

2.3 Report and Discussion of Baseline Certification for Arbitrators Subgroup



Date: April 23, 2025

To: ADR Certification Working Group

From: Alan Wiener, Attorney V, Office of Executive Director
Erika Doherty, Deputy Executive Director

Subject: Recommendations Regarding Baseline Arbitrator Certification Requirements

EXECUTIVE SUMMARY

The Baseline Arbitrators Subgroup (Subgroup) was comprised to make recommendations to the Alternative Dispute Resolution Working Group (Working Group) concerning the baseline requirements for certification of arbitrators as required by [Business and Professions Code section 6173](#).¹ The Subgroup met on March 10, March 24, April 7, and April 16, 2025, to discuss and develop its recommendations.

SUBGROUP RECOMMENDATION

- A. Following these meetings, a majority of the Subgroup proposes that the Working Group recommend that the State Bar Board of Trustees (Board) establish that baseline certification as an individual arbitrator shall be granted to a practitioner who verifies all of the following:
1. That the practitioner will comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council (“the Arbitrator Ethics Standards”), as required by section 6173, subdivision (b)(1)(A);
 2. That the practitioner has procedures in place for persons to make complaints regarding the failure of the practitioner to comply with the Arbitrator Ethics Standards, as required by section 6173, subdivision (b)(1)(C));

¹ All further references to section are to the Business and Professions Code unless otherwise stated.

3. That the practitioner has procedures to remedy failures of the practitioner to comply with the Arbitrator Ethics Standards, as required by section 6173, subdivision (b)(1)(D); and
 4. That the practitioner conducts an annual review of the Arbitrator Ethics Standards and the California Arbitration Act.
- B. As indicated above, a majority of the Subgroup does not recommend that any arbitration training or experience be required for baseline certification as an arbitrator. However, if the Working Group decides otherwise, the majority of the Subgroup recommends that, in addition to the requirements in A, an arbitrator be required to complete a two-hour training regarding the Arbitrator Ethics Standards before certification and every year thereafter while certified.

STAFF RECOMMENDATION

Staff respectfully disagrees with the Subgroup Recommendation and recommends that in addition to the Subgroup recommendations set forth above, the requirements for baseline certification of an individual as an arbitrator include a balance of training and experience components. Staff recommends that an arbitrator with more experience could have less training and vice versa. For example, and for discussion purposes, staff proposes the following:

| Options | Arbitration Training | Arbitration Experience |
|----------|--|--|
| Option 1 | 30* hours of basic arbitrator training in the last 2 years | Min. 3 Arbitrations (from appointment to award) in the last 2 Years |
| Option 2 | 6 hours of basic arbitrator training (anytime) AND 6* hours of continuing or advanced training in the last 2 years | Min. 10 Arbitrations (from appointment to award) in the last 5 Years |
| Option 3 | 6* hours of continuing or advanced training in the last 2 years | Min. 15 Arbitrations (from appointment to award) at any time |

* These required training hours must include a two-hour training regarding the Arbitrator Ethics Standards.

BACKGROUND:

The Working Group is charged with developing recommendations for consideration by the Board for the creation of a voluntary certification program for Alternative Dispute Resolution firms, providers, and practitioners as required under section 6173.

According to its [charge](#), the Working Group will balance maintaining rigorous professional standards with creating an inclusive program that accommodates the wide variety of ADR firms, providers, and practitioners. The Working Group will develop a comprehensive certification framework that promotes public confidence and consumer protection in ADR services. The Working Group's recommendations to the Board will include, among other topics, State Bar Rules and Procedures regarding qualification requirements, a tiered certification structure, and recommendations regarding program administration.

The Subgroup was comprised to make recommendations to the Working Group concerning the baseline requirements for certification of arbitrators.

The Subgroup conducted its first meeting on March 10, 2025, for approximately 90 minutes. Attendees included Working Group members Jenna Ellis, Diana Kruze, Kimberly Loew, Cliff Palefsky, and Daniel Yamshon. Working Group member and Subgroup lead Hon. Jackson Lucky (Ret.) was absent. Staff Erika Doherty and Alan Wiener also attended. At this meeting, the Subgroup reached consensus to recommend that no requirements beyond those explicitly enumerated in section 6173, subdivisions (b)(1)(A), (b)(1)(C), and (b)(1)(D) be required for arbitrators to become certified.

