Central and Eastern European Regional Symposium on Commercial Dispute Resolution

Ljubljana, Slovenia

October 27 – 29, 2003

Organized by:

District Court of Ljubljana

CHEMONICS INTERNATIONAL INC.

SECTION I

Program

USAID

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REGIONALNI SIMPOZIJ ZEMALJA ISTOČNE i CENTRALNE EUROPE O RJEŠAVANJU KOMERCIJALNIH SPOROVA

POKROVITELJ JE MEDJUNARODAN AGENCIJA ZA RAZVOJ, SJEDINJENIJ AMERIČKIH DRAŽAVA (USAID)

ORGANIZATOR CHEMONICS INTERNATIONAL, INC.

U SURADNJI SA POKRAJINSKIM SUDOM LJUBLJANE

27.-29. listopada, 2003.

Lokacija: Grand Union Hotel Conference Center, Miklosiceva 1, 1000 Ljubljana
Tel: 368 1-308-1958 Faks: 368 1-308-1908

Službeni jezici: engleski i srpski ili hrvatski

Delegati su iz: Albanije, Bosne, Bugarske, Hrvatske, Crne Gore i Makedonije

Nedjelja, 26. listopada

Dolazak delegata, prijava u hotel i registracija za konferenciju.

Smještaj:	Grand Union Hotel Miklosiceva 1 1000 Ljubljana Tel: 368 1-308-1958 Fax: 368 1-308-1908
17:00 – 18:00	Registracija za konferenciju
18:00 – 19:30	Neformalni prijem za dobrodošlicu
19:30	Nema planova za večeru. Delegatima sugeriramo da se nađu s drugim delegatima iz svoje zemlje.

Ponedjeljak, 27. listopada

7:30 – 8:30	Doručak, švedski stol
8:30 – 9:00	Registracija za konferenciju
9:00 – 9:20	Uvodna riječ i pozdrav Prezeneteri: Patricia Shaughnessy, Šef poslanstva, CDR Projekt Johnny Young, Veleposlanik, Veleposlanstvo Sjedinjenih Država, Ljubljana Ales Zalar, Predsjednik suda, Ljubljanski Pokrajinski Sud Charles A. Schwartz, Tehnički Stručnjak, USAID David Vaughn, Viši Upravitelj, Chemonics International, Inc. Predstavljanje: ▪ Jeremy Fogel, Sudac, Pokrajinski sud Sjedinjenih Država, Sjeverna pokrajina Californije ▪ Emmanuel Jolivet, Pravni Savjetnik, Međunarodni sud za arbitražu. Međunarodna gospodarska komora ▪ Sheila Purcell, Direktorica, Alternativno rješavanje sporova (ADR), Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud. ▪ Jernej Sekolec, Generalni tajnik, UN komisija za Međunarodni Zakon o trgovini (UNCITRAL) ▪ Donna Steinstra, Viši Pravnik Referent za istraživanja, Federalni pravosudni centar

9:20 – 10:40	**Predstavljanje delegacija** Predstavnici iz Bosne, Hrvatske, Makedonije i Crne Gore će rezimirati sadašnje stanje CDR u svojim državama. Tome će uslijediti pojedinačno predstavljanje delegata.
10:40 – 11:00	**Pauza za kavu**
11:00 – 12:00	**Predstavljanje delegacija (nastavak)** Predstavnici iz Albanije, Bugarske i Slovenije će sumirati sadašnje CDR stanje u njihovim državama. Nakon toga, predstavit će se svaki delegat pojedinačno.
12:30 – 13:00	**Prava stvar, na pravo mjesto** Ova sesija će naznačiti odabir prikladne metode za svaki pojedini slučaj, kada je to prikladno. Prezenter: ▪ Jeremy Fogel, Sudac, Pokrajinski sud Sjedinjenih Država, Sjeverna pokrajina Californije
13:00 – 14:00	Ručak
14:00 – 14:45	**Okrugli stol o tipovima CDR** Ova sesija se osvrće na razne vrste CDR, kako variraju u procesu i u ishodu i kakve su prednosti različitih vrsta. Diskusija će se baviti razlikom sudu pridruženim CDR programa i privatnih, te tome zbog čega alternativni oblici CDR dobivaju na popularnosti. Prezenteri: Jeremy Fogel, Pokrajinski sud Sjedinjenih Država, Sjeverna pokrajina Californije Emmanuel Jolivet, Pravni Savjetnik, Međunarodni sud za arbitražu Jernej Sekolec, Generalni tajnik, UNCITRAL Donna Steinstra, Viši Pravnik Referent za istraživanja, Federalni pravosudni centar
14:45 – 15:30	**Zakonodavstvo i pravila koja podupiru CDR: Arbitraža** Ova sesija će se fokusirati na potrebu za zakonodavstvom i pravilima koja podupiru arbitražu i međunarodno prihvatljive komponente modernog zakonodavstava i pravila. Diskusija će naglasiti važnost relevantnog zakonodavstvo, razmotriti detaljnost potrebnu u zakonodavstvu i regulativi i preispitati uravnoteženost između autonomije stranaka i državnog interesa za omogućavanje pravičnosti i držanja bitnih proceduralnih principa.

Prezenteri:

Silvi Chernev, Predsjedavatelj, Arbitražni sud, Bugarska komora gospodarstva i industrije (BCCI)
Emmanuel Jolivet, Pravni Savjetnik, Međunarodni sud za arbitražu. Međunarodna gospodarska komora
Jernej Sekolec, Generalni tajnik, (UNCITRAL)
Alan Uzelac, profesor, Pravni fakultet, Sveučilište Zagreb

15:30 – 15:45 Pauza za kavu

15:45 – 16:30 **Zakonodavstvo i Pravila koja podupiru CDR: Medijacija**
Ova će sesija naznačiti potrebu za zakonima i pravilima koja podupiru medijaciju. Raspravit će se novi UCITRAL zakon i pravila, te Jedinstveni zakon o medijaciji. Također, o tome kako se zakonodavstvo i pravila bave pristankom na medijaciju i kako provoditi ishode.
Prezenteri:
Ales Galic, docent, Pravni fakultet, Sveučilište Ljubljana
Sheila Purcell, Direktorica ADR, Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud.
Jernej Sekolec, Generalni tajnik, UNCITRAL
Alan Uzelac, profesor, Pravni fakultet, Sveučilište Zagreb

16:30 – 17:15 **Raščlanjivanje u grupe: Zakonodavstvo, pravila i potporne strukture**

17:15 – 17:45 **Izvješća grupa**

19:00 **Zajednička večera**

Utorak, 28. listopad

7:30 – 8:30 Doručak – švedski stol

9:00 – 10:00 **Povjerljivost i etika kod arbitraže i medijacije**
Ova će se sesija fokusirati na poštivanje povjerljivosti i na potrebu etičkog ponašanja u CDR. Diskusija će se fokusirati na ono što diktira povjerljivost, koje bi iznimke trebale postojati, povjerljivost kod same procedure i, konačno, da li pitanje povjerljivosti kod arbitraže i medijacije varira.
Prezenteri:
Nina Betetto, sudac, Apelacioni sud u Ljubljani
Emmanuel Jolivet, Pravni Savjetnik, Međunarodni sud za arbitražu. Međunarodna gospodarska komora

Sheila Purcell, Direktorica ADR, Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud.
Jernej Sekolec, Generalni tajnik, UNCITRAL
Donna Steinstra, Viši pravni savjetnik za istraživanja, Federalni pravosudni centar

10:00 – 10:45 **Arbitraža: Alociranje ovlasti između sudova, Arbitražnih institucija i Arbitražnih tribunala:**
Ova će se sesija fokusirati na provođenje međunarodnih i domaćih komercijalnih arbitražnih sporazuma, privremena sudska rješenja i sudsku potporu arbitraži, prigovore i revizije odluka, te provođenje domaćih i stranih odluka. Pažnja će se usmjeriti na određivanje prikladnih razina revizije, da li domaću i međunarodnu arbitražu tretirati različito i kada sudovi šalju ili prepuštaju arbitraži.
Prezenteri:
Silvi Chernev, Predsjedavatelj, Arbitražni sud, Bugarska komora gospodarstva i industrije (BCCI)
Jeremy Fogel, , Sudac, Pokrajinski sud sjedinjenih država, sjeverna pokrajina, Kalifornija
Emmanuel Jolivet, Pravni Savjetnik, Međunarodni sud za arbitražu. Međunarodna gospodarska komora.
Jernej Sekolec, Generalni tajnik, UNCITRAL

10:45 – 11:00 Pauza za kavu

11:00 – 12:00 **Nastavak o Arbitraži: Postizanje učinkovitosti i integriteta u arbitraži**
Ova sesija će se baviti načinima poboljšanja učinkovitosti procesa arbitriranja i osiguranja pravične, predvidljive procedure s provodljivim ishodom, za sve koji se spore. Rasprava će se baviti prilagođavanjem procedura arbitriranja kako bi odgovarale predmetu i stranama, te kako arbitražne institucije mogu privući predmete i zavrijediti povjerenje strana, odvjetnika i sudova; kako arbitri mogu spoznati i riješiti potrebe i probleme poslovne zajednice i kako institucije mogu podržavati proces arbitraže.
Prezenteri:
Silvi Chernev, Predsjedavatelj, Arbitražni sud, Bugarska komora gospodarstva i industrije (BCCI)
Emmanuel Jolivet, General Counsel, Pravni Savjetnik, Međunarodni sud za arbitražu. Međunarodna gospodarska komora
Jernej Sekolec, Generalni tajnik, UNCITRAL
Alan Uzelac, profesor, Pravni fakultet, Sveučilište Zagreb

12:00 – 13:00 **Raščlanjene grupe: Povjerljivost i etika arbitraže**

13:00 – 14:00 Ručak

14:00 – 15:00 **Sudu pridruženi i privatni programi CDR – struktura i implementacija**

Sesija će se fokusirati na stvaranje učinkovitog CDR programa. Diskusija će identificirati komponente uspješnog programa, kako dobar program može biti iniciran sa ograničenim resursima, procedure koje trebaju biti uspostavljene i uobičajene greške.
Prezenteri:
Sheila Purcell, Direktorica ADR, Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud
Donna Steinstra, Viši pravni savjetnik za istraživanja, Federalni pravosudni centar
Ales Zalar, Predsjednik suda, Ljubljanski Pokrajinski Sud

15:00 – 15:45 **Medijacija – odabir, obuka i osiguravanje integriteta medijatora**
Ova će sesija preispitati utemeljenje procedura za odabir uspješnih medijatora i kako stvoriti učinkovite programe obuke koji će osigurati kompetentnost i integritet posrednika-medijatora. Diskusija će se baviti načinima predviđanja tko će biti dobar medijator, kako pripremiti medijatore za potencijalne etičke probleme, kako uspostaviti učinkovite mehanizme za obuku, kako skrojiti obuku za iskusne medijatore, te kako medijatore evaluirati.
Prezenteri:
Jeremy Fogel, Sudac, Pokrajinski sud sjedinjenih država, sjeverna pokrajina, Kalifornija
Gordona Ristin, Judge and Mediator, Court of Appeal, Ljubljana
Sheila Purcell, Direktorica ADR, Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud
Donna Steinstra, Viši pravni savjetnik za istraživanja, Federalni pravosudni centar

15:45 – 16:00 pauza za kavu

16:00 – 16:45 **Raščlanjene grupe:– Kako medijaciju učiniti učinkovitom**

18:30 – 20:00 **Prijam u rezidencije veleposlanika SAD, g. Younga**

Srijeda, 29. listopad

7:30 – 8:30 Doručak, švedski stol

9:00 – 9:45 **Administriranje medijacije**
Sesija će se fokusirati na rukovođenje predmetima u medijacijskim programima. Diskusija će pokriti kako privući i izabrati slučajeve, kako osigurati da proces ne skrene s kolosijeka, te kako organizirati procedure rokova i procedura rukovođenja opsegom predmeta. Predavači će se

osvrnuti na potrebu stranaka da predoče svoj slučaj, te efikasan i pomirljiv proces. Također će se osvrnuti na administrativne procedure koje mogu proces medijacije poboljšati i, kako je moguće predvidjeti i izbjeći probleme.
Prezenteri:
Masa Kociper, Direktorica ADR Programa, Ljubljanski Pokrajinski Sud
Sheila Purcell, Direktorica ADR, Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud
Donna Steinstra, Viši pravni savjetnik za istraživanja, Federalni pravosudni centar

9:45 – 10:45

Adaptiranje CDR poslovnim realnostima
Sesija će pokriti privlačenje komercijalnih predmeta u CDR programe i kako prilagoditi programe da odgovaraju potrebama komercijalnih predmeta. Pažnja će se pokloniti problematici izvođenja programa, financiranju programa, rukovođenja predmetima, suočavanja s kompleksnim predmetima te poboljšanju i evaluiranju učinkovitosti programa CDR. Rasprava će se usmjeriti na posebne potrebe komercijalnih predmeta, kao što su kompleksna potraživanja i višestruke strane. Također će se razmatrati načine postizanja povjerenja odvjetnika i klijenata u medijaciju komercijalnih potraživanja, poboljšanja provođenja i kako izbjeći da medijacija postane dodatni trošak i zavlačenje.
Prezenteri:
Jeremy Fogel, Sudac, Pokrajinski sud sjedinjenih država, sjeverna pokrajina, Kalifornija
Sheila Purcell, Direktorica ADR, Multi-opcijski ADR projekt, San Mateo Pokrajinski Sud
Donna Steinstra, Viši pravni savjetnik za istraživanja, Federalni pravosudni centar

10:30 – 10:45

Pauza za kavu

10:45 – 11:45

Tobožnja medijacija
Organizator:
Masa Kociper, Direktorica ADR Programa, Ljubljanski Pokrajinski Sud

11:45 – 12:30

Slijedeći koraci
Sesija će omogućiti delegatima da rasprave buduće aktivnosti potrebne za promoviranje efikasnijih CDR i mogućih načina razvijanja CDR. Pitanja za razmatranje: kako viziju provesti u djelo, kako na postojećim uspjesima izgraditi budući progres, kako odrediti dugoročne ciljeve i realne metode njihovog postizanja, te moguće prepreke i moguća rješenja.
Prezenteri:
Ales Zalar, Predsjednik suda, Ljubljanski Pokrajinski Sud
jedan zastupnik iz svake delegacije

12:30 – 13:30	Ručak
13:30 – 14:30	**Raščlanjene grupe: detaljna diskusija o slijedećim koracima**
14:30 – 15:15	**Izazovi** ▪ Ograničeni resursi – određivanje prioriteta ▪ Izmjena pravne kulture – pridobivanja klijenata i odvjetnika za opciju ▪ Zakonodavstvo i pravila – osiguravanje prikladnih procedura i struktura ▪ Sudska potpora – uloga sudova kod različitih oblika ADR ▪ Obuka i obrazovanje – razvoj stalnih programa ▪ Interesi države – kontrola ili autonomija Prezenteri Panel od nekoliko delegata
15:15 – 15:30	Pauza za kavu
15:30 – 16:15	**Uloga komponenti CDR u reformi sudstva i projektima komercijalnog razvoja** Sesija će se baviti razlozima zbog kojih su CDR komponente postale važan dio projekata pravnog razvoja i kako će razvoj CDR pomoći pri odlučivanju komercijalnih sporova i poboljšati okruženje komercijalnih zakona. Također će se baviti najboljim načinom potpore razvojnih projekata CDR. Prezenteri: Development (SEED) Razvoj Charles A. Schwartz, Tehnički Stručnjak, USAID David Vaughn, Viši Upravitelj, Chemonics International, Inc Lada Busevac, Koordinator Poslovne Fondacije za Poticanje Poslovnog Okruženja, Svjetska Banka/IFC, Poduzeće za jugoistočnu Europu
16:15 – 17:00	**Buduća regionalna suradnja – što je poželjno i što je moguće** Sesija će preispitati kako regionalna suradnja CDR institucija i zainteresiranih strana može pomoći razvoju CDR i naznačiti konkretne načine razmjene znanja i iskustava između institucija. Prezenteri: Zastupnici programa i institucija CDR
17:00 – 17:15	**Zaključci** Prezenter: Patricia Shaughnessy, Šef poslanstva, CDR Projekt
18:30 – 19:30	**Prijam u gradskom poglavarstvu**
19:30	Završna večera

SECTION II

Participant Information

First Name	Last Name	Title	Organization	Email
Fatbardh	Ademi	Executive Director	Albanian Commercial Mediation & Arbitration Center	medart@sanx.net
Vangjel	Kosta	Executive Director	Albanian Commercial Mediation & Arbitration Center	medart@sanx.net
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Goran	Salihovic	President	Association of Mediators	
Mirza	Jusufovic	Judge		
Jadranka	Ivanovic	Judge		
Hakija	Kurtovic	Lawyer		
Obren	Buzanin	Judge	Supreme Court	
Silvy Vassilev	Chernev	President		ckp@online.bo
Mihael	Kovacic	Judge, Court Deputy President	Commercial Court in Sisak	mihael.kovacic@inet.hr
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Alan	Perl	Owner/Manager	Promakon D.O.O.	alan.perl@zg.tel.hr
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Borislav	Blazevic	President	High Commercial Court Zagreb	
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Agim	Miftari	Judge	Supreme Court of the Republic of Macedonia	mja@mja.org.mk
Biljana	Djuricin	Professor	Law Faculty	djuricin@cg.yu
Mladen	Bojanic	CEO	New Securities Exchange Montenegro	mladen.bojanic@nex.cg.yu
Vladimir	Radulovic	Head of Legal Inspection	Ministry of Justice	pravda@cg.yu
Dragan	Rakocevic	Judge		svetr@cg.ac.yu
Julka	Badnjar	Judge		
Petar	Ivanovic	Executive Director	CEED	Ivanovic@cg.yu
Dragana	Radevic	Program Director	CEED	dradevic@cg.yu

International Speakers/Organizers				
Jeremy	Fogel	United States District Judge	United States District Court	Jeremy_Fogel@cand.uscourts.gov
Emmanuel	Jolivet	General Counsel, International Court of Arbitration	International Chamber of Commerce	emmanuel.jolivet@iccwbo.org

First Name	Last Name	Title	Organization	Email
International Speakers/Organizers cont.				
Declan	MacGuinness		Chemonics International, CDR Project	Declan@mac-guinness.com
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Donna	Stienstra	Senior Researcher	The Federal Judicial Center	dstienst@fjc.gov
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Observers				
Nadja	Alexander	Comparative research specialist on ADR		
Steven	Austermiller		ABA/CEELI	
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Lada	Busevac	Business Enabling Environment Trust Fund Coordinator	World Bank/IFC Southeast Eurpoe Enterprise Development	lbusevac@ifc.org
Loredana	Di Stefano	Head of Court Annexed ADR programs		
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Slovenian Delegation				
Nina	Betetto	Judge	Court of Appeal, Ljubljana	nina.betetto@sodisce.si
Miodrag	Dordevic	Justice	Supreme Court of Republic of Slovenia	miodrag.dordevic@sodisce.com
Ales	Galic	Docent Doctor	University of Ljubljana, Law Faculty	ales.galic@pf.uni-lj.si
Masa	Kociper	Director of ADR programs	District Court of Ljubljana	masa.kociper@sodisce.si
Rok	Koren	Head	Regional Bar of Ljubljana	
Beti	Potparic	Adviser to the Minister	Ministry of Justice	
Kreso	Puharic	Head of Arbitration	Chamber of Commerce	
Gordana	Ristin	Judge		
Magda	Teppey	Judge	District Court of Ljubljana	magdateppey@sodisce.si
Ales	Zalar	President & Judge	District Court of Ljubljana	ales.zalar@sodisce.si

SECTION III

Speaker Information

Jeremy Fogel has served as a judge for the United States District Court, Northern District of California since 1998. Prior to that he was appointed to Santa Clara County Municipal Court in 1981, and appointed to Santa Clara Superior Court in 1986. He served as Presiding Judge for Santa Clara County Municipal Court in 1984-85, acted as a Supervising Judge, Family Law Division, Santa Clara Superior Court from 1987-88 and again in 1995. He was a Supervising Judge with the Probate/Mental Heath Division in 1991, and was a Civil Team Leader and Law and Motion Judge for Santa Clara Superior Court from 1992-94 and again from 1996-98. Judge Fogel was born in San Francisco, and raised in Los Angeles, California. He attended Los Angeles public schools, and graduated with a Bachelor of Arts with Great Distinction from Stanford University in 1971, majoring in Religious Studies. He received his Juris Doctor cum laude from Harvard University in 1974.

Mr. Emmanuel Jolivet, General Counsel of the International Chamber of Commerce (ICC) International Court of Arbitration, and is responsible for advising the Court on legal matters. He is also Secretary to the ICC Commission on Arbitration and Editor of the Bulletin of the ICC International Court of Arbitration. Mr. Jolivet is a French citizen and a lawyer by training. He holds a Ph.D. in private law.

Ms. Sheila Purcell directs the Multi-Option Anti-Dispute Resolution (ADR) Project (MAP), a partnership of the San Mateo Courts, bar and community with distinct programs and staff in civil, small claims, family, probate and juvenile courts. She served as the State Bar of California's ADR Program Developer. A Hastings graduate, she received a Coro Fellowship in Public Affairs and mediated for the San Francisco Mayor's Office. She helped found the California Dispute Resolution Council, is a frequent conference presenter, and assisted in drafting several ADR bills and Court Rules. Publications include the *California Judicial Education and Research*, *A Judges Guide to ADR*, and has guest edited the spring 2003 *American Bar Association (ABA) Dispute Magazine*, Court ADR issue. She has taught ADR Policy courses at both Hastings School of Law and UC Berkeley's Boalt Law School. The MAP has been visited by numerous foreign delegations studying ADR and civil law reform and Ms. Purcell has recently been invited to serve on a committee assisting India in implementing a comprehensive ADR and Case Management reform program.

Jernej Sekolec, Dr. jur., LLM, national of Slovenia, is the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) and Chief, International Trade Law Branch of the United Nations Office of Legal Affairs (which functions as the secretariat of UNCITRAL). Prior to joining the International Trade Law Branch in 1982, he was a Law Professor at the University of Maribor, Slovenia, Head of the Department of Commercial Law of the Faculty of Commerce of Maribor University, arbitrator, a part time Judge, and a member of the appellate panel of the Court of Appeal Maribor (commercial chamber). He has published books and articles on commercial law, including contract law, commercial arbitration, international payments, negotiable instruments, transport law and products liability.

Mr. Charles Schwartz is senior legal advisor, commercial dispute resolution team leader and corporate governance team leader in the Office of Economic Growth division of Market Transition of the USAID Bureau for Europe & Eurasia. He works in the areas of commercial law, commercial dispute resolution, corporate governance, competition and e-commerce, fiscal reform, and other market transition initiatives. Mr. Schwartz provides technical support to USAID Missions and regional projects in Europe and Eurasia to help design, implement, and evaluate projects and activities. He also works with other donors and multi-lateral lending institutions on commercial dispute resolution, corporate governance, secured transactions, bankruptcy, and insolvency. He earned his B.A. and Juris Doctorate degrees from Columbia University and a Master of Law degree from New York University Law School. He has served as assistant general tax counsel for a Fortune 500 Company, and as "in-house" counsel for several companies abroad. Mr. Schwartz has experience in company, corporate governance, dispute resolution, trade, tax, and banking matters in Western and Eastern Europe, Africa, Asia, Latin American and the Caribbean, and the U.S. He has served as director of the commercial law reform component of a USAID-funded project in Bosnia. Additionally, Mr. Schwartz has lectured at the university level, for the New York State Bar Association, the American Publishers Association, and the U.S. Department of Commerce.

Ms. Donna Stienstra is a senior researcher at the Federal Judicial Center, the research and education agency for the U.S. federal courts, where she conducts research and educational programs on ADR and case management in federal courts. Ms. Stienstra has published extensively on court-related subjects; her 1996 publication with Elizabeth Plapinger, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers*, remains the standard reference work on federal trial court ADR programs. She has co-authored the *Guide to Judicial Management of Cases in ADR,* which provides guidance to judges in selecting and managing cases in ADR. Recently, Ms. Stienstra has devoted much of her time to assisting courts to implement mediation procedures. She regularly consults with U.S. federal courts in their efforts to provide alternative dispute resolution services. She has also worked with state courts and with court systems in the Netherlands, Namibia, India, and Thailand. Ms. Stienstra currently directs a project to provide on-site consultation assisting federal district and bankruptcy courts to design or enhance ADR procedures.

SECTION IV

City Information

Ljubljana, Slovenia

Facts at a Glance

Population: 330,000
Elevation: 981 feet (299 meters)
Time Zone: Central European Time (GMT plus 1 hour)
Telephone country code: 386

History

The Slovenes' affection for their capital is apparent in the mere translation of its name: "beloved." Described as "a smaller Prague without the hordes of tourists," Ljubljana sits in the middle of Slovenia, serving as the country's cultural and political center.

Though traces to the ancient Illyrians and Celts have been discovered in the region, Emona (Ljubljana's Latin name) gained prominence when Romans built it into a vital crossroads between colonies on the Italian peninsula and the Black Sea. After the Huns destroyed the city, Slavs moved into the area in the 7th century. As Empires rose and fell, Ljubljana changed hands frequently up to and through the Middle Ages, finally falling under Habsburg rule in 1335. The Austrian monarchs held control over Ljubljana and the surrounding lands until World War I disseminated their dominions.

After WWI, Slovenia joined the Kingdom of Serbs, Croats, and Slovenes. During World War II, both the Germans and Italians occupied the city and surrounded it in barbed wire, creating an isolated, metropolitan concentration camp. In 1945, Ljubljana became the capital of the Socialist Republic of Slovenia within Yugoslavia, and became the national capital after Yugoslavia crumbled in 1991.

Climate

Although Slovenia's climate vastly varies from the Alpine north to the Mediterranean south, Ljubljana remains rather stable and warm from March to October. The early spring and autumn are the rainiest seasons.

Month	Average High (F/C)	Average. Low (F/C)	Month	Average. High (F/C)	Average. Low (F/C)
January	34/1°	25/–4°	July	83/28°	55/13°
February	36/2°	29/–2°	August	78/26°	55/13°
March	50/10°	32/0°	September	70/21°	51/11°
April	58/14°	40/4°	October	61/16°	46/8°
May	68/20°	49/9°	November	44/7°	33/1°
June	75/24°	52/11°	December	36/2°	29/–2°

Transportation

Because parking is a hassle in central Ljubljana's winding streets, public transportation is preferable on all fronts. The city has 22 bus lines; the five major routes (numbered 1, 2, 3, 6, and 11) run from 3:15 a.m. to midnight, and the rest from 5:00 a.m. to 10:30 p.m. You can pay 160 SIT on board or buy a token (žeton) for 115 SIT at most newsstands, post offices, and kiosks.

Taxis are also available throughout the city, either by hailing one off the street or calling any one of ten telephone numbers: 9700 to 9709.

For information and directions from your hotel, ask the concierge.

Attractions

The best way to absorb the history and culture of Ljubljana is by strolling through the city center. Sightseeing in Ljubljana is capped with Ljubljana castle, a 16th Century fortification that overlooks the city from the east. A good place to begin your walking tour is at Prešernov Trg, a square linking the center and Old Town, at the base of Castle Hill. On your way through you will encounter a slew of timeless churches, such as the 17th Century Franciscan Church of the Annunciation, Cathedral of St. Nicholas (Stolnica Sv Nicolai), Church of St. James, Chapel of St. Francis Xavier, and the 1672 Church of St. Florian. Also adorning Ljubljana's streets are notable residences, such as the Bishop's Palace (Škofijski Dvorec), Gruber Palace (Gruberjev Palača), as well as the medieval houses at Gornji trg 7–15, which are identified by narrow passageways where garbage was once deposited to be washed into the river.

Below are some of the main attractions. For further information please contact the concierge at your hotel.

Ljubljana Castle (Ljubljanski Grad)
Hours: Tuesday, Thursday, Saturday: 11:00–18:00
Wednesday, Friday: 13:00–18:00
Sunday, Monday: closed.
Admission: 200 SIT
A 16th Century castle with picturesque views of the bustling and tranquil city.

National Museum (Narodni Muzej)
Muzejska ulica 1
1000 Ljubljana
Hours: Tours Tuesday–Sunday 10:00–18:00, Wednesday 10:00–20:00
Admission: 500 SIT
A museum which houses Slovenia's national treasures dating to circa 500 B.C.

National Gallery (Narodna Galerija)
Cankarjeva cesta 20
1000 Ljubljana
Hours: Tuesday–Saturday 10:00–18:00, Sunday 10:00–13:00
Admission: 500 SIT
An art museum with Slovenian and other European masterpieces.

Zoological Gardens (Živalski Vrt)
Večna pot 70
1000 Ljubljana
Hours: 9:00–16:00 Daily (closed Monday)
Admission: 600 SIT
Slovenian Eden: Home to over 800 animals from over 120 species.

Shopping

Ljubljanček (in Grand Hotel Union)
Miklošičeva 1
Tel: 01–308–12–70

Galerija Zibka (in Hotel Slon)
Mesti trg 24
1000 Ljubljana
Tel: 061–170–11–83
Hours: Monday–Saturday 10:00–19:00 and Sunday 10:00–13:00

Parazol
Stari trg 15, Mestni trg 9
1000 Ljubljana
Tels: 01–425–52–77, 061–125–24–51

Ljubljanček is considered the best store for typical Ljubljana merchandise, whereas Galerija Zibka and Parazol are excellent places for typical Slovenian goods, such as Prekmurje black pottery, beehive panels with folk motifs, painted eggs, Idrija lace, and Rogaška glassware.

Emporium

Letališka 3
1000 Ljubljana
Tel: 01–584–48–00

Emporium is a major shopping center, much akin to Macy's in New York or Harrod's in London. Look here for a slew of (albeit pricy) merchandise, though the smaller shops are probably better for souvenir hunters.

Restaurants

The best source of restaurant information is the concierge of your hotel. Often hotels have maps that show all nearby restaurants, the hours they are open, the description of food they serve, and the price range. If this type of map is not available, ask the concierge what type of restaurant you are seeking and he or she should be able to guide you. Many hotels allow delivery service of local restaurants to the hotel. Delivery, or "take out" food, is often an inexpensive alternative to dining out.

Špajza
Gornji trg 28
1000 Ljubljana
Tel: 01–425–30–94

This tasty yet very expensive dining establishment is a favorite for travelers willing to spend the extra money (dinner is roughly 4500 SIT plus wine, though lunch is only 2000 SIT). Its low, frescoed ceilings and country-style walls provide an intimate yet classical setting for Slovene food.

Pri Sv Florianu
Gornji trg 20
1000 Ljubljana
Tel: 01–251–22–14

For modern Slovene and intercontinental delicacies, this elegant eatery is hardly a miss. It is open from noon to midnight daily and sports a 1490 SIT lunch from noon to 16:00.

Ljubljana, Slovenija

Ukratko

Populacija: 330,000
Elevacija: 981 stopa (299 metara)
Vremenska Zona: Centralno-Europska Zona (GMT plus 1 sat)
Telefonski pred-broj: 386

Povijest

Koliko Slovenci vole svoj glavni grad se očitava po njegovom samom nazivu, Ljubljana, ili voljena. Opisuje se kao mali Prag bez gomile turista. Ljubljana je locirana usred Slovenije i služi kao centar kulture i politike u zemlji.
Iako su pronađene drevne veze sa Ilirima kao i Keltima u regiji, Emona (Latinski naziv za Ljubljanu) je dobila veliki značaj kada su je Rimljani izgradili u važno raskrižje putova između kolonija talijanskog poluotoka i Crnog mora. Nakon što su Huni uništili grad, u polovini 7-og stoljeća doselili su se Slaveni. Kako su imperije cvale pa propadale, tako bi Ljubljana mijenjala vlasnika sve do srednjeg vijeka, kada je konačno pripala Hapsburzima 1335. godine. Austrijska monarhija je držala kontrolu nad Ljubljanom, kao i susjednim zemljama dok joj nije prvi svjetski rat razbio posjede.
Nakon prvog svjetskog rata, Slovenija se pridružila Kraljevini Srba, Hrvata i Slovenaca. Za vrijeme drugog svjetskog rata, i Talijani i Nijemci su okupirali grad i opkolili ga bodljikavom žicom, stvarajući izolirani, metropolski koncentracioni logor. 1945. godine, Ljubljana je postala glavni grad Socijalističke Federativne Republike Slovenije u sklopu Jugoslavije, te glavni grad svoje države nakon raspada Jugoslavije 1991.

KLIMA

Iako Slovenska klima varira intenzivno od alpskog sjevera do mediteranskog juga, Ljubljana ostaje dosta stabilna i topla od ožujka do listopada. Rana proljeća, kao i rana jesen, su najkišovitija doba godine.

Mjesec	Prosječna Visoka (F/C)	Prosječna Niska (F/C)	Mjesec	Prosječna Visoka (F/C)	Prosječna Niska (F/C)
Siječanj	34/1°	25/–4°	Srpanj	83/28°	55/13°
Veljača	36/2°	29/–2°	Kolovoz	78/26°	55/13°
Ožujak	50/10°	32/0°	Rujan	70/21°	51/11°
Travanj	58/14°	40/4°	Listopad	61/16°	46/8°
Svibanj	68/20°	49/9°	Studeni	44/7°	33/1°
Lipanj	75/24°	52/11°	Prosinac	36/2°	29/–2°

Prijevoz

Zbog vijugavih ulica I preopterećenosti parkiranja u centru, uvijek je poželjnije koristiti javni prijevoz. Grad ima 22 autobusne linije, pet glavnih ruta (brojevi 1, 2, 3, 6 I 11) rade od 3:15 ujutro do ponoći i ostale linije, od 5 ujutro do 10:30 navečer. Možete uplatiti 160 SIT kada uđete ili kupiti žeton za 115 SIT u pošti ili u kioscima.

Taksi-prijevoz je dostupan širom grada; možete zaustaviti taksi ili nazvati jedan od deset brojeva od 9700 do 9707.

Atrakcije

Najbolji način kako ćete upiti povijest i kulturu Ljubljane je šetnjom kroz gradski centar. Vrhunac razgledavanja je Ljubljanski dvorac, tvrđava iz 16. stoljeća s pogledom na istočni dio grada. Dobra početna točka za razgledanje pješice je Prešernov trg, koji spaja centar sa starim gradom kod Dvor-brda. Na putu, vidjet ćete veliki broj starih crkava poput Franjevačke crkve iz 17-og stoljeća, crkve Uzvišenja, kao i Katedrale Sv. Nikole, Crkve Sv. Jeronima, Kapela Sv. Franja Ksaviera, te crkve Sv. Florijana iz 1672. Ljubljanske ulice krase i značajne rezidencije poput biskupske palače (Škofijskog dvorca), Gruberjeve palače kao i srednjovjekovnih kuća kod Gornjeg trga 7-15 koje su poznate po uskim ulicama gdje je nekoć odlagano smeće kako bi otplutalo u rijeku.

Dole su navedene neke glavne atrakcije. Za dodatne informacije, molimo, kontaktirajte recepcionara u hotelu.

Ljubljanski Grad
Radno vrijeme: utorak, četvrtak, subota: 11:00–18:00
srijeda, petak: 13:00–18:00

nedjelja, ponedjeljak: zatvoreno.
Ulaznica: 200 SIT
Dvorac iz 16. stoljeća sa slikovitim pogledom nad živim i spokojnim gradom.

Narodni Muzej
Muzejska ulica 1
1000 Ljubljana
Radno vrijeme: Razgledavanje: od utorka do nedjelje 10:00–18:00, srijeda 10:00–20:00
Ulaznice: 500 SIT
Muzej koji posjeduje Slovensko nacionalno blago od circa 500 prije Krista.

Narodna Galerija
Cankarjeva cesta 20
1000 Ljubljana
Radno vrijeme: od utorka do subote– 10:00–18:00, nedjelja 10:00–13:00
Ulaznice: 500 SIT
Muzej umjetnosti koji posjeduje Slovenska i Europska remek-djela.

Zoološki vrt
Večna pot 70
1000 Ljubljana
Radno vrijeme 10:00–16:00 dnevno (ponedjeljkom zatvoreno)
Ulaznica: 600 SIT
Slovenski Raj: Više od 800 životinja i 120 vrsta.

Kupovina

Ljubljanček (in Grand Hotel Union)
Miklošičeva 1
Tel: 01–308–12–70

Galerija Zibka (in Hotel Slon)
Mesti trg 24
1000 Ljubljana
Tel: 061–170–11–83
Radno vrijeme: od ponedjeljka–subote 10:00–19:00 i nedjeljom od 10:00–13:00

Parazol
Stari trg 15, Mestni trg 9
1000 Ljubljana
Tels: 01–425–52–77, 061–125–24–51

Smatra se da je Ljubljanček jedna od najboljih trgovina gdje se mogu kupiti tipični Ljubljanski proizvodi dok su Galerija Zbirka i Parazol odlična mjesta za tipične slovenske proizvode tipa Prekmurje crna keramika, pčelinji panoi sa narodnim motivima, obojena jaja, Idrijina čipka i Rogaška proizvoda stakla.

Emporium
Letališka 3
1000 Ljubljana
Tel: 01–584–48–00

Emporium je jedan od glavnih trgovinskih centara, nešto poput Njujorški Macy's ili Londonski Harrod's. Ovdje imate mnoge, ali i skupocjene, proizvode, iako su manje trgovine bolje za lovce na suvenire.

Restorani

Najbolji izvor informacije što se tiče restorana je recepcionar u hotelu. Hoteli često imaju karte koje će vam pokazati gdje se nalazu obližnji restorani, njihovo radno vrijeme, izbor hrane, kao i cjenik. Ako vam karta nije dostupna, recite Recepcionaru(ki) kakav vas restoran zanima i on(a) će vam pomoći. Mnogi hoteli dozvoljavaju da se hrana dostavi iz lokalnih restorana. Takva dostava ili usluga je obično jeftinija alternativa.

Špajza
Gornji trg 28
1000 Ljubljana
Tel: 01–425–30–94

Ovaj restoran nudi ukusnu ali i vrlo skupu ponudu i najomiljeniji je među turistima koji su spremni potrošiti više (otprilike 4500 SIT plus vino) iako ručak košta samo 2000 SIT. Niski, freskom ukrašeni plafoni kao i rustični zidovi nude intimni, ali klasični ambijent za slovensku hranu.

Pri Sv Florijanu
Gornji trg 20
1000 Ljubljana
Tel: 01–251–22–14

Za moderne slovenske kao i interkontinentalne delikatese, ovaj elegantni restoran ne može promašiti. Radno vrijeme je od podne do ponoći I nudi ručak od 1490 SITa od podne do 16 sati.

SECTION V

UNCITRAL

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Model Law on International Commercial Arbitration

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EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

A. Background to the Model Law

1. Inadequacy of domestic laws
2. Disparity between national laws

B. Salient features of the Model Law

1. Special procedural regime for international commercial arbitration
2. Arbitration agreement
3. Composition of arbitral tribunal

4. Jurisdiction of arbitral tribunal
5. Conduct of arbitral proceedings
6. Making of award and termination of proceedings
7. Recourse against award
8. Recognition and enforcement of awards

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(United Nations document A/40/17, Annex I)

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application*

(1) This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

** Article headings are for reference purposes only and are not to be used for purposes of interpretation.*

*** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.*

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which

provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the

challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on

which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. <u>Recognition and enforcement</u>

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration

agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.***

Article 36. <u>Grounds for refusing recognition or enforcement</u>

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

*** *The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.*

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission toarbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance

with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*

1. The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of

arbitral procedures and the specific needs of international commercial arbitration practice".

2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

3. The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers.

** This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an earlier draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI - 1985)(United Nations publication, Sales No. E.87.V.4).*

A. BACKGROUND TO THE MODEL LAW

4. The Model Law is designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmonization is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.

1. Inadequacy of domestic laws

5. A global survey of national laws on arbitration revealed considerable disparities not only as regards individual provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues. Even most of those laws which appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not

exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by a general arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

6. The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by a mandatory provision of the applicable law. Unexpected and undesired restrictions found in national laws relate, for example, to the parties' ability effectively to submit future disputes to arbitration, to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate. Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.

2. Disparity between national laws

7. Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. For such a party it may be expensive, impractical or impossible to obtain a full and precise account of the law applicable to the arbitration.

8. Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

B. SALIENT FEATURES OF THE MODEL LAW

1. Special procedural regime for international commercial arbitration

9. The principles and individual solutions adopted in the Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State also in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

a. Substantive and territorial scope of application

10. The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1(3)). The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

11. As regards the term "commercial", no hard and fast definition could be provided. Article 1 contains a note calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial".

12. Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined.

13. The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is

used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

b. Delimitation of court assistance and supervision

14. As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

15. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

16. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". This is stated in the innovative article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration, will appreciate that they do not have to search outside this Law.

2. Arbitration agreement

17. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as "1958 New York Convention"), with a number of useful clarifications added.

a. Definition and form of arbitration agreement

18. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("compromis") or a future dispute ("clause compromissoire"). The latter type of agreement is presently not given full effect under certain national laws.

19. While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement", by covering the submission-type situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another", and by providing that "the reference in a contract to a document" (e.g. general conditions) "containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

b. Arbitration agreement and the courts

20. Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on article II(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

21. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

3. Composition of arbitral tribunal

22. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to fundamental requirements of fairness and justice. Secondly, where the parties have not used their freedom to lay down the rules of procedure or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively to the resolution of the dispute.

23. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appealable.

4. Jurisdiction of arbitral tribunal

a. Competence to rule on own jurisdiction

24. Article 16(1) adopts the two important (not yet generally recognized) principles of "Kompetenz-Kompetenz" and of separability or autonomy of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration

clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

25. The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

b. Power to order interim measures

26. Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party (article 17). It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

5. Conduct of arbitral proceedings

27. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

a. Fundamental procedural rights of a party

28. Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party. Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an

appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

29. Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24(2)).

b. <u>Determination of rules of procedure</u>

30. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

31. Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.

32. In addition to the general provisions of article 19, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language of the proceedings.

c. Default of a party

33. Only if due notice was given, may the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25(c)). The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim (article 25(a), (b)).

34. Provisions which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since, as experience shows, it is not uncommon that one of the parties has little interest in co-operating and in expediting matters. They would, thus, give international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6. Making of award and termination of proceedings

a. Rules applicable to substance of dispute

35. Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important in view of the fact that a number of national laws do not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law gives the parties a wider range of options as regards the designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable.

36. According to article 28(3), the parties may authorize the arbitral tribunal to decide the dispute ex aequo et bono or as amiables compositeurs. This type of arbitration is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) makes clear that in all cases, i.e including an arbitration ex aequo et bono, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

b. Making of award and other decisions

37. In its rules on the making of the award (articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

38. Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

39. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, i.e. an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

7. Recourse against award

40. National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

a. Application for setting aside as exclusive recourse

41. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings

(article 36). Furthermore, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

b. Grounds for setting aside

42. As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

43. Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

44. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

8. Recognition and enforcement of awards

45. The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.

a. Towards uniform treatment of all awards irrespective of country of origin

46. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

47. By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

b. Procedural conditions of recognition and enforcement

48. Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

49. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement (article 35(2)).

c. Grounds for refusing recognition or enforcement

50. As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.

Further information on the Model Law may be obtained from:

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Notes on Organizing Arbitral Proceedings

Preface

The United Nations Commission on International Trade Law (UNCITRAL) finalized the Notes at its twenty-ninth session (New York, 28 May - 14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993,<1> considered in 1994 a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings".<2> That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.<3> On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared "draft Notes on Organizing Arbitral Proceedings".<4> The Commission considered the draft Notes in 1995,<5> and a revised draft in 1996,<6> when the Notes were finalized.<7>

<1> Report of the United Nations Commission on International Trade Law on the work of its twenty- sixth session, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) (reproduced in UNCITRAL Yearbook, vol. XXIV: 1993, part one), paras. 291-296.

<2> The draft Guidelines have been published as document A/CN.9/396/Add.1 (reproduced in UNCITRAL Yearbook, vol. XXV: 1994, part two, IV): the considerations of the Commission are reflected in the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, Official Records of the General Assembly, Forty-ninth Session Supplement No. 17 (A/49/17) (reproduced in UNCITRAL Yearbook, Vol. XXV: 1994, part two, IV), paras. 111-195.

<3> The proceedings of the Congress are published in Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No. 7, Kluwer Law International, The Hague, 1996.

<4> The draft Notes have been published as document A/CN.9/410 (and will be reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part two, III).

<5> Report of the United Nations Commission on International Trade Law on the work of its twenty- eighth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (and will be reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part one), paras. 314-373.

<6> The revised draft Notes have been published as document A/CN.9/423 (and will be reproduced in UNCITRAL Yearbook, vol. XXVII: 1996, part two).

<7> Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17) (and will be reproduced in UNCITRAL Yearbook, vol. XXVII: 1996, part one), paras. 11 to 54.

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INTRODUCTION

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.<8> This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

<8> A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

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5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may

be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

Multi-party arbitration

6. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 86-88 (item 18).

Process of making decisions on organizing arbitral proceedings

7. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

8. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls or other electronic means. Meetings may be held at the venue of arbitration or at some other appropriate location.

9. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

10. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

11. Given that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, it is not attempted in the Notes to describe in detail different arbitral practices or express a preference for any of them.

12. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed.

13. When the Notes are used, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

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ANNOTATIONS

1. Set of arbitration rules

If the parties have not agreed on a set of arbitration rules, would they wish to do so

14.Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

15.However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

16.It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted.

2. Language of proceedings

17.Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

18.Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.

(b) Possible need for interpretation of oral presentations

19.If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

20.In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21.Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

22.Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and

cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

23.Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

24.Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25.When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

26.Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27.To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial.

Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.

5. Deposits in respect of costs

(a) Amount to be deposited

28.In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

29.When the arbitration is administered by an institution, the institution's services may include managing and accounting for the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

30.If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

31.It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions

would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

32.An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

33.To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

34.Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

8. Telefax and other electronic means of sending documents

(a) Telefax

35.Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a telefacsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were

transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail and magnetic or optical disk)

36.It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

37.When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. electronic mail or computer disks) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identification of persons who can be contacted if a problem occurs.

9. Arrangements for the exchange of written submissions

38.After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal or rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

39.It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral

tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

40.Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.

(b) Consecutive or simultaneous submissions

41.Written submissions on an issue may be made consecutively, i.e. the party who receives a submission is given a period of time to react with its counter-submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

42.Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- Whether the submissions will be made as paper documents or by electronic means, or both (see paragraphs 35-37);
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- When translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

43.In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages, it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute. However, possible disadvantages of preparing such a list include delay, adverse effect on the flexibility of the proceedings, or unnecessary disagreements about whether the arbitral tribunal has decided all issues submitted to it or whether the award contains decisions on matters beyond the scope of the submission to arbitration. The terms of reference required under some arbitration rules, or in agreements of parties, may serve the same purpose as the above-described list of points at issue.

(b) In which order should the points at issue be decided

44.While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g. a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

45.If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of a party.

