomination or appointment, disclose to all parties in the arbitration in writing if, while that arbitration is pending, he or she will entertain offers of employment as, *inter alia*, a dispute resolution neutral in another case. Section 12(b)(3) provides that a party in the arbitration may disqualify the arbitrator based on the disclosure made pursuant to Section 12(b)(1). If the notice of disqualification is served within fifteen days of receipt of the disclosure, the arbitrator is automatically disqualified. Section 12(d) requires that if an arbitrator in a consumer arbitration discloses that he or she will accept such an offer, then he or she must notify the parties within five days after receiving the offer and if the offer is accepted, the arbitrator must again notify the parties within five days of acceptance.

SB 1078 intends to add Section 1281.65 to the Code of Civil Procedure. Subsection (b) would prohibit the arbitrator from accepting any offers of employment as a dispute resolution neutral in another case involving a party or

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lawyer for a party in the pending arbitration unless all parties to the pending arbitration have agreed in writing before any solicitation of the arbitrator to allow such offers.

The present version of Section 12 of the Ethics Standards was adopted in 2014 as a part of a general revision of the Standards proposed by a blue ribbon panel of arbitrators and plaintiff and defense attorneys selected by the Judicial Council that met regularly over a period of approximately one year.

Although proposed Section 1281.65(b) would permit an arbitrator to accept solicitations from parties or lawyers in a pending arbitration under certain circumstances, it is much more cumbersome than present Section 12. Section 12 works very well. If a party is concerned by an arbitrator's disclosure that he or she will accept solicitations to serve as a dispute resolution neutral while the arbitration is pending, then such party can disqualify the arbitrator within fifteen days after receiving the disclosure. If the party chooses not to disqualify the arbitrator, then the party obviously is aware that the arbitrator may accept offers from its adversaries (or itself) for future work as a dispute resolution neutral and is not concerned about such a possibility.

My own personal experience illustrates how well Section 12 works. I am an arbitrator and the majority of my cases involve employment disputes. This year, on two separate occasions, an attorney representing an employee in a pending case before me selected me as the sole arbitrator in a second case after I disclosed that I would entertain such offers. My experience illustrates two points. First, defense counsel are not the only attorneys who solicit the service of an arbitrator while another case is pending before the same arbitrator. Plaintiff counsel do it, too. Second, attorneys are not deterred when an arbitrator discloses that he or she will entertain future offers as a dispute resolution neutral.

There is good reason for the experience that I have had, which I am sure has been shared by other arbitrators. We are thoroughly vetted by the attorneys who select us. They do so by using, among other things, the internet and attorney networks. As a result, they are confident that the arbitrator whom they have selected will be fair and independent, notwithstanding that the arbitrator may be hearing another pending case involving their adversaries or might do so in the future. Indeed, arbitrators are not rogues in league with corporate parties. To the contrary, arbitrators need to maintain a reputation for integrity---else they would be out of business.

We are also concerned about proposed Section 1281.85(d). This provision would allow a party to an arbitration to recover costs (which are not defined) incurred in an arbitration proceeding from the private arbitration company (the provider) if the award is vacated on any of the grounds set forth in Code of Civil Procedure Section 1286.2.

Subsection (d) therefore would make the provider vicariously liable for any act of an arbitrator that led to the vacation of an award. The proposed legislation seems to imply that arbitration awards are vacated solely because of fraud or other chicanery committed by the arbitrator and that the provider had something to do with it. But there is absolutely no evidence that this is the case. Arbitrators, like judges, are human and they can make mistakes that

might lead to vacatur. There is no basis to punish providers for such errors any more than there is a reason for imposing liability on the Superior Court because a judge's ruling is overturned.

In addition, the proposed legislation is impractical for several reasons. First, it would seriously endanger arbitrator immunity because the provider could be expected to seek indemnity from the arbitrator for allegedly committing the act that led to vacatur. Second, there would be no liability where the vacated award was the result of a non-administered arbitration, i.e, an arbitration where there is no provider. Third, it imposes liability on community arbitration organizations which are non-profit and operate under the aegis of DRPA. Fourth, if a provider is to be liable for the act of an arbitrator, then it needs to be an indispensable party to the motion to vacate.

There is no need for SB 1078. The current statutory scheme works.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul Dubow". The signature is fluid and cursive, with the first name "Paul" and last name "Dubow" clearly distinguishable.

Paul J. Dubow
On behalf of the California Dispute Resolution Council