On March 19, 2025, the full Working Group discussed the Subgroup's initial recommendations, as well as those of the Baseline Mediator Subgroup, which recommended that there should be requirements in addition to those explicitly enumerated in section 6173 for mediators to become certified. The Working Group members took a straw poll to gauge interest in developing recommendations for arbitrator and mediator qualifications beyond those explicitly required by the statute. The straw poll indicated 13 in favor of limiting the baseline requirements to those stated in the statute and 6 in favor of considering additional requirements. Two Working Group members were absent. The Working Group asked the arbitrator and mediator subgroups to review their initial recommendations in light of the Working Group discussion and the other subgroup's recommendations before the next Working Group meeting.

Following a full Working Group meeting on March 19, 2025, the Subgroup met for a second time on March 24, 2025, for approximately 90 minutes. Attendees included Working Group member and Subgroup lead Judge Lucky and members Jenna Ellis, Diana Kruze, Cliff Palefsky, and Daniel Yamshon. Member Kimberly Loew was absent. Staff Erika Doherty and Alan Wiener also attended. At this meeting, the Subgroup agreed to discuss possible requirements focused on ethics, disclosure, and transparency, in addition to those explicitly enumerated in section 6173, at their next meeting.

The Subgroup met for a third time at 1:00 on April 7, 2025, for approximately 90 minutes. Attendees included Working Group member and Subgroup lead Judge Lucky (joining at 1:30) and members Jenna Ellis, Diana Kruze, Kimberly Loew, Cliff Palefsky, and Daniel Yamshon. Staff Alan Wiener and Erika Doherty (joining at 2:00) also attended. At this meeting, the Subgroup

ultimately reached consensus upon the Subgroup Recommendations set forth above. (As discussed below, one Subgroup member ultimately withdrew from that recommendation and joined the staff recommendation.)

At the April 7 meeting, the Subgroup considered two versions of a draft memorandum from the Subgroup to the Working Group (one prepared by staff, with several options for the Subgroup's consideration and another by a Subgroup member). Following the meeting, staff concluded that it would be most appropriate that a memorandum summarizing the Subgroup's recommendation to the Working Group – as well as a different staff recommendation – be “from” staff, rather than from the Subgroup. Staff circulated a draft of this memorandum to the Subgroup and made some revisions to incorporate Subgroup members recommendations. Staff has since made additional revisions to the draft memorandum provided to the Subgroup, to add context that Staff thinks is important to understand the evolution of the Subcommittee recommendations.

Some Subgroup members objected to the change in the approach to presenting recommendations to the Working Group and the Subgroup held a fourth meeting on April 16 to discuss this concern and the feasibility of the staff recommendation of additional training and experience requirements. Attendees included Working Group member and Subgroup lead Judge Lucky and members Jenna Ellis, Diana Kruze, Kimberly Loew, Cliff Palefsky, and Daniel Yamshon. Staff Erika Doherty and Alan Wiener also attended.

During this meeting it was agreed that the Subgroup and staff recommendations to the Working Group would in a single memorandum from staff. Following this meeting, staff made some revisions to their original recommendation based on input from Subgroup members and has made some other revisions. While one Subgroup member, Cliff Palefsky, joins in the staff recommendation that there be some level of training and experience required; the other members of the Subgroup do not.

After considering all past discussions, including points raised during the full Working Group meetings, a majority of the Subgroup members are in general agreement with the Subgroup Recommendation set forth above for consideration by the full Working Group at its April 23, 2025, meeting.

DISCUSSION

Much of the Subgroup's discussion at its first two meetings concerned whether the State Bar requirements for baseline certification of arbitrators may or should include requirements beyond those explicitly set forth in statute. Section 6173 provides, in pertinent part:

(b) The [State Bar ADR Certification] program shall include, but shall not be limited to, all of the following:

(1) Procedures established by the State Bar for a firm, provider, or practitioner to become a certified alternative dispute resolution firm, provider, or practitioner that include, but are not limited to, a requirement that the firm, provider, or practitioner verify all of the following:

(A) The firm, provider, or practitioner requires, at a minimum, its arbitrators to comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council pursuant to Section 1281.85 of the Code of Civil Procedure.

(B) . . .

(C) The firm, provider, or practitioner has procedures in place for persons to make complaints regarding the failure of an arbitrator or mediator of the firm, provider, or practitioner to comply with the standards described in subparagraph (A) or (B), as applicable. . . .