(c) Is there a need to define more precisely the relief or remedy sought

46.If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

47.Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

48.Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

49.The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

50.Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

51.The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

52.It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document; (b) a copy of a dispatched communication (e.g. letter, telex, telefax or other electronic message) is accepted without further proof as having been received by the addressee; and (c) a copy is accepted as correct. A statement by the arbitral

tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

53.The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example, by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

54.When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

55.In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

56.If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

57.If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places, other arrangements to provide the opportunity for all

parties to be present, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

58.The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

59.While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

60.To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; and (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

61.Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 67). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

62.If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

63.To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

64.Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

(iii) May witnesses be in the hearing room when they are not testifying

65.Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending on what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) The order in which the witnesses will be called

66.When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

67.In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In those legal systems such contacts are usually not permitted once the witness's oral testimony has begun. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

68.According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. Experts and expert witnesses

69.Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

70.If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

71.The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

72.Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

73.If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see paragraphs 60-62).

17. Hearings

(a) Decision whether to hold hearings

74.Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

75.If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings. The arbitral tribunal may wish to consult the parties on this matter.

(b) Whether one period of hearings should be held or separate periods of hearings

76.Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier

to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

77.Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

78.Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements; (b) questioning its witnesses; and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

79.Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

80.Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

81.The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who

prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

82.The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one method is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

83.If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

84.Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

85.In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

18. Multi-party arbitration

86.When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. The Notes,

notwithstanding a possible greater complexity of multi-party arbitration, can be used in multi-party as well as in two-party proceedings.

87.The areas of possibly increased complexity in multi-party arbitration are, for example, the flow of communications among the parties and the arbitral tribunal (see paragraphs 33, 34 and 38-41); if points at issue are to be decided at different points in time, the order of deciding them (paragraphs 44-45); the manner in which the parties will participate in hearing witnesses (paragraph 63); the appointment of experts and the participation of the parties in considering their reports (paragraphs 70-72); the scheduling of hearings (paragraph 76); the order in which the parties will present their arguments and evidence at hearings (paragraph 80).

88.The Notes, which are limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions in multi-party arbitration as compared to two-party arbitration.

19. Possible requirements concerning filing or delivering the award

89.Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, for example, invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

90.If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS [1]

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting, aside or suspension of the award has been made to a competent authority referred to in article V (1) *(e),* the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a

member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Note

1 The Convention went into force on 7 June 1959

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Conciliation Rules

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GENERAL ASSEMBLY RESOLUTION 35/52

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Model Conciliation Clause

RESOLUTION 35/52 ADOPTED BY THE GENERAL ASSEMBLY ON 4 DECEMBER 1980

35/52. Conciliation Rules of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Noting that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session[1] after consideration of the observations of Governments and interested organizations,

1. *Recommends* the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

2. *Requests* the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

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[1] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), paras. 105 and 106

UNCITRAL CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

(1) *(a)* In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

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*In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

**The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The cost of any assistance provided pursuant to articles 4, paragraph (2)*(b)*, and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

* * *

Further information may be obtained from:

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A/57/17

United Nations

Report of the United Nations Commission on International Trade Law on its thirty-fifth session

17-28 June 2002

General Assembly
Official Records
Fifty-seventh session
Supplement No. 17 (A/57/17)

Annex I

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

(1) This Law applies to international[a] commercial[b] conciliation.

(2) For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be.

(3) For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

(4) A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

(5) For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(6) This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

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[a] States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:
- Delete the word "international" in paragraph (1) of article 1; and
- Delete paragraphs (4), (5) and (6) of article 1.

[b] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(7) The parties are free to agree to exclude the applicability of this Law.

(8) Subject to the provisions of paragraph (9) of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(9) This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) [...].

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings[c]

(1) Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

(1) There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

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[c] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

(2) Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

(2) The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

(3) Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(4) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Article 7. Communication between conciliator and parties

The conciliator may meet or communicate with the parties together or with each of them separately.

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator,

subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 10. Admissibility of evidence in other proceedings

(1) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement[d]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*].

[d] When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

SECTION VI

Mediation

Core Issues to Address in Designing a Court-Based Mediation Program

Donna Stienstra
Federal Judicial Center

This document sets out some of the central questions courts should address when considering whether and how to implement a court-based mediation program. Many of the questions apply to other forms of ADR as well.

1. **What problems are you trying to solve? What needs are not being met?**

   - litigant problems or needs, e.g.:

     - cost too high - no access
     - disillusioned with justice system

   - bar problems or needs, e.g.:

     - contentious, adversarial
     - poor quality pretrial practice
     - attorneys run up litigation costs

   - court problems or needs, e.g.:

     - cases backlogged
     - cases of a particular type backlogged
     - too great a demand for settlement services

2. **What are the court's goals in having a mediation program? The bar's goals?**

   (This is closely related to problem identification.)

   - enhance litigant satisfaction and involvement with process

   - reduce litigation costs and/or time to disposition

   - improve pretrial practice: e.g., earlier attorney attention to cases, improve information flow between parties

   - reduce court's workload

3. **What kind of mediation process does the court want?**

- facilitative? evaluative? either has implications for training the mediators and users (attorneys, judges)

- when in the case should mediation occur?

- how should the mediation process be integrated into the case management process?

- elements of the mediation process

  - party submission of materials?
  - specify length and number of sessions?
  - require party attendance, impose sanctions for noncompliance?
  - require good faith participation?
  - suspend discovery?
  - include witnesses or others as participants?

- how much does the court want to control the process?

- how much permit mediator and parties to design a process for the individual case?

4. **What kinds of cases should be referred to mediation?**

   - this is related to the goals of the ADR program

   - are certain types inappropriate?

     - prisoner pro se cases?

     - constitutional cases?

     - should the selection be by case type, dollar amount, or case-by-case?

5. **How should cases be referred to mediation?**

   - mandatory v. voluntary is a key question

   - there are permutations on the mandatory/voluntary dichotomy

     - automatic referral by case type, with constraints on opting out
     - automatic referral by case type, with liberal opt-out
     - the judge is authorized to order ADR and does so with or without consultation with the parties
     - the judge consults with parties and refers only with party consent
     - referral occurs only if the parties raise the question of ADR

   - any referral system relying on the judge's judgment requires knowledgeable judges

- any system that generates a large number of referrals, as may be the case with automatic referral, needs adequate resources, such as a sizable roster of neutrals

6. **Who should conduct the mediation sessions?**

   - attorneys?
   - other professionals?
   - court staff mediators?
   - district judges? in their own or other judges' cases?
   - magistrate judges? in their own or other judges' cases?

7. **If attorneys will serve as mediators:**

   - will the court maintain and endorse a roster?
   - how will attorneys be selected for the roster? by whom?
   - what qualifications must they have? who will set the criteria?
   - what training will be required? how will competency be demonstrated?
   - who will monitor performance? and remove from the roster?
   - what ethical guidelines must neutrals follow? who will draw them up?
   - how will conflicts of interest be determined? according to what standard?
   - will the neutrals have immunity?
   - should there be limits on how often neutrals serve?
   - should there be a pro bono requirement?

8. **If the judges will serve as mediators:**

   - should judges mediate their own cases? if not, how will cases be referred to other judges?
   - what kind of training should judges receive?
   - where can they get it?

9. **If non-judicial neutrals are used, how will they be assigned to cases?**

- if the parties select the neutral, will they have more confidence in the process?
- if the court assigns, can it ensure the quality of the neutral?
- does the ADR method need neutrals with expertise in the mediation process or in the subject-matter of the case?
- what process will be used to disqualify/check for conflicts? 28 U.S.C §§ 144 & 455? or some other standard?

10. What degree of confidentiality will be promised?

- many court rules cite Fed. R. Evid. 408 - is this sufficient?
- how can confidentiality be ensured? have participants sign an agreement?
- does anything need to be reported to the court?
  - outcome
  - noncompliance
- what communications, if any, will be permitted between the neutral and the judge?

11. Should the parties pay fees?

- if no, will a sufficient number of attorneys serve pro bono?
- if yes, will a sufficient number of cases use the process?
- will parties take it more seriously if they have to pay? or will they resent imposition of additional costs?
- are fees and mandatory referral compatible?
- who should set the fee? the court? the neutral?

12. What kinds of rules and forms should there be?

- how detailed should the rules be?
- should they be issued as rules or as a general order?
- who will write them?

13. How will attorneys and litigants learn of the mediation program?

- educational programs?
  - who?
  - when?
  - what content and tone?
- written information? e.g., an ADR brochure? program guidelines?

14. Administrative questions for the court

- who will handle problems, such as party noncompliance or mediator misconduct? how will the court ensure that the judge assigned the case will not handle such problems?

- who will manage the ADR program?

  - recruit and train neutrals
  - assign neutrals to cases
  - track case progress
  - monitor neutrals' performance
  - evaluate program effects

- does the court have sufficient and capable staff?

- who will train staff?

- how will judges be trained?

  - how to identify/refer cases
  - the details of the court's procedure
  - how to handle difficulties that may arise

- who will make the logistical arrangements for each case?

15. Who needs to be involved in deciding all these questions?

- involve those who have a stake in it, e.g.:

  - judges
  - court administrators
  - attorneys
  - client representatives - e.g., insurance companies
  - court staff

UNIFORM MEDIATION ACT *

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR
WHITE SULPHUR SPRINGS, WEST VIRGINIA
AUGUST 10–17, 2001

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 3. DEFINITIONS. In this [Act]:

(1) "Court" means [designate a court of competent jurisdiction in this State].

(2) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(3) "Mediation communication" means a statement, whether oral, in a record, verbal, or nonverbal, that is made or occurs during a mediation or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(4) "Mediator" means an individual who conducts a mediation.

(5) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(6) "Party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(8) "Proceeding" means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or a legislative hearing or similar process.

(9) "Record," except in the phrase "record of proceeding," means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) "Sign" includes:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record;

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

SECTION 4. SCOPE.

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) the parties are required to mediate by statute or court or administrative agency rule or referred to mediate by a court, administrative agency, or arbitrator;

(2) the parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the parties utilize as a mediator a person that holds itself out as providing mediation services.

(b) This [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by the collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with a public agency or court;

(3) conducted under the auspices of a primary or secondary school where all the parties are students or under the auspices of a correctional institution for youths where all the parties are residents of that institution; or

(4) conducted by a judge who might make a ruling on the case.

(c) If the parties agree in advance that all or part of a mediation is not privileged, the privileges under Sections 5 through 7 do not apply to the mediation or part agreed upon. The agreement must be in a signed record or reflected in the record of a proceeding. However, Sections 5 through 7 apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

SECTION 5. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) A mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

SECTION 6. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 may be waived in a record or orally during a proceeding, if it is expressly waived by all parties to the mediation, and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 5, to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity may not assert a privilege under Section 5.

SECTION 7. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 5 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a

party; but this exception does not apply where a [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates [, or a public agency participates in the [State to insert, for example, child or adult protection] mediation];

(6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

(7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation, except as otherwise provided in subsection (c).

(b) There is no privilege under Section 5 if a court, administrative agency, or arbitration panel finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation, except as otherwise provided in subsection (c).

(c) A mediator may not be compelled to provide evidence of a mediation communication referenced in subsection (a)(7) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

SECTION 8. MEDIATOR REPORT, DISCLOSURE, AND BACKGROUND.

(a) A mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation, but a mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 7; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(b) A communication made in violation of subsection (a) may not be considered by a court or other tribunal.

(c) Subsections (d), (e), [(f)], and (g) do not apply to an individual acting as a judge.

(d) Before accepting a mediation an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a party or foreseeable participant in the mediation; and

(2) disclose as soon as is practical before accepting a mediation any such fact known.

(e) If a mediator learns any fact described in subsection (d)(1) after accepting a mediation, the mediator shall disclose as soon as is practicable.

[(f) A mediator shall be impartial, unless after disclosure of the facts required in subsections (d) and (e), the parties agree otherwise.]

(g) A person who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute, if requested to do so by a party.

(h) A person that violates subsection (d), (e), or [(f)] is precluded by the violation from asserting a privilege under Section 5.

(i) Unless required by other law of this State, no special qualification by background or profession is necessary to be a mediator under this [Act].

SECTION 9. NONPARTY PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

SECTION 10. CONFIDENTIALITY. Unless subject to the [open meetings act/open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

SECTION 11. RELATION TO ELECTRONIC SIGNATURE IN GLOBAL AND NATIONAL COMMERCE ACT. This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001(c), except that nothing in this Act modifies, limits, or supersedes Section 101(c) of that Act nor authorizes electronic delivery of any of the notices described in Section 103(b) of that Act.

SECTION 12. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 13. EFFECTIVE DATE. This [Act] takes effect ..... .

SECTION 14. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

SECTION 15. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.

SECTION VII

Althernative Dispute Resolution

Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals

Report of the ADR Task Force of the
Court Administration and Case Management Committee
December 1997

I. Background

In June 1995, the Court Administration and Case Management Committee established an ADR Task Force, composed of Magistrate Judge John Wagner (OK-N), Bankruptcy Judge Barry Russell (CA-C), and District Judge Jerome Simandle (NJ), who served as chair. The purpose of the Task Force was to consider the issue of ethical guidelines for private sector attorneys who serve as neutrals in court-annexed ADR programs. This step was prompted by the substantial growth of such programs during the 1990s, programs which at this time are governed only by local rules. The Task Force's concerns were driven largely by rapid change in the district courts, but it recognized that ADR has grown apace in the appellate and bankruptcy courts as well.

To determine the incidence and nature of ethical problems in district court ADR proceedings, the Task Force held a series of meetings with those involved in court-annexed programs, including judges, court ADR staff, attorneys who serve as neutrals, and academics. There was general agreement that the incidence of ethical problems is low but that the combination of rapidly growing programs, sometimes inadequate training of ADR neutrals, and judges who are unfamiliar with ADR creates a potential for serious ethical breaches.

Through its meetings with the various ADR experts, the Task Force identified four areas where problems are likely to arise when courts use private sector attorneys as ADR neutrals: past, present, and future conflicts of interest; confidentiality of materials and information disclosed during ADR; exposure of the neutral to subpoena to testify in subsequent litigation; and protection of ADR neutrals from civil liability through immunity.

For a number of reasons, the Task Force determined that national ADR ethics rules would be premature at this time. Not only did the ADR experts advise against them, but the Task Force believes there is considerable value in encouraging further experimentation at the local level before national rules, if any, are drafted. Furthermore, some issues, such as immunity and conflicts of interest, are either very complicated, are currently the subject of in-depth study by other organizations, or would require statutory authorization, which the Task Force is not prepared to recommend.

Nonetheless, the Task Force did conclude that it would be useful for the Committee to issue a general statement encouraging courts to give careful consideration to several specific ethical issues and advising the courts on the attributes of a well-functioning court-annexed ADR program. A recommendation to this effect was made and accepted at the June 1996 Committee meeting. The Task Force has subsequently identified the attributes of a well-functioning court-annexed ADR program and has developed a set of ethical principles for ADR neutrals. These are presented below.

II. The Attributes of a Well-Functioning Court-Annexed ADR Program

Our Task Force agrees with the consensus view that a federal court must make a conscious effort to determine whether some type of ADR is an appropriate response to local dockets, customs, practices, and demands for ADR services. We also believe that, for ADR to be most responsive to local conditions, it should be implemented at the local court level (district, appellate, or bankruptcy). There is sufficient breadth in the Federal Rules of Civil Procedure and other legislation, as the Judicial Conference has found, to foster and support implementation of varying ADR programs in the local courts.

Although we have witnessed the gradual development of a preference for mediation, we have not seen the emergence of a single type of ADR that should serve as a paradigm for all courts and we recommend none here. Nevertheless, the Task Force believes there are common attributes of well-functioning ADR programs that all courts should strive to incorporate into their ADR programs and that should be enunciated through local rules.

At the same time, we recognize the need for flexibility in providing a means for dispute resolution that is informal, inexpensive, and adaptable. ADR is often valued, in fact, as an alternative to rule-bound and costly procedures like motion practice and trial. One cannot lose sight of the fact, however, that federal cases referred to ADR can be factually or legally complicated and can have high stakes. In such an environment, the basic ingredients of a fair and effective court-annexed ADR program should include at least minimal rules with respect to the expectations placed upon the court staff and judicial officers, the appointed neutrals, and the participants (attorneys and litigants).

Both research and anecdote suggest that, to date, litigants in federal court ADR programs have had positive experiences.[1] Our goal is to ensure that this remains true in the future. As use of ADR and understanding of its characteristics continue to grow, we feel that some guidance is both warranted and now possible. Thus, we offer the following eight attributes of a well-functioning court-annexed ADR program, drawn from our discussions with ADR experts, our own experiences, and other sources.[2] Given the critical role played by ADR neutrals, on whom the effectiveness, integrity, and reputation of court ADR rests, we address this attribute of court programs separately in Section III.

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[1] Research has consistently shown high attorney and litigant satisfaction with ADR procedures, including the fairness of these procedures. For the most recent research in federal courts, see *Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND 1997) and *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Center 1997).

[2] Other sources include two symposia offered by the Federal Judicial Center for representatives from district and bankruptcy courts with new or established ADR programs, as well as the National ADR Institute for Federal Judges, co-sponsored by the Federal Judicial Center, the Center for Public Resources, and the ABA's Litigation Section. A handbook prepared for the Institute, *Judges's Deskbook on Court ADR* (Center for Public Resources 1993), has served as a useful guide for courts interested in ensuring the quality of their ADR efforts.

1. **The local court should, after consultation among bench, bar and participants, define the goals and characteristics of the local ADR program and approve it by promulgating appropriate written local rules.**

   Comment: The program's structure follows the identification of its goals. The court should identify its needs after consultation with all constituencies, especially the advisory group set up under the CJRA if it is still in operation. The necessity for written guidance is self-evident, and the local rules process provides the surest means of careful promulgation. These rules should contain provisions to address each of the attributes discussed here, with special attention to ethical guidelines for ADR neutrals.[3]

2. **The court should provide administration of the ADR program through a judicial officer or administrator who is trained to perform these duties.**

   Comment: An ADR program does not run itself and cannot succeed without leadership. The selection of cases, administration of the panel of neutrals, matters concerning compensation of neutrals, and ethical problems will need to be addressed from time to time by a person with authority to speak for the court. During the past five years, a number of courts have appointed full-time, professional ADR staff, to whom they have assigned many core ADR functions, such as recruitment and training of neutrals, assignment of cases to neutrals, and evaluation of program effectiveness. Professional ADR staff can be particularly helpful in handling problems that arise in ADR, providing a buffer between the parties, neutral, and assigned judge. Although courts can retain these staff through the use of local funds, additional funding will depend on actions taken by the Judicial Resources Committee and the Judicial Conference of the United States. Where such staff are not available, their important functions can be and often ably have been performed by an ADR liaison judge. The important point is to have someone who is responsible for the program.

3. **When establishing a roster of neutrals for cases referred to ADR, the court should define and require specific levels of training and experience for its ADR neutrals, and appropriate training should be provided through the court or an outside organization. Training should include techniques relevant to the neutral's functions in the program, as well as instruction in ethical duties.**

   Comment: Court-appointed ADR neutrals are typically experienced attorneys from the local bar or, less frequently, attorneys specializing in an ADR practice. We have found, however, great variability in the training of these appointed neutrals. Some courts require no training, some provide training by judicial officers, and some provide training by expert consultants. No funding for training of attorney-neutrals has been available from central budget sources, so courts have sometimes funded training from local sources, such as bar associations or attorney admission funds, or have required the trainees to bear the cost. The training of a court's ADR neutrals, tailored to the goals and structure of the local program, is an essential ingredient of a well-functioning court-annexed ADR program. ADR neutrals cannot be expected to perform the sensitive functions of their role unless they have the necessary skills. Mediation and other tech-

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[3] For guidance in designing an ADR program and determining what topics should be covered by local rules, courts are strongly encouraged to consult the *Judge's Deskbook on Court ADR, supra* note 2 (available from the Federal Judicial Center).

niques require special insights into the process that may be unavailable to ordinary litigators, no matter how experienced. Training should include instruction on ethics, to increase the sensitivity of the court-appointed neutral to the ethical demands of these duties.

4. **The court should adopt written ethical principles to cover the conduct of ADR neutrals.**

Comment: Well-defined ethical principles are part and parcel of a well-functioning ADR program and are discussed in greater detail in Section III. Principles addressing past, present, and future conflicts, impartiality, protection of confidentiality, and protection of the trial process all should be included in a court's ADR rules. No national model for such ethical rules has yet emerged. It should be apparent that the American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) (which derive from an adversarial conception of an attorney-client relationship that is not pertinent to an attorney-neutral) and the Code of Conduct for United States Judges (which addresses the ethics of judges who adjudicate cases by exercise of judicial power) do not precisely fit the roles and functions of the appointed ADR neutral in most court programs. Similarly, the Model Standards of Conduct for Mediators, promulgated in 1995 by the American Arbitration Association (AAA), ABA, and Society for Professionals in Dispute Resolution (SPIDR), provide a helpful and thoughtful guide for mediators generally but not necessarily for mediators in court-annexed programs. Therefore, until national federal rules or guidelines, if any, are promulgated, courts should make certain their local rules spell out the duties of and constraints upon ADR neutrals.

5. **Where an ADR program provides for the attorney-neutral to receive compensation for services, the court should make the method and limitations upon compensation explicit. A litigant who is unable to afford the cost of ADR should be excused from any fees.**

Comment: Methods of compensation for ADR neutrals vary widely from court to court.[4] Some courts use a panel of neutrals who serve completely pro bono. Other courts use a modified program, where a certain number of hours are rendered free of charge, with a fixed hourly rate thereafter, while still others have a fixed per-case payment schedule (such as in the statutory arbitration courts under 28 U.S.C. § 651, et seq.). [Editor's note: Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659-62 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651 to 658 (1994)). After preparation of these Guidelines in December 1997, the ADR Act of 1998 was codified at 28 U.S.C. § 651-658 (1998). Before passage of the ADR Act in October 1998, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting out provisions for implementing the arbitration programs. The ADR Act of 1998 retains the authority of the twenty districts to refer cases to arbitration (see 28 U.S.C. § 654(d) (1998)) but it also authorizes ADR more generally for the district courts.] Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mechanism is decided upon, the court's rule should minimize undue burden and expense for ADR, yet not impose on the ADR neutrals to render sophisticated or prolonged services on a pro bono basis as a matter of course. Where the court draws upon a panel of federal litigators to render service as ADR neutrals, the court must

[4] For the range of fee arrangements used in the district courts, see *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 29-56 (Federal Judicial Center 1996).

avoid the appearance of an attorney earning a benefit in litigation as a result of service to the court as an ADR neutral.

6. **The local court should adopt a mechanism for receiving any complaints regarding its ADR process and for interpreting and enforcing the local rules for ADR, including the ethical principles it adopts.**

Comment: Courts have adopted a variety of mechanisms for handling problems in ADR, ranging from the appointment of a compliance judge (or ADR liaison judge) with general supervisory authority to the appointment of an ADR administrator who receives such complaints or other feedback and channels them appropriately to the court. It is important, whatever mechanism is decided upon, that the parties be aware of its availability and that it be relatively speedy and simple. Among the problems such a mechanism can address are failures of a party to attend the ADR session, scheduling difficulties, ineffectiveness of the ADR neutral and ethical problems.

7. **The court should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct by participants or neutrals.**

Comment: The candor of adversaries in a negotiation process can often depend on the confidentiality of negotiations, although this concern may be lessened in an evaluative or arbitral settlement process involving little or no confidential exchange. The rules of confidentiality and disclosure for attorney-client information under RPC 1.6 [Editor's note: RPC refers to the American Bar Association's Model Rules of Professional Conduct] will generally not apply to negotiations between adverse parties or discussions with an ADR neutral, and likewise Fed. R. Evid. 408 will not render confidential, but merely inadmissible for most purposes, evidence of conduct or statements made in compromise negotiations. In addition, most states have not adopted a statutory ADR privilege and therefore the degree of protection given by a local confidentiality rule will vary.

A blanket rule deeming the entire ADR process confidential has appeal, to protect the need of participants to share settlement facts with each other and with the attorney-neutral without fear that such information will be used against them in another forum. If the ADR process permits *ex parte* communications with the neutral, the participants should be assured that information imparted in confidence will not be shared unless authorized. A rule of complete confidentiality may be overbroad, however, and therefore costly if, for example, a participant has abused the process or revealed a fraud or crime. As in Rule 408, evidence does not become confidential merely because it was presented to the ADR neutral if it was otherwise discoverable by an adverse party independently of the ADR proceeding.

To avoid the problems of an overbroad rule, the confidentiality rule could provide that (a) all information presented to the ADR neutral is deemed confidential unless disclosure is jointly agreed to by the parties and (b) shall not be disclosed by anyone without consent, except (i) as required to be disclosed by operation of law, or (ii) as related to an ongoing or intended crime or fraud, or (iii) as tending to prove the existence or terms of a settlement, or (iv) as proving an abuse of the process by a participant or an attorney-neutral.

Whatever rule of confidentiality a court chooses, it will be informing the expectations of the ADR participants. The parties' expectations at the outset are material and will shape the ADR neutral's duties of confidentiality, as reflected in suggested Principle 6 below. The AAA/ABA/SPIDR standards, *supra*, thus state as to confidentiality: "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality." It is best practice to assure that the participants understand the contours of the confidentiality requirements and protections at the outset by having the ADR neutral review the court's rule with them.

8. **The court should evaluate and measure the success of its ADR program, perhaps in conjunction with its advisory group.**

Comment: In many districts with successful ADR programs, the advisory groups established by the CJRA have had important roles in designing, implementing, and evaluating the court's ADR processes. Whether an advisory group is used or not, however, it remains the responsibility of the local court to ensure that its program provides the quality and integrity of service that is commensurate with the court's aspirations and the parties' expectations. Unless such evaluation and measurement are included, the court may remain unaware of areas in need of improvement.

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These attributes of healthy and responsive ADR programs are not meant to provide an exclusive list. Courts may have needs and goals that go beyond these principles. The Task Force recommends the consideration of these principles as constituting a benchmark for a court-annexed ADR program.

III. Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

If courts continue to use practicing attorneys as neutrals in court-annexed ADR programs, they must make sure their local rules satisfactorily address the role of the attorney-neutral. Particularly important are rules regarding ethical issues, such as maintaining confidentiality and revealing conflicts of interest. When adopting such rules, courts should make sure the rules are consistent with the type of ADR program established. For example, while existing rules for judges and lawyers operating in advocacy roles may translate to some extent to adjudicative ADR processes such as arbitration, they cannot properly be applied to non-adjudicative ADR processes such as mediation, where the attorney-neutral acts neither as judge nor advocate but rather as a neutral facilitator in a non-binding process. In designing ethical guidelines appropriate to the type of ADR program adopted, courts should be encouraged to consider each of the following principles.

1. **An attorney-neutral appointed or selected by the court should act fairly, honestly, competently, and impartially.**

Comment: This is an objective, not subjective, standard. Should the integrity or competency of an attorney-neutral be questioned, the inquiry should be whether an attorney-neutral has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of

view of a disinterested, objective observer (such as the judge who administers the ADR program), rather than from the point of view of any particular party.

The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

2. **An attorney-neutral should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the ADR process.**

Comment: Ordinarily, an attorney-neutral cannot perform effectively as a neutral if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to an attorney-neutral's having a financial interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the ADR process, cannot be waived.

The Code of Conduct for United States Judges, which incorporates 28 U.S.C. § 455, provides guidance as to the grounds for disqualification of judges. Although the Code of Judicial Conduct is not directly applicable to the attorney-neutral context, it does set out some guiding principles that can be applied if modified to accommodate the different orientation of an attorney-neutral operating in an ADR, as opposed to a public adjudication, context. Keep in mind, however, that § 455 is expressly required as the appropriate standard when evaluating the actions of arbitrators (28 U.S.C. § 656(a)(2)). [Editor's note: *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4662 (1988) (previously codified at 28 U.S.C. § 656(a)(2) (1994)). *See also* 28 U.S.C. § 655(b)(2) (1998)]

3. **An attorney-neutral should avoid future conflicts that may arise after the ADR proceeding is complete. Thus, an attorney-neutral should be barred from representing a party to the ADR proceeding with regard to the same or substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the ADR process, provided that the law firm shields the ADR neutral from participating in the substantially related matter in any way.**

Comment: Parties to an ADR proceeding have a reasonable expectation that they will not be harmed in the future from an ADR neutral's knowledge about them, especially confidential information gained during the ADR process. Thus, this principle would preclude the ADR neutral from representing any other ADR party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and strategies learned by the ADR neutral. The same impairment would be imputed to the neutral's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely

because an attorney-neutral in that firm conducted ADR proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-neutral has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm.

A conflict rule that generally disqualifies an entire law firm from representing any party that participates in an ADR proceeding conducted by an attorney in the firm will have severe and adverse effects on court-annexed ADR programs that use active lawyers as neutrals. Finally, because an attorney who serves as a court-appointed ADR neutral does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

4. **Before accepting an ADR assignment, an attorney-neutral should disclose any facts or circumstances that may give rise to an appearance of bias.**

Comment: Once such disclosure is made, the attorney-neutral may proceed with the ADR process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the attorney-neutral to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

5. **While presiding over an ADR process, an attorney-neutral should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing ADR process.**

Comment: This provision prohibits the development of a representational attorney- client relationship, or the solicitation of one, during the course of an ADR process. It is not intended to preclude consideration of enlarging an ADR process to include related matters, nor is it intended to prevent the ADR neutral from accepting other ADR assignments involving a participant in an ongoing ADR matter, provided the attorney-neutral discloses such arrangements to all the other participants in the ongoing ADR matter.

6. **An attorney-neutral should protect confidential information obtained by virtue of the ADR process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, an attorney-neutral may disclose information (a) that is required to be disclosed by operation of law, including the court's local rules on ADR; (b) that he or she is permitted by the parties to disclose; (c) that is related to an ongoing or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-neutral.**

Comment: This provision requires protection of confidential information learned during ADR processes. For this purpose, information is confidential if it was imparted to the ADR neutral with the expectation that it would not be used outside the ADR process; information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the ADR process. This principle

also permits disclosure of information that is required to be disclosed by operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

7. **An attorney-neutral should protect the integrity of both the trial and ADR processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process, unless all of the participants agree and jointly ask the attorney-neutral to communicate in a specified way with the assigned trial judge.**

Comment: Courts implementing ADR programs should specifically adopt a written policy forbidding attorney-neutrals from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibiting the assigned trial judge from seeking such information from an attorney-neutral. Docket control should be facilitated by means of the attorney-neutral's report of whether the case settled or not or through other periodic reporting that does not discuss parties' positions or the merits of the case. Such reports should be submitted to the ADR administrator, judicial ADR liaison, or the court clerk or his or her designee.

Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the attorney-neutral and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

8. **An attorney-neutral should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with the rules of the program. When an ADR program provides for the attorney-neutral to receive a defined level of compensation for services rendered, the court should require the parties to make explicit the method of compensation and any limits upon compensation. A participant who is unable to afford the cost of ADR should be excused from paying.**

Comment: If the court intends to require a certain level of *pro bono* service in order to participate as an attorney-neutral in a court-annexed ADR program, the level of the *pro bono* commitment should be explicitly defined. Where courts permit neutrals to charge a fee to ADR participants, disputes about ADR fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS
OF PRACTICE IN ADR

Principles for ADR Provider Organizations

May 1, 2002

CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS OF PRACTICE IN ADR

May 1, 2002

Principles for ADR Provider Organizations[1]

The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed the following Principles for ADR Provider Organizations to provide guidance to entities that provide ADR services, consumers of their services, the public, and policy makers. The Commission is a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, which is chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, has also developed the CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.[2]

[1] The Principles for ADR Provider Organizations were prepared under the auspices of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. CPR-Georgetown Commission members are noted on the final page of this document.

The Principles were drafted by a Commission committee co-chaired by Margaret L. Shaw and former staff director Elizabeth Plapinger, who also served as reporter. The Drafting Committee also included: Prof. Marjorie Corman Aaron, Howard S. Bellman, Christopher Honeyman, Prof. Carrie Menkel-Meadow, William K. Slate II *(see note 5 infra)*, Thomas J. Stipanowich, Hon. John L. Wagner, and Michael D. Young. Eric Van Loon and Vivian Shelansky also provided invaluable assistance in the drafting effort.

A second committee of the Commission, chaired by Charles Pou, developed the definition of ADR Provider Organization used in these Principles, as well as a taxonomy of ADR Provider Organizations which helped guide this effort. *See Taxonomy of ADR Provider Organizations*, Appendix A.

[2] The final version of the Ethics 2000 proposal specifically addresses the lawyer's expanded role as ADR neutral and problem solver for the first time. It does so in four ways. *First*, the Ethics 2000 proposal recognizes the lawyer's neutral, nonrepresentational roles in the proposed Preamble to the Model Rules of Professional Conduct. *See* Ethics 2000 Proposal at Preamble para. [3] ("In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals.") *Second*, the proposal indicates that a lawyer may have a duty to advise a client of ADR options. The proposed language to Comment 5 of Rule 2.1 states: "...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute alternatives to litigation." *Third*, the Ethics 2000 proposal defines the various third-party roles a lawyer may play, including that of an arbitrator or mediator. *See* Proposed Rule 2.4. ("A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.") *Fourth*, the proposal addresses the unique conflicts of interest issues raised when lawyers and law firms provide both representational and neutral services. *See* Proposed Rule 1.12 (conflicts of interest proposal including screening procedures for former judges, arbitrators, mediators or other third-party neutrals.) For a complete version of the Ethics 2000 report and status, *see http://www.abanet.org/cpr/ethics2k.html*

The Principles for ADR Provider Organizations were developed by a committee of the CPR-Georgetown Commission, co-chaired by Commission member Margaret L. Shaw and former Commission staff director Elizabeth Plapinger, who also served as reporter.[3] The Principles were released for public comment from June 1, 2000 through October 15, 2001.[4] The final version reflects many of the substantive recommendations the Commission received during the comment period.[5]

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[3] Ms. Plapinger is currently a CPR Fellow and Senior Consultant to the CPR Public Policy Projects, and a lecturer in law at Columbia Law School where she teaches ADR policy and process.

[4] The CPR-Georgetown Principles for ADR Provider Organizations have been the subject of several articles and public discussions during the comment period. *See, e.g., Special Feature: The CPR-Georgetown Ethical Principles for ADR Providers*, Disp. Resol. Mag. (ABA Dispute Resolution Section, Spring 2001), including Margaret Shaw and Elizabeth Plapinger, *The CPR-Georgetown Ethical Principles for Providers Set the Bar* at 14; Michael D. Young, *Pro: Principles Mitigate Potential Dangers of Mandatory Arbitration* at 18; Cliff Palefsky, *Con: Proposed CPR Provider Ethics Rules Don't Go Far Enough* at 18. *See also* Carrie Menkel-Meadow, *Ethics in ADR: The Many "C's" of Professional Responsibility and Dispute Resolution*, 28 Fordham Urban Law J., 979, 987-990 (April 2001); Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration*, The San Francisco Chronicle Francisco Chronicle, at A15 (October 8, 2001).

During the comment period, the CPR-Georgetown Provider Principles have also been used as guidelines for consideration of measurement of quality standards of dispute resolution programs in a variety of settings. For example, at the 2000 Annual Meeting of State Programs of Dispute Resolution sponsored by the Policy Consensus Institute in New Mexico, it was noted that a number of states have used the Principles for framing discussions and establishing standards and other evaluative criteria for assessing the quality of dispute resolution development. Additionally, it was suggested that the Provider Principles should serve broadly as templates for development and evaluation of state-sponsored dispute resolution programs. Internationally, during the comment period, the Provider Principles were translated into Italian and Spanish to provide guidance to relevant groups in Italy and South America.

[5] Drafting committee member and President of the American Arbitration Association William K. Slate II has declined to fully endorse the CPR-Georgetown Principles for ADR Provider Organizations, stating that he does not believe the Principles are fully applicable to the American Arbitration Association (AAA) because of its "unique size and complexity." While "endors[ing] the basic premises of the Principles which encourage transparency and disclosure" Mr. Slate explained his position in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member. In the correspondence, which is on file at CPR, Mr. Slate stated, "I believe the [CPR-Georgetown] Principles will prove to be invaluable and [provide] appropriate guidelines for small provider organizations and for providers who serve in dual roles, by assisting in drafting agreements and then serving as neutrals. Although the AAA does not fall into either of these categories, the AAA endorses the basis premises of the Principles which encourage transparency and disclosure. As a result of my work with CPR on these Principles, the AAA has already developed an organizational ethical statement which has been posted for the past few months on the AAA website that we believe recognizes the unique size and complexity of the AAA in the ADR marketplace, while acknowledging and respecting the basic concerns that guided the CPR Principles." Mr. Slate also thanked the CPR-Georgetown Commission, and its sponsoring institutions, for providing "a true service to the advancement and credibility of alternative dispute resolution by recognizing the serious issues of ADR providers with actual or apparent conflicts of interest and convening a group to address these issues. I was pleased to be a part of this group and appreciate the consideration given to my opinions and perspective." Letter of 2/4/02 from William K. Slate to Thomas J. Stipanowich, on file at CPR.

Preamble

As the use of ADR expands into almost every sphere of activity,[6] the public and private organizations that provide ADR services are coming under greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers.[7] The growth and increasing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel this effort by the CPR-Georgetown Commission to develop the following Principles for ADR Provider Organizations.[8]

The Principles build upon the significant policy directives of the past decade which recognize the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services.[9] Several core ideas guide the Commission's effort, namely that:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR Provider Organizations and to inform consumers, policy makers and the public generally.
- The most effective architecture for maximizing the fairness, impartiality and quality of dispute resolution services is the meaningful *disclosure* of key information.
- Consumers of dispute resolution services are entitled to sufficient information about ADR Provider Organizations, their services and affiliated neutrals to make well-informed decisions about their dispute resolution options.

[6] Today, ADR processes or techniques are used in almost every kind of legal and nonlegal dispute and in all almost all sectors, including family, school, commercial, employment, environmental, banking, product liability, construction, farmer-lender, professional malpractice, etc. In the past decade, ADR has become a familiar part of federal and state courts, administrative practice, and regulatory and public policy development. The development of ADR systems for public and private institutions, as well as the use of ADR to arrange transactions are also well established. *See generally* Stephen D. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation and Other Process (Aspen Law and Business, 3rd ed., 1999).

[7] To date, much of the policy and case law development has focused on the fairness and integrity of ADR processes and forums that provide arbitration pursuant to contract in the areas of consumer services, health care and employment. *See, e.g., Circuit City Stores, Inc. v. Saint Clair Adams*, 279 F.3d 889 (9th Cir. 2002) (employment); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (employment); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (employment); *Engalla v. Kaiser Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr.2d 843 (1997) (health care); *Ting v. AT&T*, 182 F. Supp.2d 902 (N.D. Cal. 2002) (consumer). *See also Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513 (2000) (Truth in Lending Act claim).

Recent policy directives have recognized the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services. *See, e.g., Task Force on Alternative Dispute Resolution in Employment, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (1995)(hereafter cited as Employment Due Process Protocol); Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, *Ensuring Competence and Quality in Dispute Resolution Practice* (Draft Report 1994)(hereafter cited as SPIDR Report on Qualifications); American Arbitration Association, *Consumer Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Consumer Disputes* (May 1998)(hereinafter cited as Consumer Due Process Protocol); American Arbitration Association, American Bar Association, and American Medical Association, *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes* (June 1998)(hereafter cited as Health Care Due Process Protocol); Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation* (1992); and JAMS Minimum Standards of Fairness for Employment Arbitrations (1995, 1998).

Commentators also have begun to consider the role of ADR provider organizations in the delivery of private justice and the procedural fairness of ADR forums. *See generally Carrie Menkel-Meadow, Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect*, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, Currents 1 (AAA, December 1998)("All providers, whether for-profit or non-profit, facilitate and implement ADR in one or more forms and for good or ill, they all compete in the marketplace without significant outside regulation."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33.

[8] In publishing these standards, the drafters also note the increasing recognition of entity or organizational ethical responsibility or liability. *See generally* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. 1 (Nov. 1992); New York Bar Disciplinary Rules governing law firm conduct, adopted May 1996.

[9] *See supra 7.*

- ADR Provider Organizations should foster and meet the expectations of consumers, policy makers and the public generally for fair, impartial and quality dispute resolution services and processes.

In addition to establishing a benchmark for responsible practice, the CPR-Georgetown Commission hopes that the Principles will enhance understanding of the ADR field's special responsibilities, as justice providers, to provide fair, impartial and quality process. This document hopes also to contribute to the ADR field's commitment to self-regulation and high standards of practice.

Scope of Principles

The following Principles were developed to offer a framework for responsible practice by entities that provide ADR services. In framing the nine Principles that comprise this document, the drafters tried to balance the need for clear and high standards of practice against the risks of over-regulating a new, diverse and dynamic field.

The Principles are drafted to apply to the full variety of public, private and hybrid ADR provider organizations in our increasingly intertwined private and public systems of justice.[10] A single set of standards was preferred because the Principles address core duties of responsible practice that apply to most organizations in most settings. The single set of Principles may also help alert the many kinds of entities providing ADR services of their essential, common responsibilities. Additional sector-specific obligations will likely continue to develop for particular kinds of ADR provider organizations, depending on their sector, nature of services and operations, and representations to the public. The proposed Principles were developed to guide responsible practice and, like ethical rules, are not intended to create grounds for liability.

Definition

The proposed Principles are intended to apply to entities and individuals which fall within the following definition:

> **An ADR Provider Organization includes any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services.**

[10] For an overview of the array of organizations that offer dispute resolution services, *see Taxonomy of ADR Provider Organizations, infra* at Appendix A ("'ADR provider organizations' come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals, and in their resources and management philosophies."). *See also* Thomas J. Stipanowich, *Behind the Neutrals: A Look at Provider Issues*, Currents 1 (AAA, December 1998) (Noting that "[t]he contemporary landscape of ADR ranges from complex, multi-faceted organizations of national and international scope to ad hoc arrangements among individuals" and includes "more specialized services marketing particular procedures, groups that have evolved to serve the special needs of a community, industry, or business sector; and mom-and-pop mediation services.")

The Taxonomy of ADR Provider Organizations, included as Appendix A, analyzes these diverse organizations along three major continua: the organization's structure, the organization's services and relationships with neutrals, and the organization's relationships with users or consumers.

Comment

This definition of an ADR Provider Organization includes entities or individuals that manage or administer ADR services, *i.e.*, entities or individuals who serve as ADR "middlemen."[11] The definition intends to cover all private and public entities, including courts and public agencies, that provide conflict management services, including roster creation, referral to neutrals, administration and management of processes, and similar activities. It is not intended to govern the individuals who provide direct services as neutrals;[12] rather this definition addresses the entities (either organizations or individuals) that administer or manage dispute resolution services.

The definition excludes persons or organizations who do not hold themselves out as offering conflict management services, although their services may incidentally serve to reduce conflict. These may include persons or organizations whose primary activities involve representing parties in disputes, providing counseling, therapy or similar assistance, or offering other services that may incidentally serve to reduce conflict. Importantly, however, if a law firm, accounting or management firm, or psychological services organization holds itself out as offering conflict management services as defined herein, it would be considered an ADR Provider Organization and fall within the ambit of these Principles.

[11] *See also* Consumer Due Process Protocol, *supra* note 7 ("An Independent ADR Institution is an organization that provides independent and impartial administration of ADR Programs for Consumers and Providers, including, but not limited to, development and administration of ADR policies and procedures and the training and appointment of Neutrals.")

[12] There are a number of ethics codes for ADR neutrals promulgated by national ADR professional organizations (*e.g.*, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1977, under revision); the CPR-Georgetown Commission's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); and the transdisciplinary ABA/AAA/SPIDR Model Standards of Conduct for Mediators (1995)), by state-wide regulatory or judicial bodies (*e.g.*, Florida Rules for Certified and Court- Appointed Mediators (Amended Feb. 3, 2000); Minnesota Rule 114; Virginia Code of Professional Conduct), as well as by individual court or community ADR programs (*e.g.*, D. Utah Code of Conduct for Court-Appointed Mediators and Arbitrators) and individual ADR provider organizations (*e.g.*, JAMS Ethics Guidelines for Mediators and Arbitrators).

Principles for ADR Provider Organizations

I. Quality and Competence of Services

The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.

a. Absent a clear and prominent disclaimer to the contrary, the ADR Provider Organization should take all reasonable steps to maximize the likelihood that (i) the neutrals who provide services under its auspices are qualified and competent to conduct the processes and handle the kind of cases which the Organization will generally refer to them; and (ii) the neutral to whom a case is referred is competent to handle the specific matter referred.

b. The ADR Provider Organization's responsibilities under Principles I and I.a decrease as the ADR parties' knowing involvement in screening and selecting the particular neutral increases.

c. The ADR Provider Organization's responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.

Comment

[1] With the growth of voluntary and mandatory ADR use in all kinds of private and public disputes, the Drafting Committee believes it is essential to hold the ADR Provider Organizations, which manage these forums and processes, to the highest standards of quality and competence. This Principle thus establishes that ADR Provider Organizations are responsible, absent specific disclaimer, for taking all reasonable steps to maximize the quality and competence of the services they offer.

The Principle holds ADR Provider Organizations responsible for the quality and competence of the services they render, but articulates a rule of reason in determining the precise contours of that responsibility for each Organization. The nature of this obligation will vary with the circumstances and representations of the organization. The Drafting Committee adopts this approach over a more prescriptive rule because of the vastly different organizations that currently provide ADR management services.[13]

Understanding that ADR Provider Organizations come in a variety of forms and hold themselves out as offering different levels of quality assurance, this Principle permits the Organization to limit its quality and competence obligation by a clear and prominent communication to that effect to the parties and the public. Specifically, the Principle provides that the ADR Provider Organization can diminish these obligations by a clear and prominent representation that the Organization intends a minimal or no warranty of quality or competence. Such a disclaimer may be appropriate, for example, where a bar association assembles a roster of available neutrals as a public service, but establishes only minimal criteria for inclusion and engages in no screening or assessment of the listed neutrals.

[2] Maximum quality and competence in the provision of neutral services has two main components under this Principle. The Organization is required to take all reasonable steps to maximize the likelihood that neutrals affiliated with the organization are qualified and competent (1) to conduct the

[13] *See supra* note 10 for a discussion of the varied landscape of ADR provider organizations; *see also Taxonomy of ADR Provider Organizations, infra* at Appendix A; Stipanowich, *supra* note 7, at 14 ("The provider's 'administrative' role varies greatly; in NASD arbitrations, case managers routinely sit in on hearings; at the AAA, case managers facilitate many aspects of the ADR process, while the CPR Institute for Dispute Resolution offers 'non-administered' procedures with minimal involvement by its employees.")

processes and handle the kind of cases which the organization will generally refer to them;[14] and (2) to handle the specific matter referred.[15]

[3] This Principle advisedly uses the related concepts of both qualification and competency. In the multidisciplinary field of conflict resolution, where neutrals come from a variety of professions of origin, there is no bright line between the concept of qualifications and competence. Unlike single disciplinary fields, where there are specific entry qualifications and examinations that certify that a practitioner is generally qualified to work in the field, no such universal entry standard exists in the conflict resolution field. Accordingly, the Principle uses the twin concepts of qualification and competency, as they are generally understood in the field today, as including a combination of process training and experience, and substantive education and experience.[16]

[4] Principle I.b reflects, and is consistent with ADR standards honoring party autonomy and knowing choice.[17] It provides that when knowledgeable parties have meaningful choice in the identification and selection of individual neutrals, the duty for assuring the quality or competence of the neutral chosen transfers in part from the administering Organization to the parties themselves. Where party choice is limited by contract, statute or court rules, the ADR Provider Organization retains responsibility for maximizing the likelihood of individual neutral competence and quality.

[5] Under Principle I.c, the ADR Provider Organization has a continuing duty to take all reasonable steps to oversee, monitor and evaluate the quality and competence of affiliated neutrals.[18] Determination of the specific monitoring and evaluation measures needed to fulfill this obligation will turn on the circumstances of each ADR Provider Organization. Currently, a spectrum of organizational oversight practice exists from extensive to modest monitoring of neutral performance. Some oversight measures used by Organizations include user evaluations, feedback forms, debriefings, follow-up calls, and periodic performance reviews.[19]

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[14] As the dispute resolution field grows and becomes more specialized, ADR provider organizations are developing specialized panels or groups to handle disputes in particular subject areas, such as insurance or employment conflicts, or specific kind of processes, such as multiparty mediation. This Principle provides that neutrals be competent and qualified in their areas of general substantive and process expertise, as well being competent and qualified to serve in the specific matter referred. It does not suggest that all neutrals affiliated with an organization must be competent and qualified in all substantive areas and processes covered by the ADR provider organization.

[15] While there continues to be limited understanding about the mix and types of training, personal attributes and experience that predict effective performance, there is a growing willingness in the field to contemplate some objective criteria for judging competence. *See* Howard S. Bellman, *Some Reflections on the Practice of Mediation*, Negotiation J. 205 (July 1998). The current best practices standard for promoting competence relies on "some combination of training, experience, skills-based education, apprenticeships, internships, mentoring and supervised experience" and that "the appropriate combinations must be linked to the practice context." SPIDR Report on Qualifications, *supra* note 7, at 11-12. *See also* Margaret Shaw, *Selection, Training, and Qualifications of Neutrals*, National Symposium on Court-Connected Dispute Resolution Research (1994); Christopher Honeyman, *The Test Design Project: Performance-Based Assessment: A Methodology for Use in Selecting, Training, and Evaluating Mediators* (NIDR, 1995); Consumer Due Process Protocol, *supra* note 7, ("Elements of effective quality control include the establishment of standards for neutrals, the development of a training program, and a program of ongoing performance evaluation and feedback.")

[16] *See, e.g.*, SPIDR Report on Qualifications, *supra* note 7 and note 15 generally. For an example of how these combined concepts are used in the development of a roster of neutrals, see the roster entry criteria established by the U.S. Institute for Environmental Conflict Resolution for environmental mediators, at www.ccr.gov/r_entry. htm.

[17] *See, e.g.*, SPIDR Law and Public Policy Committee, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991).

[18] *See, e.g.*, National Standards for Court-Connected Mediation Programs, Standard 16, Evaluation ("Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.")

[19] *See* SPIDR Report on Qualifications, *supra* note 7, at 12 (ADR Provider Organization should "be assessed on a regular basis," through such means as "consumer input, review of complaints, self-assessment, trouble-shooting, regular audits, peer review and visiting committees from other programs.")

II. Information Regarding Services and Operations

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

a. The nature of the ADR Provider Organization's services, operations, and fees;

b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;

c. The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;

d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and

e. The method by which neutrals are selected for service.

Comment

[1] Reasonable and meaningful disclosure of key information about the ADR Provider Organization is the cornerstone of this document. In conformity with established ADR standards,[20] this Principle underscores the importance of clear, accurate and understandable information to informed decision-making by consumers of dispute resolution services and the public generally.

[2] This Principle, like this document generally, applies the rule of reason to the extent and form of the required disclosure. While some may prefer an absolute rule, the drafters believe that requiring reasonable disclosure consistent with the nature, structure and services of the organization and the knowledge base of the individual user, is more appropriate in this evolving field. Currently, ADR Provider Organizations come in a wide variety of organizational forms, provide a variety of services, and operate in an array of disparate settings.[21] These entities can differ considerably in their services, policies, relationships with the affiliated neutrals, affiliation criteria, markets, and their approaches to listing and referring cases to affiliated neutrals. A principle establishing an affirmative obligation to provide key information should recognize these differences, as well as differences in effective means of disclosure.[22]

[3] This Principle calls for reasonable disclosure of information about relevant financial relationships between the affiliated neutrals and the ADR Provider Organization. Information about specific compensation arrangements is not contemplated under this section. Rather, general statements of the existence or absence of consequential financial links, either direct or indirect, between the affiliated neutral and the ADR Provider Organization that may have an impact on the conduct of the Organization or the neutral, or may be reasonably perceived as having such an effect, are expected.[23]

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[20] *See, e.g.*, SPIDR Report on Qualifications, *supra* note 7, at 6 ("It is the responsibility of . . . programs offering dispute resolution services to define clearly the services they provide . . . and provide information about the program and neutrals to the parties."); National Standards for Court-Connected Mediation, *supra* note 7, Standards 3.1-3.2.

[21] *See Taxonomy of ADR Provider Organizations, infra* at Appendix A; *see also supra* note 10 and accompanying text.

[22] We recognize that the kinds of disclosures advocated by this Principle will be different, for example, for a large international organization, like the American Arbitration Association, and a small mediation firm.

[23] In some organizations, there is no financial relationship with affiliated neutrals other than their inclusion on a roster. In other entities, affiliated neutrals are owners, employees, contributors, franchisees, independent contractors or stand in other consequential economic relationship to the ADR organization. *See Taxonomy of ADR Provider Organizations, infra* at Appendix A.

III. Fairness and Impartiality

The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.

Comment

ADR parties and the public are entitled to fair processes and impartial forums. As justice providers, ADR Provider Organizations have an obligation to take all reasonable steps to ensure the impartiality and fundamental process fairness of their services. This mandate may have particular importance when the ADR Provider Organization undertakes to administer an in-house dispute resolution program, another organization's process or policy, or processes designed or requested by one party to a dispute. Recent ADR policy directives and case law provide the field, courts and regulators with important baselines of fundamental fairness and impartiality.[24] To date, key indicia of fair and impartial processes and forums include: competent, qualified, and impartial neutrals; rosters of neutrals that are representative of the community of users; joint party selection of neutrals; adequate representation; access to information; reasonable cost allocation; reasonable time limits; and fair hearing procedures.[25] Building on these standards, this Principle establishes an across-the-board obligation on the part of the ADR Provider Organization to ensure the impartiality and fundamental process fairness of its services.

IV. Accessibility of Services

ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.

Comment

As the profession and business of dispute resolution grows, ADR Provider Organizations have a responsibility to provide services to low-income parties at reasonable or no costs. This access-to-services obligation can be satisfied in various ways, depending on the circumstances of the ADR Provider Organization. For example, the Provider Organization can offer *pro bono* neutral services or sliding scale fees. The entity could also require its affiliated neutrals to participate as neutrals in dispute resolution programs offered by the courts, government, nonprofit groups or other institutions at below market rates or as volunteers.

V. Disclosure of Organizational Conflicts of Interest

a. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a *de facto* stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

[24] *See supra* note 7.

[25] *See, e.g.*, Employment Due Process Protocol, *supra* note 7; Consumer Due Process Protocol, *supra* note 7; and the Health Care Due Process Protocol, *supra* note 7. *See also Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Engalla v. Kaiser Permanente Medical Group*, 15 Cal. 4th 951, 938 P. 2d 903, 64 Cal. Rptr. 2d 843 (1997).

b. The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.

Comment

Reflecting the field's longstanding reliance on reasonable disclosure to address the existence of interests or relationships which may effect fairness and impartiality,[26] this Principle imposes an independent duty of disclosure on the Organization to provide information about significant organizational relationships with a party or other participant to an ADR process. As with these Principles generally, the rule of reason is intended to apply to this provision.[27]

At issue is the potential for actual or perceived conflicts of interest involving ADR participants (such as, businesses, public institutions, and law firms) that have continuing professional, business or other relationships with the ADR Provider Organization. For example, an ADR Provider Organization may be under contract to an institutional party to provide a volume of ADR services; or a law firm may regularly choose a particular ADR Provider Organization to resolve disputes repeatedly, or represent a client or clients that does so; or a public institution may send most or all its employment disputes to a particular ADR Provider Organization by contract or *de facto* business relationship. Under this Principle, disclosure of such relationships between the Organization and repeat player parties or other repeat players to the other parties to the dispute would be required.

This Principle reflects the evolving concept of "organizational conflict and relationship."[28] Since ADR Provider Organizations perform functions which may have a direct or indirect impact on the dispute resolution process (in the creation of lists of neutrals for selection, scheduling or other administrative functions), concerns about organizational impartiality have begun to be raised by courts, policy makers and commentators.[29] While the drafters understand that this disclosure obligation may impose some additional costs, particularly for large ADR Provider Organizations, we believe that disclosure of organizational relationships and interests is critical to preserving user and public confidence in the independence and impartiality of ADR Provider Organizations and services.

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[26] *See ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes* (1977, under revision); *Commonwealth Coatings Corp. v. Continental Co.*, 393 U.S. 145, 151-52 (1968)(concurring opinion); Christopher Honeyman, *Patterns of Bias in Mediation*, J. of Dispute Resolution 141 (1985); CPR-Georgetown Commission on Ethics and Standards in ADR, *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral* (Final, 2002).

[27] As with Principle II, we recognize that the extent and form of disclosures advocated by this Principle will be different depending on the nature of the ADR Provider Organization and is subject to the rule of reason. *See generally* Principle II, Comment [2].

[28] For an analysis of recent case law and repeat player issues in ADR, *see generally Carrie Menkel-Meadow, Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect*, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, Currents 1, 15 (AAA, December 1988)("providers should recognize that an ongoing, close connection between a provider and regular user may be a source of concern to the incidental user who is drawn into an ADR process by a pre-dispute ADR clause in a contract of the other party's devising.") *See also* JAMS Conflicts Policy, addressing both organizational conflicts and individual conflicts.

[29] *See, e.g.*, Consumer Due Process Protocol, *supra* note 7, at 18 ("'The consensus of the Advisory Committee was that the reality and perception of impartiality and fairness was as essential in the case of Independent ADR Institutions as it was in the case of individual Neutrals. . . . In the long term, ... the independence of administering institutions may be the greatest challenge of Consumer ADR.") In *Engalla v. Kaiser Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 938 P 2d 903, 64 Cal. Rptr. 2d 843 (1997), the California Supreme Court strongly criticized the fairness and enforceability of Kaiser Permanente's mandatory malpractice self-administered arbitration program, and remanded the case for further factual consideration of claims of fraud. For an analysis of *Engalla*, *see* Carrie Menkel-Meadow, *California Court Limits Mandatory Arbitration*, 15 Alternatives 109 (September, 1997). While the suit filed by the family of the deceased lung cancer patient has since settled, the *Engalla* case has led to a comprehensive assessment and restructuring of the Kaiser arbitration process. *See* The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration, The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement (January 5, 1998). Kaiser has since hired an independent ADR provider organization to administer its formerly in-house program. *See* Justin Kelly, *Case Study Shows Consumer Confidence in Kaiser Arbitration Program*, adrworld.com, April 22, 2002; Davan Maharaj, *Kaiser Hires Outside to Oversee Arbitrations*, Los Angeles Times, November 11, 1998, at C11.

VI. Complaint and Grievance Mechanisms

ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

Comment

This Principle requires ADR Provider Organizations to establish and provide information about mechanisms for addressing grievances or problems with the Organization or individual neutral. Organizations should develop policies and procedures appropriate to their circumstances to provide this complaint review function.[30] The organizational oversight provided through these mechanisms is concerned primarily with complaints about the conduct of the neutral, or deficiencies in process and procedures used. The complaint and grievance mechanisms are not intended to provide an appeals process about the results or outcome of the ADR proceeding.

VII. Ethical Guidelines

a. ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.

b. ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.

Comment

[1] Absent a controlling statutory or professional code of ethics, this Principle directs the ADR Provider Organization to require its neutrals to adhere to a reputable code of conduct. The purpose of this Principle is to help ensure that neutrals affiliated with the ADR Provider Organization are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR. To this end, ADR Provider Organization should take reasonable steps on an ongoing basis to educate its neutrals about the controlling code and ethical issues in their practices. An ADR Provider Organization may elect to develop an internal code, which conforms to prevailing ethical norms, or to adopt one or more reputable external codes.[31]

[30] For example, an Organization may provide a complaint form, and/or designate an individual within the entity to receive and follow up on complaints. Another Organization may develop a more formal procedure for filing, investigating and resolving complaints. *See, e.g.*, JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. In some states, disciplinary bodies have been established to review the conduct of state-certified ADR neutrals. For example, the Florida Mediator Qualifications Board was established by the Florida Supreme Court to govern the discipline of state-certified mediators in Florida. In the federal courts, the Northern District of California recently modified its local rules to provide that any complaint alleging a violation of ADR rules should be presented in writing and under seal directly to the U.S. Magistrate Judge who oversees the ADR programs in that court. (Local rule, effective May 2000).

[31] For examples of codes of conduct developed by an ADR provider organization, *see* JAMS's Ethical Guidelines for Mediators, Ethical Guidelines for Arbitrators, and the JAMS Conflicts Policy addressing both organizational and individual conflicts issues. *See* Principle V, Disclosure of Organizational Conflicts of Interest, *supra*. In addition, JAMS designated a senior executive as the organization's arbiter of service complaints, and has developed procedures for handling ethics-based complaints against panelists. *See* JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. *See also* Principle VI, Complaint and Grievance Mechanisms, *supra*.

[2] As the numbers of ADR Provider Organizations increase, it is particularly important that Organizations attend to issues of their own managerial, administrative and financial integrity. To this end, ADR Provider Organizations should consider adopting ethical guidelines for employees or other individuals associated with the Organizations who provide ADR management or administrative services, addressing such issues as impartiality and fair treatment in ADR administration, privacy and confidentiality, and limitations on gifts and financial interests or relationships.[32]

VIII. False or Misleading Communications

An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

Comment

As providers of neutral dispute resolution services, ADR Provider Organizations should be vigilant in avoiding false or misleading statements about their services, processes or outcomes. With ADR Provider Organizations assuming greater prominence in the delivery of ADR, it is important that organizations take care not to foster unrealistic public expectations about their services, processes or results.

The reporting of settlement rates and other measures of reporting by ADR Provider Organizations and individual neutrals raises concern. Settlement rates can be calculated in various ways and reflect various factors (including the number of cases, the difficulty of cases, the time frame for inclusion, and the definition of settlement). This Principle calls for disclosure of how the settlement rates and other key reporting measures (such as "number of cases") are determined when ADR Provider Organizations use these measures to market their services.

IX. Confidentiality

An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract.

a. ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction.
b. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization.
c. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.

[32] The American Arbitration Association recently adopted a Code of Ethics for Employees which addresses the ethical responsibilities of AAA employees in administering cases and other responsibilities. In the area of impartiality, for example, the Code provides, "[t]he appointment of neutrals to cases shall be based solely on the best interests of the parties." In the areas of Financial Transactions, the Code provides, *inter alia*, "[e]mployees shall avoid any financial or proprietary interest in contracts which the employee negotiates, prepares, authorizes or approves for the Association and shall not contract with family members." Additionally, the Code prohibits gifts to employees, stating: "Employees shall also observe the gift policy of the Association which prohibits the acceptance of gifts from neutrals, parties, advocates, vendors, or from firms providing services, regardless of the nature of the case or value of the intended gift." *Code of Ethics for Employees of the American Arbitration Association* (1998).

Comment

This Principle establishes the protection of confidentiality as a core obligation of the ADR Provider Organization. Given the varied sources of confidentiality protections, unsettled case law, and diverse regulatory efforts,[33] this Principle imposes a general obligation on the part of the ADR Provider Organization to establish, disclose and uphold governing confidentiality rules, whether set by party agreement, contract, policy or law. This Principle also makes it a core organizational obligation to communicate the Organization's confidentiality policies to neutrals and parties.[34]

[33] *See, e.g.*, Kathleen M. Scanlon, *Primer on Recent Developments in Mediation*, ADR Counsel In Box, No. 6, Alternatives (February 2001 and October 2001 Update)(overview of current ADR confidentiality policy, practice, case law and uncertainties)(October 2001 Update at www.cpradr.org, Members Only section); *Special Issue: Confidentiality in Mediation*, Disp. Resol. Mag., (Winter 1998) (for a review of policy issues and uncertainties, regulatory reforms, and case law); Christopher Honeyman, *Confidential, More or Less: The Reality, and Importance, of Confidentiality is Often Oversold by Mediators and the Profession*, Disp. Resol. Mag. 12, (Winter 1998); Proposed Model Rule 4.5.2 of the CPR-Georgetown Commission on Ethics and Standards in ADR's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); Uniform Mediation Act & Reporter's Notes (jointly drafted by National Conference of Commissioners on Uniform State Law and ABA Section of Dispute Resolution) (adopted and recommended for enactment in all states by NCCUSL at 2001 Annual Meeting on August 10-17, 2001; adopted by ABA House of Delegates in February 2002).

[34] For an example of a public ADR Provider Organization's statement of confidentiality policy and rules, *see* U.S. Institute for Environmental Conflict Resolution, Confidentiality Policy and Draft Rule (1999).

Appendix A: Taxonomy of ADR Provider Organizations[35]

I. Definition of "ADR Provider Organization"

See Definition and Comment in the Principles for ADR Provider Organizations, *supra* at 5-6.

II. Taxonomy of ADR Provider Organizations

ADR Provider Organizations come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve, and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals; and in their resources and management philosophies.

To help organize our understanding of this diverse and dynamic field, we believe it is useful to categorize ADR Provider Organizations according to (i) their organizational structures, (ii) the nature of their services and relationships with neutrals, and (iii) the nature of their relationships with users or consumers. The following discussion looks closely at each of these three main categories and tries to identify the major distinguishing factors in each area. We hope this discussion helps to provide a framework for understanding and guiding the diverse entities which manage or administer dispute resolution and conflict management services.

A. ORGANIZATIONAL STRUCTURES

Nine distinguishing factors related to the organizational structure of ADR Provider Organizations were identified:

- Overall Organizational Status
- Overall Organizational Structure
- How Neutrals Are Listed
- How Neutrals Are Referred
- Organization's Role in Quality Control
- Organization's Stake in Dispute or Substantive Outcome
- Organization's Size
- Organization's Resources
- Organization's Operational Transparency

[35] CPR-Georgetown Commission member Charles Pou headed the Commission's effort to develop a taxonomy of ADR Provider Organizations, *see Principles for ADR Provider Organizations*, *supra* at note 1(hereinafter referred to as ADR Provider Principles). The Commission's goal in developing the taxonomy was to describe, group and provide a framework for analysis of the many different kinds of entities that fall within the rubric of ADR Provider Organization. Mr. Pou is the primary author of the taxonomy. Commission members Bryant Garth and Michael Lewis also contributed to its development. The Taxonomy committee also played the lead role in formulating the definition of ADR Provider Organization included in the ADR Provider Principles.

1. Organizational Status:

Court • Public regulatory agency • Public dispute resolution provider agency • Other public entity (State dispute resolution agency, University, Administrative support agency, Office of Administrative Law Judges, Shared neutrals program) • Quasi-public (*e.g.*, community dispute resolution programs) • Private not-for-profit • Self-regulatory entity • Private industry programs for intra-industry disputes, franchisee disputes, consumers, employees, clients • Private for-profit

A variety of different kinds of organizations currently provide dispute resolution services. In recent years, many public entities have been established, or extended their activities, to serve as ADR Provider Organizations. These include court-annexed systems individually or centrally managed by a judge or an administrator, programs run in-house by government agencies with regulatory duties, programs in government agencies that employ staff neutrals, shared neutrals programs, expedited government contracting vehicles, and activities at government, academic, or other public entities interested in conflict management. On the private side, Provider Organizations include private sector non-profit entities and for-profit entities. Some private groups also serve as contractors to assist public agencies or others wishing to employ ADR more effectively.

2. Organizational Structure:

Corporation • Limited liability company • Partnership • Franchise • Law firm • Membership organization • Other entities

A variety of structures are used to arrange the business or other dealings of private provider organizations, including corporations, limited liability companies, partnerships, franchises, law firms, and membership organizations.

3. How Neutrals Are Listed:

Pure clearinghouse • Selective listing (objective) • Selective listing (subjective)

The ADR Provider Organization may list all neutrals who provide required data and serve simply as a clearinghouse. Alternatively, it may employ objective criteria and list all who are found to comply; or it may selectively limit listed neutrals in explicitly or implicitly subjective ways.

4. How Neutrals Are Referred:

Nonselective • Random panel selection • Subjective panel selection • Party-identified panels • Assignor of neutral • Mixture

The Organization may refer all of its listed neutrals to users requesting a panel of neutrals, or all who meet users' stated criteria, or a randomly selected subset of responsive neutrals; alternately, it may subjectively select a panel, or a single neutral, from among those that it (or the parties) deems appropriate for a given case. Some organizations employ a mix of these referral or selection techniques.

5. Organization's Role in Quality Control:

Certification of listed neutrals • Qualifications and selection process • Conflicts check • Performance evaluation • Discipline • Training • No role

Some management entities certify or otherwise indicate that the neutrals to whom they refer cases or employ are qualified, or even superior. Others offer no warranties of qualifications beyond the general accuracy of the information they supply about potential neutrals. Whatever warranties or disclaimers are made, a variety of informal and formal approaches to quality control are used. These generally include one or more of the following: requiring affiliated neutrals to receive approved training courses; requiring neutrals to show that they have certain kinds of experience, training, or references; providing

ongoing in-service or other training and education to affiliated neutrals; offering informal, case-specific advice to neutrals; evaluating performance based on observation by the ADR Provider Organization's personnel or users' questionnaire responses; offering processes for receiving complaints, assessments, or other feedback from users; removing listed neutrals who, over time, are not selected by parties; and disciplining or removing neutrals who fail to meet ethical or other standards.

6. Organization's Stake in Dispute or Substantive Outcome:

None • Full party to dispute • Good will, future business • Membership organization • Non-profit mission • Administrative charge for matchmaking • Portion of neutral's fee • Other

Most ADR provider entities are explicitly independent and have no stake in the dispute. A few may be parties to cases for which they provide referrals, as in ADR programs that are managed internally by the private or public organization involved in the dispute (*e.g.*, an internally-managed corporate, university or governmental dispute resolution). Other ADR Provider Organizations may have some attenuated or perceived interest (programs using collateral duty or shared neutrals from the same, or another, agency). Some managing organizations provide ADR services as a public service, pursuant to a statutory mandate, as a means of improving or supplementing other services or activities, or as a way to fulfill other non-profit missions. Others provide services primarily in return for fees. Several other benefits may accrue to an ADR Provider Organization: service to members, good will that may influence other activities, or access to additional cases or clients.

7. Organization's Size:

Individual part-time solo • Individual full-time solo • Small entity • Large entity • Regional organization • National organization • International organization

ADR Provider Organizations may include a single individual for whom mediation, arbitration, or management or administrative services are a sideline, a full-time practitioner, a small specialized entity with several neutrals, a large entity that offers a diverse array of services and neutrals in several parts of the U.S., or a national or international organization with hundreds or thousands of available neutrals.

8. Organization's Resources:

Substantial paid staff and related resources devoted to program • Limited volunteer staff and few other resources

Staff and other resources available for operating a program vary dramatically and can have an impact on the nature and quality of services. A few providers devote no full-or part-time staff to their activities; they may, for example, use volunteers, simply provide a list of neutrals without more, or respond to requests on a "catch-as-catch can" basis. At the other extreme, some have substantial full-time staffs devoted to one or more provider roles (*e.g.*, setting standards for listing neutrals, admitting listed neutrals, furnishing panels, advising parties, assessing or disciplining listed neutrals).

9. Organization's Operational Transparency:

Opaque • Open decision making • Rules of procedure defining required competencies, disclosing standards and/or methods for selecting neutrals in individual cases

Some ADR Provider Organizations operate as black boxes, with little or no provision for oversight or openness; others are relatively more open and explicit about the processes by which neutrals are selected, assigned, and monitored; a few seek explicitly to assure openness and regularity via rules, standards, or methodologies.

B. ORGANIZATION'S SERVICES AND RELATIONSHIPS WITH NEUTRALS

Five key attributes of ADR Provider Organizations were identified in this area:

- Nature of Organization's Services
- Nature of Cases
- Nature of Process Assistance Furnished by Neutral
- Relation of Listed Neutrals to ADR Provider Organization
- Status of Neutral

1. Nature of Organization's Services:

Neutral who assists disputants • Clearinghouse list of available neutrals • Management service • Full service administration • Assignor of neutrals • Advisor • System design • Other consultant • Mixture

Some ADR Provider Organizations offer only certain limited kinds of neutral services; others offer a menu of ADR options, which may include training and consulting. A few operate purely as clearinghouses that do little beyond offering a list of neutrals for users to review, perhaps accompanied by a short brochure or generalized advice. Some court programs, for instance, simply maintain a binder containing resumes sent in by local neutrals. Many ADR Provider Organizations, however, offer a range of administrative, management, and consulting services, including helping parties select or design appropriate processes, finding suitable neutrals, and managing the case during the ADR process. Some Provider Organizations offer set management choices, while others offer parties tailored management (from full-service to self-administration) depending on the users' request. A few offer all of these neutral and management services, sometimes in settings where the Organization both manages a roster and provides neutrals' services for the same client.

2. Nature of Cases:

Number of parties (multiparty or two-party) • Complexity • Length • Subject matter (environmental/policy • civil enforcement • mass tort, insurance, product liability, or similar litigation • commercial/business conflicts • small claims litigation • workplace/employment • family • consumer • labor-management • neighborhood • other)

ADR Provider Organizations assist parties in cases that vary in size, complexity, length, and number of parties, as well as in their subject matter. A few Provider Organizations offer services for cases involving a wide array of settings or subjects. Other Provider Organizations tend to specialize by subject matter. For instance, some Organizations deal mainly with environmental matters; others tend to focus primarily on a broad range of business, commercial, employment and public disputes. Most public Provider Organizations—for example, entities managing court-annexed ADR programs, state-wide court management organizations, and user-specific entities (like the FDIC's roster of neutrals for litigation stemming from bank closings)—deal mostly, or exclusively, with the kinds of cases they were established to support, though this may encompass a broad array of subject areas.

3. Nature of Process Assistance Furnished by Neutral:

System design • Other consulting • Training • Facilitation • Mediation • Case evaluation • Binding arbitration • Private judging • Specialized expertise in specific subject area • Hybrid ADR Processes • Mixture

The ADR Provider Organization may refer listed neutrals who offer a range of ADR processes and related services. The neutral's roles may also range from a brief consultations to extended conflict resolution interventions. Training and design consulting assignments may also include short or longer tenures.

4. Relation of Listed Neutrals to Organization:
Independent • Contractors • Franchisee • Staff • Other

Some management organizations have few, or no, dealings with neutrals beyond listing them. Other organizations work primarily, or exclusively, with neutrals who are contractors, subcontractors, employees, members or franchisees. Several provider organizations require most of their listed neutrals to pay a fee.

5. Status of Neutral:
Private full-time professional neutral • Private part-time • Public collateral duty • Public full-time • Judicial officer • Lawyer • Other professionals

An ADR Provider Organization may offer services from private full-time or part-time dispute resolution practitioners, public full-time practitioners, private individuals who serve occasionally as neutrals, public employees who offer neutral services on a collateral duty basis, or judicial officers whose activities as neutrals may be related to official duties. Apart from their employment status, neutrals referred by a Provider Organization may also come from a variety of professional or other backgrounds (*e.g.*, lawyer, judge, engineer, environmental scientist, social worker, therapist, among others).

C. ORGANIZATION'S RELATIONSHIPS WITH USERS OR CONSUMERS

Two key factors were identified in this area:

- Characteristics of Parties or Representatives
- Organization's Prior Relationship with a User or Representative

1. Characteristics of Parties or Representatives:
Unsophisticated/vulnerable/pro se/novice parties or representatives • Experienced/ fully represented parties or representatives • Individual v. Organization • Individual v. Individual • Other

ADR Provider Organizations deal with a variety of users. Organizations handling neighborhood, consumer, or family cases may often deal with cases involving exclusively first-time participants or similarly unsophisticated users. In many court programs and other settings, the Provider Organization may deal with some parties who are novices on one side and well-represented organizations, or ones that have great experience with ADR processes, on the other. These and other Provider Organizations—particularly in large commercial or labor disputes—deal largely with sophisticated repeat players (as parties and/or representatives) on one or all sides.

2. Organization's Prior Relationship with a User or Representative:
None • Repeat contractor • Long-term contractor • Financial dealings • Other (*e.g.*, board member)

An ADR Provider Organization may have had no dealings with any party or representative; may have worked one or more times with a party or with both parties, or their representatives; or may have a long-term service contract or other relationship with one party or law firm. A Provider Organization may also have certain types of prior, ongoing, or intermittent professional relations with parties or representatives, such as providing training, consulting, or systems design services. In some instances, a Provider Organization may have financial, business, professional or personal dealings with a party or representative.

CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR*

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* Affiliations and titles as of May 1, 2002

San Mateo Superior Court Multi-Option ADR Project, "MAP"
Evaluation Highlights- July 2001- July 2002

MAP is a partnership of the San Mateo Court, Bar and Community.
MAP provides various forms of ADR including mediation, private and judicial arbitration and neutral evaluation for civil cases, mediation and arbitration of family law cases and mediation of small claims, juvenile dependency and juvenile delinquency cases.

Civil ADR Program

The Civil program provides assessments and referrals to trained and experienced screened attorney, non-attorney professional neutrals and private judges. It is a voluntary, market-rate program with income-based pro bono and modest means services available.

For the 313 cases we had 515 responses to the survey.

Voluntary Participation: 62% of those referred participated in ADR; 38% did not or had not yet gone to ADR.

Cases Not Participating in ADR
34% settled after assessment and referral without an ADR session.
17% dismissed. 7% found ADR not suitable/unwilling. 17% had other situations.
14% had not yet scheduled an ADR session. 11% had a session pending.

Of those that had already completed ADR:
75% settled fully. 4% partially settled. 21% did not settle in ADR.

Process: 96% Mediation; 2% Neutral Evaluation; 2% Other

Case Types: 41% Personal Injury, 30% Business, 13% Real Estate, 2% Construction, 6% Employment, 4% Malpractice, 4% other.

Satisfaction: *(The ranges include differing responses by plaintiffs and defendants and their attorneys)* Fairness of process: satisfied/very satisfied 78-92%. Neutral understood key issues: 80-90% were satisfied or very satisfied. Would use neutral again 80-89%. Would use MAP program again 80-90%.

Time:
Duration of average ADR session: 4.9 hours with an average of 1.2 sessions.
Court time: 95% thought the court time was reduced. 5% thought court time was increased.

Costs Savings:
86% thought ADR reduced cost, 14% thought it increased cost. 46% thought it reduced cost by $10,000 or less and 45% estimated it reduced cost by $10,000 to $50,000.
Pro Bono: Approximately 5% of cases received pro bono/modest means assistance

At what phase in Dispute was ADR session held: 45% after some preliminary discovery. 28% after significant discovery. 21% was imminent. 6% within four months of filing.

Small Claims

Small Claims Mediation is provided at no cost to the parties and is done at the courthouse by trained community volunteers.

Resolution:

116 cases participated in mediation during this time period.

38% of cases resolve fully while 62% did not resolve. (Given these relatively modest settlement numbers it is interesting to note the high levels of satisfaction.)

Satisfaction:

86% to94% of parties were satisfied with the fairness, safety, opportunity to be heard and the degree of pressure to settle. 86% to 92% felt the mediators skillfully structured the process, understood key issue, would use the mediator again and would recommend the process to others.

Communication:

The majority of respondents believed mediation improved communication, clarified issues and provided parties with a better understanding of the case.

Case Types:

33% Contracts. 25% Landlord/Tenant. 14% Car Repair . 12% Property Damage. 7% Consumer Merchant. 5% PI. 4% Collections.

Judicial Arbitration

Judicial Arbitration is a statutorily mandated program offering parties an ad judicatory hearing conducted by a member of the local bar who issues a non-binding award which, if accepted, becomes binding, if not a trial de novo is available. The arbitrators are paid by the court $150 per case.

949 cases were referred to judicial arbitration. 87% were ordered. 12% entered by party stipulation.

Cases Referred Back:
32 cases returned for a CMC. 59 were ordered to trial. 37 switched to mediation. 115 were set for an OSC (as part of a redesign and cleanup of old problematic cases). 8 involved bankruptcy.

Cases Removed from Arbitration:
240 cases settled before an arbitrator's award was filed. 458 cases an arbitrator award was filed. 251 cases were removed from arbitration(as outlined above).

Judgment and Settlement:
71 cases had judgments entered on the awards. 13 awards were filed but cases settled prior to judgment.

Requests for Trial de Novo:
Defendants requested 67% of the trial de novos and plaintiffs 33%.

Trial De Novo Dispositions:
OF the 152 cases with trials pending for this reporting period, 122 settled prior to the settlement conference. 27 settled at the settlement conference. 16 settled prior to the trial de novo. 10 settled on the day of trial.

Trial after Judicial Arbitration:
of the 336 cases where a trial de novo was requested only 6% of cases actually went to trial.

Juvenile Dependency Mediation

Dependency Mediation is provided by trained Peninsula Conflict Resolution Center community volunteers at no cost to the parties. The program volunteer coordinator is a half-time court, half-time PCRC employee and PCRC receives funding from the Human Services Agency to support this and related family conferences and parent-teen mediation work.

52 cases were referred during this reporting period. 18 cases were mediated. 14 cases had no party response. 6 declined. Most cases were resolved in one session.

Satisfaction with the process:
88%-97% were satisfied with the fairness, the chance to talk about concerns, the opportunity to lean about the other person's concerns and the safety of the session.

Satisfaction with the mediator:
88 - 97% did not feel pressure to reach an agreement and felt treated fairly.

Mediation Outcome:
94% reached agreement. 59% thought communication was improved. 76%had a better understanding of the other person's perspective and 53% thought the mediation helped improve the relationship with the other party.

Mediation Results/Future Use of Mediation:
80-97% were satisfied with the results, thought issues were resolved, would use mediation again and would recommend mediation to others.

Juvenile Delinquency Mediation

Delinquency Mediation is also provided by staff and trained Peninsula Conflict Resolution Center community volunteers at no cost to the parties. San Mateo is currently the only court we know of receiving State Trial Court money for this purpose.

130 new cases were referred during this report period. 48 cases completed mediation. We received responses from about 25% of those who mediated.

Satisfaction:
Both offenders and victims expressed satisfaction in the 90-97% with the ability to speak their mind and to meet with the other party.

Victim Satisfaction:
91% thought the mediation was fair.97% were satisfied the could speak their mind and felt safe. 90-91% found it helpful to meet with the other party and would recommend it to others. 85% thought mediation helped them deal with the impact of the harm caused by the incident and 75% felt the justice system was more sensitive to their needs.

Offender Satisfaction:
95% thought the mediation was fair.90% were satisfied the could speak their mind. 94% found it helpful to meet with the other party. 90% would recommend it to others. 75% felt the justice system was more sensitive to their needs.

Parent Satisfaction:
95% thought the mediation was fair. 100% thought it was helpful. 95% would recommend it to others. 100% of those responding thought felt the justice system was more sensitive to their needs.

Victim Mediation Results:
80% felt their fear of another crime was reduced. 100% reported a satisfactory agreement or understanding though only 40% though a written agreement was necessary. 78% had concerns about the crime or person answered.

Offender Mediation Results:
89% felt the mediation helped them better understand what their behavior did. 100% thought they would not commit another crime knowing what they know now. 100% thought they reached a satisfactory agreement. 80% thought a written agreement was necessary.

COURT BAR COMMUNITY

MULTI-OPTION ADR PROJECT

A PARTNERSHIP OF THE
SAN MATEO COUNTY
COURTS, BAR & COMMUNITY

SHEILA R. PURCELL
APPROPRIATE DISPUTE RESOLUTION DIRECTOR
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M.A.P. OVERSIGHT COMMITTEE
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JUDGE MARK R. FORCUM
JUDGE GEORGE A. MIRAM
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DAWN M. WARD

Re: Multi-Option ADR Project

Dear MAP Applicant:

Thank you for your interest in San Mateo County Superior Court's Multi-Option ADR Project ("MAP"). I am enclosing a panelist application for the general Civil ADR Program as you requested. The MAP Roster Committee, which includes representatives of the San Mateo County Superior Court, Bar Association and community, reviews prospective panelist applications once a year in the spring. The deadline for submission of panelist applications for consideration in calendar year 2003 is **Friday, March 5, 2004.**

The Civil ADR Program is committed to making available to the public a core group of qualified, dispute resolution professionals who may be privately retained by parties to help in the resolution of their dispute. The program must limit the number of qualified applicants who may be selected to serve on the panel. Please be assured that the MAP Roster Committee reviews all applications and that all applicants will be notified after the review is completed.

In San Mateo Superior Court cases, parties have the choice of either selecting an ADR neutral from the MAP panel or selecting an ADR neutral who is *not* affiliated with the program. The selection of the neutral rests with the parties. Since parties have the option to select whomever they would like to handle their case, the MAP Civil ADR Program acts as a starting point for parties to find qualified neutrals, it does not limit the universe of potential ADR providers.

As stated in the application, all of our panelists must be available to conduct ADR sessions in San Mateo County if requested by the parties. Panelists also are required to handle at least one pro bono or modest means case a year. In addition, in accordance with Local Rule 2.3 (i)(5), all ADR neutrals are required to submit evaluations 10 days following all ADR sessions conducted for San Mateo County Superior Court cases.

If I can answer any questions you might have about the program or about the application in particular, please feel free to contact me directly at (650) 363-1962.

Very truly yours,

Valerie E. Berland
ADR Coordinator
San Mateo Superior Court

Enclosure

SUPERIOR AND MUNICIPAL COURTS
OF SAN MATEO COUNTY
400 COUNTY CENTER, COURTROOM 2F
REDWOOD CITY, CA 94063-1655

Multi-Option ADR Project Panelist Application for Mediation, Private Arbitration and Neutral Evaluation

I. GENERAL INFORMATION

Name: _____
Current Occupation: _____
Address: _____
_____
Firm/Office Number: _____
Telephone Number: _____ Length of time employed at firm? _____
Facsimile Number: _____ E-mail address: _____
Best time to call: _____
Confidential and Optional: Home address and telephone number: _____
_____

Relevant Experience

As applicable:
Date admitted to the California Bar: _____ ( ) Active ( ) Inactive Bar Number: _____

Summarize legal experience (including teaching) particularly during the last five years: _____
_____
_____
_____
_____
_____

Number of years engaged in active litigation: _____
Please indicate the percentage of your practice in the last five years spent representing:
Plaintiff _____% Defense _____%

Are you licensed in a profession or occupation other than the practice of law? _____
Occupation: _____ Licensing Agency: _____
State: _____ License Number: _____

Summarize professional experience particularly during the last five years: _____
_____
_____
_____
_____
_____

Place of Employment	Position	Dates

Languages/Bi-Cultural Capabilities

Languages: _____ Bi-cultural capabilities: _____
Degree of Fluency (Comfortable conducting ADR session in foreign language): _____

II. SUBJECT MATTER AND PROCESS EXPERTISE

Please indicate no more than four subject matter areas and process with which you have expertise:

Subject Matter	Mediation	Private Binding Arbitration	Neutral Evaluation
Personal Injury			
Employment			
Business			
Real Estate/Eminent Domain			
Professional Malpractice (Indicate legal, medical and/or dental)			
Probate: Estates and/or Conservatorships			
Construction Defect			
Public Agency			
Insurance			
Environmental			
Securities and/or Intellectual Property			
Other Areas of Subject Matter Expertise			

Working Style

Mediators: Please characterize the primary thrust of your mediation style:

_____Facilitative/Nondirective (does not tend to make substantive evaluations but may make process suggestions)

_____Evaluative/Directive (takes a strong role in leading parties to a solution, more of a settlement conference style)

_____ Other/Comments

If you would like to characterize your style for other ADR processes please do so.

III. TRAINING, EXPERIENCE AND PERFORMANCE REQUIREMENTS

For mediation panel applicants: Please check off which combination of training and experience (Track A, B or C) you believe qualifies you for inclusion on MAP's mediation panel. For other panels, check off if you believe you qualify and would like to be considered for inclusion on panel(s).

MEDIATION _____

Track A Have completed at least 5 days of continuous participatory education or training including role playing in mediation

_____ and

Have participated as a mediator or co-mediator in at least 5 mediations.

Track B Have completed at least 2 days of continuous, participatory education or training including role playing in mediation

_____ and

Have participated as a mediator or co-mediator in at least 15 mediations.

Track C Provide other satisfactory evidence of mediation skills and experience.

_____

PRIVATE ARBITRATION _____

Admitted to the practice of law for at least ten years

and

Have served as a neutral in at least 5 on site private arbitrations.

These requirements may be modified in individual circumstances for good cause.

NEUTRAL EVALUATION _____

Admitted to the practice of law for at least ten years

and, if accepted to the panel, will commit to participating in a 3-5 hour training session offered by MAP.

ADR Experience as a Neutral

Indicate process used (mediation, arbitration, neutral evaluation or other), organization, number of cases/type of cases, number of hours, dates and location.
(For example: AAA, 3 construction defect arbitrations, each arbitration approx. 18 hours, 1998-2000, San Francisco.) Please be cautious not to reveal confidential information.

_____

_____

_____

_____

_____

_____

_____

(Add further pages if necessary)

ADR Training Programs Completed

Training: Organization/Trainer's Name, Number of Hrs/Dates. Indicate Med., Arb. or Neutral Evaluation (For example: Steve Rosenberg, 40 Hour Mediation Training, September 5–8, 1998).

_____
_____
_____
_____
_____
_____

For arbitration panel applicants, please indicate the number of arbitrations you have conducted which were:
Binding Arbitrations _____ Non-Binding Judicial Arbitrations _____

Are you currently an ADR neutral? Yes _____ No _____
(Check as many as apply)
Private Practice Firm Organization Volunteer Agency Court

Firm name: _____
ADR organization(s): _____
Volunteer agency name(s): _____
Court approved ADR list (indicate which court ADR programs): _____
_____
Other agencies or organizations for which you are an approved neutral: _____
_____

Education

School	Course of Study	Dates	Degree/Certificates

Membership in Professional Organizations

_____
_____
_____

Professional and/or Personal Diversity

Please describe what elements of professional and/or personal diversity you would bring to the Multi-Option ADR Project if selected for inclusion in the program (please use additional pages if necessary):

_____
_____
_____
_____
_____
_____
_____

References

Please list only persons with whom you have worked as a **neutral**. Provide three references for each panel on which you are applying to serve. We encourage you to be mindful of the confidentiality requirements and to seek prior permission to use these names. (Add pages if necessary)

Attorney: _____ or Client: _____ in
a Mediation: _____ Arbitration: _____ Neutral Evaluation: _____ Other (specify): _____
Name: _____
Position: _____
Organization: _____
Address: _____
_____
Telephone Number: _____ Fax Number: _____

Attorney: _____ or Client: _____ in
a Mediation: _____ Arbitration: _____ Neutral Evaluation: _____ Other (specify): _____
Name: _____
Position: _____
Organization: _____
Address: _____
_____
Telephone Number: _____ Fax Number: _____

Attorney: _____ or Client: _____ in
a Mediation: _____ Arbitration: _____ Neutral Evaluation: _____ Other (specify): _____
Name: _____
Position: _____
Organization: _____
Address: _____
_____
Telephone Number: _____ Fax Number: _____

Insurance

Please identify what insurance coverage you have which will be applicable to ADR services:
Coverage Type: _____
Carrier name: _____
Limits: _____
(Insurance coverage may become a requirement for panel membership at some future date.)

Have you ever been convicted of a felony or misdemeanor? _____ If so, on a separate sheet of paper please list all convictions since your 18th birthday including: offense, date and place of conviction and sentence and the date of release from custody and/or probation/parole. Driving under the influence must be reported.

Have you ever had any disciplinary actions taken against you by any state, federal or professional licensing board/agency? _____ If so, please describe the nature of the offense, date of disciplinary action, length of sentence/probation and amount of restitution, if any.

Criminal or disciplinary actions will not automatically bar you from inclusion in the program. Each case is considered individually. However, failure to list criminal convictions or professional disciplinary actions taken against you will result in automatic removal from the program.

To All Applicants:
If accepted to the Multi-Option ADR Project I consent to:

- ☐ Comply with the Rules of Operation including, if necessary, being removed from the panel for failure to comply with the Rules.
- ☐ Attend a local two-hour training and panelist orientation.
- ☐ Disclose to both counsel and parties the mediation approaches you most often utilize (e.g., directive vs. facilitative, a combination of styles, etc.).
- ☐ Disclose all fees to counsel and parties.
- ☐ Disclose any potential conflicts of interest.
- ☐ Be available to conduct ADR sessions in San Mateo County if requested by the parties.
- ☐ Agree to handle at least one pro bono or modest means case per calendar year for the program.
- ☐ Fully fill out and return, and encourage ADR participants to fill out and return, evaluation forms within 10 days following the final ADR session (in accordance with **Local Rule 2.3[i][5]**).
- ☐ Report to MAP staff any criminal convictions in which you are involved as well as any disciplinary action taken against you by any state, federal or professional licensing board and/or agency.
- ☐ Be available for observation by MAP staff with the consent of counsel and parties.

My signature below certifies that I have made full and accurate disclosure of all information requested in this application form.

Signature: _____ Date: _____

Please return application to:
Valerie E. Berland
ADR Coordinator
Multi-Option ADR Project
Superior and Municipal Courts of San Mateo County
400 County Center, Courtroom 2F
Redwood City, CA 94063
Telephone Number: (650) 363-1962
Facsimile Number: (650) 599-1754

County of San Mateo

Established _____
Job Class Code _____

ADR PROGRAM ADMINSTRATOR
DRAFT – October 2000

DEFINITION
Design, plan, direct, coordinate, review and evaluate the Appropriate Dispute Resolution Program, which utilizes the coordinated resources of the Court, bar and community, within the Superior Court of San Mateo County; and assist attorneys and potential litigants in determining an alternative resolution method for civil, ~~ARD~~, family, small claims, juvenile, probate and law and motion cases.

SUPERVISION RECEIVED AND EXERCISED
Receive general direction from the Deputy Court Executive Officer. Exercise direct supervision over assigned professional, technical and clerical personnel. Exercise program oversight over ADR service providers.