(D) The firm, provider, or practitioner has procedures to remedy failures of arbitrators or mediators to comply with the standards described in subparagraph (A)

(2) Different levels or tiers for certification that meet all of the following requirements:

(A) Higher levels or tiers are awarded to firms, providers, or practitioners that demonstrate a higher level of commitment to accountability and consumer protection based on criteria developed by the State Bar.

(B) The levels or tiers do not reflect an assessment of the quality of a firm, provider, or practitioner.

(C) The levels or tiers only reference standards of conduct described in subparagraph (A) or (B) of paragraph (1), as applicable.

Some members of the Subgroup interpret subdivision (b)(2)(**B**) as prohibiting arbitration training or experience or other similar requirements (e.g., education) for baseline certification and for higher tiers. They assert that arbitration training and experience would constitute prohibited “quality-based requirements” (although subdivision (b)(2)(B) refers to “*assessments of quality*” rather than to “*quality-based requirements*”). They also assert that there is a key difference between the phrasing in section 6173, subdivisions (b)(2)(**A**) and (b)(2)(**B**) because in (**A**) “*higher* levels or tiers” are awarded based on “a higher level of commitment to accountability and consumer protection” and (**B**) simply refers to “levels or tiers,” not “higher” tiers. These members thus interpret section 6173, subdivision (b)(2)(B) as a statutory prohibition against the State Bar’s imposing arbitration training or experience requirements for baseline certification or for higher tiers.

The Subgroup recognizes that some Working Group members who attended the March 19, 2025, full Working Group meeting have disagreed with the Subgroup’s interpretation, partly on the basis that section 6173, subdivision (b) states twice that the certification requirements

include but are not limited to those specifically set forth. Some Subgroup members disagree with this interpretation of the statute and assert that a “baseline” is necessarily a level of certification that would still be subject to the limitations placed in section 6173, subdivision (b)(2). They further assert that, even if “baseline” certification was different than certification at a particular “level,” presumably “baseline” certification requirements would be baked into the certification requirements used for upper “level[s] or tier[s].” This, they assert, would violate section 6173, subdivision (b)(2)(B) and lead to an “absurd” requirement that “baseline” certification could include quality requirements not required by a level or tier.

In the alternative, some Subgroup members assert that the State Bar’s requirements for baseline certification of arbitrators should not include arbitration training and experience *even if the statute allows this*. They assert that not having such requirements would promote access to the certification program and “avoid inherent complexities and difficulties that would be created for the State Bar if it were responsible for a certification program suggesting a minimum level of alternative dispute resolution quality.” The Subgroup recognizes that its recommended approach would permit or require State Bar certification of an arbitrator who has no arbitration training or experience.

At least some Subgroup members believe that consumers can be well-informed that State Bar certification does not reflect a quality assessment of a dispute resolution provider, including through text provided alongside any certification “stamp” or “seal” listed in dispute resolution advertising. The Subgroup believes that “the best outcome is to create an accessible certification program that focuses on ethical standards and consumer protection procedures, including a consumer’s right to informed choice, rather than evaluating professional qualifications.”

Staff and Subgroup member Cliff Palefsky disagree with the Subgroup interpretation of section 6173, subdivision (b)(2)(B) and agree with those Working Group members who interpret the [repeated] “including but not limited to” language in section 6173, subdivision (b)(1)(A) as allowing the State Bar to establish certification requirements in addition to those explicitly set forth in the statute, *at least at the baseline level*. Staff also does not think that requiring minimum amounts of arbitration training and experience would “reflect an *assessment* of the quality of a firm, provider, or practitioner,” such as would be prohibited by section 6173, subdivision (b)(2)(B), because there would not be an assessment of the quality of the arbitrator’s training or experience (e.g., no “performance-based qualification”). Finally, staff believes it would be problematic, potentially misleading, and contrary to the purposes underlying section 6173 for the State Bar to certify arbitrators who do not have any arbitration training and experience. Staff believes that the requirements set forth in the Staff Recommendation above strike an appropriate balance between promoting consumer protection and making certification accessible to relatively new arbitrators.

CONCLUSION:

The Subgroup provides its recommendation to the Working Group with the understanding that it is the Working Group's recommendations that will ultimately be submitted, by staff, to the Board (with any dissenting views noted in those recommendations). The Subgroup and staff look forward to the Working Group's consideration of their recommendations on April 23, 2025, and to answering any questions that Working Group members may have.