EXAMPLES OF DUTIES
Duties may include, but are not limited to the following:

- Plan, develop, recommend and implement operational procedures for the Appropriate Dispute Resolution Program, ensuring maximum utilization of available staff and financial resources.
- Coordinate the activities of the Program with those of related Court programs and the activities of County and other community resources.
- Assess cases for referral to mediators, arbitrators, neutral evaluators and other ADR service providers; ensure that ADR service providers have skills to facilitate individually assigned cases.
- Serve as liaison and a technical resource with attorneys, litigants and ADR service providers.
- Plan, direct, review and evaluate the work of assigned professional, technical and clerical staff; assist in the selection of staff and train staff in work procedures; provide oversight and review of the work of ADR service providers.
- Develop and maintain ADR Program work processes and procedures, including a case management and tracking system.
- Develop and maintain a list of ADR service providers; recruit and train potential service providers and ensure that providers maintain standards and work within ethical guidelines.
- Participate in community outreach and in the development of funding sources regarding Program services; represent the Court and act as liaison at Judicial Council conferences, community and related meetings.
- Ensure compliance with Judicial Council and other ADR legislation and procedures.
- Prepare a variety of reports, forms, correspondence informational materials, procedures and other written information; disseminate informational materials through a variety of media, including automated systems.
- Provides staffing for programs in cooperation with the Multi-Option ADR Project partners with the community mediation center and the local Bar Association.
- Maintain accurate records and files; prepare and provide statistical information to the Judicial Council and other departments and organizations.

- Provide input regarding the budgetary needs of the Program; develops budget requirements in association with the local Bar Association.
- Perform related duties as assigned.

QUALIFICATIONS

Knowledge of:
- Laws, codes and regulations related to the process of establishing and maintaining a comprehensive ADR Program, which includes civil, small claims, juvenile, probate and law and motion cases.
- Principles and practices of supervision, including work planning, direction, training, motivation, review, evaluation, staff selection and discipline.
- Principles and practices of program development and evaluation.
- Practices and techniques of effective mediation between attorneys, litigants and others.
- Judicial processes, including trial and hearing procedures.
- Community resources for the provision of arbitration, mediation and related services to attorneys and litigants .
- Computer applications related to the work.
- Standard office practices and procedures.
- Techniques for dealing with persons of various ages and ethnic and socio-economic backgrounds.

Skill/Ability to:
- Develop, implement and modify a comprehensive program of Appropriate Dispute Resolution.
- Develop and administer guidelines and office procedures relating to the Program.
- Plan, supervise, review and evaluate the work of professional, technical and clerical staff; oversee, train and evaluate the work of ADR service providers.
- Interpret, evaluate, make decisions in accordance with, and explain complex laws, regulations, policies and procedures.
- Analyze and apply legal principles, facts and precedents to legal problems.
- Prepare clear, concise and accurate narrative and statistical reports, documents, correspondence, procedures and other written materials
- Make sound, independent decisions within established legal, policy and procedural guidelines.
- Communicate effectively, both orally and in writing.
- Establish and maintain effective working relationships with those contacted in the course of the work.

Education and Experience:
Any combination of education and experience that would likely provide the required knowledge, skills and abilities is qualifying, unless otherwise specified. A typical way to qualify is:

Education: Equivalent to a JD degree from an accredited college or university and admission to the California State Bar.

Experience: Three years of professional experience with an emphasis on arbitration, mediation and other appropriate dispute resolution matters.

License:
Must possess a valid California class C driver's license and a satisfactory driving record.

Previous Classification:
Deputy District Attorney III

MULTI-OPTION
ADR
PROJECT

A PARTNERSHIP OF THE
SAN MATEO COUNTY
COURTS, BAR & COMMUNITY

SHEILA R. PURCELL
APPROPRIATE DISPUTE RESOLUTION DIRECTOR
650/363-4148 FAX 650/599-1754
E-MAIL SPurcell@sanmateocourt.org
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M.A.P. OVERSIGHT COMMITTEE
JUDGE ROBERT D. FOILES
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BERNARD COTTER
DAVID DELBON
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STUART OPPENHEIM
JANE C. SMITHSON
PEGGY THOMPSON
GRETCHEN M. WALLACKER
ELIZABETH B. WILSON

M.A.P. PANELIST MATERIALS

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO
400 COUNTY CENTER, COURTROOM 2F
REDWOOD CITY, CA 94063-1655

MAP Panelist Orientation

Agenda

Welcome and Introductions

I. History of Program **(see tab 1)**

II. Statutes and Guidelines

a) Neutral Evaluation
   Video, Binder/Guidelines
b) Arbitration
   Different than Judicial Arbitration
   Comply with variety of disclosure requirements
c) Mediation
   Confidentiality, Evidence Code §1115-1128 **(see tab 2)**
   Enforceability of agreements under CCP §664.6 **(see tab 2)**

III. Referral Procedures **(see tab 3)**

Local Rules 2.3(i)(3)-(5)
Pro bono and modest means requirements
Information given to parties regarding program neutrals

IV. Ethics Standards and Grounds For Removal From Program **(see tab 4)**

V. Continuing Quality Control **(see tab 5)**

Evaluations for neutrals, attorneys and litigants
Continuing education for program neutrals

Next Steps/Questions

MAP Panelist Orientation
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SMCBA "*Docket*" article outlining program goals
MAP Strategic Plan, 2002-2007
2001-2002 Evaluation Highlights Summary
Settlement Conference Chart
2002 Panelist Demographics
Chart of MAP Programs
Press clipping

Tab 2. Qualifications/Statutes and Guidelines

Confidentiality: Summaries re statutory authority and recent case law
Evidence Code §§1115-1128
Stipulation for Settlement: CCP § 664.6
Articles re confidentiality case law and Rojas decision (2002)
Sample engagement letters (mediation and neutral evaluation), confidentiality agreement and fee agreement
Neutral evaluation guidelines

Tab 3. Referral Procedures/Local Rules

Local Rules pertaining to case management and ADR
Pro bono/modest means information and application
ADR Information Sheet (distributed at the time of filing)
Stipulation and Order to ADR and Case Management Statement
Sample MAP Information Sheets
MAP Court Website: www.sanmateocourt.org/adr.htm

Tab 4. Rules and Ethics

Resignation, Suspension and Removal from MAP Panel
MAP's Ethics Standards of Professional Conduct
Standards of Conduct for Mediators in Court-Connected Mediation Programs (California Rules of Court §§1620-1620.9 and 1622)
Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Division VI of the Appendix to the California Rules of Court)

Tab 5. Continuing Quality Control

Article re multidisciplinary mediation
Sample letter from MAP neutral re submission of evaluation forms
Program evaluation forms for neutrals, attorneys and clients

Multi-Option ADR Project:

A Partnership of the San Mateo County Courts, Bar and Community

Strategic Plan 2002-2007

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Multi-Option ADR Project:
A Partnership of the San Mateo County Courts, Bar and Community

Reviewed and approved by MAP Oversight Committee April 18, 2002

Draft Strategic Plan *2002-2007*

The Multi-option ADR Project (M.A.P.), a partnership of the San Mateo Court, Bar and Community has been operating since 1996 and first developed a strategic plan in 1997. The plan is regularly revised and updated. The following document is the Strategic Plan for 2002-2007. It has been substantially shortened, and prior plans may be a good source for those looking for a deeper understanding of the original vision and principles of the Project (see attachments).

Vision:

By the Year 2020, MAP will become a full spectrum referral source. This means MAP will play coordination and leadership functions within the court system. Cases will either be referred to appropriate individuals and agencies, or receive on-site services. MAP will be well respected for providing referrals to highly skilled, impartial dispute resolution providers. "Going to Court" will come to mean utilizing various ADR procedures as well as traditional litigation and trial.

Mission: The mission of MAP is:

- To increase the court's ability to resolve cases.
- To provide a flexible array of dispute resolution services, where the unique features of cases are given priority attention.
- To encourage early case analysis and preparation, with the benefits of saving both time and money.
- To promote an ongoing attitude of cooperation and collaboration in both the public and private sectors' approach to handling disputes of all kinds, whether institutional, business or interpersonal.
- To promote greater public satisfaction with the civil, family, juvenile and criminal justice systems.
- To promote the usefulness of ADR to members of the public through educational efforts.

Governance Structure Partnership

Strengths and Challenges

MAP is built on the premise that partnerships provide for a unique blend of perspectives and resources. The importance of an inclusive governance structure cannot be overestimated. Maintaining and supporting the partnership is critical.

Strategies

- Clearly define roles and responsibilities of each partner in the collaborative.
- Consider creating agreements around how to work together in partnership.
- Consider an annual review of the Partnership at one of the quarterly Oversight Committee meetings.
- Explore a mechanism to review the progress of the Project in the form of Strategic Plan Updates.
- Use Advisory Committees to assist with advice on program design and implementation of specific programs subject to the Oversight Committee's approval.
- Provide the Strategic Plan to each of the Partners for approval and review by their respective organizations (Judges at their monthly meeting and the Board of Directors of PCRC and the Bar Association).
- Clarify how Oversight Committee members' with representative roles plan to carry information about MAP back to the organizations they represent.

Program Development Objectives

The range of programs, Juvenile, Family, Probate, Judicial Arbitration, Small Claims and Civil, while each structured somewhat uniquely, have the following program development strategies in common:

Governance

- Oversight Committee will work with collaborative Advisory Committees, which give advice on program design and implementation subject to the Oversight Committee's approval.

Neutrals

Develop and distribute outreach materials in English and Spanish.

- Increase the diversity and size of the mediator pool. Actively recruit, train and support volunteer mediators representing all culturally diverse members of the community within San Mateo County. Target an increase in Spanish-speaking neutrals particularly for the family and juvenile programs.

Education and Outreach

- Enhance utilization of MAP by increasing referrals to the program through outreach efforts and networking with referring agencies and program partners.

- Expand the use of the Court/MAP Web site and other interactive technology for dissemination of program materials and information.
- Develop and distribute outreach materials in English and Spanish.

Program Staffing

- Secure adequate resources to support and expand program staff as needed and possible.

Research and Program Development

- Research and investigate other programs and resources for proven models to develop a program tailored to meet the needs of our community.

Evaluation

- Evaluate the effectiveness of programs by providing parties, attorneys and neutrals an opportunity to comment on their experiences in written evaluations, phone surveys and focus groups. As feasible, attempt to compare data across program years and across program areas.

Programs to be monitored, maintained and enhanced

1. Civil ADR

Strengths and Challenges

MAP has sufficient experience to institutionalize practices that are working. The challenge may be keeping the flexibility while making practices more routine in a phase that is less experimental.

Strategies

- Emphasize the availability of Neutral Evaluation, a lesser known ADR option.
- Consider how to monitor and track the number of court days saved, settlement conferences avoided, and the direct referrals to ADR.
- Require MCLE training and evidence of malpractice insurance coverage for arbitrators to ensure panelists are current on rapidly changing case law and new ethical requirements.
- Integrate Civil ADR into court's case management procedures and describe the two as related in outreach materials.

2. Juvenile Dependency Mediation

Strengths and Challenges

The Juvenile Dependency Mediation Program is a collaborative effort between the Superior Court of San Mateo County, the Peninsula Conflict Resolution Center (PCRC) and the Human Service Agency of San Mateo County. The program uses volunteer mediators to handle dependency cases from pre-filing to guardianship and adoption. Recruiting and maintaining a more diverse (i.e. culture, language, gender, geography, and age) pool of volunteer mediators represents a challenge that will be addressed with the involvement of the advisory committee. The program is part of a continuum of services offered through and with our PCRC partner. Other services include Family Conferencing and Parent-Teen Mediation.

Strategies

- Comply with the Uniform Standards of Conduct for Court-related Juvenile Dependency Mediation Programs that are specific to court staff mediators.
- Work with an Advisory Committee of members drawn from the Human Services Agency, CASA, the private defender program and other relevant stakeholders.
- Emphasize recruitment of bilingual mediators to assist with the significant number of Spanish speaking clients.

3. Family Law ADR

Strengths and Challenges

The Family Law Section of the San Mateo County Bar Association began a mediation and arbitration panel in May of 1996. The project was underutilized during its early years. MAP has been promoting the program drawing largely on the suggestions outlined in "Family Court 2000," the Judicial Council's report emphasizing the need for family law ADR programs.

MAP assumed leadership of the program and secured funding for a full time program coordinator in February 2000. The Family program has two components:

- a panel of private neutrals providing mediation and arbitration and
- on-site staff mediation and settlement conferencing.

Although the total number of mediations increased with the addition of the staff attorney, numbers for private mediation and arbitration have remained steady. Effort must now be extended to increase referrals to the panel.

Strategies

- Evaluate the efficacy of staff-provided mediation as one part of the array of ADR services.
- Make referrals to other MAP services where appropriate.
- Promote the use of ADR through collaboration with the Family Law divisions, PCRC, the Peninsula Collaborative Law Group, the Bar and the greater community.

Programs to be focused on in *2002-2004* (the "short-term")

1. Judicial Arbitration

Strengths and Challenges

Judicial arbitration referrals are made with regularity by the judges. While these arbitrations have generally run smoothly it is time for a review of practices and procedures. An internal working group and an external Bench/Bar Advisory Committee have developed a plan to redesign the judicial arbitration system, with a primary role being assumed by MAP staff. The goals are to consolidate the limited and unlimited court procedures, to automate the systems and to comply with the California Rules of Court. The Redesign group's recommendations follow:

Strategies

- Automate as many steps as possible.
- Centralize the Judicial Arbitration work, to the extent feasible, to allow for easier tracking.
- Establish a communication mechanism for the various units of the court to work together on redesign and implementation issues.
- Keep statistics.
- Rely on the arbitrators to set hearing dates and to send awards.
- Hold parties accountable for staying within the jurisdictional timeframes.

2. Juvenile Delinquency Mediation

Strengths and Challenges

Our community partner, the Peninsula Conflict Resolution Center, has provided a small victim-offender mediation program in the past. By securing court staffing in 2001 and expanding the advisory and referral network, this revised program has been re-energized.

Victim-Offender Mediation provides youth offenders and the victims of their criminal and/or offensive behavior with an opportunity to meet face to face in the presence of trained neutrals.

The participants determine the form of restitution required to address the victim's losses and to make things as right as possible. The offender has an opportunity to take responsibility for his/her actions and is held accountable. Intensive case development is necessary to evaluate the appropriateness of mediation between the parties, to address safety issues and to prepare the parties for constructive participation.

Implementing the principles of "Restorative Justice" (a term now in common usage by the Judicial Council) to address the harm suffered by individual victims, the community and the

offender significantly increases overall satisfaction with the Criminal Justice System. It can also reduce recidivism and provide direct involvement of the community in preventing crime.

Strategies

- Work closely with PCRC to support a comprehensive network of mediation services carried out by trained volunteer mediators.
- Work with an Advisory Committee made up of individuals from the District Attorney's Office, Probation, Youth Service Bureaus, Education, Private Attorneys, the Judiciary, Victim Advocates and diverse members of the community.

3. Probate/Trust/Conservatorship Mediation

Strengths and Challenges

The Civil program has always been able to assist with probate, trust, estate and conservatorship cases, but probate practitioners have not made regular use of the service. An initiative to increase the use of mediation on the probate calendar was undertaken by staff in the spring of 2000. The initiative has the support of the Bench, Oversight Committee, the Public Guardian, County Counsel, Court Investigator and Public Administrator's offices. The Public Guardian of San Mateo County began referring adult conservatorship cases to mediation on a pilot basis in June, 2000. One challenge facing this initiative is overcoming any skepticism by the local probate bar, which may not be as familiar with ADR as other civil practitioners. Another possible challenge lies in the fact that while PCRC is set up to offer case development for adult conservatorship cases, crucial case development for these cases handled through MAP may prove time consuming for MAP staff.

Strategies

- Increase the use of mediation in all types of probate/trust/conservatorship cases.
- Screen appropriate cases for mediation carefully and develop specific screening criteria for mediation of adult conservatorship cases.
- Work with incoming probate presiding judges and CMC judges regarding referral of probate/trust cases to mediation.

4. Civil Temporary Restraining Order Mediation

Strengths and Challenges

The Presiding Judge hears a number of neighbor disputes that have resulted in requests for temporary restraining orders. These are acrimonious disputes. Though MAP has offered to refer these cases to our community partner, the number of referrals has varied year to year based in large part on the Presiding Judge's comfort level with referring such cases to mediation and the total numbers have been very minimal. A review of possible practices is in order.

Strategies

- Explore the feasibility and challenges to mediating TRO cases using community volunteers off-site or on-site at the court.

Programs to be enhanced *2004-2006* (the "mid-term")

1. Small Claims Mediation

Strengths and Challenges

The county began a community mediation program in 1982 and it was housed first in Community Services, then Human Services and in 1994 became a court program with one staff person providing coordination of on-site volunteer mediators in South San Francisco, Central and Redwood City. This was pioneering but underutilized work since the public was even less familiar with mediation than now.

MAP has assumed leadership for this program and supervision of its staff person in 2000. Although there is a solid and committed core of long-standing volunteers, it is a small group of about 15. A coming challenge is the recruitment, training and integration of new and diverse volunteers while trying to retain the current pool. An even more perplexing challenge is that of providing confidential space in both courthouses where services are offered at a time when there are increasing pressures on those spaces from other departments. Rotating court personnel also poses an ongoing challenge for keeping court staff aware of the services of the program.

Strategies

- Explore ways to secure additional confidential space in the locations where mediations are conducted.
- Conduct an assessment of "best practices" for small claims mediation.
- Continue to educate, meet with and provide materials to clerks, Judges, Pro Tems and other court staff regarding the mediation program.
- Make small claims mediation as user friendly as possible and assist parties to be prepared for mediation.

2. Public Agency ADR

Strengths and Challenges

In order to have a true countywide partnership needs to reach out to City and County departments. While we have made overtures, staffing on the MAP side and perhaps political consideration on the part of potential County and City partners have slowed progress in this area.

Strategies

- Look for additional opportunities to meet and work with members of the Board of Supervisors, City Council members, County Counsel's Office and other public agencies.
- Recognize this will be a long-term effort.
- Promote pre-litigation training in assessment and referral by City and County agencies.
- Encourage the work of public agencies using mediation internally.

Programs to be considered *2006-2007* (the "long-term")

1. Other ADR Processes

Strengths and Challenges

A number of ADR processes are beginning to emerge. Developments in this area may be worthy of attention. For example, Summary Jury Trials offer litigants in larger cases an opportunity to preview what might happen in a more prolonged jury trial. Since it has not been frequently used in state courts, identifying cases where Summary Jury Trials are warranted and integrating this procedure within the existing system may be challenging.

Strategies:

- Monitor developments in the ADR field for promising processes and developments
- Research existing models.
- Other Strategies: to be developed.

Conclusion

In this strategic plan, MAP has gone through a planning process to define areas of need and to prepare a blueprint for the foreseeable future. Factors such as the need for services, potential for support, readiness of stakeholders, and available resources have helped identify the areas for new programs. MAP recognizes that this is an evolving process and MAP will be vigilant about the changing needs of the legal culture.

This plan continues earlier Bar, Court, and community commitments to managed growth with maintenance of high quality services and the greatest possible involvement of partners in the design and implementation of new programs. The upcoming years are filled with challenges and opportunities. MAP is prepared to purposefully and energetically respond to the public's growing recognition of the value of resolving conflict in a collaborative, non-adversarial manner.

Appendix I

The guiding principles for MAP program expansion are:

1. Build on proven programs and skills.
2. Modify committees, staff, and volunteer structures as needed to support programs.
3. Continuously evaluate the role of the MAP ADR Director in encouraging and supporting the development of new programs and assess how this will impact work on existing programs.
4. Recognize that education is a critical preliminary and ongoing task for all program development.
5. Where resources allow, coordinate with new and existing ADR projects.
6. Identify ongoing funding for all programs.
7. Develop effective screening processes for cases.
8. Consider the possibility of raising revenue with innovative programs.
9. Defer growth efforts if current programs are being negatively impacted.
10. Continue ongoing planning and strategy development, since a rapidly changing environment may require plan modifications or additions.
11. Use a pilot approach to refine program components.
12. Recognize the need for information gathering prior to new program development.

Appendix II

The following **draft Organizational Chart** was developed during and following two partnership discussion meetings held in 2001-2002.

These meetings involved Oversight Committee members Judge Miram, Judge Mittlesteadt and Judge Foiles, Court CEO Peggy Thompson, Bar representatives Marie Seth Weiner, John Blackman and Catherine Raye-Wong, PCRC Executive Director Pat Brown and the MAP Director Sheila Purcell. (Not all parties were at both meetings)

Multi-option ADR Project:
A Partnership of the San Mateo Court, Bar and Community

Draft Organizational Structure
Revised Draft 2/28/02

CEO/ Judges

- Personnel responsibilities
- Ultimate decision making responsibility.

Work with

- Partners in the Oversight Committee
- Advisory Committees
- Director
- Staff

Oversight Committee

Made up of representatives from the bench, bar and community partners

Roles:

- Provide guidance on policy, goals and planning in consultation with each of the primary partners
- Assessment of broader community needs and opportunities which may impact program development
- Develop, review and revise the long-term strategic plan
- Community Partner assists with providing volunteers for two programs
- Oversight and liaison with the Advisory Committees for each Program.

Advisory Committees
Family, Judicial Arbitration, and the two Juvenile programs each have Advisory Committees. Small Claims and Civil anticipate that may develop these as well.

These committees are made up of representatives from the bench, bar and community partners
Roles:

- Provide specific guidance on policy, planning and implementation issues
- Provide liaison to the Oversight Committee for updates and consultations on larger policy issues that may arise at the Advisory level first.

Program Staff

ADR Director

Manages all staff
Direct program work on Civil assessments and referrals

Civil/ Probate	**Family**	**Jud. Arb**	**Small Claims.**	**Juv. Dep**	**Juv. Delinq.**
CSS (Community Services Specialist) .5 FTE	Leg. Res Atty	Man Analyst	CSS	CSS .5FTE (other .5 funded by community non-profit – to run Parent-Teen Med. and Family Conferencing programs) ▪ Jointly managed staff person who is a part-time court, part-time community staff person	CSS

AAII
Supports Family, Civil, Jud. Arb
Translation, case development in Spanish
Database, evaluation all programs

AAII
Supports Small Cl., 2 Juv. programs

Outreach, brochure, web for all programs

San Mateo Superior Court Multi-Option ADR Project, "MAP"
Evaluation Highlights- July 2001- July 2002

MAP is a partnership of the San Mateo Court, Bar and Community.
MAP provides various forms of ADR including mediation, private and judicial arbitration and neutral evaluation for civil cases, mediation and arbitration of family law cases and mediation of small claims, juvenile dependency and juvenile delinquency cases.

Civil ADR Program

The Civil program provides assessments and referrals to trained and experienced screened attorney, non-attorney professional neutrals and private judges. It is a voluntary, market-rate program with income-based pro bono and modest means services available.

For the 313 cases we had 515 responses to the survey.

Voluntary Participation: 62% of those referred participated in ADR; 38% did not or had not yet gone to ADR.

Cases Not Participating in ADR
34% settled after assessment and referral without an ADR session.
17% dismissed. 7% found ADR not suitable/unwilling. 17% had other situations.
14% had not yet scheduled an ADR session. 11% had a session pending.

Of those that had already completed ADR:
75% settled fully. 4% partially settled. 21% did not settle in ADR.

Process: 96% Mediation; 2% Neutral Evaluation; 2% Other

Case Types: 41% Personal Injury, 30% Business, 13% Real Estate, 2% Construction, 6% Employment, 4% Malpractice, 4% other.

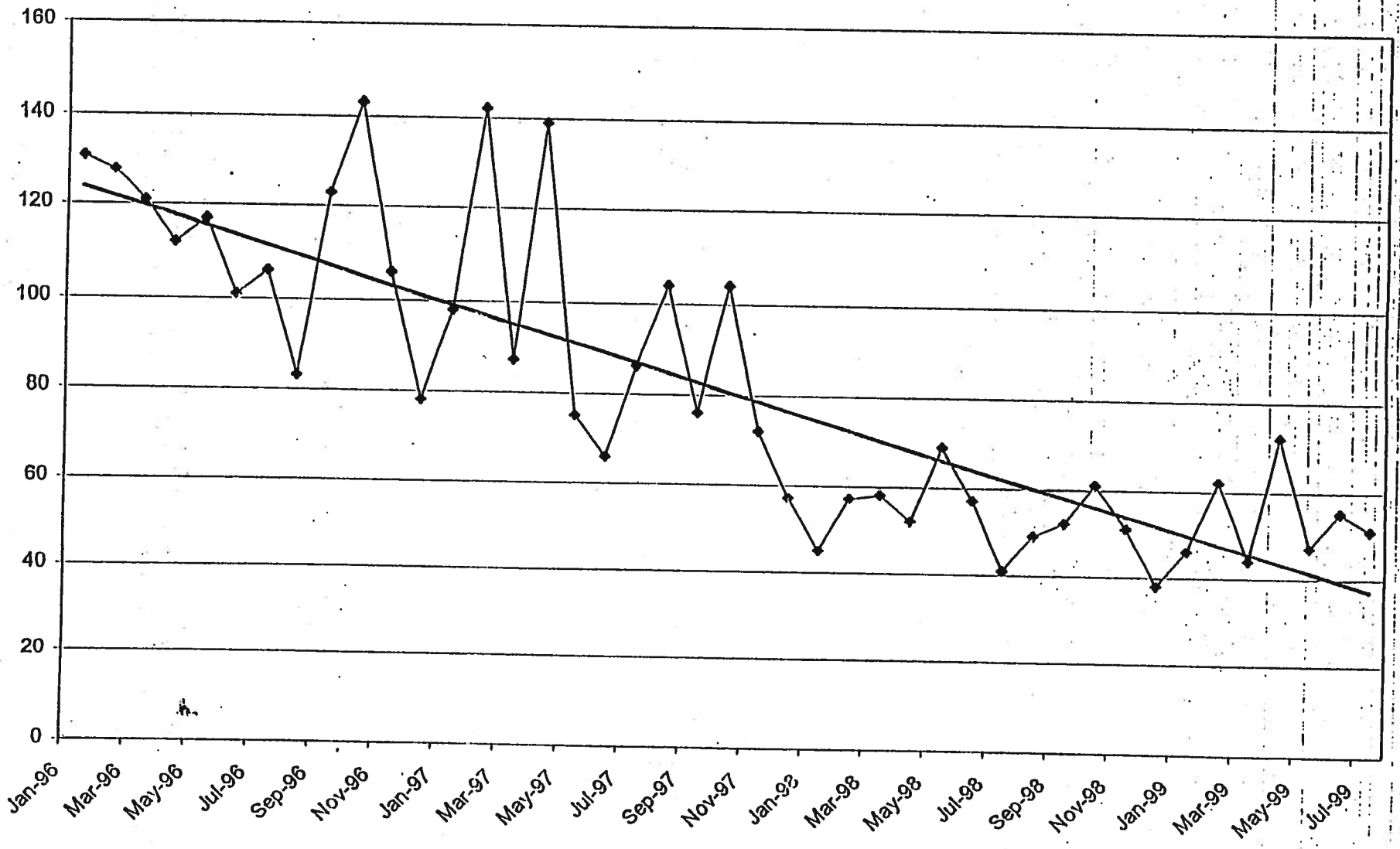
Satisfaction: *(The ranges include differing responses by plaintiffs and defendants and their attorneys)* Fairness of process: satisfied/very satisfied 78-92%. Neutral understood key issues: 80-90% were satisfied or very satisfied. Would use neutral again 80-89%. Would use MAP program again 80-90%.

Time:
Duration of average ADR session: 4.9 hours with an average of 1.2 sessions.
Court time: 95% thought the court time was reduced. 5% thought court time was increased.

Costs Savings:
86% thought ADR reduced cost, 14% thought it increased cost. 46% thought it reduced cost by $10,000 or less and 45% estimated it reduced cost by $10,000 to $50,000.
Pro Bono: Approximately 5% of cases received pro bono/modest means assistance

At what phase in Dispute was ADR session held: 45% after some preliminary discovery. 28% after significant discovery. 21% was imminent. 6% within four months of filing.

Settlement Conferences Per Month (1996-To Date)



MULTI-OPTION ADR PROJECT
PANELIST DEMOGRAPHICS - FALL, 2002

Number of Panelists: 118

Men:	87
Women:	31
Justices/Judges:	10
Attorneys:	99
Lay Mediators:	9
People of Color:	3

Foreign Language Capabilities: 19

Spanish:	10		
French:	7		
Italian:	2		
German:	6		
Cantonese:	1	Loong-Du:	1
Mandarin Chinese:	1	Armenian:	1

Process Expertise

Mediators:	95
Arbitrators:	84
Neutral Evaluators:	57

Geographic Distribution of Panelists

San Mateo County:	52
Santa Clara/Santa Cruz Counties:	17
San Francisco County:	27
Alameda/Contra Costa Counties:	13
Marin/Sonoma Counties:	7
Sacramento County	1
San Diego County	1

Panelist Hourly Rates

$100-$200:	31	$401-$500:	12
$201-$300:	44	$501-above:	1
$301-$400:	30	First 2 hrs. free:	1

Subject Matter Expertise

Business:	85	Medical Malpractice:	28	Consumer/Lemon Law:	5
Real Estate:	76	Dental Malpractice:	12	Elder Law/Abuse:	4
Employment:	73	Intellectual Property:	17	Civil Rights:	4
Personal Injury:	70	Environmental:	15	Americans With Disabilities Act:	3
Construction:	56	Securities:	13	Engineering:	2
Insurance:	45	Landlord-Tenant/ Neighborhood:	10	Partnership Dissolutions:	2
Estates/Trusts:	44	Product Liability:	9		
Public Agency:	35	Healthcare:	5		
Legal Malpractice:	37				

MULTI-OPTION APPROPRIATE DISPUTE RESOLUTION PROJECT

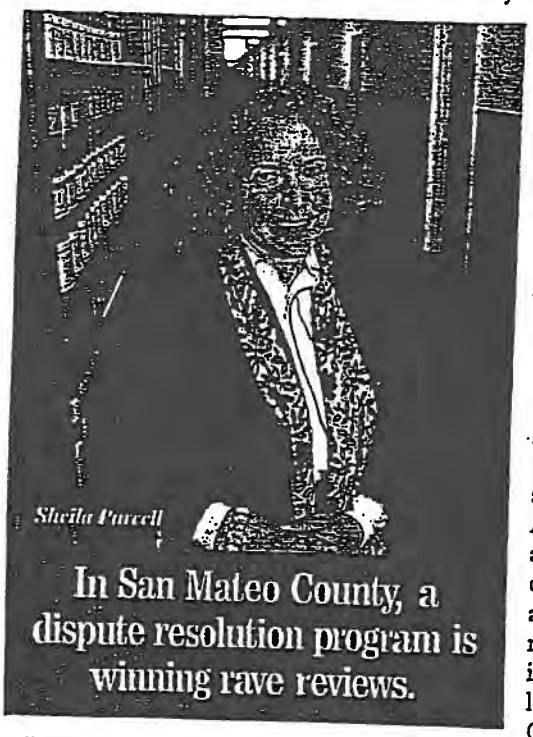
ADR Programs	Voluntary or Mandatory	Process Available	Types of Neutrals	Cost
Civil Probate	✓ Mandatory assessment ✓ Voluntary referral	✓ Mediation ✓ Arbitration ✓ Neutral evaluation ✓ Hybrids	✓ Attorney mediators ✓ Non-Attorney mediators ✓ Private judges ✓ Community Referrals ✓	✓ Market Rate ✓ Pro bono and modest means income-based screening available
Family Law	✓ Voluntary	✓ Mediation ✓ Arbitration	✓ Attorney neutrals ✓ Court staff (for day of court single-issue)	✓ First 90 minutes $100 ✓ Market rate after first 90 minutes
Small Claims	✓ Voluntary	✓ Mediation	✓ Volunteers	✓ Free
Judicial Arbitration	✓ Voluntary by stipulation of Plaintiff/Man-datory by statute	✓ Arbitration (non-binding)	✓ Attorneys	✓ Free to parties ✓ Arbitrators paid $150 per session by court
Juvenile Dependency	✓ Emphasis on voluntary opt-in but can be mandated by statute	✓ Mediation	✓ Volunteers	✓ Free
Juvenile Delinquency	✓ Voluntary	✓ Mediation	✓ Volunteers	✓ Free

Swifter Justice

Timely dispute resolution options attract greater interest.

If imitation is the sincerest form of flattery, then clearly San Mateo County is on the right track with its Multi-option ADR Project (MAP). Begun three years ago, it represents, says program director Sheila Purcell, a "true collaboration" among the bench, the bar, and the community to present parties with a multiplicity of dispute resolution options—including mediation, private arbitration, neutral evaluation, and private settlement conferences.

David McKim, former president of the San Mateo County Bar Association, proclaims MAP a great success. And a survey conducted by the ADR Committee of the Court between June 1997 and June 1998 supports his assessment. It credits MAP with a 73 percent settlement rate. The program also saves as much as ten days of court time per ADR case. Moreover, compared to going through a full trial, self-referred mediation cases are as much as $75,000 less expensive according to the same survey. So it's only natural that other counties would jump onboard with similar programs.



Sheila Purcell

In San Mateo County, a dispute resolution program is winning rave reviews.

Purcell: Xiang Xing Zhou

Just a few weeks ago Santa Barbara launched a program loosely based on MAP called CADRe (Court Administered Dispute Resolution). "This is the first county in southern and central California to adopt this model," says program manager Robert E. Oakes. Like MAP in San Mateo the program is voluntary for the most part, and the experts provided are paid market rates, although they must agree to do one pro bono case and one modest means case per year.

"If clients are not offered opportunities for ADR alternatives early and often, then clients are not well served, and they know it," says Santa Barbara County Bar Association President Jim Herman, who is one of CADRe's enthusiastic supporters.

In Contra Costa County, meanwhile, there is EASE (Extra Assistance to Settle Early), which offers litigants numerous alternatives to traditional litigation at practically every stage of a civil case. Last year 700 cases were processed in this manner. And, according to Robin W. Siefkin, who heads up all ADR programs in the county, a 58 percent settlement rate was achieved after two months, usually in just one session per case.

Then there's Los Angeles County, where a status conference date is assigned somewhere between 120 and 270 days after a case is filed. As few as 30 days after that a mediation can occur. Mediation and arbitration are mandatory for cases involving $50,000 or less in Los Angeles County and voluntary for cases that involve more.

Observers agree that for a program like MAP or CADRe to be successful, it needs to be largely voluntary, yet at the same time require litigants to at least learn what their ADR options are.

—*Geraldine Lewis*

CALIF LAWYER MARCH 2000

CONFIDENTIALITY IN MEDIATION

A. **Mediators *can't testify:***

California Evidence Code § 703.5 (found in Division 6, "Witnesses") declares that **"no mediator is competent to testify in any subsequent civil proceeding."**

Exceptions: Mediator is competent to testify regarding statements or conduct that could
(a) give rise to civil or criminal contempt;
(b) constitute a crime;
(C)) be the subject of an investigation by the State Bar or Commission on Judicial Performance
(d) in a mediation under Family Code §§ 3160 et seq. (mediation of visitation or custody matters, wherein the psychologist or social worker conducting the mediation may submit a recommendation to the court.)
See Family Code §§ 1815 (qualifications of mediator under Family Code); 3177 (proceedings confidential); 3183 (recommendation with reasons to the court).

B. **Mediators *can't report* much:**

California Evidence Code § 1121 (found in Division 9, "Evidence Affected or Excluded by Extrinsic Policies") limits mediators reports to **"whether an agreement was reached"** when mandated by court rule or other law. Indeed, a court or other adjudicative body "may not consider any report, assessment, evaluation, recommendation, or finding of any kind by a mediator.

Exception: If all parties to the mediation expressly agree in writing, or their oral agreement is recorded by a court reporter, tape recorder, or other reliable sound recording device, the mediator *may* report. to the court.

C. ***Nobody* can testify:**

California Evidence Code § 1119 ("Evidence . . .Excluded by Extrinsic Policies") says that **"No evidence of anything said or any admission made" in a mediation process is admissible** in evidence or subject to discovery. **Disclosure "shall not be compelled"** in any noncriminal proceeding. **"All communications, negotiations, or settlement discussions. . .shall remain confidential."**

D. **What's not covered?**

California Evidence Code § 1123 says that **a written settlement agreement prepared as part of the mediation is admissible in evidence if signed by the settling parties and either (1) it provides that it is admissible or subject to disclosure; or, (2) it provides that it is binding or enforceable**; or (3) all parties expressly agree in writing (or orally, subject to Evidence Code § 1118) to its disclosure; or (4) the agreement is used to show fraud, duress or illegality. California Evidence Code § 1120 says that "this chapter" ("Evidence . . .Excluded by Extrinsic Policies") does not limit evidence of (1) an agreement to mediate; (2) 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; or (3) disclosing that the mediator has served as a mediator in a dispute.

E. **Don't try to force the mediator to testify.**

Mediators can recover fees anc costs. Evidence Code § 1127 protects mediators from having to appear in court or otherwise respond to subpoenas for documents. It authorizes the court to award the mediator reasonable attorneys fees and costs against the person seeking the testimony or discovery.

F. **What do the courts say?**

In rare circumstances courts may order mediators to testify, initially *in camera*. (See *Rinaker v. Superior Court*, 62 Cal App. 4th 155 (juvenile court proceeding); *Olam v. Congress Mortgage* 68 F. Supp. 2d 1110 (validity of settlement agreement).)

G. **What do the professional associations say?**

The standards of CDRC (the California Dispute Resolution Council) say that "A Mediator shall preserve and

maintain the confidentiality of all mediation proceedings except where required by law to disclose information." Within the mediation process, "A mediator shall not disclose information to the other participants when confidentiality is requested."

SPIDR (the Society of Professionals in Dispute Resolution), AAA (the American Arbitration Association), and the ABA (American Bar Association) jointly say that "The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy."

Michael McCabe, Mediator ◙ San Francisco ◙ Contra Costa ◙ Santa Rosa
www.mediate.com/mccabe 415-392-3450 925-687-3450 707-865-0170
© Permission to copy granted

RELEVANT STATUTORY AUTHORITY

Evidence Code Section 703.5. Competency to Testify. (effective 1/98)

No . . .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. . . .

Evidence Code Section 1119. Confidentiality, Nonadmissibility, and Nondisclosure. (effective 1/98)

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or 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.

. . . .

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

Evidence Code Section 1121. Mediator's Reports or Conclusions--Conditions for Use by Adjudicator. (effective 1/98)

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Evidence Code Section 1127. Attempt to Compel Mediator to Testify or Produce Writing. (effective 1/98)

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in [Evidence Code] Section 250, and the court or other adjudicative body determines that the testimony is inadmissible under this chapter, or protected from disclosure under this chapter, <u>the court or other adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.</u> (emphasis added).

SHORT SUMMARY OF RINAKER, OLAM AND FOXGATE FACTS/HOLDINGS

Rinaker v. Superior Court of San Joaquin County, 62 Cal. App. 4th 155 (1998)

-Two minors charged in a JD action w/ vandalism for throwing rocks at a car. Car owner brought a Civil Harassment action against the youths and case was mediated by a mediator affiliated w/w a community program.

-The minors claim the car owner stated during mediation that "he did not actually see who threw the rocks at his car" and attempt to compel the mediator's testimony in order to impeach him at the JD trial.

-Mediator objects; court orders her to testify; she appeals.

-Appellate court applies a balancing analysis and determines that "When balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial in a juvenile delinquency proceeding, the promotion of settlements must yield to the constitutional right to effective impeachment." Appellate court also states that the juvenile trial court should have taken an extra step. To wit, it should have conducted an *in camera* hearing (behind the scenes and off the record) to weigh the claim of need for her testimony against the mediation confidentiality privilege.

Olam v. Congress Mortgage Company, et al., 68 F. Supp. 2d 1110 (1999)

-Plaintiff Donna Olam received a loan from Defendant Congress Mortgage Company in 1992, which loan was secured by two single family homes in San Francisco.

-Plaintiff defaulted twice on her loan agreement. On both occasions, the usual foreclosure notice was followed by attempts to work things out.

-June 1995: Plaintiff filed an action in state court against Defendants that included a claim under the federal Truth in Lending Act. The matter was removed to the ND Federal Court in SF in August.

-On September 9, 1998, at 10:00 a.m., the parties commenced mediation with one of the staff mediators who works for the federal court's ADR Program. Mediation lasted all day and into the evening. At around 10:00 p.m., the mediator and counsel went to the mediator's office to type up a MOU that contemplated preparation of a formal settlement agreement, but which itself was intended by its terms to be binding. The MOU was signed at 1:00 a.m. The next day, both counsel confirmed on the record that the case had settled.

-By December 1998, the Plaintiff had not signed the formal settlement agreement. In April 1999, Defendants file a motion to enforce the agreement and enter judgment thereon. Plaintiff opposes on two grounds, the second of which is relevant to this discussion. To wit, that at the time she signed the MOU she was intellectually, emotionally and physically incapable of giving legally viable consent.

-Both Plaintiff and Defendants waive the mediation privilege so that the mediator's testimony can be taken.

-Magistrate Judge Brazil assumes the mediator has asserted his privilege not to testify, finds that California privilege law should control and proceeds to apply a two stage analysis:

I. First, in order to make the decision whether to compel the mediator's testimony in a protected proceeding, he stated: The court must assess whether the potential harm to the values underlying confidentiality that would arise from compelling testimony in a protected proceeding is justified in view of the possibility that the testimony might advance an interest of comparable or greater magnitude. (This is what I call the "quick and dirty in a vacuum analysis".)

II. Second, if the result of the first stage analysis is a conclusion that the mediator must testify, albeit in a protected environment, then after the testimony has been taken the following 4-part analysis is to be applied:

a. Assess the importance of the interests/values harmed
b. Assess the magnitude of harm that compelling the mediator's testimony would cause
c. Assess the importance of the interests/values that would be threatened if the mediator's testimony were not available
d. Assess the extent to which the testimony might protect or advance those interests

-Judge Brazil puts much weight on the fact that the mediator was not only the sole truly disinterested "witness" to Ms. Olam's condition and demeanor, but also that he had spent more time with her than had anyone else during the mediation. And he closes his analysis by saying that the mediator's testimony was <u>essential</u> to advance the interests he had previously articulated "so we decided to use it and unseal it."

-Mr. Herman's testimony was in sharp contrast to Plaintiff's and the agreement was enforced, with this result: Plaintiff got to keep one of the houses, with a revised payment plan for the loan. There is a suggestion in the opinion that had the case gone to trial, she likely would have lost everything. Justice done?

Foxgate Homeowners' Association v. Bramalea California, Inc. et al., 00 C.D.O.S. 1490 (2000)

-Plaintiff Foxgate HOA was a group of owners of 65 condo's in Culver City. The Bramalea defendants were the developer and general K'r for the condo complex. Foxgate sued for alleged construction defects.

-By Case Management Order ("CMO"), retired Judge Peter Smith appointed both as Special Master and mediator. Judge Smith, as mediator, authorized to arrange a pre-mediation meeting of all expert witnesses to discuss repair methodology—a power commonly given to Special Masters, but not to mediators. In his capacity as Special Master, Judge Smith authorized to set exact dates and structure the mediation process, as well as to provide reports and recommendations to the court [&*$#@*^!!]. The CMO also provides that the parties would make every best effort to cooperate in the mediation process., i.e., the "good faith" clause. Interestingly, it specifically preserved all privileges applicable to mediation.

-On September 16th, pursuant to Judge Smith's instructions, plaintiff's counsel shows up with 9 expert witnesses. Defense counsel shows up half an hour late, with no experts. The a.m. session is held, but the remaining sessions are cancelled. Judge Smith files a report, presumably in his capacity as Special Master, with the court recommending that the defendants be sanctioned for their conduct. He then resigns.

-Plaintiff files a motion for $24k in sanctions based on defendants' failure to meaningful participate in mediation, causing Plaintiff to incur unnecessary expert fees. The motion is denied without prejudice, in part because further mediation sessions had been scheduled with a new mediator. The new mediator holds one session and issues a report concluding that "further sessions would not be constructive at this time."

-Plaintiff renews its sanctions motion, now for $30k. Defendants make a separate motion seeking the return of mediation fees. In support of its opposition to defendants' motion, Plaintiff submits the declaration of Judge Smith, which states, in part, that defense counsel "aborted" the 9/97 session by refusing to participate in good faith. Trial court grants the sactions motion this time.

-Appellate court acknowledges the importance of mediation confidentiality. BUT goes on to say that the Legislature could not have intended the relevant code sections to provide immunity from sanctions for "those who disobey orders concerning their participation in the mediation process." (Conversely, I am not convinced that the Legislature intended to place mediators in the peculiar position of assisting litigants to obtain sanctions.) At bottom, this case seems to stand for the proposition that the court can find out just about anything it wants to know, protective rules notwithstanding.

West's Annotated California Evidence Code §1115 - §1128

§ 1115. Definitions

For purposes of this chapter:

(a) **"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.

(b) "Mediator" means a neutral person who conducts a **mediation.** "Mediator" includes any person designated by a mediator either to assist in the **mediation** or to communicate with the participants in preparation for a **mediation.**

(c) **"Mediation** consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a **mediation** or retaining the mediator.

§ 1116. Effect of chapter

(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

§ 1117. Application of chapter

(a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 222 of the California Rules of Court.

§ 1118. Oral agreements

An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

§ 1119. Written or oral communications during mediation process; admissibility

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. Evidence otherwise admissible

(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.

§ 1121. Mediator's reports and findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

§ 1122. Communications or writings; conditions to admissibility

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

§ 1123. Written settlement agreements; conditions to admissibility

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if

CODE OF CIVIL PROCEDURE

§ 664.6. Judgment pursuant to terms of settlement

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

CASE NO.

Plaintiff(s),

vs.

STIPULATION FOR SETTLEMENT
CCP SECTION 664.6

Defendant(s)
_____/

This case having come before Hon. _____, Judge of the Superior Court, for a mandatory Settlement Conference, and the parties having conferred, it is hereby stipulated that this matter is deemed settled pursuant to the following terms and conditions:

1. Defendant _____shall pay
Defendant _____shall pay
Defendant _____shall pay
Defendant _____shall pay
to plaintiff(s) _____ and to his/her/their attorney _____ for the total sum of $_____ in full settlement and compromise of this action and in release and discharge of any and all claims and causes of action made in this action, and in release and

discharge of any and all claims and causes of action arising out of the events or incidents referred to in the pleadings in this action.

2. Plaintiff(s) agree to accept said sum in full settlement and compromise of the action and agree that such payment shall fully and forever discharge and release all claims and causes of action, whether now known or now unknown, which plaintiff(s) has against any and all of the defendants in that action arising out of the incident.

This settlement includes an express waiver of Civil Code § 1542, which states: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

3. Plaintiff(s) further agree to sign, acknowledge and deliver to defendants a standard form of a Release of all such claims and causes of action and to sign and deliver to defendants a standard form of Dismissal with Prejudice of the action.

4. Plaintiff(s) shall protect and indemnify the defendants in said action, (and his/her/their liability insurance carrier(s)) against any and all liens, subrogation claims and other rights that may be asserted by any person against the amount paid in settlement of the action or against any recovery by the plaintiff(s) in the action.

5. Counsel for each of the parties to this agreement represents that he/she has fully explained to his/her client(s) the legal effect of this agreement and of the Release and Dismissal with Prejudice provided for herein and that the settlement and

compromise stated herein is final and conclusive forthwith, and each attorney represents that his/her client(s) has freely consented to and authorized this agreement.

6. Payment of the stated settlement amount shall be made by _____(199__) or as soon thereafter as reasonably possible.

7. Unless otherwise stated herein, each party will bear its own attorneys' fees and court costs.

8. Other terms and conditions:

_____

_____

_____

_____

_____

_____

9. This agreement may be enforced by any party hereto by a motion under Code of Civil Procedure § 664.6 or by any other procedure permitted by law in the Superior Court of San Mateo County.

Date: _____

_____	_____
for	for
_____	_____
for	for
_____	_____
for	for
_____	_____
_____	_____

VENNER ADR
MEDIATION SERVICES
CHARLOTTE M. VENNER, ESQ.

119 HAZEL AVENUE MILL VALLEY, CA 94941 • PHONE: (415) 388-0905 • FAX: (415) 388-1036 • E-MAIL: VENNERADR@MSN.COM • WEB: WWW.VENNERADR.COM

February 19, 2003

, Esq.

, In Pro Per

Re: **Confirmation of Retention and of Scheduled Mediation**
Case: **_____ v. _____, _____ (Case No. 425210)**
Date: **April 16, 2003 @ 10:00 AM**
Location: **_____'s Oakland office**

Dear Mr. . and Ms. .

This letter serves to confirm that I have been retained to serve as your Mediator in connection with the above-entitled matter. The mediation will be held on April 16, 2003 @ 10:00 AM at 's Oakland office. **Please note the provisions in my Fee Schedule pertaining to cancellation or rescheduling of this session within 14 days of this scheduled date.** The San Mateo County MAPP program rules provide that unless excused in advance by the assigned judge, all trial lawyers, principals or clients, and all claims representatives must personally attend the mediation. Telephone standby is not sufficient unless approved in advance by the assigned judge. It is also important that you have full authority available to settle this matter. Thus, please make the necessary arrangements in advance.

IT IS BEST TO FAX YOUR BRIEF AND ANY SUPPORTING MATERIALS TO ME AT (415) 388-1036. YOU CAN ALSO ATTACH YOUR BRIEF AND ANY DOCUMENTS TO AN E-MAIL TO ME AT venneradr@msn.com. IF YOU WANT TO SEND ME ANY MATERIALS OR RECORDS THAT MAY BE TOO VOLUMINOUS TO FAX, PLEASE SEND THEM TO MY HOME ADDRESS: 119 HAZEL AVENUE, MILL VALLEY, CA 94941. THANK YOU.

I enclose a copy of my Fee Schedule. For mediation services I charge a $250.00 Case Administration Fee, which is split equally among the parties and $750.00 for the first three hours of a scheduled mediation session. Additional time worked on the case is billed at $250 per hour. This hourly rate includes any pre-session preparation time, including reading and reviewing briefing materials and documents provided by the parties and any post-mediation time authorized by the parties. **Also, I do not charge for travel time to and from a mediation.** The Administrative Fee covers my time involved in intake, any pre-mediation confidential contact with the parties' attorneys, obtaining dates from and then scheduling and confirming the

mediation date to the parties, and completing and processing any required Court ADR paperwork to the parties and to the court, both before and after the mediation.

NOTE: If a scheduled mediation session is **cancelled 14 days or less** before the day of the scheduled session, the $750 Minimum Mediation Fee and the $250 Administrative Fee will be charged as a Late Cancellation Fee to the party requesting the cancellation, unless it is specified that the parties have agreed to divide the Cancellation Fees pro-rata. If the Mediator is able to schedule another mediation for that day, only the $250 Administrative Fee will be charged. County pro-bono deductions are not deducted from Late Cancellation Fees. Please also note the sections in the Fee Schedule pertaining to **rescheduling of a mediation** within **14 days** of the date of a scheduled session.

I will assume the parties are equally sharing the costs associated with the mediation, unless advised otherwise. My EIN Number is 94-3337278. Should any other parties be brought in, please inform them immediately of the mediation date. Payment for mediation services is due within thirty days of your receipt of my bill for mediation services.

Unless I have previously provided this for you, I also enclose my Professional Profile. This and my Mediation and Confidentiality Agreement, are also available on my website at www.venneradr.com, and can be downloaded using Adobe Acrobat. The Mediation and Confidentiality Agreement will be signed by all of the participants at the beginning of the mediation session.

I prefer to get briefs (position statements) from the parties five days before the day of the mediation, so I can have time to read all of the materials in detail and reflect on them before we meet. However, I am aware of the time constraints your busy practices place on you and will of course read anything sent to me up to and including the night before our session. **If you are sending a late brief, please call me and let me now when I can expect it. Please remember, do not send material to my office in San Francisco.**

I understand this case is venued in San Mateo County. In accordance with Local Rule 2.3 (i) (3), following the referral to ADR, the parties have 21 days to file a Stipulation and Order to ADR. This form is available on the court's website. Also, under Local Rule 2.3 (i) (5), the parties and their counsel (and the Mediator) are also expected to fill out and then submit evaluations after the mediation session. I will provide copies of these to you at the mediation.

To prepare for a mediation, I have found it to be very helpful in my understanding of the issues if each party would send to me, a legal brief summarizing the following:

1. The facts and pertinent legal and evidentiary issues in the case.
2. Your position on each element of claimed damages, setting forth computations, if appropriate.
3. Your position on pertinent insurance coverage or indemnification issues, if any.
4. The last communicated demand and offer.

5. Any other matter that you believe may have a bearing on settlement negotiations.

Inclusion of any significant documentary or investigative materials or medical records or reports that you will be relying on in evaluating the case may also be helpful. Compelling or exemplary exhibits, including photographs, documents, and accident reconstruction analyses can be very helpful also. If your evaluation turns on pending motions or matters on appeal, the legal briefs in support of these motions may also be provided. If there is a particular case that supports a position that is central to your case, feel free to also provide me a copy of it. **Please clearly specify any materials that are to be kept confidential pursuant to the terms and law cited in the Mediation and Confidentiality Agreement.**

Thank you again for selecting me to serve as your Mediator. I am looking forward to working with you on this case. If you have any questions regarding the mediation process, or want to discuss any aspects of your case with me in confidence prior to the mediation, feel free to give me a call.

Sincerely,

Charlotte M. Venner

CMV: jel

Enclosures: Fee Schedule and Professional Profile, unless previously provided
cc: w/o encls:

Carol J. Marshall

150 Spear Street, Suite 725
San Francisco, CA 94105
Telephone: 415-618-0090
Facsimile: 415-618-0190

Wednesday, April 02, 2003

Via U.S. Mail & Fax

Via U.S. Mail & Fax

Re: , et al. v. , et al.
San Mateo Superior Court Case No. CIV 426712

Dear Ms. & Mr. :

I am writing to confirm that you and your clients have selected me to serve as a mediator in connection with the above-referenced case, which, I understand, is under the auspices of the San Mateo County Multi-option ADR Project (MAP).

Each of you will find the following enclosed:

- Notice of Mediation Date
- Mediation and Fee Agreement (sign and return)
- Confidentiality Agreement

My initial conflicts check has revealed no actual or potential conflicts of interest with regard to any of the parties. Moreover, I do not believe that I have met either of you before. Therefore, I am not presently aware of any factors that could bring my impartiality into question. As we progress through the process, I will let you know if I become aware of anything that might present an actual or potential conflict or give the appearance of one which might bring my impartiality into question and I ask you and your clients to do the same.

If I have indeed met you before, I apologize for my memory lapse and ask you to remind me of the facts. Ms. mentioned to me that someone in Mr. s office may have used my services in the past. Please let me know the details, and if either of you are aware of other such prior connections between your office and mine, please make me and opposing counsel aware of the facts. My goal is to conduct every mediation in a totally fair and impartial manner and to make sure that any factor that might bring my impartiality into question is disclosed to everyone involved. Both parties and their counsel should be as confident as possible about the integrity and fairness of the proceedings.

Thank you for selecting me to serve as your mediator. I am looking forward to working with you on this case. If you have any questions regarding the process or the content of this letter or any of the attachments, please let me know.

Very truly yours,

Carol J. Marshall

Carol J. Marshall

CJM/pcm

Multi-Option ADR Project - MAP

Superior and Municipal Courts of San Mateo County

400 County Center • Redwood City CA 94063-1655 • Telephone: 650-363-4148 • Fax .650-599-1754

NOTICE OF ADR HEARING DATE

Service List:

Plaintiffs Counsel:	Defendant's Counsel:

(use attachment for additional counsel or parties if needed)

FROM: Carol J. Marshall
(ADR Provider)

DATE: April 2, 2003

CASE: , et al. v. , et al.
San Mateo Superior Court Case No. CIV

This will confirm an ADR hearing has been scheduled in the above-referenced case for:

DATE: May 9, 2003 (FRIDAY)

TIME: 9:00 A.M. to 1:00 P.M.

PLACE: 150 SPEAR ST., STE. 725, SAN FRANCISCO, CA 94105

Please have all parties, principals /individuals with full settlement authority attend the hearing.

Please forward any documents you wish reviewed prior to the hearing and, if you wish, a 3-4 page summary of the issues to be addressed no later than five(5) business days before the hearing to the ADR provider at the following address:

NAME: CAROL J. MARSHALL

ADDRESS: 131 CALIFORNIA AVE., MILL VALLEY, CA 94941

PHONE: (415)618-0090

FAX: (415)389-6517

cc: Multi-Option ADR Project - MAP

counsel (or plaintiff filing in propria persona). An additional extension of the time to serve (an initial extension if the application is by a cross-complainant) may be obtained upon written application to the court upon good cause shown before the prior extension has expired. The filing of a timely application for an extension will automatically extend the time to serve by five days, whether or not the application is granted.

Good cause will be found if the declaration shows that the action is filed against a defendant who is an uninsured motorist, and the plaintiff's claim is subject to an arbitration provision in plaintiff's contract of insurance. In determining good cause in other cases, the court will give due consideration to any standards, procedures and policies which have been developed in consultation with the bar of the county through the bench-bar trial court delay committee.

(B) Additional extension of time if uninsured motorist arbitration is pending. In addition to any extension of time obtained pursuant to subsection (5)(A) above, if an uninsured motorist arbitration is still pending between plaintiff and plaintiff's insurance carrier 30 days prior to the expiration of the extension, plaintiff may obtain an additional extension of time by an ex parte application supported by a declaration showing the scheduled or anticipated date of the arbitration hearing and the diligence of plaintiff in pursuing arbitration.

(C) Time to respond may be extended for good cause: Before the time to respond has expired, any party served with a complaint or cross-complaint may, with notice to all other parties in the action, make ex parte application to the court upon good cause shown for an extension of time to respond. The filing of a timely application for an extension will automatically extend the time to respond by five days, whether or not the application is granted.

(e) Case management conference

(1) Date of conference: Unless the parties stipulate in writing and the court orders that the case be earlier referred to arbitration, a case management conference will set by the clerk at the time the complaint is filed. (Government Code 68616)

(2) The Court will deem the case to be at-issue at the time of the conference (Reference: CRC 209(a)) absent a showing of extraordinary circumstances.

(3) The conference may be set at an earlier date by order of the Court or by written stipulation of the parties.

(4) Designation of trial counsel: Trial counsel and, except for good cause shown, back-up trial counsel, must be specified at the case management conference. If such counsel is not specified, relief from the scheduled trial date may not be obtained based upon the ground that counsel is engaged elsewhere.

(5) Conference orders: At the initial conference, the program judge will make appropriate pre-trial orders that may include the following:

(A) An order referring the case to arbitration, mediation or other dispute resolution process;

(B) An order transferring the case to the limited jurisdiction of the superior court;

(C) An order assigning the case to a particular judge for all purposes;

(D) An order assigning a trial date;

(E) An order identifying the case as one which may be protracted and determining what special administrative and judicial attention may be appropriate, including special assignment;

(F) An order identifying the case as one which may be amenable to early settlement or other alternative disposition technique;

(G) An order of discovery; including but not limited to establishing a discovery schedule, assignment to a discovery referee, and/or establishing a discovery cut-off date;

(H) An order scheduling the exchange of expert witness information;

(I) An order assigning a mandatory settlement conference date pursuant to Local Rule 2.3(k) and 2.4; and

(J) Other orders to achieve the interests of justice and the timely disposition of the case.

(6) CourtCall Telephonic Appearances

(A) Reference CRC, Rule 298

(B) Procedure. Telephonic appearances through the use of CourtCall, an independent vendor, are permitted at case management conference hearings. A party wishing to make a telephone appearance must serve and file a Request for Telephone Appearance Form with CourtCall not less than five court days prior to the case management conference hearing. Copies of the Request for CourtCall Appearance form and accompanying information sheet are available in the Clerk's office. There is a fee to parties for each CourtCall appearance and fees are paid directly to CourtCall. CourtCall will fax confirmation of the request to parties.

(C) On the day of the case management conference hearing, counsel and parties appearing by CourtCall must check-in five minutes prior to the hearing. Check-in is accomplished by dialing the courtroom's dedicated toll-free teleconference number and access code that will be provided by CourtCall in the confirmation. Any attorney or party calling after the check-in period shall be considered late for the hearing and shall be treated in the same manner as if the person had personally appeared late for the hearing.

(D) At a case management conference, parties may be referred to an appropriate dispute resolution ("ADR") process (e.g., mediation, binding arbitration or neutral evaluation). If parties are referred ADR, they must redial the dedicated toll-free teleconference number immediately following their case management conference appearance and use a second CourtCall access code to telephonically appear at the ADR referral meeting with ADR staff. If a case has been referred to ADR, a party's

case management conference appearance is not complete until they have also telephonically appeared at the mandatory ADR referral. If parties are referred to judicial arbitration, they do not have to appear at the ADR referral.

(f) Case Management Statement

At least 15 calendar days before the scheduled case management conference, each party shall file with the court and serve on all other parties a completed Judicial Council Case Management Statement.

(g) Appropriate Dispute Resolution, ADR, Policy Statement

The Court finds it is in the best interests of parties to litigation to participate in appropriate dispute resolution procedures, including but not limited to mediation, neutral evaluation, private or judicial arbitration, voluntary settlement conferences, and the use of special masters and referees. Therefore, all parties shall stipulate to, or be referred to, an appropriate form of dispute resolution before being set for trial, unless there is good cause to dispense with this requirement. Parties are encouraged to stipulate to judicial arbitration or ADR prior to the case management conference.

(h) Stipulations to Arbitration

(1) If the case is at issue, and all counsel and each party appearing in propia persona stipulate in writing to judicial arbitration prior to the case management conference, discovery will remain open following judicial arbitration. A written stipulation to judicial arbitration must be filed with the clerk and a copy immediately sent to the Master Calendar Coordinator at least 10 calendar days before the case management conference in order to avoid the need to appear at that conference. A written stipulation to arbitrate will be deemed to be without a limit as to the amount of the award unless it expressly states otherwise.

(2) It is the policy of this court to make every effort to process cases in a timely manner. Parties who elect or are ordered b the court to judicial arbitration must complete the arbitration hearing within the time frame specified by the court.

Parties who wish to continue the arbitration hearing after the jurisdictional time frame must submit a court "Continuance Request Form" to the court judicial arbitration administrator stating the dates of any prior continuances the length of continuance requested and the reason for the request. Continuances without adequate grounds will not be considered. A case management judge will either grant or deny the request for continuance. If the request is denied, the case may be assigned a trial date. If the request is granted, the judge will impose a new deadline by which the arbitration must be completed.

(3) Parties who wish to change their election from judicial arbitration to another form of ADR must file a "Stipulation and [Proposed] Order to [Mediation, Neutral Evaluation, etc.] in Lieu of [Court-Ordered] Judicial Arbitration" with the Clerk of the Court. The Stipulation must state that parties have: (i) notified both the judicial arbitration and ADR coordinators; (ii) cancelled the judicial arbitration hearing: (iii) scheduled the ADR session within five months of the previously scheduled judicial arbitration hearing; and (iv) stipulated to a trial date, which is not more than six months from the previously scheduled judicial arbitration hearing.

(i) Stipulations to Private ADR

(1) If a case is at issue and all counsel and each party appearing in propria persona stipulate in writing to ADR and file a completed Stipulation and Order to ADR with the clerk of the court at least ten (10) calendar days before the first scheduled case management conference, that conference shall be continued 90 days. The court shall notify all parties of the continued case management conference.

(2) If counsel and each party appearing in propria persona are unable to agree upon an appropriate ADR process, they shall appear at the case management conference.

(3) Following an appearance at a case management conference hearing, parties shall, within 21 calendar days , file a completed Stipulation to ADR and Proposed Order identifying the name of the ADR provider, date of ADR session and the names of those who will be in attendance at the ADR session. The completed Stipulation to ADR and Proposed Order shall be filed with the court by plaintiff's counsel. The parties, through counsel, if represented, shall confer with the court's Multi-Option ADR Project (M.A.P.) staff if they cannot agree on a provider. Plaintiff's counsel, shall additionally, send a copy of the completed Stipulation to the court's M.A.P. offices within the same 21-day period.

(4) All parties and counsel shall participate in the ADR process in good faith.

(5) To maintain the quality of ADR services the court requires cooperation from all parties, counsel and ADR providers in completing ADR evaluation forms, and returning these forms to the M.A.P. offices within 10 calendar days of the completion of the ADR process.

(6) In accordance with the Code of Civil Procedure, section 1033.5(c)(4), the court, in its discretion, may allow the prevailing party at trial the fees and expenses of the ADR provider, unless there is a contrary agreement by the parties.

(j) Setting Short Cause Matters

If the parties agree that the time estimated for trial is 5 hours or less prior to the conference, a written stipulation shall be filed at least 10 calendar days before the case management conference in order to avoid the need to appear at that conference and a copy immediately sent to the Master Calendar Coordinator. In the absence of a stipulation, either party may file a motion to have the matter designated a "short cause" and set the case accordingly. All such matters shall be presumed short cause unless the contrary is established at the hearing on the motion.

(k) Law and Motion

All law and motion matters shall be heard by the regularly assigned Law and Motion judge.

(l) Settlement Conferences

All cases not assigned to arbitration or some other dispute resolution mechanism will be assigned two settlement conference dates, the first of which will be at the earliest practicable date under the circumstances presented by the case, and the second within approximately two

Pro Bono/Modest Means Instructions For MAP Panelists

The San Mateo Superior Court's Multi-Option ADR Project thanks you for your willingness to serve on a pro bono or reduced fee basis. Your generosity allows our program to be accessible to all who use our court. Feel free to contact Valerie Berland (650-363-1962) or Sheila Purcell (650-363-4148) if you or your staff needs any assistance regarding this process.

As you may know, we have pre-screened parties for eligibility based on their income.

We ask each panelist to accept one pro bono or modest means case a year [CRC §1580(b)(2)]. Some neutrals have graciously agreed to serve beyond this, but one case per year is all that is required by the program.

We ask that you provide 6 hours of service on a pro bono or reduced fee basis. After the first six hours, you should see if the parties want to continue the session at your normal market rate. (In some instances, panelists will continue at a reduced rate beyond the first 6 hours, particularly if the case seems close to completion. However, panelists are not expected to do so by the program.)

Since most cases involve only one party who qualifies for a waiver or reduced fee, you may charge the other parties in the case their proportional share of your normal hourly fee. For example, if it were a two party case with one pro bono party, you would waive the fee for the pro bono party and charge the other party half of your regular hourly fee. If it is a modest means case, MAP staff will let you know how much you may charge the party who was granted a reduced fee and, again, you would charge the other party their half of your normal hourly fee.

MAP staff will contact you to:

- See if you are able to serve in a given case and will give you contact information for the parties, case name and number, etc.
- Let you know which parties qualified for the fee waiver/reduction and the amount you can bill the eligible parties if they were given a reduced fee arrangement.

Parties will contact you directly regarding scheduling and all other arrangements. Parties should <u>not</u> be contacting you regarding reducing your fees. We will screen for eligibility and check with you ourselves regarding your availability to handle a particular case. Occasionally, parties disregard our instructions to them and contact a neutral directly and, for this, we apologize. Do feel free to tell them that MAP staff conducts all financial aid screening.

Parties file a Stipulation and Order to ADR form provided to them by the court. The stipulation identifies the name of the neutral and the date of the ADR session. In financial aid cases, stipulations are filed within 3-5 weeks of the parties' case management conference.

Thank you for all of your help. We truly appreciate it. Best of luck and please call if you have questions.

Multi-Option ADR Project
Financial Aid Request Instructions

The Multi-Option ADR Project requires that all program panelists handle at least one case a year on a limited fee basis. The ADR staff screens applications for fee waivers using income guidelines. To request financial aid for ADR services, you need to:

1) **Complete the MAP Financial Aid Application.**
   This information is considered confidential and will be reviewed only by court ADR staff. The application must be submitted to the MAP offices within one week of the case management conference hearing or from the initial referral to ADR.

   For those applicants whose income exceeds federal poverty guidelines (modest means applicants), you may be asked to contribute fees on a reduced and/or sliding scale. Program staff will inform you of what the sliding scale will be.

2) **If an application is granted, the parties select the names of 4 mutually agreed upon neutrals from the MAP Financial Aid Panelist List. Parties must submit the names of these neutrals to MAP staff within 2 weeks of receiving financial assistance through the program.**
   Counsel and parties should agree on the names of four potential neutrals and inform ADR staff of the four candidates selected. (Staff is happy to fax resumes of any panelists upon request.) If the names of mutually agreed upon neutrals are not received within 2 weeks, the assistance will be withdrawn.

3) **Assignment of a neutral and scheduling of ADR session.**
   ADR staff will notify counsel/parties regarding which MAP panelist will be available to handle their case on a limited fee basis. After the neutral is assigned, parties schedule the ADR session directly with the neutral's office.

4) **Parties submit an original and one photocopy of the executed Stipulation and Order to ADR to the Clerk of the Court with the name of the neutral and the date of the session included.**

The neutral will waive the fee as to the party receiving financial aid for the first 6 hours of the ADR session. If one of the parties in a case is receiving financial aid through the court's ADR program, their fee waiver will not effect the portion of the neutral's fee that is paid by the other parties in the case. For example, in a case where the mediator charges $300 an hour, with one party receiving financial aid and one fee paying party, the fee paying party will pay $150 per hour.

Please contact ADR staff directly if you have any questions (650-363-1962).

Application for Financial Aid for ADR Services

If you filed an ***Application for Waiver of Costs and Fees,*** do not fill out this form! Just attach a copy of the judge's Order to this application.

Your Name:
Your Address:

_____
Number *Street*

_____
City *State* *Zip*

Your phone #: (____) _____
Your Date of Birth: ___ / __ / __ _____

Case No:
Case Name:

Your Place of Birth:

_____
City *State*

		Yes	No
1.	Are you self-employed or do you have a job now? Name of your employer:		
2.	Do you expect to be working soon?		
3.	Do you get any money from any other source (welfare, pension, unemployment, disability, alimony, spousal support, etc.)?		
4.	Does your spouse have a job?		
5.	Does your spouse get any money from any other source?		
6.	Do you own, or are you buying your home?		
7.	Do you have a checking account?		
8.	Do you have a savings account?		
9.	Does your spouse have a checking account?		
10.	Does your spouse have a savings account?		
11.	Do you or your spouse own:		
	stock or bonds?		
	jewelry?		
	a truck, trailer or boat?		
12.	If you are unemployed, how have you supported yourself while unemployed?		

Your Assets & Income		**Your Monthly Expenses**	
Your take-home pay per month	$	Rent payment per month	$
Your spouse's take-home pay per month	$	Mortgage payment per month	$
Other income per month	$	Food	$
Money in your savings account	$	Utilities (gas, electric, phone, garbage)	$
Money in your spouse's savings account	$	Insurance (Medical, Dental, Life, Auto, etc.)	$
Money in your checking account	$	Monthly Credit payments	$
Money in your spouse's checking account	$	Child care expenses	$
Equity in real estate	$	Clothing	$
Money owed to you	$	Medical/Dental (not covered by insurance)	$
Money at home (cash)	$	Spousal support or alimony you pay	$
Amount of tax refund you will receive	$	Transportation (car payments, bus, train, etc.)	$
Cash value of your insurance	$	IRS/Franchise Tax Board payments	$
Cash value of your spouse's insurance	$	Other expenses: (specify)	
Cash value of autos, trucks, trailers and/or boats	$		$
			$
Total Assets & Income:	$	**Total Monthly Expenses:**	$

Multi-Option ADR Project, 400 County Center, Courtroom 2F, Redwood City, CA 94063-1655
Tel: (650) 363-1962, or (650) 599-1070 • Fax (650) 599-1754

MAP Mediation Panelists Available for Limited Fee Cases
Summer, 2003

Leslie Airola
Elana Auerbach
Eileen Barker
Keith Bartel
Florence Beier
Dick Bennett
Robin Berry
Michael Carbone
Robert Cullen
Susan Davidson
Nicholas Dewar, CPA
Michael Dickstein
Michael Duncheon
Philip Fagone
John George
Ruth Glick
Richard Gould

Judith Gordon
Robert Hamilton
Robert Kahn
Michael Kasperzak
Mark Katz
Philip Keith
Killefer, Gail
Barbara Kong-Brown
Urs Martin Lauchli
B. Scott Levine
Selena Low
Robert Luft
Jim Madison
Judge John Marlo
Carol Marshall
Theresa Moore
Jessica Notini

Morton Orenstein
Daniel Pearlman
Tom Reese
Charles Riffle
Cathy Rincon
Steve Rosenberg
Marvin Schwartz
John Segall
Judge Aram Serverian
Robert Smith
Valene Sopher
Patrick Streb
Paul Taylor
Jack Tjeerdsma
Dinah Verby

APPROPRIATE DISPUTE RESOLUTION PROCEDURES FOR THE SUPERIOR COURT OF CALIFORNIA, SAN MATEO COUNTY

In addition to the court provided voluntary and mandatory settlement conferences, this court has established, in partnership with the community and Bar Association, the Multi-Option ADR Project. Recognizing that many civil disputes can be resolved without the time and expense of traditional civil litigation, the San Mateo County Superior Court encourages the parties in civil cases to explore and pursue the use of Appropriate Dispute Resolution.

WHAT IS APPROPRIATE DISPUTE RESOLUTION?

Appropriate Dispute Resolution (ADR) is the general term applied to a wide variety of dispute resolution processes which are alternatives to lawsuits. Types of ADR processes include arbitration, mediation, neutral evaluation, mini-trials, settlement conferences, private judging, negotiation, and hybrids of these processes. All ADR processes offer a partial or complete alternative to traditional court litigation for resolving disputes.

WHAT ARE THE ADVANTAGES OF USING ADR?

- ADR can have a number of advantages over traditional court litigation.
- ADR can save time. Even in a complex case, a dispute can be resolved through ADR in a matter of months or weeks, while a lawsuit can take years.
- ADR can save money. By producing earlier settlements, ADR can save parties and courts money that might otherwise be spent on litigation costs (attorney's fees and court expenses).
- ADR provides more participation. Parties have more opportunity with ADR to express their own interests and concerns, while litigation focuses exclusively on the parties legal rights and responsibilities.
- ADR provides more control and flexibility. Parties can choose the ADR process most appropriate for their particular situation and that will best serve their particular needs.
- ADR can reduce stress and provide greater satisfaction. ADR encourages cooperation and communication, while discouraging the adversarial atmosphere found in litigation. Surveys of disputants who have gone through ADR have found that satisfaction with ADR is generally high, especially among those with extensive ADR experience.

Although there are many different types of ADR processes, the forms most commonly used to resolve disputes in California State courts are Arbitration, Mediation and Neutral Evaluation. The Multi-Option ADR Project offers pre-screened panelists with specialized experience and training in each of these areas.

Arbitration: An arbitrator hears evidence presented by the parties, makes legal rulings, determines facts and makes an arbitration award. Arbitration awards may be entered as judgments in accordance with the agreement of the parties or, where there is no agreement, in accordance with California statutes. Arbitrations can be binding or non-binding, as agreed by the parties in writing.

Mediation: Mediation is a voluntary, informal, confidential process in which the mediator, a neutral third party, facilitates settlement negotiations. The mediator improves communication by and among the parties, helps parties clarify facts, identify legal issues, explore options and arrive at a mutually acceptable resolution of the dispute.

Neutral Evaluation: A neutral evaluator hears informal presentations from each party, assesses the strengths and weaknesses of the parties contentions based on brief written and oral presentations and offers a valuation of the case. This process is meant to facilitate settlement of the case by helping the parties isolate the core of the dispute and offering the parties an assessment of their positions and the overall value of the case.

Settlement Conference: (Court provided, voluntary and mandatory) A settlement conference is similar to a mediation, in that a neutral third party (usually a judge but sometimes an attorney) helps guide the parties to a resolution of their dispute. It can differ from mediation in that the judge may be more evaluative, directive and coercive than a mediator, aiming primarily at settlement. By contrast, mediation seeks to increase communication and understanding among the parties with resolution of the case constituting an additional benefit of the process.

The court offers voluntary settlement conferences through the court upon request. Additionally, the court conducts mandatory pre-trial settlement conferences two weeks before commencement of a trial.

ADR PROCEDURES FOR THE SAN MATEO COUNTY SUPERIOR COURT

- Upon filing a Complaint, the Plaintiff will receive this **information sheet** from the Superior Court Clerk. Plaintiff is expected to include this information sheet when he or she **serves the Complaint** on the Defendant.

- All parties to the dispute may voluntarily agree to take the matter to an ADR process. A stipulation is provided here. Parties chose and contact their own ADR provider. The Multi-Option ADR Project has information on ADR providers who have been screened for both specialized training and experience. If you would like to see a list of these ADR providers or their specific resumes, you may contact the Multi-Option ADR Project at (650) 599-1070 or (650) 363-1962.

- If the parties have not agreed to use an ADR process, an initial Case Management Conference ("CMC") will be scheduled within 120 days of the filing of the Complaint. An **original and copy of the Case Management Conference Questionnaire must be completed and provided to the court clerk no later than 15 days prior to the scheduled conference.** The San Mateo County Superior Court Case Management Judges will strongly encourage all parties and their counsel to consider and utilize ADR procedures and/or to meet with the ADR Director and staff where appropriate.

- If the parties voluntarily agree to ADR, the parties will be required to sign and file a **Stipulation and Order to ADR.**

- A timely filing of a stipulation (at least 10 days prior to the CMC) will cause a notice to vacate the CMC. ADR Stipulated cases (other than judicial arbitration) will be continued for further ADR status review for 90 days. If the case is resolved through ADR, the status review date may be vacated if the court receives a dismissal or judgement.

- The parties shall pay ADR neutrals directly for ADR services except for court-provided voluntary and mandatory settlement conferences. The ADR Director **may screen appropriate cases for pro bono or modest means financial assistance where a party is income eligible.**

- The court requires you to complete and submit a brief **evaluation** form following your ADR session **within 10 days of completion of the process.** Evaluations should be submitted to the ADR office at the address listed below.

For more information visit our website at www.co.sanmateo.ca.us/sanmateocourts/adr.htm or contact the Multi-Option ADR Project, 400 County Center, Courtroom 2F, Redwood City, CA 94063, 650/363-4148 or 363-1962; fax 650/599-1754

ADR Stipulation and Evaluation Instructions

In accordance with *Local Rule 2.3(i)(3)*, all parties going to ADR must complete a Stipulation and Order to ADR and file it with the Clerk of the Superior Court. The Office of the Clerk is located at:

Clerk of the Superior Court, Civil Division
Attention: Case Management Conference Clerk
Superior Court of California, County of San Mateo
400 County Center
Redwood City, CA 94063-1655

There is no filing fee for filing the stipulation. An incomplete stipulation will be returned to the parties by the Clerk's Office. All stipulations must include the following:

- ☐ Original signatures for all attorneys (and/or parties in pro per);
- ☐ The name of the neutral;
- ☐ Date of the ADR session; and
- ☐ Service List (Counsel need not serve the stipulation on parties).

Parties mutually agree on a neutral and schedule ADR sessions directly with the neutral. If parties would like a copy of the San Mateo County Superior Court's ADR Panelist List and information sheets on individual panelists, they may contact the ADR Coordinator at (650) 363-1962 or (650) 599-1070.

If Filing the Stipulation Prior to an Initial Case Management Conference
To stipulate to ADR prior to the initial case management conference, parties must file a completed stipulation at least 10 days before the scheduled case management conference. The clerk will send notice of a new case management conference date approximately 90 days from the current date to allow time for the ADR process to be completed.

If Filing Stipulation Following a Case Management Conference
When parties come to an agreement at a case management conference to utilize ADR, they have 21 days from the date of the case management conference to file a Stipulation and Order to ADR with the court [*Local Rule 2.3(i)(3)*].

Post-ADR Session Evaluations
Local Rule 2.3(i)(5) requires submission of post-ADR session evaluations within 10 days of completion of the ADR process. Evaluations are to be filled out by both attorneys and clients. A copy of the Evaluation By Attorneys and Client Evaluation are attached to the ADR Panelist List or can be found on the court's web site.

Non-Binding Judicial Arbitration
Names and dates are not needed for stipulations to judicial arbitration. The Judicial Arbitration Administrator will send a list of names to parties once a stipulation has been submitted. The Judicial Arbitration Administrator can be contacted at (650) 363-4896.

For further information regarding San Mateo Superior Court's ADR program, contact the ADR offices at (650) 599-1070 or the court's ADR web site at **http//www.co.sanmateo.ca.us.sanmateocourts/adr.htm.**

Attorney or Party without Attorney (Name, Address, Telephone, Fax, State Bar membership number):	Court Use Only
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO Hall of Justice and Records 400 County Center Redwood City, CA 94063-1655 (650) 363-4711	
Plaintiff(s):	Case number:
Defendant(s):	Current CMC Date:

STIPULATION AND ORDER TO APPROPRIATE DISPUTE RESOLUTION

Plaintiff will file this stipulation with the Clerk's Office 10 days prior to or 3 weeks following the first Case Management Conference unless directed otherwise by the Court and ADR Director [*Local Rule 2.3(i)(3)*]. Please attach a Service List.

The parties hereby stipulate that all claims in this action shall be submitted to (select one):

☐ Voluntary Mediation
☐ Neutral Evaluation
☐ **Non-Binding Judicial Arbitration CCP 1141.12**
☐ Binding Arbitration (private)
☐ Settlement Conference (private)
☐ Summary Jury Trial
☐ Other: _____

Case Type: _____
Neutral's name and telephone number: _____ Date of session: _____
(Required for continuance of CMC except for non-binding judicial arbitration)
Identify by name the parties to attend ADR session: _____

Original Signatures

Type or print name of ☐Party without attorney ☐Attorney for ☐Plaintiff/Petitioner ☐Defendant/Respondent/Contestant	(Signature) Attorney or Party without attorney
Type or print name of ☐Party without attorney ☐Attorney for ☐Plaintiff/Petitioner ☐Defendant/Respondent/Contestant	(Signature) Attorney or Party without attorney
Type or print name of ☐Party without attorney ☐Attorney for ☐Plaintiff/Petitioner ☐Defendant/Respondent/Contestant	(Signature) Attorney or Party without attorney
Type or print name of ☐Party without attorney ☐Attorney for ☐Plaintiff/Petitioner ☐Defendant/Respondent/Contestant	(Signature) Attorney or Party without attorney

IT IS SO ORDERED:

Date:

Judge of the Superior Court of San Mateo County

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
CASE MANAGEMENT STATEMENT (Check one): ☐ **UNLIMITED CASE** (Amount demanded exceeds $25,000) ☐ **LIMITED CASE** (Amount demanded is $25,000 or less)	CASE NUMBER:

A **CASE MANAGEMENT CONFERENCE** is scheduled as follows:

Date: Time: Dept.: Div.: Room:

Address of court *(if different from the address above)*:

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

1. **Party or parties** *(answer one)*:
   a. ☐ This statement is submitted by party *(name)*:
   b. ☐ This statement is submitted **jointly** by parties *(names)*:

2. **Complaint and cross-complaint** *(to be answered by plaintiffs and cross-complainants only)*
   a. The complaint was filed on *(date)*:
   b. ☐ The cross-complaint, if any, was filed on *(date)*:

3. **Service** *(to be answered by plaintiffs and cross-complainants only)*
   a. ☐ All parties named in the complaint and cross-complaint have been served, or have appeared, or have been dismissed.
   b. ☐ The following parties named in the complaint or cross-complaint
      (1) ☐ have not been served *(specify names and explain why not)*:
      (2) ☐ have been served but have not appeared and have not been dismissed *(specify names)*:
      (3) ☐ have had a default entered against them *(specify names)*:
   c. ☐ The following additional parties may be added *(specify names, nature of involvement in case, and the date by which they may be served)*:

4. **Description of case**
   a. Type of case in ☐ complaint ☐ cross-complaint *(describe, including causes of action)*:

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

4. b. Provide a brief statement of the case, including any damages. *(If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)*

☐ *(If more space is needed, check this box and attach a page designated as Attachment 4b.)*

5. **Jury or nonjury trial**
The party or parties request ☐ a jury trial ☐ a nonjury trial *(if more than one party, provide the name of each party requesting a jury trial):*

6. **Trial date**
a. ☐ The trial has been set for *(date):*
b. ☐ No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint *(if not, explain):*

c. Dates on which parties or attorneys will not be available for trial *(specify dates and explain reasons for unavailability):*

7. **Estimated length of trial**
The party or parties estimate that the trial will take *(check one):*
a. ☐ days *(specify number):*
b. ☐ hours (short causes) *(specify):*

8. **Trial representation** *(to be answered for each party)*
The party or parties will be represented at trial ☐ by the attorney or party listed in the caption ☐ by the following:
a. Attorney:
b. Firm:
c. Address:
d. Telephone number:
e. Fax number:
f. E-mail address:
g. Party represented:

☐ Additional representation is described in Attachment 8.

9. **Preference**
☐ This case is entitled to preference *(specify code section):*

10. **Alternative Dispute Resolution (ADR)**
a. Counsel ☐ has ☐ has not provided the ADR information package identified in rule 201.9 to the client and has reviewed ADR options with the client.
b. ☐ All parties have agreed to a form of ADR. ADR will be completed by *(date):*
c. ☐ The case has gone to an ADR process *(indicate status):*

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

10. d. The party or parties are willing to participate in *(check all that apply)*:
    (1) ☐ Mediation
    (2) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, rule 1612)
    (3) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to remain open until 30 days before trial; order required under Cal. Rules of Court, rule 1612)
    (4) ☐ Binding judicial arbitration
    (5) ☐ Binding private arbitration
    (6) ☐ Neutral case evaluation
    (7) ☐ Other *(specify)*:

    e. ☐ This matter is subject to mandatory judicial arbitration because the amount in controversy does not exceed the statutory limit.
    f. ☐ Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.
    g. ☐ This case is exempt from judicial arbitration under rule 1600.5 of the California Rules of Court *(specify exemption)*:

11. **Settlement conference**
    ☐ The party or parties are willing to participate in an early settlement conference *(specify when)*:

12. **Insurance**
    a. ☐ Insurance carrier, if any, for party filing this statement *(name)*:
    b. Reservation of rights: ☐ Yes ☐ No
    c. ☐ Coverage issues will significantly affect resolution of this case *(explain)*:

13. **Jurisdiction**
    Indicate any matters that may affect the court's jurisdiction or processing of this case, and describe the status.
    ☐ Bankruptcy ☐ Other *(specify)*:
    Status:

14. **Related cases, consolidation, and coordination**
    a. ☐ There are companion, underlying, or related cases.
        (1) Name of case:
        (2) Name of court:
        (3) Case number:
        (4) Status:
    ☐ Additional cases are described in Attachment 14a.
    b. ☐ A motion to ☐ consolidate ☐ coordinate will be filed by *(name party)*:

15. **Bifurcation**
    ☐ The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action *(specify moving party, type of motion, and reasons)*:

16. **Other motions**
    ☐ The party or parties expect to file the following motions before trial *(specify moving party, type of motion, and issues)*:

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

17. **Discovery**
    a. ☐ The party or parties have completed all discovery.
    b. ☐ The following discovery will be completed by the date specified *(describe all anticipated discovery):*

Party	Description	Date

    c. ☐ The following discovery issues are anticipated *(specify):*

18. **Economic Litigation**
    a. ☐ This is a limited civil case (i.e., the amount demanded is $25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90 through 98 will apply to this case.
    b. ☐ This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed *(if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case):*

19. **Other issues**
    ☐ The party or parties request that the following additional matters be considered or determined at the case management conference *(specify):*

20. **Meet and confer**
    a. ☐ The party or parties have met and conferred with all parties on all subjects required by rule 212 of the California Rules of Court *(if not, explain):*

    b. After meeting and conferring as required by rule 212 of the California Rules of Court, the parties agree on the following *(specify):*

21. **Case management orders**
    Previous case management orders in this case are *(check one):* ☐ none ☐ attached as Attachment 21.

22. Total number of pages attached *(if any):* _____

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and ADR, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date:

_____ (TYPE OR PRINT NAME) ▶ _____ (SIGNATURE OF PARTY OR ATTORNEY)

_____ (TYPE OR PRINT NAME) ▶ _____ (SIGNATURE OF PARTY OR ATTORNEY)

☐ Additional signatures are attached

MAP Background Information

Name:

Address:

Telephone: **Fax:**

Fees: $250.00

Other Costs Passed on to Parties:

Mediation Experience: Several as attorney for party involved. None as mediator

Mediation Training: none

Arbitration Experience: Several as attorney for party involved. None as arbitrat

Neutral Evaluation background: Attorney-client fee disputes for Bar Association.

Settlement Conference Experience: Many as attorney for party.

Subject Matter Expertise: PI__ Employment__ Business__ Real Estate__ Prof Malpractice__
Probate xx Construction__ Public Agency__ Insurance__ Other:

Other Education:

Describe your mediation approach (including whether you are primarily facilitative or directive):

Describe your arbitration approach:

Describe your neutral evaluation approach: Listen to both sides, review appropriate documents and give honest opinion as to the strengths and weaknesses of each side and the value of the case.

Other Information:

MAP
BRIEF Thumbnail paragraph (150 words or less)

Name:
Phone:
Fees: $250.00
Training:
Experience:

Name and Phone of three references:

MAP BACKGROUND INFORMATION

Name: V. Gene McDonald

Address: JAMS
Two Embarcadero Center, Suite 1100
San Francisco, CA 94111

Telephone: (415) 982-5267 Fax: (415) 982-5287
Direct: (415) 774-2625 Fax (Home): (650) 365-4884

Fees: $450.00/hour

Other Costs on to Parties: Travel out of Bay Area

Mediation Experience: 550 Cases at JAMS/Endispute; see also, Settlement Conference experience, below.

Mediation Training: 1) Pepperdine, Mediating the Litigated Case (1997);
2) Pepperdine, Advanced Mediation (1995); 3) Harvard Negotiation Workshop (1994)

Arbitration Experience: 25 (approx.) (plus dozens of court trials)

Neutral Evaluation Background: See evaluative Settlement Conference (as described under "mediation approach", below.

Settlement Conference Experience: Literally Thousands

Subject Matter Expertise: PI☑ Employment☑ Real Estate☑ Prof Malpractice☑ Probate☑ Construction☑ Public Agency☑ Insurance☑ Other: Anything within the jurisdiction of the Superior Court.

Other Education:

Describe your mediation approach (including whether you are primarily facilitative or directive): Analytical, evaluative (on issues); open, direct but non-confrontational questions designed to obtain information and establish rapport at beginning; shifting to pointed and probing questions to focus on risk as conference goes on. Eventually, quite direct comments on issues.

Describe your arbitration approach: As informal as parties and attorney's personalities and relationship permits. Type of evidence depends upon the agreement of the parties re: rules.

Describe your neutral evaluation approach: Much like the initial phase of a settlement conference or mediation.

Other information: While on the Superior Court, Judge McDonald served as a general trial judge for several years and at one time or another was assigned to every calendar department on the court. In 1983, he was Presiding Judge of the Court.

THE RESOLUTION EXPERTS

Hon. V. Gene McDonald (Ret.) was a trial judge for 20 years during which he handled virtually every calendar available to a Superior Court judge, including Presiding Judge of the court.

Judge McDonald settled over 3,000 cases during his judicial career, the last seven years of which were devoted exclusively to the settlement of civil disputes.

RESOLUTION EXPERTISE

- **Business/Commercial:** Corporate/partnership dissolution, breach of contracts, franchise, fraud, etc.
- **Intellectual Property:** Trade secrets/unfair competition, technology licensing, infringement
- **Employment:** Wrongful termination, discrimination, harassment
- **Real Property:** Land use, land slides, fraud, breach of contract, easements
- **Professional Negligence:** Medical, dental, legal, accounting
- **Catastrophic Personal Injury:** Workplace injuries, auto accidents, premises liability, etc.
- **Insurance Issues:** Coverage, bad faith
- **Construction Defects:** Single family homes to condo complexes
- **Environmental:** Toxic waste contamination, insurance issues, etc.
- **Consumer Class Actions:** Products and services

REPRESENTATIVE CASES JUDGE MCDONALD HAS HANDLED

- A complex business case involving approximately 15 major law firms with issues varying from liability of directors and officers to bankruptcy, to insurance coverage
- Trade secret/unfair competition and technology licensing actions involving technology issues in a variety of factual and legal contexts
- Real property disputes involving undisclosed defects, lease disputes, toxic waste contamination, etc.
- Medical malpractice cases, including a multi-million dollar birth injury case
- Insurance cases ranging from coverage disputes and bad faith claims to inadequate limits
- Employment cases ranging from multi-plaintiff racial discrimination claims against a multi-national corporation to wrongful termination to sexual harassment

SPECIAL HONORS AND MEMBERSHIPS

- Judicial Chair of the Bench-Bar committees charged with supervising the planning and early implementation of the San Mateo County Superior Court's Multi-Option ADR Program
- Member, California Judges Association, American Judicature Society, American Bar Association (Judicial Administration Division and Dispute Resolution Section) and California Dispute Resolution Council
- Judge of the Year, Consumer Attorneys of San Mateo County, 1996
- President's Award, California Judges Association, 1985
- President, California Judges Association, 1987-1988
- Member, Board of Directors, California Judges Association, 1985-1987
- Lecturer, panel member or seminar leader for the Center for Judicial Education & Research, Hastings School of Advocacy, CEB, CTLA, the California Judges Association, The Rutter Group and various local or specialty bar associations

BACKGROUND EXPERIENCE

- Associate Justice (pro tem), First District Court of Appeal, 1984
- Judge, San Mateo County Superior Court, 1979-1997
- Judge, San Mateo County Municipal Court, 1976-1979

EDUCATION

- L.L.B., University of California, Los Angeles, 1965
- B.S., University of California, Los Angeles, 1960

(c) **[Contingent fees]** The amount or nature of a mediator's fee must not be made contingent upon the outcome of the mediation.

(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.

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 1620.8(d).*

Rule 1622. Complaint procedure

(a) Each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in the court must establish procedures for receiving, investigating, and resolving complaints against the mediators who are on the court's list or who are recommended, selected, appointed, or compensated by the court.

(b) The court may reprimand a mediator, remove a mediator from the court's panel or list, or otherwise prohibit a mediator from receiving future mediation referrals from the court if the mediator fails to comply with the rules of conduct for mediators in this part, when applicable.

Advisory Committee Comment

Section 16 of the Standards of Judicial Administration sets out recommendations concerning the procedures that a court should use in receiving, investigating, and resolving complaints against commissioners and referees and may serve as guidance in adopting procedures for receiving, investigating, and resolving complaints against mediators.

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.

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 1620.5.*

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 1620.9. 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.

(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.

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 1620.8. 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

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 subdivision (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.

(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;

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 1620.7. 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 1620.3 (Voluntary participation and self determination), rule 1620.4(a) (confidentiality), and subdivision (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.

(d) **[Representation and other professional services]** A mediator must inform all participants, at or before the outset of the first mediation

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 1620.6. 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.

(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.

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 subdivision (b)(1)(A) include but are not limited to: (i) prior, current, or currently expected service as a mediator in another mediation involving any of the participants in the present mediation; (ii) prior, current, or currently expected business relationships or transactions between the mediator and any of the participants; and (iii) 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 subdivison (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 subdivision (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 subdivision (b)(1—that is, is it

ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include, but are not limited to:

(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.

(c) **[Proceeding if there are no objections or questions concerning impartiality]** Except as provided in subdivision (f) below, 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.

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

(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.

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 1620.4. 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.

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 1620.5. 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

Advisory Committee Comment

Subdivision (b). *This definition departs from the definition of "mediator" 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.*

Subdivision (c). *"Participant" includes insurance adjusters, experts, and consultants as well as the parties and their attorneys.*

Rule 1620.3. 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:

(a) 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;

(b) 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

(c) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

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

compensated by that court to mediate a case within that court's mediation program.

(b) 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 part 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.

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

(d) The rules in this part 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.

(e) The rules in this part do not apply to settlement conferences conducted under rule 222 of the California Rules of Court.

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 1620.2. Definitions

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

(a) **[Mediation]** "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.

(b) **[Mediator]** "Mediator" means a neutral person who conducts a mediation.

(c) **[Participant]** "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.

(d) **[Party]** "Party" means any individual, entity, or group taking part in a mediation who is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.

Rules 1620, 1620.1, 1620.2, 1620.3, 1620.4, 1620.5, 1620.6, 1620.7, 1620.8, 1620.9, and 1622 would be adopted, effective January 1, 2003, to read:

PART 1—RULES OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED MEDIATION PROGRAMS FOR CIVIL CASES

Rule 1620. Purpose and function

(a) The rules in this part 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.

(b) 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.

Rule 1620.1. Application

(a) The rules in this part 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; and

(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

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

Mediators: In those situations in which more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort and should extend every possible courtesy to co-mediators.

During mediation, the mediator should carefully avoid any appearances of disagreement with or criticism of co-mediators. Caucusing with a co-mediator may be a helpful tool in this regard.

IX. Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitation are inappropriate and, in some conflict resolution disciplines such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made.

G. THE LAW - Mediators and Neutral Evaluators are not serving in the capacity of lawyers. At no time shall a mediator or neutral evaluator offer legal advice to parties in disputes. Mediators shall refer parties to appropriate attorneys for legal advice. This same code of conduct applies to mediators who are themselves trained in the law. The role of an impartial mediator should not be confused with that of an attorney who is an advocate for a client.

III. Unrepresented Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of the parties dictate, to assure that such interests have been considered by the principal parties.

IV. Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedures is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or may share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute process to another.

V. Background and Qualifications

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

VI. Support of the Profession

The experienced neutral should participate in the development of new neutrals and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide pro bono services, as appropriate.

VII. Responsibilities of Neutrals Working on the Same Case

B. INFORMED CONSENT AND DISCLOSURE OF FEES- The neutral has an obligation at the outset to assure that all parties understand the basis of compensation, fees and charges, the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

C. CONFIDENTIALITY - Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.

D. CONFLICT OF INTEREST - The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest or where they feel they could no longer be neutral. The neutral also must disclose any circumstance that may create or give the appearance of a conflict of interest and any circumstance that may reasonably raise a question as to the neutral's impartiality.

The duty to disclose is a continuing obligation.

E. PROMPTNESS - The neutral shall exert every reasonable effort to expedite the process. Neutrals should not prolong unproductive discussions that result in increased time and emotional and monetary costs for the parties.

F. THE SETTLEMENT AND ITS CONSEQUENCES - The resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must seriously conder informing the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section C, above, Confidentiality, of these standards.

Mediators: A mediator's satisfaction with the agreement is secondary to that of the parties.

Multi Option ADR Project: A Partnership of the San Mateo County Courts Bar & Community

Ethical Standards of Professional Conduct

Application of Standards

All MAP panel members shall adhere to these standards which are basic to professional conduct. The MAP Oversight Committee is available to advise panel members about interpretation of these standards.

Scope

ADR Service panel members resolve disputes in various sectors within the disciplines of dispute resolution some of which have their own codes of professional conduct. These standards shall serve as fundamental guidelines of practice within this program and should be complementary to other professional codes. Certain practitioners may have additional obligations not covered by these standards.

I. General[1] Responsibilities

Neutrals have a duty to parties, to the profession, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of the parties.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias toward individuals and institutions involved in the dispute, be reasonably available as requested by the parties and be certain that the parties are informed of the process in which they are involved.

Mediator: The mediator should provide an evaluation only upon the request or with authorization from the parties or counsel.

II. The Neutral's Responsibilities to the Parties

A. IMPARTIALITY - The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

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[1] These ethical standards are based, in part on the Society of Professionals in Dispute Resolution (SPIDR) Ethical Standards of Professional Responsibility, Washington D.C. (Adopted June 1986) and the Council of Mediation Organization Code of Professional Conduct.

Resignation, Suspension, and Removal from Multi-Option ADR Panel

1) Any Panel Member may resign at any time upon ten days advance notice, and completion of reports.

2) It will be the policy of this Project to first seek informal and mediative problem solving solutions to complaints and concerns.

3) Any panel member may be summarily suspended by the MAP Oversight Committee for so long as there is failure to comply with the rules of this program, including any reporting requirements.

4) Any panel member may be removed from any or all panels or suspended for:

a. Failure to maintain continuous eligibility and qualification under these rules;
b. Failure to handle MAP referred case with professional competence and diligence;
c. Charging unconscionable fees or other charges;
d. Failure to completely disclose all fees and charges at the outset of the case;
e. Falsification of any material statement made to qualify for any panel or made in any required report;
f. Violation of any rule of professional conduct applicable to the provider as determined by the applicable professional organization;
g. Commission of a crime involving moral turpitude;
h. Repeated failure to comply with these rules;
j. Loss or suspension of a professional license may be grounds for removal;
k. Violation of ethical standards for ADR providers as adopted by the MAP Oversight Committee.

5) Before a panel member may be removed or suspended under Rule 4 above, said panel member shall be given written notice of the grounds asserted against the panel member (for suspension or removal), which notice shall further contain the date, time, and place of hearing on said matter and which notice shall be given no less than twenty days prior to said hearing; provided, however, that a proceeding for conduct which immediately endangers the public interest may be noticed less than twenty days, as the public interest may require, in the discretion of the MAP Oversight Committee.

6) A three member subcommittee of the MAP Oversight Committee shall be appointed by the Co-chairs of the Oversight Committee to serve as the Review Board and shall have jurisdiction to hear all matters involving suspension or removal under Rule 4 above, and shall render its decision within forty-five days from the date of notice of suspension or removal was first given to the panel member, unless said time is extended with the panel member's consent.

7) Any panel member may appeal the decision of the subcommittee to the Oversight Committee as a whole within ten days of being notified of suspension or removal.

Judicial Council of the Ninth Circuit

Standing Committee on Alternative Dispute Resolution Programs

Model Local ADR Rule

December 1, 1999

This model local rule was prepared by the Standing Committee on Alternative Dispute Resolution Programs of the Ninth Circuit. Courts are free to adopt such parts of the rule, if any, as they deem appropriate. Copies of the rule may be obtained from the address listed below.

ADR Standing Committee
Office of the Circuit Executive
Ninth Circuit Judicial Council
P.O. Box 193939
San Francisco, CA 94119-3939
telephone (415) 556-6158
fax (415) 556-6179
website: *www.ce9.uscourts.gov*

Ninth Circuit Standing Committee on ADR/Model Local Rule

Local options are shown in *bold italics within [brackets].*

Provisions of the Act are set out in the endnotes with quotations from the Act in italics.

PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION

(Revised December 1, 1999)

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(a) INTRODUCTION.

(1) Purposes. Pursuant to the findings and directives of Congress in 28 U.S.C. § 651 *et seq.*, this Local Rule provides parties to civil cases in this district with opportunities to use alternative dispute resolution (ADR) procedures. This Local Rule is intended to provide parties access to the dispute resolution process that best serves their needs and fits their circumstances, to reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services.[i] Through this Local Rule, the court authorizes and regulates the use of court- sponsored ***[mediation] [early neutral evaluation] [consensual mini-trial] [arbitration under § 654, et seq.] [and/or] [other appropriate ADR process].***[ii]

(2) Scope.

(A) Cases Pending Before a District Judge or Magistrate Judge. This Local Rule applies to all civil cases pending before any district judge or magistrate judge in this district ***[except that cases in the following categories are exempt from presumptive inclusion: _____, _____, _____, or _____].***[iii] ***[The fact that a case falls in a category that is exempt from presumptive applicability of this Local Rule neither (1) precludes the parties to such a case from agreeing to participate in an ADR process, nor (2) deprives the court of authority to compel participation in an appropriate ADR proceeding.]***

(B) Proceedings Pending Before a Bankruptcy Judge. Parties to proceedings pending before any bankruptcy judge in this district also may be afforded an opportunity to participate in ADR, but because of the unique circumstances that attend proceedings in bankruptcy, the provision of ADR services in the bankruptcy court is governed separately by ***[Bankruptcy Local Rules ____].***[iv]

(3) **Rules Specific to Individual ADR Processes.** While many of the provisions of this Local Rule apply to all ADR processes conducted under its auspices, there are differences among ADR processes that require some process-specific prescriptions. Rules that are applicable only to a particular process are set forth in sections (r-u) below.

(4) **Parties Retain Right to Secure ADR Services Outside the Programs Sponsored by the Court.** Nothing in this Local Rule precludes the parties from agreeing to seek ADR services outside the court's program. ADR

proceedings conducted outside this Local Rule, however, will not be subject to the enforcement, immunity, or other provisions of this Local Rule.[v]

(5) Parties May Request an ADR Process at any Time. Notwithstanding any other provision of this Local Rule, parties, individually or in any combination, retain the right to ask the assigned judge, at any stage in the proceedings, to refer the case, in whole or in part, to an appropriate ADR process. Any reference made in response to such a request must be consistent with the provisions of sections (c) (Selection of an Appropriate ADR Process) and (i) (Integration with Case Management). ***[The court will enter an order of reference only if all parties voluntarily agree to the proposed reference.]***

(b) PROGRAM ADMINISTRATION.

(1) ADR Judge.

(A) Appointment. A ***[district or magistrate]*** judge will be appointed to serve as ADR Judge of this Court. When necessary, the Chief District Judge shall appoint another judge to temporarily perform the duties of the ADR Judge.

(B) Duties. The ADR Judge shall serve as the primary liaison between the Court and the ADR staff, consulting with that staff on matters of policy, program design and evaluation, education, training, and administration. ***[The ADR Judge shall rule on all requests by parties to be excused from appearing in person at any ADR proceeding and shall hear and determine all complaints alleging violations of this Local Rule.]***[vi]

(2) **Director of the ADR Program/ADR Administrator.** The ***[Director of the ADR Program or ADR Administrator]*** shall be responsible for implementing, administering, overseeing, and evaluating the ADR program and procedures covered by this Local Rule.[vii] These responsibilities shall extend to educating litigants, lawyers, judges, and court staff about the ADR program and rules. In addition, the ***[director or administrator]*** shall assure that appropriate systems are maintained for recruiting, screening, and training neutrals, as well as for maintaining on an ongoing basis the neutrals' ability to provide role-appropriate and effective services to the parties.

Rules and Materials Available. The Clerk of Court shall make pertinent rules and explanatory materials available to the parties.

(c) SELECTION OF AN ADR PROCEDURE.

(1) Early ADR Selection Process.

(A) The Parties' Duty to Consider ADR,[viii] Confer, and Report. ***[Within ___ days following filing/service of the complaint] [___ days prior to the case management conference /Rule 16 scheduling conference] [No fewer than ___ calendar days before a scheduling order is due under Fed. R. Civ. P. 16(b)],*** unless otherwise ordered, in every case to which this Local Rule applies, the parties[ix] must meet and confer about:

(i) whether they might benefit from participating in some ADR process;

(ii) which type of ADR process, if any, is best suited to the specific circumstances in their case; and

(iii) when the ADR session, if any, should be held

The parties must report in their case management statement ***[or in a statement filed separately]*** their shared or separate views about the utility of ADR, which ADR procedure, if any, would be most appropriate, and when the ADR session should occur. In these reports or statements, counsel must certify expressly that they understand and have explained to their clients the local ADR rules and process options and that, with their assistance, their clients have carefully considered whether their case might benefit from participation in any of the available ADR programs. If any party recommends using ADR, this report or statement must be accompanied by a Proposed ADR Order of Reference in conformity with section (h), below.

[Option A]

(B) Designation of Process. After considering the parties' submissions, the court may order the parties, on appropriate terms and in conformity with section (i) (Integration of Case Management) below, to participate in ***[mediation or early neutral evaluation].***[x] If all parties consent, the court may refer the case to arbitration under 28 U.S.C. § 654 *et seq.*, to a non-binding mini-trial, to an advisory summary jury or bench trial, or to an ADR procedure which, by stipulation of all parties, has been tailored to meet the specific needs of the case.

[Option B]

(B) Voluntary Selection of Process. If, after considering all pertinent circumstances, all parties voluntarily agree that referral to a particular ADR process is appropriate, the court may issue an order of ADR

reference to the stipulated ADR process. The order will comply with section (i) (Integration of Case Management) below.

(2) Selection of ADR Process at Any Time After Issuance of Initial Case Management or Scheduling Order.

[Option A] Notwithstanding the provisions of subsection (c)(1) above, at any time before entry of final judgment the court may, on its own motion or at the request of any party, after affording the parties an opportunity to confer and to express their views, order the parties to participate in ***[mediation or early neutral evaluation]***[xi]***[and/or] [with the consent of all parties, refer the case to a mini-trial, an arbitration under 28 U.S.C. § 654, et seq., or an advisory summary jury or bench trial, or a specially tailored ADR proceeding].***

[Option B] At any time after issuance of the initial case management or scheduling order and before entry of final judgment, if all parties voluntarily agree that referral to a particular ADR process is appropriate, the court may issue an order of ADR reference to the stipulated ADR process. The order will comply with section (i) (Integration of Case Management) below.

(3) Protection Against Unfair Financial Burdens. Assigned judges will take appropriate steps to assure that no referral to ADR results in an imposition on any party of an unfair or unreasonable economic burden. A party who cannot afford to pay any fee normally charged under this Local Rule shall be excused from paying or shall be ordered to pay at an appropriately reduced rate.

(d) PANELS OF NEUTRALS; SELECTION OF NEUTRALS.

(1) Panels of Neutrals. For each type of ADR procedure authorized under this Local Rule, the court shall assure that a separate panel is maintained of persons who are trained and otherwise qualified to serve as neutrals for that ADR process. Only persons who agree to serve on the terms set forth in this Local Rule and in any pertinent General Orders, and whose background, training, and skills satisfy the requirements that the court establishes for the particular type of ADR procedure, shall be admitted to and remain as members of the panel for that process.[xii]

(2) Selection of the Neutral. The following procedures shall apply to selection of the neutral.

(A) Parties to Confer about Selection of Neutral and Confirm Neutral's Availability. Unless otherwise ordered, the parties must confer about and attempt to agree on a neutral at the same time they confer, under subparagraph (c)(1)(A), above, for the purposes of selecting an ADR process and suggesting the time frame in which the ADR session should be held. If authorized by the assigned judge, the parties may nominate a neutral who is not on the court-approved panel for the kind of ADR process that the parties propose to use.[xiii] Before nominating a neutral, the parties must have confirmed his or her availability and willingness to serve within the time frame they propose.

(B) Appointment of the Neutral When Parties Agree. If the parties agree on a neutral and confirm his or her availability, they must identify their nominee in the case management statement ***[or in a separate filing that meets these purposes]***. Absent substantial countervailing considerations, the assigned judge will appoint the neutral whom the parties have jointly nominated and who is willing to serve.

(C) Appointment of a Neutral When Parties Disagree. If the parties cannot agree on a neutral, they shall so state in their case management statement ***[or in a statement filed separately]***. Upon being so advised, the assigned judge will select an available neutral from the panel or order the ***[Director of the ADR Program] [the ADR Administrator] [the designated judicial officer]*** to select an available neutral from the appropriate panel.[xiv]

(D) Documents Provided *[by the Court] [by the Plaintiff]* to the Neutral. Promptly after the neutral is designated, ***[the Director of the ADR Program] [the ADR Administrator] [a designated judicial officer] [the Plaintiff]*** shall provide her or him with a copy of:

(i) the Order of ADR Reference (see sections (h) and (i), below);

(ii) each party's most recent pleading; and

(iii) any other order or document from the court file that sets forth requirements or stipulations related to the ADR proceedings.

****

As an alternative **to** the paragraphs that make up subsection **(d)(2)**, above, the following provision is suggested for courts that elect to have ***court staff assign neutrals*** to cases -- instead of trying to get the parties to select an agreed-upon neutral.

(2) Selection of Neutral by the Court ***[Director of the ADR Program] [the ADR Administrator] [designated judge].***

(A) Assignment of Neutral from Appropriate Panel. After the ADR process that will be used in a particular case has been approved or selected by the court, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** shall assign a neutral from the appropriate panel who is available to serve during the period the session should be held and who has no disqualifying conflict of interest.

(B) Documents Provided by the Court to the Neutral. Promptly after the neutral is designated, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer] [designated counsel]*** shall provide her or him with a copy of:

(i) the Order of ADR Reference;

(ii) each party's most recent pleading; and

(iii) any other order or document from the court file that sets forth requirements or stipulations related to the ADR proceedings.

(e) DISQUALIFICATION OF NEUTRALS.

(1) Applicable Standards. No person may serve as a neutral in an ADR proceeding under this Local Rule in violation of:

(A) the standards set forth in 28 U.S.C. § 455;

(B) any applicable standard of professional responsibility or rule of professional conduct; or

(C) any additional standards adopted by the court.[xv]

(2) Mandatory Disqualification and Notice of Recusal. A prospective neutral who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** a written notice of recusal. The parties may not waive a basis for disqualification that is described in 28 U.S.C. § 455(b).

(3) Disclosure and Waiver of Non-Mandatory Grounds for Disqualification. If a prospective neutral discovers a circumstance that would not compel disqualification under rules of professional conduct or under 28 U.S.C. § 455(b), but that might be covered by 28 U.S.C. § 455(a) (impartiality might reasonably be questioned), the neutral must promptly disclose that circumstance in writing to all counsel and to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]***. A party may waive a possible basis for disqualification that is premised only on 28 U.S.C. § 455(a), but any such waiver must be in writing and delivered to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** within ten days of the party's receiving notice of the possible basis for disqualification.

An alternative to subsection (e)(3), above, regarding waiver of disqualification under § 455(a): A party who has not delivered a written objection to the ***[Director of the ADR Program] [or the ADR Administrator] [a designated judicial officer]*** within ten days of receiving written notice from a prospective neutral of a possible ground for disqualification based only on 28 U.S.C. § 455(a) shall be deemed to have waived any such objection.

(4) Objections Not Based on Disclosures by Neutral.

(A) One Peremptory Objection Permitted. Each party has the right to disqualify one proposed neutral by making a peremptory objection (*i.e.*, without stating a basis for the objection) to that person's appointment. The right to make a peremptory objection is waived unless exercised by delivering the objection in writing to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** within seven days of learning the identity of the proposed neutral.

(B) Objections for Cause. Within seven days of learning the identity of a proposed neutral, a party who objects for cause to service by that neutral must deliver to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** and to all other counsel a writing that specifies the basis for the objection. Any party who wishes to take exception to the objection must do so in a writing that is delivered to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** and to all other counsel within five days of receiving the objection. Promptly after the close of the period for submitting exceptions, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** shall determine whether the proposed neutral will serve or whether another neutral should be selected.

(f) COMPENSATION OF NEUTRALS.

[Option A] Subject to subsection (c)(3) (Protection Against Unfair Financial Burdens), above, neutrals shall be compensated by the parties[xvi] at a rate specified by general order of this court[xvii] or otherwise by law, or at a different rate if all parties so agree.[xviii] In every case where the parties and neutral agree to a rate of compensation that differs from the rate set by the court, the neutral must disclose in writing to the ADR Administrator, before the ADR session is held, all the fee, expense, and reimbursement terms and limitations that will apply to the service by that neutral. ***[Any neutral may voluntarily serve on a pro bono basis].*** Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.[xix]

[Option B] Neutrals shall serve without compensation. Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.

[Option C] Neutrals shall not be compensated ***[for preparation time before the ADR proceeding] and/or [for the first _____[xx] hours of the ADR session]***. After ***[some specified number of]*** hours in session, the neutral may ***[continue to serve without compensation] or [give the parties the option of concluding the proceeding or paying the neutral for additional time]*** at ***[a mutually agreeable hourly rate]*** or ***[at an hourly rate fixed by General Order of this court]***. In every case where the parties and the neutral agree to a rate of compensation for time the neutral commits after the first _____ hours of session that differs from the rate set by the court, the neutral must disclose in writing to the ADR Administrator all the fee, expense, and reimbursement terms and limitations to which the parties and neutral have agreed. This written disclosure must be made no more than ten days after the agreement about compensation is reached. Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.

(g) IMMUNITY OF NEUTRALS. All persons serving as neutrals under this Local Rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.[xxi]

(h) PROPOSED ORDER OF ADR REFERENCE.

(1) File with Case Management Statement. If any party recommends using ADR, pursuant to section (c) of this Local Rule, Counsel must attach to their Case Management Statement ***(or to the statement they file separately to comply with this Local Rule)*** a Proposed Order of ADR Reference.

(2) Contents of Proposed Order. The Proposed Order of ADR Reference must:

(A) identify the type of ADR process that the parties have agreed is most appropriate for their circumstances;

(B) ***[identify by name and organizational affiliation the available neutral whom they nominate to serve in their case];***[xxii]

(C) if different from rates or terms fixed by the court, specify the proposed rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any proposed limitations on compensation or expense reimbursement;

(D) specify the time frame within which they propose the ADR process will be completed and the date by which the neutral must file written confirmation of that completion; and

(E) suggest and explain any modifications or additions to the case management plan that would be advisable because of the reference to ADR.

(i) INTEGRATION WITH CASE MANAGEMENT

(1) Contents of Order of ADR Reference. Every order referring a case to an ADR process under this Local Rule must specify:

(A) the ADR process to be used;

(B) ***[if known, the identity of the neutral who will serve in the case];***[xxiii]

(C) if different from rates or terms fixed by generally applicable rule or order, specify the rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any limitations on compensation or expense reimbursement;

(D) the dates by which the ADR proceedings must be completed and by which the neutral must file a confirmation of that completion;

(E) the date by which the parties must notify the court, in a jointly filed statement, whether all or part of the case has been resolved; and

(F) any pretrial activity, *e.g.,* specified discovery or motions, that shall be completed before the ADR session is held or that shall be stayed until the ADR session is concluded.

(2) Protection Against Unreasonable Delay. In fixing deadlines in its Order of ADR Reference, the referring court will assure that the time allotted for completing the ADR process is no more than is appropriate and that the referral does not cause unreasonable delay in case development, in hearing motions, or in commencing trial.

(3) Assigned Judge's Continuing Responsibility for Case Management. Neither the parties' agreement to participate in an ADR procedure nor the court's referral of an action to ADR shall reduce the assigned judge's power and responsibility to maintain overall management control of a case before, during, and after the pendency of an ADR process.

(j) TELEPHONE CONFERENCE WITH NEUTRAL BEFORE ADR SESSION. Promptly after being appointed to serve in a case, the neutral shall hold a brief joint telephone conference with all counsel to discuss:

(1) fixing a convenient date and place for the session;

(2) the procedures that will be followed during the session;

(3) who shall attend the session on behalf of each party;

(4) what material or exhibits should be provided to the neutral before the session or brought by the parties to the session;

(5) any issues or matters that it would be especially helpful to have the parties address in their written pre-session statements;

(6) page limitations for the pre-session statements; and

(7) any other matters that might enhance the utility of the ADR proceeding.

(k) WRITTEN PRE-SESSION STATEMENTS

(1) Deadline for Submission. No later than ten calendar days before the first ADR session, each party must serve on all other parties and deliver directly to the neutral a written ADR statement.

(2) Prohibition Against Filing. The parties' written ADR statements must not be filed and the assigned judge shall not have access to them.

(3) Content of Statement. Unless otherwise approved by the neutral during a telephone conference under section (j), above, each ADR statement must:

(A) not exceed the number of pages allowed by the neutral;

(B) identify by name and title or position:

(i) the person(s) with decision-making authority who, in addition to counsel, will attend the ADR session on behalf of the party; and

(ii) person(s) connected with a party opponent, if known, whose presence at the ADR session might substantially improve the productivity of the proceeding;

(C) describe briefly the substance of the litigation, addressing key liability and damages issues and discussing the most significant evidence;

(D) identify any discovery or motion activity that is likely either to significantly affect the scope of the litigation or to enhance the parties' ability to assess the case's settlement value or, for other reasons, to improve prospects for settlement;

(E) describe the history and current status of any settlement negotiations;

(F) identify any other considerations, and set forth any additional information, that the party believes might enhance the utility of the ADR session; and

(G) if allowed by the neutral, attach copies of documents likely to be useful during the ADR session.

(l) FOR MEDIATIONS ONLY,[xxiv] SEPARATE *EX PARTE* WRITTEN STATEMENTS

(1) Contents. Only if the ADR procedure being used is mediation, each party may submit directly to the mediator, for his or her eyes only, a separate, *ex parte* confidential written statement describing any additional interests, considerations, or matters that the party would like the mediator to understand before the mediation session begins.

(2) Timing. Any such additional *ex parte* written statement must be delivered to the mediator at the same time the party delivers the written statement required under section (k) of this Local Rule.

(m) ATTENDANCE AT THE ADR SESSION

(1) In Person Attendance. All parties and their lead counsel, having authority to settle and to adjust pre-existing settlement authority if necessary, are required to attend the ADR session in person unless excused under section (2), below. Insurer representatives also are required to attend in person, unless excused, if their agreement would be necessary to achieve a settlement.

(A) Corporations and Other Non-Governmental Entities. A corporation or other non-governmental entity satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle, as defined above, and who is knowledgeable about the facts of the case.

(B) Governmental Entities. A unit or an agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.

(2) Requests to be Relieved of Duty to Appear in Person.

(A) Duty to Confer. No one may ask the court ***[or the neutral]*** to be relieved of the duty to attend an ADR session in person, unless that person first has conferred about the matter with the other parties ***[and the neutral]*** who would be participating in the session.

(B) Standard. A person may be excused from attending an ADR session in person only on a showing that personal attendance would impose a serious and unjustifiable hardship.

(C) Timing and Content of Request; Proposed Order. No fewer than 15 days before the date set for the session, a party seeking to be relieved of the duty to attend in person must submit a letter to the ADR Judge ***[or the neutral]*** (copying all other parties) that sets forth all considerations that support the request, states realistically the amount in controversy in the case, and indicates whether the other parties ***[and the neutral]*** support or oppose the request. ***[Each such letter request must be accompanied by a proposed order.]***

(3) Participation by Telephone When Appearance in Person Is Excused. Every person who is excused from attending an ADR session in person must be available to participate by telephone, unless otherwise directed by the ***[ADR Judge] [assigned judge] [the neutral].***

(n) CONFIDENTIALITY OF ADR PROCEEDINGS

(1) Generally Applicable Provision. Except as provided in this Local Rule or by 28 U.S.C. § 657 (arbitrations),[xxv] and except as otherwise required by law[xxvi] or as stipulated in writing by all parties and the neutral, all communications made in connection with any ADR proceeding under this Local Rule shall be privileged and confidential.[xxvii]

(2) Limitations on Communication With Assigned Judge. No person may disclose to the assigned judge any communication made, position taken, or opinion formed by any party or neutral in connection with any ADR proceeding under this Local Rule except as otherwise:

(A) stipulated in writing by all parties and the neutral;

(B) provided in this Local Rule;

(C) provided in 28 U.S.C. § 657 (for arbitrations); or

(D) ordered by the court -- after application of pertinent legal tests that are appropriately sensitive to the interests underlying ADR confidentiality[xxviii] – in connection with proceedings to determine:

(i) whether, if a record or a signed writing is produced that appears to constitute a binding agreement, the

parties entered an enforceable settlement contract at the end of the ADR session, or

(ii) whether a person violated a legal norm, rule, court order, or ethical duty during or in connection with the ADR session.[xxix]

(3) Authorized Studies and Assessments of Program. Nothing in this Local Rule shall be construed to prevent any participant or neutral in an ADR proceeding from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate any aspect of the court's ADR program or to enforce any provision of this Local Rule. The identity of the sources of such information provided for purposes of monitoring or evaluating the ADR programs shall be appropriately protected.

(o) NEUTRAL'S REPORT THAT ADR PROCESS HAS BEEN COMPLETED.

(1) Timing and Limited Content. No more than five days after the ADR process has been completed, and by the deadline fixed in the Order of ADR Reference, the neutral must file (copying all parties) a form that reports ***[only]*** the date on which the parties completed the ADR process.

(2) Prohibition on Disclosure of Confidential Communications or Neutral's Opinions. Absent a written stipulation signed by all parties, in making this report the neutral must not disclose to the assigned judge any confidential ADR communication or any opinions or thoughts the neutral might have about the merits of the litigation, about how it should be managed, or about the character of any party's participation in the ADR proceeding.

(p) PARTIES' JOINT REPORT AFTER THE ADR PROCEEDING. By the deadline fixed in the Order of ADR Reference, or, if no such deadline was fixed, no later than ten days after the ADR session has been concluded, the parties must jointly file a statement in which they report to the assigned judge:

(1) whether they have settled all or part of the case; and

(2) any proposals in which all parties join for case development, further exploration of settlement, motion practice, discovery, or trial.

(q) VIOLATIONS OF THIS LOCAL RULE

(1) **Complaints Alleging Material Violations.** A complaint alleging that any person[xxx] or party has materially violated this Local Rule must be presented in writing, under seal, directly to ***[the ADR Judge] [a judge who has been designated by the Chief Judge to hear the matter and to whom the underlying case is not assigned (the "designated judge")]***.[xxxi] Copies of any such complaint must be sent to all counsel and the neutral at the time they are presented under seal to the ***[ADR Judge] [designated judge]***. Any such complaint must be accompanied by a competent declaration, must not be filed, and must not be presented to the judge to whom the underlying case is assigned for litigation.

(2) **Proceedings in Response to Complaint.** Upon receipt of an appropriately presented and supported complaint of material violation, the ***[ADR Judge] [designated judge]*** shall determine whether the matter warrants further proceedings. If further proceedings are warranted, the ***[ADR Judge] [designated judge]*** shall issue an order to show cause why sanctions should not be imposed. Any such proceedings shall be conducted on the record but under seal. The ***[ADR Judge] [designated judge]*** shall afford all interested persons an opportunity to be heard before deciding whether to impose or recommend a sanction.

RULES SPECIFIC TO PARTICULAR FORMS OF ADR

(r) MEDIATION.

(1) Definition.[xxxii]

[Option A] Mediation is a process whereby an impartial third party (the *mediator)* facilitates communication between negotiating parties attempting to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. When appropriate the mediator may also offer an evaluation of the case and/or recommend a settlement. Whether a settlement results from a mediation is within the sole control of the parties.

[Option B] Mediation is a process in which an impartial third party (the mediator) facilitates communication between parties and assists them in their negotiations (*e.g.*, by clarifying underlying interests) as they attempt to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. Whether a settlement results from mediation and the nature and extent of the settlement are within the sole control of the parties.

(2) Criteria for Inclusion on the Panel of Mediators. In order to qualify for appointment to the court's Panel of Mediators, the applicant shall certify that he or she:[xxxiii]

(A)

(B)

(C)

****

(s) EARLY NEUTRAL EVALUATION.

(1) Definition. Early neutral evaluation (ENE) is a procedure in which the parties and their counsel, in a confidential session, present summaries of their cases to an experienced and impartial lawyer, judge, or retired judge, who evaluates the parties' legal positions and provides the parties and their counsel with a non-binding evaluation of the case. The evaluator may also help the parties identify areas of agreement, provide case-planning guidance, and, if requested by all parties, assist in negotiating a settlement of the dispute.

(2) Criteria for Inclusion on the Panel of Evaluators. In order to qualify for appointment to the court's Panel of Evaluators, the applicant shall certify that he or she:

(A)

(B)

(C)

****

(t) CONSENSUAL MINI-TRIAL.

(1) Definition. A mini-trial is a process containing both conciliatory and non-binding adjudicative elements. A mini-trial is consensual, non-binding, and non-judicial, as in negotiation or mediation, yet one of its primary features is an adversarial presentation of each party's case, as in arbitration or litigation.

In a mini-trial, each party's best case is presented in summary form to the parties themselves or to party representatives with authority to settle the dispute. Following the presentations, the parties enter into negotiations, typically with a neutral acting as a facilitator. The facilitator may act as an evaluator of the case if the parties so designate.

(2) Criteria for Membership of the Panel of Mini-trial Facilitators. In order to qualify for appointment to the court's panel of mini-trial facilitators, the applicant shall certify that he or she:

(A)

(B)

(C)

****

(u) ARBITRATION.

(1) Definition. Arbitration is a process whereby an impartial third party (the *arbitrator*) hears and considers the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The arbitrator makes an *award* on the issue(s) presented for decision. The arbitrator's award is binding or non-binding as the parties may agree in writing.

(2) Criteria for Inclusion on the Panel of Arbitrators. In order to qualify for appointment to the court's panel of arbitrators, the applicant shall certify that he or she:[xxxiv]

(A)

(B)

(C)

(3) Standards for Certification of Arbitrators. All arbitrators shall be certified to perform services in accordance with the following standards:[xxxv]

(A) The arbitrator shall take the oath or affirmation described in 28 U.S.C. § 453; and

(B) The arbitrator shall be subject to the disqualification rules under 28 U.S.C. § 455.

(4) Eligibility of Cases for Referral to Arbitration. No civil action shall be referred to arbitration except upon written consent of all parties. Notwithstanding the parties' request or consent to refer a case to arbitration, the court shall decline to make such referral if it finds that:[xxxvi]

(A) the action is based on an alleged violation of a right secured by the Constitution of the United States;

(B) jurisdiction is based in whole or in part on 28 U.S.C. § 1343;

(C) the relief sought includes money damages in an amount greater than $150,000;[xxxvii] or

(D) the objectives of arbitration would not be realized for any other reason.

(5) Procedure for Consenting to Arbitration. Any request for reference to arbitration shall be in writing, signed by all parties and their counsel, and directed to the judge to whom the case is assigned. All such requests shall:

(A) State whether the parties desire that the entire case be referred to arbitration. If the parties desire that only certain issues or portions of the case be referred to arbitration, the parties shall identify with particularity those issues or portions of the case and state the reason(s) why such a request should be granted;

(B) State whether the arbitrator's award will be binding, with trial *de novo* waived, or non-binding, with trial *de novo* permitted if a request therefor is timely served and filed;

(C) Propose a discovery plan, a timetable for completion of the proposed discovery, and the date by which the arbitration shall be completed;

(D) Acknowledge that the arbitration shall be governed by the provisions of Title 28 U.S.C. chapter 44, as the same may be amended from time to time, and, to the extent applicable, 9 U.S.C. § 1 *et seq.*;

(E) Contain a certification that the parties have been provided access to materials describing the arbitration program, and that they agree to arbitration freely and knowingly;[xxxviii] and

(F) Provide such other information as may assist the court in determining whether to grant the request.

(6) Conduct of the Hearing; Protection Against Prejudice for Declining to Go to Arbitration.

(A) Unless otherwise ordered, all arbitrations under this Local Rule will be held before a single arbitrator who shall have the power to:[xxxix]

(i) conduct the arbitration hearings;
(ii) administer oaths and affirmations; and

(iii) make awards based upon the facts and the law.

(B) The provisions of 28 U.S.C. chapter 44, as the same may be amended from time to time, shall govern all aspects of the arbitration proceeding authorized.

(C) ***[Option one: The arbitrator will apply the Federal Rules of Evidence with respect to all evidence offered by any party.] [Option Two: In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which the arbitrator considers relevant and trustworthy and which is not privileged.]***

(D) The arbitrator shall apply Federal Rule of Civil Procedure 45 with respect to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Local Rule.[xl]

(E) No party or attorney may be prejudiced in any way for refusing to participate in arbitration.[xli]

(7) The arbitrator shall make his or her award in writing and shall file the award under seal with the Clerk of Court promptly after the arbitration hearing is closed together with proof of service on all other parties by United States mail, addressed to the parties or, if represented, to the parties' attorney(s) of record. Unless the parties have waived trial *de novo,* the clerk shall seal the award, and the award shall remain sealed and the contents thereof not made known to any judge who might be assigned the case until the time has expired for a party to seek a trial *de novo* with no party timely serving and filing such a demand; *provided, however,* that the award may be unsealed after final judgment has been entered in the case or the action has otherwise been terminated.[xlii]

(8) If, in any non-binding arbitration conducted under this section, a resolution of all aspects of the dispute does not result and the case proceeds to trial, no reference to the arbitration proceeding, or the result thereof, may be made to the trier of fact; *provided however,* that nothing in this Local Rule shall prevent a party from presenting or using at the trial evidence presented in the arbitration proceeding, if such evidence is otherwise admissible under the Federal Rules of Evidence or the parties have stipulated to its use.[xliii]

(9) If trial *de novo* has not been waived by all parties, any party may demand a trial *de novo* of the issues referred to arbitration by serving and filing a request therefor within thirty (30) calendar days after service of the award. If a demand for trial *de novo* is timely served and filed, the case will be treated for all purposes, and the trial shall be conducted, as if no arbitration had occurred.[xliv]

(10) Nothing in this Local Rule limits any party's right to agree to arbitrate any dispute, regardless of the amount involved, pursuant to title 9, United States Code, or any other provision of law.[xlv]

COMMITTEE COMMENTARY

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i The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658, requires each federal district court to *authorize by local rule the use* of [at least one] ADR process in all civil actions, including adversary proceedings in bankruptcy, *except that the use of arbitration may be authorized only as provided in Section 654* of the Act. Congress found that there is a *continued growth of federal appellate court-annexed mediation programs which suggests that this form of alternative dispute resolution can be very effective; therefore, the district courts should consider including mediation in their local alternative dispute resolution program.* Section 651(c) states that *those courts with existing ADR programs shall examine the effectiveness* of their programs and *adopt such improvements* as are consistent with the Act.

ii Section 652(a) requires each district court *to provide litigants with at least one ADR process.* Section 651(a) includes *early neutral evaluation, mediation, mini-trial, and arbitration under § 654* in a non-exhaustive list of ADR processes that district courts may consider adopting. This listing does not restrict the district from offering other alternatives such as advisory mini-trials, advisory summary jury trials, or advisory summary bench trials.

There are two significant questions about the meaning of these fundamental components of the statute to which the Committee has given focused consideration. The first question is about "outsourcing" -- to what extent does the Act permit district courts to "outsource" part or all of their ADR programs? The Committee believes that the Act reflects a decision by Congress that each district court should be actively involved in the design, implementation, and oversight of its own ADR program -- and, therefore, that a district court would not be in compliance if it delegated responsibility for all aspects of its ADR program to some entity or group outside the court. We note, for example, that in § 651(d), the Act requires each court to "designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's [ADR] program." This provision, and others, indicate that Congress wants each court to be responsible in fact for the program it sponsors and sanctions -- to assure, among other things, that the program is of high quality and that service by neutrals conforms to apapropriate ethical norms.

It does not follow, however, that there are no sub-parts of its program that a district court could appropriately "outsource." A court might well determine, for example, that to provide its neutrals with the best possible training it is necessary to engage the training services of an outside entity. Similarly, a court might decide appropriately that to assure that the statutorily mandated "evaluation" of its program is as objective and reliable as possible it is necessary to engage professionals outside the court to conduct an independent assessment. Thus, the Committee believes that the Act would permit individual courts to "outsource" the front line work that is required to fulfill some of the duties the statute imposes. But each court retains, under the statute, ultimate responsibility for assuring that the quality and content of any delegated work satisfy the objectives contemplated in the Act. So before "outsourcing" any task, each court must take steps to assure itself that the work by the outside entity or professionals will conform to appropriate standands and will achieve the mandated ends.

The second broad question to which the Committee gave special attention relates to the role Congress expected magistrate judges to play in the ADR programs adopted under the Act. The Committee believes that a court clearly would not comply with the Act if its "ADR program" consisted of nothing more than making magistrate judges available to host settlement conferences. Magistrate judges have been doing extensive settlement conference work in many courts for many years -- a fact well-known by Congress before it enacted this legislation. No statute was necessary to sanction or promote such work -- and the Act never mentions settlement conferences. An ADR program that was limited to referring cases to magistrate judges for settlement conferences clearly would not "encourage and promote the use of alternative dispute resolution in [the] district" -- which, according to Congress' express declaration in the statute, is to be the primary purpose of each district court's ADR program. Moreover, because the Act requires each court to make at least one ADR process available to every civil case (except in limited categories of cases exempted by local rule), a district court whose ADR "program" consisted only of judicial settlement conferences would clearly be out of compliance unless it made such conferences available in all non-exempt cases. But the district courts do not have sufficient magistrate judge hours available to staff any such program -- and the Committee believes that one of the purposes of the Act was to free-up judge time for other work by encouraging the development of ADR programs in which persons other than judges would serve as the neutrals.

None of this means that magistrate judges have no role to play under the Act. While Congress called expressly for the creation of "panels" of "neutrals," Congress also made it clear that such panels might well include magistrate judges -- as long as they "have been trained to serve as neutrals in alternative dispute resolution processes." Thus, a court could include magistrate judges in its panel of mediators or early neutral evaluators -- as long as the court first ensured that the particular judges involved had received specialized training in the particular role contemplated.

As the Model Rule makes clear, the Committee believes that magistrate judges could play another. very significant role in complying with the Act. A magistrate judge might well be a particularly appropriate "judicial officer" to be designated to "implement, administer, oversee and evaluate the court's alternative dispute resolution program." It might be easier to "earmark" a portion of a magistrate judge's time for this work than a portion of a district judge's time -- and assigning these kinds of larger-scale responsibilities to a judicial officer instead of a clerk's office employee might well enhance the standing of the program in the community and within the court itself and improve its vitality and quality. Assigning responsibility to enforce the ADR rules to a magistrate judge also offers significant advantages -- in saving the time of the district judges and in insulating them from the possibility of exposure to sensitive settlement-related communications.

iii Each district court may identify here those categories of civil cases, if any, that the court has concluded, after consulting with the local bar and the United States Attorney, should not automatically be subject to this Local Rule.

Section 652(b) permits courts to identify *cases or categories of cases* in which ADR would not be appropriate and to *exempt* from these requirements those categories of cases. Section 652(b) further directs that before deciding which types of cases should be exempt, *each district court shall consult with members of the bar and with the local United States Attorney.*

iv The relationship between the ADR Act and matters that remain in bankruptcy courts is unclear. There seems to be a consensus that Congress intended the Act to apply to adversary proceedings in bankruptcy matters where the reference to the bankruptcy court has been withdrawn -- so the adversary proceeding is being handled directly by the district court. It is not clear whether Congress intended the Act to apply to matters that proceed within the bankruptcy courts.

The Model Rule encourages bankruptcy courts to provide ADR opportunities to participants in bankruptcy proceedings -- but the Model Rule does not regulate or govern ADR programs that bankruptcy courts establish. Rather, the Model Rule recognizes that ADR programs in bankruptcy courts should be regulated by separately crafted sets of rules, rules tailored to fit the special circumstances that obtain in the bankruptcy setting.

v ADR proceedings are not deemed to be "conducted outside this Local Rule" when the district court orders the parties to participate in ADR under this Local Rule (without their freely-given consent) but permits the parties to select a neutral who is not on the roster of neutrals that the court has approved. Nor is an ADR proceeding deemed to be "conducted outside this Local Rule" when all parties voluntarily consent to participate under this Local Rule and the assigned judge enters an order of reference approving service by a specifically identified neutral whom all parties want to serve but who is not on the roster of neutrals the court has approved.

However, the Ninth Circuit's ADR Committee does not recommend approval by district judges of service by neutrals not on the roster the court has approved because this practice can jeopardize quality control and give rise to immunity issues.

Courts that permit parties to use a neutral who is not on the roster the court has approved should give active consideration to requiring each non-roster neutral, as a condition to serving, to (1) certify that he or she meets the qualifications the court has set for neutrals to be included on its roster, (2) take the oath in 28 U.S.C. § 453, and (3) expressly agree, in a writing that is filed before the neutral begins his or her service, to be bound by the provisions of the Court's Local ADR Rule, including particularly (but not exclusively) the provisions related to compensation and disqualification.

vi A district court may delete or modify the last sentence if the district determines that requests to be excused should be decided by the neutral or by the assigned judge, or that complaints alleging violations should be heard and determined by the assigned judge.

Choices among these options, as with many other decisions under the ADR statute, will vary with local practice and culture.

Some commentators believe that it is unwise to have the assigned judge hear and determine complaints about alleged violations of the ADR rules, in part because resolving such matters could require disclosure to the judge of sensitive settlement communications. And apprehension that such matters might be disclosed to a judge with power over their case might make some parties less forthcoming during the ADR proceedings.

vii Section 651(d) requires the district to *designate an employee or a judicial officer who is knowledgeable in ADR to implement, administer, oversee, and evaluate* the local program. The same section of the statute authorizes the designee to be responsible for recruiting, screening, and training neutrals. The ADR judge may also serve as the program administrator.

viii Section 652(a) directs each district court *to require all litigants (*except in certain cases exempted by the district) *to consider the use of ADR.*

The process of "considering" whether or not ADR might be helpful has two components -- first, "within" a side (or party) and second, across party lines.

Focusing first on the duty to consider ADR within a party or side, the Committee emphasizes that each lawyer has a duty to teach and advise her or his client thoroughly about the relative value of each ADR option in the specific setting of the case at bar. Toward this end, district courts might add a requirement that both counsel and client certify (*e.g.*, in the case management statement) that they have read specified court materials explaining ADR processes and have discussed the possible value of each of the available dispute resolution options.

One district court, for example, includes the following section in the standard form "Joint Case Management Statement and Proposed Order" that all parties must submit before the first Rule 16 conference:

> SIGNATURE AND CERTIFICATION BY PARTIES AND LEAD TRIAL COUNSEL Pursuant to Civil L.R. 16-6, each of the undersigned certifies that he or she has read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," discussed the available dispute resolution options provided by the court and private entities, and has considered whether this case might benefit from any of the available dispute resolution options.
>
> Dated:_____
>
> _____
> [Typed name and signature of each party and lead trial counsel]

The second component of "considering" ADR involves communication across party lines. Generally, it is preferable to involve the parties themselves in this communication, but in some instances it may be appropriate for counsel to conduct the meet and confer without direct client participation. See endnote 9 to this Local Rule.

ix In this context, the word "parties" does not necessarily mean the litigants themselves. While the Committee believes that the litigants should play a major and active role in the processes through which participation in ADR is considered, the Committee also recognizes that in some instances that participation need not include direct involvement in the "meet and confer" session that the Model Rule requires. When counsel have discussed the pertinent considerations and process options thoroughly with their clients in advance, there may be no need to have the clients also directly involved in the "meet and confer. The wisdom of direct client involvement in the meet and confer also may depend on the level of client familiarity with ADR, as well as the client's general sophistication about litigation in federal court. Courts and counsel must be careful, however, not to assume too much in these arenas -- a surprising percentage of clients who are quite knowledgeable about litigation (e.g., repeat institutional players) think they know more about ADR than they really do.

x Section 652(a) provides that *any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation [or] early neutral evaluation.* (Emphasis added.)

Within the Ninth Circuit, the only district court that is statutorily authorized to require parties (to certain kinds of cases) to participate in arbitration under Section 654(d) of the ADR Act of 1998 is the Northern District of California.

xi Id.

xii Section 653(a) requires each district to *adopt appropriate processes for making neutrals available for use by the parties for each category of process offered* and *to promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) directs courts to establish training and credential criteria for each neutral panel. These criteria could be set out in a general order or in the sections of this Local Rule devoted to the specific ADR processes. Examples of requirements that courts might impose for ADR neutrals are set forth in endnote 33.

xiii See endnote 5 above, for comments about the use of neutrals who are not on the roster already approved by the court.

xiv Courts should consider whether the designation of a neutral should ordinarily be done by someone other than the assigned judge. Some commentators have suggested that the following kinds of concerns can arise when the assigned judge selects the ADR neutral.

This practice might cause the parties to worry more that the neutral will disclose confidential ADR matters to the judge.

Being selected by the assigned judge might make the neutrals feel more pressure to "deliver" in the ADR process -- and thus might distort the role the neutral is supposed to play -- *e.g.*, might cause the neutral to put pressure on the parties to settle.

The assigned judge might not have thorough knowledge of the panel of neutrals, and so might not make the best informed selection, or might tend to appoint repeatedly the same small group -- leading to concerns about an elite club of lawyers who enjoy a special level of trust by the judge.

The fact that the judge has selected a particular neutral might be construed by other members of the bar as an expression of special confidence by the judge in that lawyer -- leading other lawyers to question the levelness of the playing field when they appear before that judge and their adversary is a lawyer the judge has selected for this important work.

Similarly, selection of the neutral by the judge might lead other members of the bar to worry that the judge feels indebted to the lawyer who served as the neutral (owes him or her a favor), especially if that lawyer- neutral was not compensated or helped settle some of the cases the judge otherwise would have been required to try.

xv In section 653(b) the Act requires each court to *issue rules . . . relating to the disqualification of neutrals.* The duty to issue such local rules attaches, under the statute, until national rules are promulgated on this subject -- but it is likely to be years before pertinent national rules are adopted. "Arbitrators" are the only neutrals that the Act expressly subjects to the disqualification rules set forth in 28 U.S.C. § 455.

xvi "Arbitrators" serving in programs formerly authorized under Title IX of the Judicial Improvements and Access to Justice Act) are compensated with public funds, not by the parties.

xvii Section 658(a) requires each court, subject to regulations approved by the Judicial Conference, to *establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered* in each ADR process. At its meeting in September of 1999, the Judicial Conference adopted one binding regulation and two non-binding sets of guiding "principles" related to compensation of ADR neutrals in court-annexed programs. The regulation states:

COMPENSATION OF ADR PROVIDERS:

a. Approve for inclusion in the *Guide to Judiciary Policies and Procedures* the following regulation regarding the compensation of alternative dispute resolution neutrals (including arbitrators):

All district courts must establish a local rule or policy regarding the compensation, if any, of neutrals for services rendered under Chapter 44 of Title 28, United States code, §§ 651-658. Discretion remains with the court as to whether that rule or policy should provide that neutrals serve *pro bono* or for a fee. As long as funding is not provided pursuant to the Act, the Judicial Conference does not encourage courts to institute rules or policies providing for court-funded, non-staff alternative dispute resolution neutrals.

b. Adopt the two principles and accompanying commentary as set out [below].

The recommended principles are as follows:

(a) Where an ADR program provides for the neutral to receive compensation for services, the court should make explicit the rate of and limitations upon compensation.

Commentary: Methods of compensation for ADR neutrals vary widely from court to court. Some courts use a panel of neutrals who serve completely *pro bono*. Other courts use a modified program, where a certain number of hours are provided free of charge, with a fixed hourly rate thereafter to be paid by the parties, while still others have a fixed per-case payment schedule. Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mechanism is decided upon, the court's rule should minimize undue burden and expense for parties electing to use ADR.

(b) *When an ADR program provides for neutrals to receive compensation, the court should require both the neutrals and the parties to disclose all fee and expense requirements and limitations in the ADR process. A participant who is unable to afford the cost of ADR should be excused from paying.*

Commentary: Where courts permit neutrals to charge a fee to ADR participants, fee disputes can be prevented through disclosure of the fee arrangements. If the court intends to require a certain level of *pro bono* service in order to participate as a neutral in a court-annexed ADR program, the level of the *pro bono* commitment should be explicitly defined.

See also note 33, ¶ 9, below.

xviii As pointed out in the preceding note, at its meeting in September of 1999, the Judicial Conference of the United States approved a non-binding "principle" urging district courts whose programs provide for compensation of neutrals to "make explicit the rate of and limitations upon compensation."

In the spirit of this "principle," the Committee observes that several kinds of problems can ensue when courts leave the rate of compensation to be negotiated between the parties and the prospective neutral. First, the court risks losing control over the rate. In so doing, the court increases the risk that the ADR proceedings conducted in its name will impose unjustifiable economic burdens on the parties.

This risk is magnified by the second potential problem: a litigant who is "negotiating" with the person who will serve as the neutral might fear that the neutral will be angry or resentful if the litigant expresses any reluctance to pay whatever fee the neutral proposes, or if the litigant proposes a rate of compensation that could be construed as ungenerous or unflattering to the neutral. A litigant in that position has no real bargaining power -- and would justifiably be resentful of being put in this position by a court rule (a position in which the litigant could be taken advantage of unfairly).

Finally, many good mediators feel that "negotiating" a fee can put a strain on their relationship with the parties -- and either distort their role or make it more difficult for them to build the kind of trust from the parties that they need to serve effectively.

xix Section 658(b) directs that each district court *may reimburse arbitrators and other neutrals for actual transportation expenses . . . incurred*, under regulations prescribed by the Director of the AO.

xx For example, in the Northern District of California, the neutrals are expected to serve without compensation for the first four hours of the ADR session.

xxi In the Act, Congress explicitly conferred "quasi-judicial function" immunity only on "arbitrators." See 28 U.S.C. § 655(c). There is, however, case law authority for the view that court-appointed mediators and early neutral evaluators are agents of the judicial process performing functions sufficiently similar to and integral with the judicial function to warrant entitlement to this immunity. See, e.g., Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994). A good many states also have conferred immunity on neutrals serving in ADR programs in state courts. *See, e.g., Col. Rev. Stat. Ann. § 13-22-507 (West 1998) [Immunity]; Fla. Stat. Ann § 44.107 (West 1998) [Immunity for Arbitrators & Mediators]; Ga. Code Ann. ADR VII(B) [Confidentiality and Immunity]; Me. Rev. Stat. Ann. Tit. 4, § 1506 (West 1997) [Immunity from Civil Liability].*

Immunity is a privilege that should be conferred only when a court has met its responsibility to undertake reasonable steps to assure quality control over the neutrals who serve under the court's auspices. Such steps should include:

(a) imposing specific background, experience, training, and skill qualifications on all neutrals who serve in the court's program;

(b) establishing mechanisms to assure that neutrals maintain their skills and knowledge at an appropriate level;

(c) providing means by which parties and lawyers can give feedback to the court about how the neutrals performed -- and for addressing shortfalls in performance by additional training or by removing persons from the rosters of approved neutrals;

(d) requiring each neutral to take the oath of office in 28 U.S.C. § 453; and

(e) requiring each neutral to comply with all pertinent disqualification norms, including those set forth in 28 U.S.C. § 455.

xxii This provision would not apply if the court, *e.g.*, through an ADR Administrator, designates the neutral without earlier input from the parties.

xxiii In some ADR programs, the assigned judge will not know the identity of the neutral who will serve when the judge issues the Order of ADR Reference -- *e.g.*, because a program administrator will designate the neutral later, after locating someone from the roster who is available during the contemplated time frame, who has the appropriate subject matter expertise, and who clears the disqualification rules.

xxiv The Model Rule provides for submission of separate statements only when the ADR process will be "mediation" because in no other ADR process is it appropriate for the parties to communicate with the neutral *ex parte* (except about scheduling) before the ADR session.

xxv Sections 657(a), (b) and (c) of the Act govern the confidentiality of arbitration proceedings and awards. If a timely demand is made for trial *de novo*, the action will be *restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration*, and the arbitration award *shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment . . . or the action has otherwise terminated.*

xxvi See, e.g., Rinaker v. Superior Court, 62 Cal.App.4th 155 (3d Dist. 1998).

xxvii Section 652(d) provides that until nationally applicable rules are promulgated under chapter 131 of Title 28, *each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution process and prohibit disclosure of confidential dispute resolution communications.* National rules on this subject are not likely to be in effect for several years.

xxviii See, e.g., Olam v. Congress Mortgage, __ F.Supp. __ (N.D. Cal., October , 1999).

xxix To reduce the risks that can attend disclosure of otherwise confidential ADR communications to the assigned judge, it generally would be preferable to have a judge to whom the underlying case is not assigned conduct proceedings to determine whether a party has violated a rule or committed some other wrong during an ADR session. Parties who fear that their settlement communications will be disclosed to the assigned judge are likely to participate less fully in the ADR

process. And if the case is still being litigated after the ADR session, there is a risk that the assigned judge would be exposed to matters that might raise concerns about his or her impartiality if he or she heard and determined motions alleging violations of rules or other norms during the ADR session. If counsel know that such motions will be heard by the assigned judge, there also is a risk that such motions will be filed for tactical reasons.

xxx The word "person" in this section includes any lawyer or other representative of a party as well as any person serving as a neutral in a court-sanctioned proceeding.

xxxi For reasons described in endnote 29, above, it is generally preferable for a judge other than the judge to whom the underlying case is assigned to hear and determine motions alleging violations of the rules or other wrongs during or in connection with the ADR session.

xxxii In some states, statutes define "mediation" and/or "mediators."

xxxiii Section 653(a) requires each district court to *promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) requires *each person serving as a neutral in an alternative dispute resolution process [to] be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process.* Each district *may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in* ADR.

The following are examples of the kinds of requirements for inclusion in a panel of neutrals that some courts impose:

(1) Must have been a member of the bar *[or some other licensed professional organization]* in good standing for *[5], [7], [10], [15]* years; and/or

(2) Must have successfully completed a court-approved *[or court-conducted]* training course *[or a specified number of hours of court-approved or conducted training]* in *[the specific ADR process in which the neutral would serve, e.g., in mediation, in ENE, in arbitration, etc.]* The training must have included:

(a) instruction about the purposes and philosophy of the court's ADR program, as well as instruction in the court rules that are relevant to the neutral's service (including especially rules related to confidentiality, integration with case management, restrictions on communication with the assigned judge, and limits on the neutrals' powers and responsibilities);

(b) instruction in the characteristics and purposes of the particular ADR process (including the features that distinguish it from other ADR processes), the procedures and methods that it appropriately includes;

(c) monitored role playing -- with feedback and evaluation of performance -- and assessment by faculty of the candidate's suitability for the particular neutral role (appropriate temperament, patience, demeanor, listening and communication skills, etc.); and

(d) instruction in pertinent ethical issues and norms, e.g., how to identify ethical issues that might arise during service and suggested ways to respond, as well as standards for conflicts of interest and disqualification.

(3) Must have conducted or observed/co-conducted at least *[5] [10] [20] [mediations], [arbitrations], [early neutral evaluations];*

(4) Must take the oath in 28 U.S.C. § 453;

(5) Must abide by the disqualification rules of 28 U.S.C. § 455;

(6) Must agree to participate *[annually] [semi-annually] [periodically]* in court-approved refresher training or advanced training;

(7) Must agree (A) to permit participants in the ADR sessions they host to give feedback to the court about how the process was conducted and (B) to respond appropriately to suggestions about how to enhance the value of the process;

(8) ***[For early neutral evaluators and for arbitrators:]***
Must have substantial practice experience in and knowledge of the subject matter that will predominate in the kinds of cases in which the neutral will serve;

(9) ***[For courts that elect to require some pro bono service by members of their panels of neutrals:]*** Must agree to

For more detailed discussion of issues related to qualifying people to serve in court-connected ADR programs, and for descriptions of standards imposed in a variety of different courts, see, e.g., *Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs* (published by the State Justice Institute and Society of Professionals in Dispute Resolution, Washington, D.C. ca. 1997); *National Standards for Court-Connected Mediation Programs* (published by the State Justice Institute, Washington, D.C. ca. 1993); and *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (published by the Federal Judicial Center and the CPR Institute for Dispute Resolution in 1996). See also the standards for service by ADR neutrals that are being developed jointly by the CPR Institute for Dispute Resolution (NY) and the Georgetown University Law School.

xxxiv The ADR Act of 1998 does not specify criteria to qualify to be on the panel of arbitrators. Instead, Section 653(a) authorizes each district court to *promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) requires *each person serving as a neutral . . . [to] be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process.*

xxxv Section 655(b) requires each district that authorizes arbitration under the Act to establish standards of certification for arbitrators and to certify those who serve in this capacity.

xxxvi Section 654(a) specifically provides for the four exceptions listed.

xxxvii See subsection (u)(10) of this Local Rule.

xxxviii Section 654(b)(1) specifically directs the court to establish procedures ensuring that the parties' *consent to arbitration is freely and knowingly obtained . . . .*

xxxix Section 655(a) sets out the specific powers of the arbitrator as listed.

xl Section 656 specifically applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

xli Section 654(b)(2) specifically directs that the court shall establish procedures ensuring that the parties' shall not *be prejudiced in any way for refusing to participate in arbitration.* Section 654(d), however, permits courts that were previously authorized to establish presumptively mandatory arbitration programs to continue such programs.

xlii Section 657(a) and (b) provides for filing and sealing an arbitration award.

xliii Section 657(c)(3)(A)-(B) provides for the exclusion of the evidence of arbitration.

xliv Section 657(c)(1)(2) provides for the trial *de novo* of arbitration awards.

xlv Section 651(e) provides: *This chapter shall not affect title 9, United States Code.*

Guide to COURT-RELATED ADR

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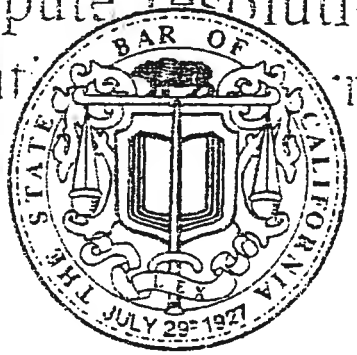

State Bar of California
Office of Research
September 1993

Guide to Court-Related ADR:
Programs to Facilitate Settlement

State Bar of California
Office of Research
September 1993

This guide is not intended to provide a legal opinion or legal advice. Readers who are interested in designing or implementing a court-related ADR program should independently determine whether there is authority to support the program features which are being considered, including such things as mandatory participation requirements, incentives to participate in voluntary programs, incentives to settle in the ADR process, and confidentiality. Readers should not rely on the discussions of legal provisions contained in this document, but should perform their own legal research.

The court-related ADR programs described in this guide are subject to change. Readers should not assume that program descriptions and forms contained in this guide accurately reflect the features, procedures and forms of these court-related programs at any future date.

Points of view or opinions expressed in this Guide are those of the authors. They have not been adopted or endorsed by the Board of Governors and do not constitute the official position or policy of the State Bar of California.

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I. INTRODUCTION

Purpose of This Guide
Why Interest in ADR Has Grown
History of Court-Related ADR in California
The State Bar's Involvement in Court-Related ADR
Role of ADR in the Court Process
Organization of This Guide

This is a guide to planning, designing and implementing court-related alternative dispute resolution (ADR) programs to facilitate the settlement of civil cases. As used in this guide, "court-related ADR" refers to three different types of programs: ADR programs administered through the courts as alternatives to traditional court trials; ADR programs not administered by the courts but to which courts refer cases; and policies and procedures courts use to make litigants aware of ADR options or to refer cases to ADR processes.

The court system is the backdrop against which successful settlements, including those resulting from ADR processes, often emerge. However, statistics show that most civil disputes are not resolved at trial, and court-related ADR programs hold substantial promise for resolving these cases earlier, at less expense and with less emotional toll on the parties and any existing relationships they may have.

Significant variations exist in the level of knowledge and familiarity with ADR within the bar, bench, court administrative staff and public. Because the guide is designed to be a useful resource for all who are interested in developing court-related ADR programs, some subjects may be covered in greater detail than those who are more familiar with ADR may feel is necessary. We hope that those already knowledgeable about ADR will treat these sections simply as a quick checklist or tool for review.

Purpose of This Guide

A popular perception is that most cases are resolved at trial. However, fewer than 10 percent of civil cases actually go to trial. Many believe that, properly used, ADR can

resolve cases earlier in the court process, if not before filing,[1] thus obviating the need for the extensive motion practice, discovery and trial preparation that accompany settlements reached shortly before trial. Even when cases do not settle as a direct result of an ADR process, the use of ADR can substantially benefit the court and the parties; for example, it can clarify the issues in dispute, result in better and earlier case analysis, and conserve resources by generating better focused discovery and motion practice plans. This guide is intended to assist the bench, the bar, court administrative staff and the public in developing court-related ADR programs which will achieve these goals.

This guide presents options, describes design and implementation issues, and identifies recommendations concerning court-related ADR programs. It attempts to bring together information from a wide variety of sources. These include books, articles and other literature relevant to court-related ADR programs,[2] standards and guidelines for court-related ADR programs (proposed by the Judicial Council of California and organizations representing ADR providers), and information concerning innovative court-related programs now operating in the courts. In order to make this guide as useful as possible for those interested in developing programs in California, wherever possible, information pertaining to California is used, including information gathered from discussions with program planners and those who have already implemented innovative ADR programs in California courts.

No single "right" way to design or implement a court-related ADR program is presented in this guide. The field is too new for this; court-related ADR is a rapidly evolving

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1 Several innovative programs for pre-filing resolution of cases through ADR are currently under study in California. These programs are beyond the scope of this guide; pre-filing ADR, however, is an essential component of any comprehensive approach to appropriate dispute resolution.

2 The subject of alternative dispute resolution has produced a vast literature. In reviewing this literature, the criteria used to determine whether to utilize specific source information in this guide were: (a) materials with a focus on court-related ADR programs; and (b) materials with a specific focus on program planning, design and implementation issues. Of the materials reviewed (see full listing at Appendix A), the following met these criteria and were central in developing this guide: Elizabeth Plapinger and Margaret Shaw, Court ADR: Elements of Program Design, CPR Legal Program, CPR Judicial Project (1992); Emerging ADR Issues in State and Federal Courts (ABA Litigation Section, 1991) [This publication includes the following articles: Wayne D. Brazil, "Institutionalizing ADR Programs in Courts", at p. 52; and Craig A. McEwen, "Evaluating ADR Programs", at p. 204.]; Society of Professionals in Dispute Resolution, "Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts" (January 1991); National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and The Institute for Judicial Administration (no date given); Principles and Standards Concerning Alternative Dispute Resolution, Administrative Office of the Courts (May 29, 1992); and Robert Barrett, Jay Folberg and Joshua Rosenberg, "Use of ADR in California Courts; Findings and Proposals", Report to Judicial Council of California Advisory Committee on Dispute Resolution (December 1991).

subject and every new court-related ADR program is, to some extent, an experiment. Instead, this guide identifies issues that program planners and administrators may wish to consider in developing a court-related ADR program and describes the variety of approaches others have taken or believe should be taken to address these issues. It is our hope that this guide will be a helpful resource for those who are interested in planning, designing, or implementing a court-related ADR program.

Why Interest in ADR Has Grown

Interest in ADR has grown tremendously over the past decade. The Society of Professionals in Dispute Resolution suggest that this can be understood to some degree as a "reaction by citizens to the perceived inefficiencies and economic and other costs of litigation."[3] In their report, the Judicial Council ADR consultants identify in greater detail some of the recent developments which suggest both the need and the opportunity for a new approach to California's procedures for helping citizens resolve disputes. The need appears to be attributable to a number of factors, including: (1) an increase in the volume and complexity of court cases; (2) proportionately less funding available for courts and judges; (3) increased pressure on litigants to settle due to the increasing costs of litigation and delays in getting cases to trial; and (4) a crisis of citizen confidence in our legal system. However, the consultants point out that at the same time these pressures were growing, so too was the recognition by the bench, bar, and legislature that alternatives to litigation should be more fully utilized, that a wealth of ADR resources exist outside the courts and successful ad hoc ADR experiments are operating within the courts.[4] As the use of ADR has grown both outside and within the court system, there has been a growing acknowledgement of the benefits that appropriate ADR processes can offer litigants. These benefits include reducing the time, cost and stress of resolving disputes and increasing party satisfaction in many cases.[5] An increasing number of bar associations have created ADR committees or sections, and local bench/bar activity to consider expansion of court-related ADR programs is probably at an all time high. In addition, ADR is becoming the dispute resolution process of choice for many clients, including large corporations. This has created an incentive for lawyers and law firms to

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[3] 26, p. 100: These and all subsequent citations by number refer to materials listed at that number in the bibliography at Appendix A.

[4] 20, pp. 1-6.

[5] 7, pp. 12-17.

develop a greater understanding of ADR processes and to obtain more experience in their use. In addition, a perception that a litigation practice has become too acrimonious, unpleasant and draining has led a number of lawyers to explore practice as ADR neutrals (i.e., mediators or arbitrators) over traditional law practice.

History of Court-Related ADR in California

Alternative processes for reducing the cost, time and stress of dispute resolution have long been effectively used in California and elsewhere. For example, for over a decade, California has had court-annexed judicial arbitration. As a general rule, most civil cases are referred by courts to non-binding arbitration if the amount in controversy does not exceed $50,000. Consequently, current discussions regarding court-related ADR in California center on processes other than judicial arbitration, e.g., mediation and neutral evaluation. These processes focus on assisting settlements. This is in contrast to judicial arbitration, where the role of the arbitrator is to adjudicate, albeit on a non-binding basis.

The role of California courts in facilitating settlement is also not new. Mandatory and voluntary settlement conferences have been a feature of California courts for many years and are required by Judicial Council rule in long cause matters in certain superior courts.[6] Some courts have used pro tems to conduct these conferences. In conducting settlement conferences, both judges and pro tems have employed techniques including mediation and neutral evaluation. Settlement conferences, however, have tended to come late in the litigation process, close to the date set for trial. By contrast, most new proposals for expanded use of ADR in the courts focus on early settlement activities before a trial date has been set, and before the litigants and the court have expended great amounts of time and money on motions, discovery and trial preparation.

In addition to judicial arbitration and settlement, more recent legislation has contained substantial encouragement for courts to use ADR processes. The State of California has adopted a policy set forth in the Dispute Resolution Programs Act ("DRPA"), enacted in 1986, supportive of the resolution of disputes through alternatives to the courts, such as mediation, conciliation, and arbitration because formal court proceedings can be

6 Cal. Rules of Court, rule 222.

unnecessarily costly, time-consuming and complex.[7] The DRPA authorizes counties to collect additional filing fees to fund non-profit dispute resolution programs, including those that are court-related.[8]

The Trial Court Delay Reduction Act of 1986 ("fast track"), now applicable to all superior courts, requires that courts "establish procedures for early identification and timely and appropriate handling of cases within the program which may be amenable to settlement or other alternative disposition techniques."[9] More recently, the Trial Court Realignment and Efficiency Act of 1991, which required that courts prepare trial court coordination plans, identified "the coordinated or joint use of alternative dispute resolution programs" as one possible element in such a plan.[10]

In recent years, the Judicial Council has studied and sought to promote court-related ADR programs. In 1991 the Council created an advisory committee on alternative dispute resolution. The Council also commissioned a study of the use of ADR in California courts. The research team which undertook this study conducted a survey of ADR programs in California courts and made recommendations to the advisory committee. Subsequently, the advisory committee recommended, and the Judicial Council adopted, general principles concerning alternative dispute resolution in the

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7 The statutory language is as follows:

"The Legislature hereby finds and declares all of the following:

...

(d) Courts, prosecuting authorities, law enforcement agencies, and administrative agencies should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved."

...

(f) The Judicial Council should consider, in redrafting or updating any of the official pleading forms used in the trial courts of this state, the inclusion of information on options for alternative dispute resolution." (Bus. & Prof. Code, § 465)

"It is the intent of the Legislature to permit counties to accomplish all of the following:

...

(e) Encouragement of courts, prosecuting authorities, public defenders, law enforcement agencies, and administrative agencies to work in cooperation with, and to make referrals to, dispute resolution programs." (Bus. & Prof. Code, § 465.5)

8 Bus. & Prof. Code, § 465 et seq. and Code Civ. Proc., § 470.3.

9 Gov. Code, § 68607(e).

10 Gov. Code, § 68112(b)(8).

courts, and several standards of judicial administration relating to the coordination of ADR programs and the criteria for referral of cases to dispute resolution providers.[11] These principles and guidelines and the consultant's reports are discussed throughout this guide in connection with the issues to which they pertain.

Role of ADR in the Court Process

The development of court-related ADR programs is but one way in which courts are evolving and adapting to changing circumstances. In responding to change, a tension may exist between viewing ADR programs as a "quick fix" for problems currently facing the court system and integrating ADR into judicial dispute resolution processes in a way that maintains the quality of justice. For example, some courts may view ADR programs primarily as a means of removing cases from crowded civil calendars. However, a leading exponent of court-related ADR, Magistrate Judge Wayne Brazil of the U.S. District Court for the Northern District of California, cautions that there are substantial dangers in adopting this as the predominant rationale for establishing an ADR program.[12] He points out the tremendous importance of maintaining public trust in public dispute resolution processes and notes that, because of this, "we must be sure that neither the programs we recommend nor the ways we justify or promote them undermine or detract from public trust in our courts as institutions."[13] Because of this need to maintain public trust, he argues, court-related ADR programs must be of sufficient quality that they will be respected by those using them "both in the fairness and carefulness of the processes that are employed and in the persons who preside at them."[14]

As interest in and familiarity with ADR develops, it is crucial that court-related ADR programs be viewed as complementary to traditional adjudication in the courts, not as a substitute for court processes. This view is espoused by the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (SPIDR) in a recent report entitled "Public Encouragement of Private Dispute Resolution: Implications, Issues, and Recommendations". The Report emphasizes that ADR can never fully

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[11] 17, 18 and 19.

[12] 12, p. 57.

[13] 12, p. 55.

[14] 12, p. 57.

replace the courts which must interpret the law, establish precedent or provide a forum for decision by a jury of one's peers.[15]

The State Bar's Involvement in Court-Related ADR

During this period of growth and developing interest in court-related ADR, a substantial focus of State Bar efforts in the administration of justice area has been improving citizen access to the California justice system. This has included playing an active role in stimulating expanded use of ADR, and in educating attorneys, judges and the public about its use for resolving disputes.

In 1986, the State Bar supported the adoption of the DRPA and the State Bar Office of Legal Services' staff includes a Dispute Resolution Program Developer who works with local bar associations, courts and ADR programs, among other things, to assist them in participating in the DRPA.

In 1989 and 1990, the State Bar brought together a cross-section of participants in the California justice system in six separate colloquia held throughout the state to identify problems in the justice system and possible solutions. Numerous California trial court judges and court staff participated in these meetings, along with experienced civil and criminal attorneys, district attorneys, public defenders and police officials. There was virtually unanimous agreement that enormous growth in criminal and civil caseloads has undermined the ability of California courts to handle civil cases. In addition, participants suggested that many civil cases should be able to be settled without the delay, cost and stress of extended litigation. There was a concern that members of the public, especially those with lower and middle incomes, are at risk of being excluded from the system for the resolution of civil disputes. Expanded availability and use of ADR processes were seen by many participants at these colloquia as a way of relieving some of the current pressures on the courts and improving citizen access to effective and affordable dispute resolution services.

As an outgrowth of these colloquia, the State Bar Board of Governors adopted an ADR Action Plan in 1991 which recommended, among other things, the expansion of court-related ADR programs. The Action Plan called for pilot projects to assess the feasibility of referring cases to an ADR process and to experiment with "multi-door courthouses"

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[15] 26, p. 100.

that would provide a wide range of ADR processes in the courts or through referral.

During 1992 and 1993, the State Bar conducted several roundtable discussions in both Northern and Southern California which focused on court-related ADR. These meetings brought together ADR bar leaders, ADR providers and court staff from a number of California's counties with a focus on superior court programs. These meetings revealed that there is a great deal of activity in the area of court-related ADR. In some counties courts and bar associations - particularly those featured in this guide - are already implementing programs; others are in the planning stage for programs designed to expand ADR options in the courts. It is hoped that this guide will be a useful tool for courts and bar associations that are in the process of considering, planning for or implementing an ADR program.

Organization of This Guide

Chapter Two of this Guide contains descriptions of six innovative court-related ADR programs currently operating in California's superior courts, including several administered by local bar associations.[16]

Chapter Three explores issues that should be considered in planning for a dispute resolution program. Some are process issues such as who should be involved in the planning process, how to assess a court's need for an ADR program, and what options may best achieve program goals. This section also discusses several substantive threshold issues. These include responsibility for program administration, (and specifically, the degree of court involvement in operating a program); sources of program funding and the impact of funding availability on program design; and considerations regarding size, scope and timing of court-related ADR projects.

Chapter Four considers design and implementation issues. These include methods of communicating ADR options to attorneys and clients; whether participation in court-related ADR should be mandatory or voluntary; descriptions of ADR processes courts have used or to which they have referred parties, and the types of cases considered most

[16] Not all of the ADR programs operating in these courts are described; judicial arbitration and special masters programs, for example, are not covered here. This chapter, and much of the remainder of this guide, focuses on some of the less familiar, more innovative programs currently operating in the California courts. The primary focus of this guide is on programs in superior courts. There are also other ADR programs operating in municipal courts of California, as well as the Federal courts, which are not covered in this guide.

II. DISPUTE RESOLUTION PROGRAMS IN THE CALIFORNIA COURTS OVERVIEWS OF SIX INNOVATIVE PROGRAMS

A. Introduction
B. Los Angeles Superior Court Voluntary Settlement Officer Programs
C. San Francisco Superior Court Early Settlement Program for Large Cases
D. Marin Superior Court Status/ADR Assessment Conference Program
E. San Diego Superior Court Case Management Conference and Voluntary Mediation Referral Programs
F. Contra Costa Superior Court Multiple ADR Program Options
G. Ventura Superior and Municipal Courts Multiple Mandatory ADR Processes

A. INTRODUCTION

There are many ADR programs currently in use in California's trial courts. Some of these are probably familiar to most judges and practitioners, including judicial arbitration[1] and judge-conducted mandatory settlement conferences, both of which tend to occur relatively late in the trial preparation process.[2] Others, including most of those featured in this section, are designed to encourage the use of ADR processes to facilitate earlier settlement of civil cases. This chapter provides a brief description of innovative court-related ADR programs in six California courts.[3] Each of these programs is described in greater detail in chapter VII of this guide.

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1 Code Civ. Proc., §§ 1141.10 et seq. and Cal. Rules of Court, rule 1600 et seq.

2 Cal. Rules of Court, rule 222.

3 This information is based on local court rules and data obtained during interviews from April through August 1993. Not all of the ADR programs operating in these courts are described here. The courts' judicial arbitration programs, for example, are not discussed in this chapter, although they are covered in Chapter VII.

B. LOS ANGELES SUPERIOR COURT VOLUNTARY SETTLEMENT OFFICER PROGRAMS

In Los Angeles County, Dispute Resolution Services ("DRS"), a non-profit corporation sponsored by the Los Angeles County Bar Association and funded in part through the Dispute Resolution Programs Act ("DRPA"), has worked with judges and court administrators in four superior court locations to develop voluntary settlement conference programs using volunteers as settlement officers. Currently these programs are in place in Los Angeles Central, Long Beach, Pasadena, and Southeast superior courts.[4] All four of these programs are co-sponsored by local bar associations; for example, the Los Angeles Superior Court Central program, Joint Association Settlement Officer Program ("JASOP"), is co-sponsored by the Litigation Section of the Los Angeles County Bar Association, the American Board of Trial Advocates, the Association of Business Trial Lawyers and the Association of Southern California Defense Counsel.

Each of these programs began as a pilot project tailored to the needs of the particular court and then developed into a permanent program. Because they were individually designed, these programs differ from each other in a number of respects, including the types of cases which are eligible for the program, the timing of referral to the program and the individuals who are eligible to serve as neutrals conducting the conferences. While there are individual differences between these settlement officer programs, they also share certain features:

- All programs are administered by DRS. DRS and co-sponsoring local bar associations recruit the volunteer neutrals, and DRS trains all of these neutrals. Because these functions are performed by bar associations, these programs are run at a relatively low cost to the courts;

- All programs were designed to reduce caseload and to save costs for the court and the litigants;

- All programs are voluntary; whether referral to the program is initiated by the attorneys or by the court, all parties must voluntarily agree to participate in the settlement conference;

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[4] There are also similar programs in four municipal courts in Los Angeles: Los Angeles, Beverly Hills, Long Beach, and Santa Monica.

- All programs provide for confidentiality of statements made during the settlement conference and documents produced; participants are required to sign a confidentiality agreement pursuant to Evidence Code sections 1152 and 1152.5 (see Appendix B, LA-4); and

- The parties are not charged a fee for these settlement officer services.

C. SAN FRANCISCO SUPERIOR COURT EARLY SETTLEMENT PROGRAM FOR LARGE CASES

San Francisco Superior Court has an early settlement program developed by representatives of the Bar Association of San Francisco ("BASF") and the court in the Spring of 1985 with the goal of reducing the court's backlog of cases. Like the settlement officer programs in Los Angeles, this program uses volunteers to conduct the settlement conference, is administered by the bar association and is a relatively low-cost program for the court. BASF provides an early settlement conference coordinator who is responsible for such functions as scheduling volunteer neutrals for panels, scheduling ases for conferences and notifying counsel of their scheduled conferences. However, unlike the Los Angeles programs, participation in San Francisco's early settlement program may be either voluntary or mandatory; cases are assigned to the program either upon the stipulation of the parties or upon order of the court.

The cases eligible for San Francisco's early settlement program are limited, excluded from the program are all cases with amounts in controversy of less than $50,000, (1) asbestos cases; (2) DES cases; (3) IUD cases; (4) short cause cases; (5) unlawful detainer cases; (6) cases with calendar preference; and (7) cases whose complexity suggests that program participation would be ineffective. Currently about 450 cases are handled by the program per year. Cases referred to the program by the court are selected by a court commissioner based on (1) whether the potential expenditure of costs and attorney's fees, when weighed against the potential recovery, suggests that the early settlement program is in the best economic interest of the litigants and (2) whether it appears that the resolution of the case might be assisted by participation in the program. The settlement conferences generally occur three to four months after a case is referred to the program which occurs approximately 150 days after the case is filed. Prior to a settlement conference, the parties must undertake substantial good faith settlement gotiations.

The settlement conferences in San Francisco's early settlement program are conducted by two-member panels of volunteer attorneys, one plaintiffs' and one defense attorney, with experience in the area of law involved in the case. Although there is no set format for the settlement conferences, a brief meeting with all the parties is generally held at the beginning of the conference in order to explain to the parties the process and the role of the panelists. Each party, in the presence of counsel, is also given time to tell his or her story. After this, panelists may meet with both parties and counsel or with counsel alone, depending upon the circumstances. Panelists are encouraged to speak candidly about the strengths and weaknesses of the parties' positions. Information given to panelists in confidence is kept confidential. Panelists also discuss with the parties the pressures, risks, time commitment and costs of trial and encourage the parties to continue their efforts toward settlement.

D. MARIN COUNTY SUPERIOR COURT STATUS/ADR ASSESSMENT CONFERENCE PROGRAM

In Marin County, the superior court judges and court administrators worked with the Marin County Bar Association to design an ADR program which has required no additional funding to implement. Aspects of the program are administered by both the court and the bar association using existing personnel and resources. The program planners' primary goals in designing this program were to reduce the court's backlog of cases and to reduce court costs.

Marin County Superior Court's ADR program distinguishes itself by being both early in the litigation process and applicable to most civil cases. It combines distribution of information designed to educate attorneys and clients about ADR and encourage their voluntary participation in ADR processes with a status/ADR assessment conference. When a complaint is filed, the clerk provides the plaintiff with a general notice concerning the court's delay reduction program and ADR; this notice lists examples of ADR programs available in Marin County (binding and non-binding arbitration, mediation, neutral case evaluation and the use of a special master), urges attorneys to review these programs with their clients, and notes that all of the judges in the court are supportive of the use of ADR programs and are available to meet with the parties before the status conference to assist in selecting the most appropriate ADR mechanism for the case (see Appendix B, MA-1). At the same time, the clerk also provides the plaintiff with (1) notice of the first status/ADR assessment conference (see Appendix B,

MA-2); (2) a blank status conference questionnaire (see Appendix B, MA-3); and (3) an ADR stipulation form (this form provides simple check-off boxes which the parties can use to stipulate to binding arbitration, non-binding arbitration, mediation, neutral case evaluation, special master or other ADR processes) (see Appendix B, MA-4). The plaintiff is required to serve all of these forms, including the ADR notice, on the defendant together with the complaint, so that both sides are aware of the court's ADR policy and the upcoming assessment conference.

The first status/ADR assessment conference is scheduled by the court clerk within 140 days of the filing of the complaint. At this conference, the judge tries to determine if the case is appropriate for ADR, discusses available ADR options with the parties, and encourages the parties to stipulate to the use of an appropriate ADR process. Party participation in this conference is mandatory, but participation in an ADR process (other than judicial arbitration or a mandatory settlement conference) is voluntary. If the parties voluntarily agree to participate in an ADR process, they are responsible for paying the cost of that process. Upon the parties' stipulation to a process, the court orders the case referred to that process and sets a date for a future conference at which it can follow up on this referral.

Parties are also free to choose their own ADR neutral. The Marin County Bar Association maintains separate lists of ADR neutrals for mediators, arbitrators and neutral evaluators. Copies of these lists are available in the court, the clerk's office and the county law library in order to make it easier for parties to stipulate to an ADR process and provider. Parties may also choose a provider not on the list. The litigants schedule their own ADR sessions with their chosen ADR neutral and are responsible for compensating this neutral.

E. SAN DIEGO SUPERIOR COURT CASE MANAGEMENT CONFERENCE AND VOLUNTARY MEDIATION REFERRAL PROGRAMS

San Diego Superior Court has a combined case management conference, similar to that held in Marin County Superior Court, at which the court and parties consider ADR options. In addition, the court has a voluntary mediation program under which cases are referred to the San Diego Mediation Center ("SDMC"), a private, non-profit community dispute resolution center funded in part through a DRPA grant and the City and County

of San Diego (see Appendix B, SD-2). These programs were developed by the court, with the assistance and cooperation of the SDMC and the San Diego County Bar Association. The court was prompted to explore ADR options by the lack of additional resources available to handle its increasing caseload.

The San Diego Superior Court holds a case management conference at which the court considers, among other things, whether a case is appropriate for ADR and, where appropriate, encourages the parties to stipulate to or orders the case to a suitable ADR process. The court sets this conference for approximately 150 days after the filing of the original complaint and mails out a notice of this conference to all counsel approximately 120 days after the filing of the complaint. Before this conference, counsel for all parties are required to complete a case management conference questionnaire which asks, among other things, whether mediation, judicial arbitration, contractual arbitration, referral to a special master/referee, a settlement conference, or other ADR process would be of assistance/are applicable in the case and when a referral would be appropriate (see Appendix B, SD-1). Party participation in the conference is mandatory. At the conference, if ADR is considered appropriate, the court will ask the parties to stipulate to, or where authorized by statute, the court will order, referral to mediation, judicial arbitration, a special master/referee, pro tem judge, or settlement conference.

Where the parties have stipulated to participate in mediation, the court refers the case to SDMC (see Appendix B, SD-3).[5] The court makes a minute order referring the case to mediation and schedules a follow-up event; a copy of the Minute Order is sent to SDMC so that they may contact the parties if necessary. SDMC does not charge the parties a fee for the initial four hour mediation session in these case. However, the parties pay for any additional sessions that are required; the fees charged are based on a sliding scale. At the conclusion of the mediation, basic information on the mediation including who attended, where, when, and whether an agreement was reached is reported back to the court.

[5] Referrals are also being made to Judicial Arbitration and Mediation Service (JAMS), American Arbitration Association (AAA), the Bates-Edwards Group, and various other individual mediators and private ADR providers; however, parties must agree to pay for the entire mediation session.

F. CONTRA COSTA SUPERIOR COURT MULTIPLE ADR PROGRAM OPTIONS

Contra Costa Superior Court offers a number of different ADR options at different points in the litigation process. In addition to its judicial arbitration program, the court has:

1. a status conference at which alternative dispute resolution programs or procedures available to the parties are considered;

2. the Extra Assistance to Settle Early ("EASE") program in which volunteer attorneys analyze issues and weaknesses in the parties' cases;

3. the Special Mediators Actively Resolving Trials ("SMART") program which uses volunteer attorneys to try to resolve cases on the morning of the scheduled trial date; and

4. the Trials on Time ("TOT") program which offers parties a firm trial date if they stipulate to the use of a pro tem judge.

All of these programs are administered by the court; the Contra Costa County Bar Association assists the court in the recruitment and scheduling of attorneys to serve as volunteer neutrals in the SMART program. Prior to 1993, the administrative responsibilities associated with these programs were performed by existing personnel within existing budgets and one of the judges took an active role in administering the programs. Recently, the court hired an ADR coordinator to staff these programs; this coordinator position is funded by a DRPA grant.

When a civil complaint is filed in Contra Costa Superior Court, the clerk provides the plaintiff with notice of the date of the first status conference which is set within 140 days of the filing of the original complaint (see Appendix B, CC-2). If parties agree, an earlier status conference may be requested. At this conference, the court discusses available ADR options with the parties and may make orders on stipulations to binding arbitration, judicial arbitration, set the date for completion of the arbitration and filing of the award, and/or set a future status conference date for referral to arbitration. The parties may also seek referral to, or the judge on his or her own motion may order the case to, the EASE program.

The EASE program, which began in May 1992, uses volunteer attorneys as referees to review cases in detail with all sides in a two hour conference. The referees make recommendations to the parties and prepare a written report for the court which outlines, for example, the obstacles to settlement and last settlement proposals. The purpose of the EASE program is to analyze issues, investigate weaknesses and provide an early intervention mechanism for an economical, accelerated resolution of the case. Business litigation is considered especially suitable for this program.

The court's SMART program uses volunteer attorneys with expertise in the appropriate subject matter to conduct settlement conferences on the morning of the scheduled trial date. The trial judge may suggest that the case be referred to the SMART program at the time of the issue conference (approximately 14 days before the trial date); participation in the program is voluntary. The volunteer attorney neutral spends at least 1 1/2 to 3 hours reviewing the issues with the litigants and attempts to facilitate a settlement. If the case does not settle during the SMART program, the neutral consults with the judge and the judge may recommend the case for binding arbitration, or another process to move the parties toward settlement.

Contra Costa Superior Court's TOT program is designed for jury trials of four to seven days in length. The parties are guaranteed a trial date certain and a judge who will conduct the trial from 9 to 5 each day if they agree to a pro tem judge appointed under Article 6, section 21 of the California Constitution and Rule 244 of the California Rules of Court.

G. VENTURA SUPERIOR AND MUNICIPAL COURTS MULTIPLE MANDATORY ADR PROCESSES

The Ventura County Superior and Municipal Courts, like the Contra Costa Superior Court, offer a number of different ADR options at various points in the litigation process, including a mandatory early mediation program, a mandatory early settlement conference program, judicial arbitration, and, upon the stipulation of the parties, the use of temporary judges. This system of ADR processes is intended to achieve several goals, including reducing the backlog of cases, saving the court time and money, speeding case resolutions, bringing parties together before they have made a major economic and emotional investment in litigation; providing an alternative to litigation; and encouraging the future voluntary use of mediation through education and familiarization concerning

the process. The program planners believed that with each meeting of the parties, there is an opportunity to narrow the issues which provides the basis for future settlement. All of these programs are administered by the court with existing staff and existing court budgets. The Ventura County Bar Association assists in the recruitment of attorneys to serve as volunteer neutrals in the early settlement conference program.

Ventura's mandatory early mediation program, which began operation in April 1993, was developed through a six-month long formal planning process in which judges and court staff worked with representatives of the Ventura Center for Dispute Settlement and mediators in private practice. The types of cases eligible for referral to mediation in this program are: (1) neighbor to neighbor disputes; (2) sexual harassment, discrimination, employment disputes; (3) homeowner's association, code enforcement disputes; (4) business or partnership disputes; and (5) disputes in which any party requests mediation. Eligible cases are identified and referred to the program approximately 110 days after the filing of the complaint by the court's mediation clerk based on a review of the papers filed. Upon referral by the court, participation in mediation is mandatory. Litigants have the option of selecting a private mediator at their own expense, or appearing before a court appointed mediator at no fee. Because the courts do not have funding to hire mediators, the court-appointed mediators serve without compensation. Volunteer mediators are recruited by the court and are asked to donate at least one day each month (see Appendix B, VE-4). Mediators are not required to be attorneys, but are required to have 32 hours of training before submitting their application and, in addition, completed four to six hours of court orientation plus eight mediations (see Appendix B, VE-5). Policy decisions that affect the mediation program are handled by a special committee that was formed to regularly discuss and plan the program's implementation process.

Ventura's early settlement conference program was implemented through the joint efforts of the court and the Ventura County Bar Association. The settlement conferences in this program are conducted by volunteer attorneys and are held approximately 145 days after the filing of the complaint. Cases are selected for referral to the program by the court's case management attorney based on a review of the parties' joint status report (see Appendix B, VE-2). The types of cases typically referred to these conferences include: cases in which the offer and demand which indicates serious negotiations are under way; real property cases; cases with an emotional component, such as defamation cases; personal injury cases in which damages, not liability, appear to be the central issue in dispute; any case where statements on the joint status report appear to indicate the

parties believe the case will settle before trial; and almost all actions in which both plaintiff and defendant are in pro per. Once a case is referred to the program, participation is mandatory. The volunteer attorney neutrals are recruited by the Ventura County Bar Association and are asked to serve no more than four days per year. After the conclusion of the settlement conference, the neutrals are required to complete a report on the conference for the court, including the substance of the settlement reached or, if the case did not settle, the best good faith settlement offer and demand from each side and any areas of agreement reached.

Ventura also has a **Retired Judges Program** which utilizes temporary judges in the superior and municipal courts to assist in reducing the backlog of cases and to help meet the time standards that are now required of the courts. All parties to the case must stipulate to having their case heard by the temporary judge.

III. PLANNING FOR A COURT-RELATED DISPUTE RESOLUTION PROGRAM

A. Introduction
B. Pre-Decision Input/Strategy
C. Assessment of Needs and Development of Goals
D. Program Leadership and Policymaking
E. Responsibility for Program Administration
F. Funding
G. Size/Scope/Timing of Project

A. INTRODUCTION

In response to burgeoning caseloads, increasing costs, decreasing resources and a view that more should be done to settle cases as early as possible, many of California's superior courts have implemented or are in the process of implementing innovative ADR programs to facilitate settlement in civil cases. Prior to implementing a court-related ADR program, a series of planning issues should be considered. The planning decisions made at this stage can impact many of the decisions about program design and implementation.

Most of the court-related ADR programs featured in this guide were the result of some degree of pre-implementation planning. However, it is noteworthy that the formality of the planning processes varied tremendously from county to county. Some counties used formal step-by-step planning techniques, while others approached the issues more informally. These differences may be due in part to the specific needs of the individual courts, or to differences in the availability of resources. In Ventura County, for example, the planning process for the superior and municipal courts' settlement and mediation programs took about six months and involved judges, court administrators, local bar representatives and local ADR providers. In San Diego, on the other hand, because the staff and necessary expertise were readily available, the court was able to set up its mediation program without a great deal of formal advance planning.

This chapter outlines some of the issues which might be addressed when planning for a court-related ADR program, regardless of the formality of the approach used. Depending upon who originally initiates a proposal for court-related ADR, these planning considerations may vary.

B. PRE-DECISION INPUT/STRATEGY

1. Involving Groups Likely To Be Affected by ADR Program
2. Judges
3. The Bar
4. ADR Provider Community
5. Others
6. Coordinating with Other Courts
7. Obtaining Endorsements

Proposals for new court-related ADR programs generally have come from three sources: the courts themselves, bar associations and ADR providers. The planning considerations discussed in this section vary substantially depending on the source of the ADR proposal. For example, courts that propose ADR programs are likely to be most concerned about obtaining input from the bar associations and trial lawyers affected by any changes in case processing. Conversely, bar associations that propose new court-related ADR programs will be concerned about identifying the interests and concerns of the judges and staff of the court for which the program is proposed. Additionally, courts and bar associations working in a new program may benefit from the input of the local ADR provider community.

1. Involving Groups Likely To Be Affected by ADR Program

At the outset of the planning process, it is important to obtain input from those likely to be impacted by a court-related ADR program (12, p. 66). The groups whose input and support typically is most needed include judges, lawyers, bar associations, ADR providers, law professors and others. This input is important:

- To provide a broad base of support for the program;
- To allow for the expression of a variety of different views on the perceived advantages and disadvantages of the new program;
- To ensure that the ADR program fits the needs of the individual court (12, p. 19) as well as the needs of the community/potential user base;

- To ensure that the expertise of different groups on design issues such as timing, choice of cases and process is tapped (12, p. 18).

Joint bench-bar cooperation in planning court-related ADR programs is particularly critical. For example, those involved in planning the Marin County program noted that "enlisting the support of the bench and bar was crucial to the success of the [Marin County Bar Association's ADR] section's efforts. . . . Each raised legitimate concerns which were addressed in the course of the dialogue from which the contours of the final program were defined."[1]

2. Judges

A program cannot succeed without the support, encouragement and understanding of the local judges. This is especially true in the planning stages.

All the programs featured in this guide demonstrate the need to secure active bench support. This support enhances credibility by giving the program the imprimatur of the court. The support of local judges also serves to more firmly establish the program as a viable and welcome expansion of the "dispute resolution continuum" in the eyes of the bar and the general public (12, p. 18). In particular, it may be important to secure the support of the presiding judge who can be particularly effective in communicating the court's interest in ADR to the bench, the bar and other interested individuals likely to be impacted by the development of a new program (12, p. 74).

Obtaining judicial input and support at the outset may be especially important when the driving force for the program comes from the bar. Judicial involvement in program planning is necessary if judges are to feel they have a stake in the program and encourage its development (12, p. 73). San Francisco's early settlement program provides an example of this. When bar association representatives initially presented the idea to the court, the court gave its full support; particularly when the bar association assured the court it would administer the program and emphasized that all it needed from the court was program approval. After initial court approval was secured, the program was changed to meet the specific needs of the court. Magistrate Judge Wayne Brazil of California's Northern District has stated that it is imperative for courts to give

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1 Barnum & Rosenberg, Marin County Embraces Court-Annexed ADR, ADR Newsalert (January 1993), p. 5.

exploration of ADR options their "full blessing and active encouragement"; bar interest is likely to flag if the judiciary is persistently unresponsive (12, p. 73).

3. **The Bar**

All the programs featured in this guide emphasize the necessity of local bar and trial lawyer involvement in planning for court-related ADR programs. The literature suggests several reasons why bar involvement at the planning stage is critical to program success:

- If the bar is not consulted during the planning stage, lawyers may resent and resist the program (12, p. 16);

- Bar involvement in program planning is an important means of developing support for the program and educating the bar about the benefits of ADR. Although exposure to and acceptance of ADR is on the rise, and although California has often been considered a leader in the development of innovative ADR programs, there is still considerable skepticism within the bar regarding the benefits of ADR. Much of this skepticism stems from a lack of familiarity with ADR (11, pp. 38-39). Other concerns include the fear that initiating settlement discussions may be perceived by opponents as a sign of weakness and a belief that increased use of ADR will mean less work for lawyers;

- Bar associations need to develop a vested interest in the program as the basis for providing program support including volunteers, funds, etc. Active involvement at the planning stage is one way to foster this interest (12, pp. 66-67);

- Early bar support may also generate judicial enthusiasm, since some judges may want to know that the bar is favorably disposed before endorsing a new ADR program (12, p. 72);

- Involving the bar in early program planning helps to identify and address bar concerns early in the process. For example, some attorneys may object to procedural changes, additional paperwork, or appearances;

- There are likely to be many different ideas within the bar respecting the changes needed to encourage the use of ADR. It is important that as many of these ideas as possible be considered at the planning stage in order to develop bar involvement and support.

4. **ADR Provider Community**

It is also important to forge ties with the ADR provider community in planning for an ADR program. Some of the reasons ADR provider involvement is needed include:

- ADR providers, more than other participants, may have expertise in specific areas important to the development of the program and may be a fertile source of new ideas and approaches (20, p. 72);

- If local ADR providers are a likely source of ADR neutrals for the program, their support is essential in both the planning and implementation stages; and

- ADR providers are also a resource for training and education.

5. **Others**

Participants in the National Conference on Emerging ADR Issues in State and Federal Courts noted that, in addition to involving judges and bar associations, input from others likely to be impacted should be actively sought, e.g., community groups, the public interest bar, law school professors, etc. Suggested reasons for involving these groups include:

- Client/community groups should be contacted in order to foster a more general awareness of the development and imminent availability of ADR programs within the court system;

- The public interest bar and other attorneys servicing low-income clients should be contacted concerning the financial advantages of using ADR;

- Some law professors have a particular interest in ADR and can be instrumental in fostering long term awareness, acceptance and development of ADR through articles and law school and continuing education courses on ADR. (See IV.B., below for more detailed information relating to education.)

6. **Coordinating with Other Courts**

Courts considering creation of an ADR program may wish to consult with other trial courts during the planning process including, in particular:

- Courts with which they are or may in the future be coordinating.

  Pursuant to the Trial Court Realignment and Efficiency Act of 1991, each trial court in California is required to develop a plan for coordinating its activities with one or more other trial courts. Coordination of ADR programs is one of the 24 elements which must be considered in these trial court coordination plans;[2]

- Courts which have already established court-related ADR programs.

  Consultation with courts which have existing ADR programs will enable a court to benefit from the insights of others (1, p. vi-9).

7. **Obtaining Endorsements**

In addition to obtaining the input of various groups during the planning stage, efforts should also be made to secure the endorsement of organizations representing the affected groups, including judges' associations, bar associations and other high visibility entities (12, p. 72). Such endorsements are important to convince skeptics (12, p. 75) and to enhance program credibility.

[2] Cal. Standards Jud. Admin., § 29.

C. ASSESSMENT OF NEEDS AND DEVELOPMENT OF GOALS

1. Needs
2. Goals

1. Needs

Program planners suggest that courts or others planning a court-related ADR program attempt to identify the needs or problems which they would like to address prior to designing an ADR program (12, pp. 29, 66-68). This process can be broken down into three steps:

- Isolate the problems or conditions which program planners would like to address;
- Identify the specific sources or causes of these problems or conditions;
- Tailor program components so they are responsive to the identified needs and objectives. (Program Design is discussed in Chapter IV.)

Courts in California have approached the needs assessment process in a variety of ways. For example, in Ventura County, the court appears to have collapsed the first two steps and identified the following variables in establishing its ADR program: diminishing judicial resources; the demands of fast track; court administrators' recognition of the value of ADR; and the high cost of litigation. In San Francisco, the development of the settlement program stemmed directly from a belief that the bar needed to do something about the backlog of cases in the court.

2. Goals

It is important to develop clear goals for a court-related ADR program prior to its implementation (1, p. iv-7). Program goals and their prioritization can dramatically affect: (1) how the program is designed and (2) what criteria are used to monitor and evaluate its success. Additionally, clarity about program goals can help to ensure that cases are referred to an appropriate ADR process (12, p. 67; 15, p. 2-3).

a. Goal Development/Prioritization

Commentators suggest program planners consider several issues in developing program goals:

- **Relationship Between Program Goals and the Needs/Problems Program is Intended to Address:** The National Standards for Court-Connected Mediation Programs recommend that program goals relate directly to the courts' identified needs (15, p. 2-2);

- **Individualized Selection of Goals:** Even though, as discussed above, courts should look to existing programs for models and ideas, it is most important that those planning a court-related ADR program examine the individual needs of the court for which the program is being planned when establishing the goals for that program (15, p. 2-3). This means taking into account available resources, existing problems, existing ways of approaching those problems, etc.;

- **Goal Prioritization:** It is important that goals are prioritized. There can be considerable tension between and among ADR program goals. For example, an ADR program that provides greater public access to dispute resolution processes will not necessarily reduce the court's costs or caseloads. For this reason, it has been suggested that, even if all program goals appear consistent, courts should clarify and prioritize goals for any ADR programs they design and adopt (12, pp. 68-69). Furthermore, goal prioritization can assist program planners in clearly identifying the direction of a particular ADR program. Finally, the National Standards for Court-Connected Mediation Programs suggest that the prioritization of goals can be a crucial element in evaluating program effectiveness (15, p. 2-2).

b. Goal Options

There are many different goal options for court-related ADR programs. However, these goals generally fall into two categories: goals relating to the interests of litigants and goals relating to the interests of courts. Ideally, these two types of goals will be congruent.

(1) Court-Oriented Goals

Court-oriented goals include:

- To increase the court's ability to resolve cases within given resources;
- To assist in decreasing backlog;
- To provide dispute resolution processes that are most appropriate for resolving specific types of disputes; and
- To encourage earlier and better case analysis and preparation by litigants.

Traditionally, the goal of reducing backlog has been viewed as a primary advantage of court-related ADR (12, p. 15). In each of the counties featured in Chapter II, a central goal of the ADR/early settlement program implemented was to reduce the court's caseload or backlog.

(2) User-Oriented Goals

User-oriented goals are those directed to improving services delivered to users of the courts (12, pp. 68-69). Some of the most commonly cited user-oriented goals include:

- To provide disputing parties with a lower-cost, semi-formal, quasi-adjudicatory alternative to full blown trial;
- To reduce party alienation from the dispute resolution process;
- To help forge better relations between parties;
- To improve communication between parties and their lawyers;
- To bring the parties together before they have made a major economic and emotional investment in the case;

- To improve case analysis, reduce discovery costs and produce better focused discovery and motion practice plans; and

- To enhance the parties' capacity to protect their privacy interests.

(3) Hybrid

Some goals do not fall easily into one or other of these categories, but rather appear to have advantages for both the court and the parties. For example:

- To shorten the time to disposition;

- To improve communication between parties and the court;

- To reduce the expense of resolving disputes;

- To encourage earlier settlement; and

- To encourage the future voluntary use of ADR through education and familiarization with the processes.

In implementing its new court-related ADR program, the Ventura County Superior and Municipal Courts identified the following range of goals: bringing the parties together for settlement discussions before they have made a major economic and emotional investment in the case; narrowing the issues; and providing a basis for future settlement, even if an ADR process does not result in settlement at the time the process occurs.

D. PROGRAM LEADERSHIP AND POLICYMAKING

1. Program Leadership
2. Policymaking

1. Program Leadership

As noted above, the leadership in planning and implementing court-related ADR programs has come from several sources, typically from judges, a bar association or an ADR provider. Institutionalizing a court-related ADR program requires several different types of leadership. These include leadership in initiating a program, bringing together individuals who need to be involved in program planning, implementation and sustained leadership needed to maintain a program once it is underway. This continuing leadership includes taking the initiative to promote the program to affected constituencies, considering ways of improving the program, program oversight and policymaking. A leading commentator on court-related ADR has suggested that it is important for the implementation of an effective court-related ADR program to have high visibility leadership at all the critical stages of the program (12, p. 71).

For a new court-related ADR program to be most effective, the center of leadership may need to shift as the program develops. For example, where the local bar proposes the initiation of an ADR program, it may be important that program leadership shift to a judge or court administrator in order to successfully institutionalize the program as an ongoing feature of court procedures.

2. Policymaking

Regardless of where formal leadership lies, it is critical to have a small and committed group of people who have ongoing responsibility for program policy (12, p. 74). This group might include the presiding judge, the ADR coordinator and his/her staff, the bar association and/or an appointed ADR board or committee consisting of a representative group of individuals likely to be involved in and impacted by the program.

Just as different forms of leadership may be needed to institutionalize a program, so too different forms of policy-making may be needed during different phases of the program planning and institutionalization. During the initial program planning phase, a variety of

policy decisions concerning program design will need to be made, including decision related to (1) goals, (2) program elements, (3) governing rules, and (4) the manner in which the program is to be administered. In planning the Ventura Superior and Municipal Courts' mediation program, for example, this type of policymaking was done by a committee made up of court staff and professional mediators which met regularly to discuss and plan the program. In most courts, formal approval of an ADR program will probably have to be obtained through a vote of all judges, court executive committee or presiding judge.

A second type of policymaking pertains to the ongoing administration of the court-related ADR program. The counties featured in this guide have structured the responsibility for ongoing ADR program policymaking in different ways:

- In San Diego, ongoing policymaking for ADR programs is handled through a monthly meeting of independent calendar judges and court administrators. Input from ADR providers is obtained, as needed;

- In Contra Costa, the ADR coordinator consults with all civil fast track judges and the local bar association's ADR committee;

- In San Francisco, a small group of lawyers, the court commissioner and the bar association coordinator meets when the need arises. This group also receives suggestions from neutrals.

E. RESPONSIBILITY FOR PROGRAM ADMINISTRATION

1. Degree of Court Involvement
2. Options for Administrative Structure

1. Degree of Court Involvement

In addition to overall program policy decisions, planners need to consider the day-to-day administrative issues of how and by whom the court-related ADR program will be administered. A key decision when instituting a court-related ADR program is the

degree to which the court will be involved in implementing and administering the ADR program. A court can maintain a high degree of involvement throughout the planning, development and implementation stages. Alternatively, a court can be heavily involved in planning and development and then permit an outside agency to administer the program. Another option is to have the court and the outside agency develop an appropriate combination of direct involvement and delegation. None of these options need be rigidly fixed. Especially in the early stages of a program, it may be most appropriate to adopt a flexible approach which can be altered easily depending on the needs of the individual court. When designing a court-related ADR program, program planners may wish to consider the potential advantages of different types of involvement and weigh them against such factors as the program's goals and available resources.

a. Court Administers Its Own Program

Commentators have suggested a number of advantages to a court administering its own ADR program (12, pp. 78-79):

- **Court's Stake in the Program:** To institutionalize ADR requires that the court have a major stake in the program. This stake is greatest when the court itself administers the program. Moreover, placing administrative responsibility with the court may offer certain advantages when and if the court moves from a pilot project to a full blown program.

  An example of this potential advantage of court administration of the program may be seen by comparing two multi-door courthouse pilot projects.

  In Washington, D.C., the Multi-Door Program is an operating division of the Superior Court of the District of Columbia, and the various forms of ADR offered are integrated into the court's civil case processing structure. The program began as a pilot project within the court offering a few ADR alternatives; over the years, it has expanded the ADR processes it offers. The D.C. program enjoys a national reputation as the most comprehensive court-based ADR program (24, p. 22; 8, p. 4).

  In Tulsa, the multi-door pilot project was administered outside the court system. The business community initially provided significant support for ADR efforts and for implementation of the Multi-Door project. The Tulsa County Bar Association

worked closely with the Chamber of Commerce to raise funds and instill community interest in ADR. The program became popular and was heavily used by the citizens of Tulsa. However, at least in part because it was not integrated into the courts and did not gain the support of the judges, it was not able to move beyond the pilot project stage (24, pp. 23-24);

- **Control:** When a court administers its own program, it may be in a better position to exercise tighter control over the program, and therefore be better able to ensure compliance with its rules and any quality control standards;

- **Integration with Court Procedures:** A court-administered program is likely to facilitate greater integration between ADR procedures and the court's normal, pretrial case management procedures and rules;

- **Efficiency:** A court-administered program may reduce duplication of services or delay as cases move in and out of the court system;

- **Keeping Informed:** Courts may be more likely to learn about problems in ADR programs which are administered internally.

b. Outside Agency Administers the ADR Program

Commentators have also suggested a number of advantages of having an outside agency administer the ADR program (12, p. 80):

- **Burden on Court:** It may reduce the demands on court staff and judges;

- **Volunteer Recruiting:** It may allow the use of already established and effective means of recruiting volunteers;

- **Confidentiality:** Reducing the contact between the court and lawyers who may serve as neutrals may make it easier to maintain confidentiality concerning what transpired during the ADR session and may reduce the risk of compromising the judges' impartiality.

2. Options for Administrative Structure

Depending on the nature of the court's ADR efforts, the level of court involvement, and the nature of the program design, different administrative schemes may be appropriate (2, p. 110). A variety of administrative options is available including:

- Designated judge(s) directs the program (e.g., this used to be the case in Contra Costa County before that court hired an ADR coordinator);
- Court clerk/administrator has primary programmatic responsibilities (e.g., Ventura);
- The court designates an ADR administrator/coordinator to administer the program (e.g., Contra Costa);
- ADR administration is diffused among individual judges and litigants, court staff and the county bar association (e.g., Marin where the judges hold assessment conferences, the litigants choose the process and the neutrals, staff provide notices and schedule conferences and the bar association maintains lists of ADR providers);
- Outside agency provides ADR services to the court, with varying degrees of court oversight (e.g., DRS/LA, San Diego).

Whatever administrative structure is adopted, program planners have stressed the importance of courts developing strong administrative leadership in the day to day running of their programs. Participants in the National Conference on Emerging ADR Issues in State and Federal Courts recommended that court staff be designated whose sole responsibility is ADR (12, p. 20). The National Standards for Court-Connected Mediation Programs strongly advise courts to designate a particular individual responsible for supervision, monitoring and administration of the court-connected ADR program (15, p. 2-6).

F. FUNDING

1. Introduction
2. Full Public Financing
3. Private Funding/Support Options
4. Options to Alleviate the Need for Additional Funding

1. Introduction

Another important issue to consider when planning a court-related ADR program is how the program will be funded at the planning stage, the implementation stage and for the long-term. Many funding options are available to program planners. These options range from traditional public and/or private funding to more creative methods of budgetary juggling.

Given the current fiscal climate, establishing additional court programs may seem challenging. However, several ADR programs in California have been established with little or no additional expenditure of funds. The ADR programs in Marin, San Diego, Ventura and Contra Costa are among these.

2. Full Public Financing

Many suggest that if courts wish to institutionalize ADR as an alternative equal to court adjudication, then the service should be supported with public funding to the same extent and in the same way as other court services (12, pp. 16, 73). The Judicial Council also considers that ADR programs are an appropriate use of public funds (17, p.1).

Public funding of existing court-related ADR programs in California has come from the general court budget, court filing fees or a combination of both.

a. Funding from the Court Budget

All courts with ADR programs use funds from their budgets to support those programs to some degree. This may range from a specific allocation to support a particular ADR program to the use of existing court staff to perform tasks for the ADR program. Not all new court-related ADR programs have required additional court funding; the degree

of support needed from the court budget will depend upon the level of funding available from other sources and the options a program has implemented to reduce the need for specific additional funding.

b. Funding from Court Filing Fees Under the Dispute Resolution Programs Act

An early proponent of court-related ADR, Professor Frank Sander of Harvard University, advocates the use of add-on filing fees as a "fairer form of assessment [than financing through volunteers or party fees] since the costs of improving the public dispute system are thus spread over all litigants, not simply imposed on the immediate disputants seeking to avail themselves of ADR procedures" (15, p. 13-3). In 1986, California enacted a specific statutory scheme authorizing increased court filing fees to fund ADR programs. This scheme, the Dispute Resolution Programs Act ("DRPA"),[3] encouraged the creation of a system of locally funded programs to provide dispute resolution services to county residents. Prior to July 16, 1993, counties which chose to offer these services were authorized to raise their superior, municipal and/or justice court civil filing fees by up to $8.00 over the existing fee level to fund ADR programs. (See Appendix C for a list of the counties participating in this program.) In turn, the counties and funded programs are required to comply with certain requirements of the Act and accompanying regulations, such as using a sliding scale for program fees and maintaining specified records.[4] The California Department of Consumer Affairs oversees the DRPA program, offers technical assistance, and monitors and evaluates county grant-making and program activities and their impact on the state justice system. The State Bar's Office of Legal Services assists existing ADR programs with matters such as quality control, training and funding.

Prior to 1992, the maximum amount that could be added to filing fees under the DRPA was $3.00. When the increase in DRPA fees to $8.00 was authorized in 1992, the Legislature established, as part of its overall trial court funding scheme, a cap for filing fees and required that most filing fee revenues be transferred to the state. One of the few exceptions to this transfer requirement are DRPA funds which can be retained at the county level. Under this same statute, state controller approval was required both for any county which had already opted to participate in the DRPA to increase their

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[3] Bus. & Prof. Code, § 465 et seq., as amended by stats. 1993, ch. 158.

[4] Cal. Code Regs., tit. 16, § 3600 et seq.

DRPA filing fee amount and for any new county to opt to participate in the DRPA.[5] On July 16, 1993, the Governor signed into law AB 392.[6] This statute eliminates the state controller's authority to approve increases in the amounts of the funds held locally, including DRPA funds; the statute now provides: "Notwithstanding any other provision of law, no agency shall take action to change the amounts allocated to any of the above funds."[7] Pursuant to this provision, which became effective immediately, it appears that no additional counties may opt to increase filing fees for ADR programs under the DRPA. In addition, this statute provides that counties which have elected to devote more than the $3.00 in filing fee revenues originally permitted under the DRPA are required to report this amount to the controller. The controller is then required to deduct this amount from the counties' trial court funding block grants and redistribute it to all counties according to the state trial court funding formula.[8]

Contra Costa Superior Court is a recipient of DRPA funding. Its grant funds the salary of the court's ADR coordinator. The remainder of the ADR program, including administrative and support functions, is paid from the general court budget.

3. Private Funding/Support Options

Some court-related ADR programs may obtain support through private funding options, such as grants or in-kind services from private organizations.

a. Grants

Certain foundations, the National Institute for Dispute Resolution ("NIDR"), the State Justice Institute and the William and Flora Hewlett Foundation have provided grants to assist in the creation of ADR programs. When the San Francisco Superior Court settlement program first got underway, the Bar Association of San Francisco ("BASF") received two grants from foundations. It was only after the program became successful that BASF itself fully funded the program.

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5 Stats. 1992, ch. 696.

6 Stats. 1993, ch. 158

7 Gov. Code, § 68085(d), as amended by stats. 1993, ch. 158.

8 Gov. Code, § 77200(f), as amended by stats. 1993, ch. 158.

b. In-Kind Services

Bar associations or other private organizations may be able to provide services or resources that reduce the need for additional funding. Examples of these types of services or resources include:

- Supplying staff or volunteers to administer a program; the Los Angeles County Bar Association's Dispute Resolution Services, for example, provides an administrator for each of their court programs;
- Providing space from which to conduct the ADR program;
- Recruiting neutrals; BASF, for example, does this for the San Francisco Superior Court's early settlement program and Contra Costa Bar Association does this for the court's SMART program; and
- Handling other administrative tasks; the Marin County Bar Association, for example, maintains the lists for ADR providers which are located in the courtrooms, clerk's office and law library.

4. Options to Alleviate the Need for Additional Funding

In addition to traditional methods of funding, creative approaches exist that allow programs to be established with little or no additional funds.

a. Incorporate ADR Program Functions into Existing Court Procedures

The need for additional funding for a court-related ADR program can be reduced to some degree by incorporating some of the ADR program procedures into existing court procedures, rather than setting up costly, separate procedures. (See IV.G, below for general discussion of integration with other court procedures.) For example, in Marin County Superior Court's ADR program, ADR assessments are conducted as part of existing case management conferences. Similarly, in Marin, Contra Costa and other counties, ADR information and questions have been incorporated into the court's existing forms, such as the status conference or case management questionnaire (see, e.g., Appendix B, CC-4 and MA-3).

b. Use Existing Court Staff

Another option for reducing the need for additional funding to support court-related ADR is integrating ADR program functions into existing staff assignments or reallocating existing assignments so that a staff member can take on the additional responsibilities of an ADR program. In the Contra Costa Superior Court, for example, before the court received a DRPA grant, existing staff handled the day to day operating procedures for the ADR programs, under the direction of a judge. Other examples include San Diego, where the independent calendar coordinator may also coordinate neutrals for settlement conferences, and Ventura, where existing court staff perform the administrative and case assessment functions under the ADR program. (See IV.D.S.b(2), below for a discussion of using court staff to select cases for referral to ADR.)

c. Use Volunteer Neutrals

Yet another way to minimize the need for additional funding is to use volunteer neutrals. Most court-related ADR programs in California utilize volunteer neutrals. Whether they act as pro tem judges for settlement conferences, or as case evaluators, mediators or arbitrators, the utilization of volunteers means the courts may be able to provide ADR programs within existing budgets. (See IV.H.8.b, below for a general discussion of pros and cons of paid versus unpaid neutrals.)

d. User Fees

Another option for funding court-related ADR programs is user fees. The Judicial Council, the State Bar and others have taken the position that any mandatory court referrals to ADR processes should not be at the expense of the parties, as would be the case if user fees were required in such a mandatory program (25, p. 19; 17, p. 12; 15, p. 13-1; 13, p. 16; see also IV.C.5.a., below for additional discussion of user fees in mandatory programs). Where the parties themselves agree to an ADR referral, this issue does not arise. Thus, for example, judges discussing ADR options with the parties at Marin County Superior Court status/ADR assessment conferences encourage but do not require the parties to use an ADR process; if the parties agree to use an ADR process, they pay for it themselves. (See IV.H.8., below for a general discussion of court and party compensation of neutrals.)

IV. DESIGNING AND IMPLEMENTING A COURT-RELATED DISPUTE RESOLUTION PROGRAM

A. Introduction
B. Program Elements Designed to Educate Litigants
C. Mandatory or Voluntary Participation in Process
D. Selecting Cases and Dispute Resolution Processes
E. Scheduling ADR Conferences or Sessions
F. Timing of ADR Use
G. Integration of ADR With Other Court Procedures
H. Neutrals
I. Confidentiality
J. Incentives to Settle in the ADR Process
K. Enforceability of Settlements Reached

A. INTRODUCTION

At the center of any court-related ADR program lies a set of issues which must be addressed regarding program design, development and implementation. These include such things as whether participation in the program should be mandatory or voluntary, which ADR processes should be offered, what cases should be included and how neutral services will be provided. How developers/implementors choose to resolve these issues may flow, at least in part, from the program's goals. Moreover, many of these issues are inter-related. Mandating participation in an ADR process, for example, has implications affecting quality control of neutrals, incentives to settle, and program funding.

This chapter outlines some of the issues and program elements which might be considered in designing and implementing a court-related ADR program and provides examples of the various ways in which the programs featured in this guide have addressed these issues.

B. PROGRAM ELEMENTS DESIGNED TO EDUCATE LITIGANTS

1. Introduction
2. What Information Should Be Given to Litigants?
3. How and When Should Information Be Disseminated?
4. Written Information
5. In-Person Discussions or Presentations by Court
6. Requiring Attorneys to Convey Information

1. Introduction

An important issue to consider when designing and implementing a court-related ADR program is how to educate litigants (both attorneys and parties) about the use of ADR and the court's ADR practices and procedures. Educating litigants about ADR is a goal supported by many in the ADR field. Education about ADR and encouraging its use is an important component of a court-related ADR program. Judges and ADR providers who responded to surveys conducted for the Judicial Council's Advisory Committee on ADR consistently ranked educating litigants about ADR as among the highest priority goals for the Council Advisory Committee to pursue.

Disseminating information about alternative dispute resolution processes can stand alone as a court's ADR program or can serve as an element of a broader ADR program in which the court actually makes referrals to ADR. Regardless of the nature of the ADR program, program planners should consider what information should be given to litigants, how and when the information should be disseminated, and who should be responsible for providing the information.

2. What Information Should be Given to Litigants?

The following is a list of subjects concerning ADR in general and the court's ADR processes which a court might disseminate to litigants.

a. In General

- What is ADR?
- What are its potential benefits?
- Generally, what types of ADR processes are there and what types of cases are appropriate for these processes?
- What services are available in the immediate area or where such information is available?
- What is the court's policy respecting voluntary use of ADR?

b. If the Court Offers an ADR Process

- The purpose of the ADR process;
- Program operation, including location, times of operation, intake procedures, contact person;
- Role of the parties and/or attorneys in the process;
- Role of the neutral, including lack of authority to impose a solution;
- Process used in selecting neutrals;
- Party choice, if any, of neutrals;
- What fees, if any, are involved;
- Confidentiality of the process and records;
- Voluntary acceptance of any resolution or agreement;
- The advantages and disadvantages of participating in achieving resolution of the dispute;

- The availability of formal adjudication if a formal resolution or agreement is not achieved and implemented;

- The advantages and disadvantages of the lack of a formal record; or

- The availability of special services for non-English speakers and persons who have communication, mobility and other disabilities (15, pp. 3-3,4).

3. **How and When Should Information be Disseminated?**

Other issues which program designers should consider are how and when litigants should receive information about ADR in general and the ADR processes available through the court. A number of different ways of disseminating information are available. These include:

- Provide litigants with information sheets or pamphlets (see Appendix B, CC-3 and LA-1);[1]

- Put together a video presentation or use an existing video that discusses alternatives to traditional dispute resolution;

- Judges discuss with attorneys and parties the availability of ADR and the specifics of the processes available to litigants;

- Attorneys convey ADR information to their clients and opposing counsel; or

- Use a hybrid approach. For example, planners may choose to require attorneys to orally discuss the information contained in ADR pamphlets (see Appendix B, CC-4).

Education of litigants about ADR can take place at different points in the litigation process. If the goal is early use of ADR, information should be provided at or soon after a case is filed. Timing options include:

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1 In addition to materials prepared by courts (see below), the State Bar's Office of Legal Services has published a brochure "Should I Try to Settle My Problem Out of Court?" which is available in limited quantities to interested courts and programs (see Appendix D).

- Provide ADR information at the court, so it is available to litigants before a case is filed, e.g., a brochure or information sheet;

- Provide ADR information at the time of filing;

- Provide information at the first scheduled conference (e.g., status conference);

- Provide information at later conferences (e.g., at-issue conference);

- Require parties to discuss ADR among themselves; or

- Use a hybrid approach.

4. Written Information on ADR

An important issue faced by those designing and implementing a court-related ADR program is whether that program should include elements, such as the required distribution of an ADR pamphlet, designed to educate litigants about ADR and encourage the voluntary use of ADR. Some examples of ADR information provided by California courts include:

- Marin Superior Court and Contra Costa Superior Court provide parties at filing with a "Notice to Plaintiffs" describing the ADR processes available to litigants. The notice also explains that all judges in the civil trial delay reduction program are supportive of the use of alternative dispute resolution programs (see Appendix B, MA-1 and CC-1);

- In San Diego, shortly after filing in superior court, litigants are sent with the case assignment notice a notice about the availability of mediation services. The notice explains that voluntary mediation is funded through filing fees and also includes the number of the San Diego Mediation Center ("SDMC") in the event litigants have further questions;

- In San Francisco Superior Court, after cases are assigned to the early settlement program, litigants are sent a brochure that outlines the details of the referral and participation in the program (see Appendix B, SF-1);

- Contra Costa's ADR information sheet outlines the ADR programs available through the court (see Appendix B, CC-3). This information sheet is included in the general information packet a litigant receives when the case is filed. Plaintiffs are required to serve it upon parties in the case within 60 days of filing. Previously, information about ADR was discussed by the judges on an ad hoc basis at the first scheduled status conference. In addition, as part of the general information packet, a description of the EASE program was sent to litigants after filing.

5. In-Person Discussions or Presentations by Court

It has been suggested that the most effective way to educate litigants about the use of ADR is through a personalized presentation. Litigants, especially parties unfamiliar with ADR processes, are more likely to retain this information if it is conveyed to them personally (20, pp. 47-49). Courts can have litigants meet with a judge, court representative or ADR expert to discuss the use of ADR. This could be either in a meeting set specifically for this purpose, or as part of a regularly scheduled meeting, such as a status conference; for example, the Marin and San Diego superior courts use status conferences to discuss ADR. Courts can require that attorneys be prepared to discuss ADR at this conference. This will require attorneys to discuss the availability and the advantages of ADR with their clients before the first scheduled conference. This approach is utilized in Marin and Contra Costa's ADR programs.

6. Requiring Attorneys to Convey Information

Another way in which both attorneys and clients may be educated about ADR is to impose a requirement that the attorney convey information about ADR to his or her client. When parties are represented by counsel, those attorneys may be the most appropriate persons to explain available ADR options to their clients and to describe the advantages and disadvantages of those options. Such a requirement can, in turn, serve as an incentive for the attorney to become educated about ADR. Some options for implementing this objective are:

- **Require attorney to give information pamphlet to client.** One way to structure such a requirement is to mandate that attorneys give a copy of an ADR pamphlet or information sheet to their clients (12, p. 77);

- **Require attorney to discuss ADR with client.** It has also been suggested that courts require attorneys to discuss ADR with their clients (17, p. 2). This approach is used in Contra Costa where counsel must certify that they have reviewed ADR options with their clients (see Appendix B, CC-4). Such proposals have been criticized, however, on the basis that any attempt to explore whether the requirement has been met may potentially breach the confidentiality of communications between attorney and client; or

- **Require parties to make ADR decisions, thus implicitly requiring attorneys to discuss ADR with clients.** For example, in the Beverly Hills Municipal Court, litigants are required to sign a confidential statement regarding alternative procedures. This form asks parties (1) to acknowledge that other dispute resolution procedures are available in the court, and (2) to check off an ADR option they would like to participate in, if any (e.g., binding arbitration, non-binding arbitration, non-binding mediation). If two or more parties in the case are supportive of the ADR option, the court notifies the parties and an ADR procedure is conducted within 60 days.

If the court decides that the information should come from the attorney, the court may wish to consider ways of educating attorneys on use of the court's ADR processes, practice and procedures. (See Chapter VI., below for discussions of educating attorneys.)

C. MANDATORY OR VOLUNTARY PARTICIPATION IN PROCESS

1. Introduction
2. The Pros and Cons of Voluntary and Mandatory Participation
3. Criteria for Deciding Whether to Mandate Participation
4. If Participation is Voluntary, Incentives to Participate
5. Design of a Mandatory Program

1. Introduction

There are both mandatory and voluntary court-related ADR programs in California. Among the mandatory programs are some that have been in operation for a number of years and which may be quite familiar to judges, court administrators, attorneys, and

other justice system participants. These familiar mandatory programs include judicial arbitration. They also include mandatory settlement conferences ("MSCs"). The term MSC is actually used to refer to a wide range of processes. Traditional MSCs are judge-conducted conferences usually held approximately two weeks before trial. MSCs can also, however, be early conferences conducted by volunteer neutrals who utilize mediation or case evaluation techniques; San Francisco's early settlement program is an example of this form of settlement conference. In addition to these familiar programs, there are also other newer and less familiar mandatory court-related ADR programs, such as Ventura's mandatory mediation program.

Among voluntary court-related ADR programs, there are again, many that are quite familiar, including judicial arbitration pursuant to voluntary stipulation and voluntary settlement conferences (which, like their mandatory counterparts, can encompass a wide range of program designs). Los Angeles Superior Court's Joint Association Settlement Officer Program ("JASOP") is an example of such a voluntary settlement conference program. Another voluntary program is San Diego Superior Court's mediation program.

The decision whether to make a court-related ADR program voluntary or mandatory is an important one, not just in and of itself, but because it may affect decisions concerning a number of other program design issues. These include what quality control measures are adopted for the program and for neutrals, how neutrals are chosen, whether incentives to settle are included in the program design, and whether the parties are required to pay for neutral services.

Whether to select a voluntary or a mandatory program structure involves balancing the desire to involve in the ADR program as many cases as appropriate and possible against the potential detrimental impact mandatory participation may have on the fairness and effectiveness of the ADR program. Most commentators agree that mandatory participation requirements are acceptable so long as they meet the broad interests of the parties, the justice system and the public and include certain recommended safeguards.

It should also be noted that the decision concerning a mandatory or voluntary program need not be irrevocable or completely either-or. Some program design options may provide the benefits of both mandatory and voluntary programs; for example, parties could be required to participate in some ADR process, but be allowed to choose the process and the neutral themselves. Another such option could be to have the program

start out as a mandatory program; as litigants became familiar with, and hopefully supportive of the program, the mandate to participate could be phased out.

2. The Pros and Cons of Voluntary and Mandatory Participation

a. Arguments for Voluntary Participation

Those favoring voluntary participation in court-related ADR programs argue that:

- Voluntary participation avoids sweeping cases into an inappropriate, ill-designed or poorly administered process with the result that time and effort are wasted, unfair settlements are reached, or other harmful consequences to litigants ensue (13, pp. 13-14; 15, p. 5-1);

- The process of deciding whether to participate in a voluntary program makes the litigants think creatively and concretely about settlement possibilities (2, p. 14);

- Voluntary participation gives the litigants a stake in making the process work; litigants who are not committed to the ADR process may view it as just another hurdle and may not participate in a meaningful fashion, thereby wasting the time of the parties, the court, and the neutral (2, p. 14);

- Voluntary participation allows the parties to voice their opinions about the appropriate ADR process to be used, when it should occur and who the neutral should be (2, p. 14; 13, pp. 13-14);

- Voluntary participation may avoid the appearance of a two-tiered justice system which sometimes results when participation is mandated for certain cases or classes of cases (2, p. 14);

- Voluntary participation is part of the essential nature of some ADR processes, particularly mediation, and it has been argued that mandatory participation requirements may therefore be theoretically incompatible with mediation (11, p.47);[2]

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[2] Whether such a conflict actually exists will depend on the specifics of how the mandate to participate is structured. The National Standards for Court-Connected Mediation, for example, suggest that in mandatory mediation programs participants should only be required to attend an initial mediation session

- Voluntary participation may avoid some of the risks likely to accompany institutionalization of ADR. There is a risk for example, that the flexibility and high quality of dispute resolution will deteriorate due to the routinizing influence of bureaucracy. In mediation programs particularly, narrowly focused procedures and briefer, more formulaic sessions seem likely to result in resolution of a narrower range of issues. This in turn may lead to less party involvement, poorly crafted resolutions, and thus lower voluntary compliance with settlement terms (13, pp. 13-14; 15, p. 5-1);

- Voluntary participation may avoid satellite litigation concerning the other party's failure to participate in good faith. Such litigation seems to be more likely to result if participation is mandated. Moreover, the cost of such litigation if it does occur, may exceed any savings achieved through the additional settlements reached in a mandatory program (11, p. 48).

b. Arguments for Mandatory Participation

Proponents of mandatory programs assert that mandating participation ensures that ADR will be used in more cases. Commentators suggest that participation rates in voluntary programs, even high quality voluntary programs, tend to be low (11, supp., pp. 38-39; 2, pp. 15-16; 12, pp. 19-20; 13, pp. 12-13; 11, supp., pp. 38-39; 15, p. 5-1). These commentators cite a number of potential barriers to voluntary participation in ADR: litigants' lack of familiarity with ADR processes (11, supp., pp. 38-39); litigants' reluctance to indicate to their adversaries a desire for compromise (13, pp. 12-13); litigants' inherent suspicion of anything suggested by the other party (11, supp., pp. 38-39); attorneys' potential economic concerns (11, supp., pp. 38-39) and apprehension that they will be criticized for abdicating their role as legal "gladiator" (12, pp. 19-20); attorneys' reluctance to spend time on ADR in light of already busy pretrial and trial schedules (12, pp. 19-20); and litigants' fear of loss of control over potential settlement outcomes (12, pp. 19-20). Given these barriers, it is argued that voluntary programs may not produce significant benefits because few will choose to participate.

The recent experience of the Middlesex Multi-door Courthouse program in Cambridge, Massachusetts indicates that there may be ways to overcome this. This program began

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and be educated about the process so that they may make an informed choice about whether to continue participating (15, p. 5-1 and 11-2). See IV.C.5.b., below concerning the specifics of the mandate.

as a pilot program in which participation in an initial educational/assessment conference was mandatory, but participation in an ADR process was voluntary. Cases are now referred to the initial conference either upon the voluntary agreement of the parties or upon the order of the court, but participation in an ADR process remains voluntary. Initially, participation rates in ADR processes following the educational/assessment conference were fairly low, approximately 30 percent. Over time, however, the percentage of cases in which the parties have voluntarily agreed to participate in an ADR process following an assessment conference has risen to between 60-70 percent. This suggests that a voluntary ADR program, at least when combined with a mandatory educational component or screening, may be able to attract a fairly large number of participants.

Assuming that mandating participation will result in the referral of more cases to court-related ADR programs, however, the following rationales have been offered in support of using a mandatory program:

- Since mandated participation does not appear to reduce the rate of settlement sizably (11, p. 47), the total number of cases settled through the ADR program may increase substantially (13, pp. 12-13; 11, p. 47);
- Earlier settlements may be reached in more cases (11, p. 47);
- More parties may achieve an outcome through ADR which is more satisfying than could have been achieved through litigation (13, pp. 12-13);
- The disruption experienced by non-parties to a dispute may be diminished in a greater number of cases (13, pp. 12-13);
- More court resources may be freed up (15, p. 5-1; 13, pp. 12-13);
- The administrative cost of the ADR program may be spread over a larger number of cases, making the process more cost-effective (13, pp. 12-13; 15, p. 5-1).

Other arguments favoring mandating participation include:

- Voluntary participation in court-related ADR programs is really a matter of degree and perception; even when program rules indicate participation is voluntary, parties referred by court personnel may feel they must participate (11, p. 46);

- Parties frequently respond favorably to mandated dispute resolution; some are receptive to court control of the procedures (13, pp. 12-13; 11, p. 47);

- Mandated participation will serve to educate the parties and their attorneys about ADR, perhaps resulting in an increased voluntary used of ADR in the future (13, pp. 12-13; 20, p. 69; 15, p. 5-1). In Ventura, for example, planners cite as a reason for the mandatory mediation program: "mandated participation in mediation will result in an increase in the future of voluntary use of mediation as an alternative to litigation through education and familiarization of the process for parties and their attorneys" (Ventura County Superior and Municipal Courts' Multi-door Dispute Resolution Programs, Court Mediation Overview).

3. Criteria for Deciding Whether to Mandate Participation

Because mandatory ADR programs may in some instances improve and in others impede the administration of justice, it is generally suggested that careful consideration be given before a mandatory program is instituted (13, p. 14). Those who have analyzed this issue have suggested that the basic criterion for deciding whether to mandate participation should be whether a mandatory program is more likely to serve the interests of the parties (including those not represented by counsel), the justice system and the public than would a voluntary program (15, p. 5-1; 13. p. 12).[3]

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[3] Standard 5.1 of the National Standards for Court-Connected Mediation provides, in pertinent part:

> "Mandatory attendance at an initial mediation session may be appropriate, but only when a mandate is more likely to serve the interest of parties (including those not represented by counsel), the justice system and the public than would voluntary attendance." (15, p. 5-1)

Similarly, Recommendation 1 in SPIDR's report "Mandated Participation and Settlement Coercion" provides, in part:

> "Participation should be mandated only when the compulsory program is more likely to serve these broad interests of the parties, the justice system, and the public than would procedures that would be used absent mandatory dispute resolution." (13, p. 12)

Answering this question will involve weighing the following considerations:

- The general interest in maximizing party choice;
- The monetary and emotional costs for the parties;
- The parties' interest in achieving results that suit their needs and will last;
- The interest of non-parties whose lives are affected and sometimes disrupted by litigation;
- The justice system's ability to deliver results that do not harm the interest of those groups that have historically been at a disadvantage in this society;
- The need to have courts that function efficiently and effectively;
- The importance of the public's trust in the justice system;
- The importance of the courts' development of legal precedent (13, p. 12).

In weighing these valid and sometimes competing concerns, it is suggested that program designers be cautious not to give undue emphasis to a desire for efficient administration of court business and thereby subordinate other concerns (13. p. 12).

4. **If Participation is Voluntary, Incentives to Participate**

If a court determines to offer a voluntary program, incentives to encourage participation in the program should be considered. One of the ADR principles adopted by the Judicial Council, effective July 1, 1992, provides: "Nonfinancial incentives for parties to engage in ADR may be appropriate" (17, p. 2). Such incentives could include, for example, exemption from attendance at a scheduled conference in cases where the parties have participated in, or agreed to participate in, an ADR program.

Several courts provide incentives for parties to stipulate to early, voluntary participation in judicial arbitration. For example, the local superior court rules of both San Mateo and Santa Clara Counties provide that parties who stipulate to arbitration at least 10 days prior to the case management conference, at which referral to arbitration would

otherwise be considered, do not have to appear at that conference. In addition, parties who stipulate to arbitration prior to this conference are permitted to conduct discovery post arbitration; such discovery must normally be completed before arbitration.

5. Design of a Mandatory Program

a. Suggested Safeguards If Participation Is Mandatory

Most commentators generally agree that mandating participation in court-related ADR program requires that the program be designed with specified safeguards.[4] Among those recommended are:

- **Inform Litigants of Program Procedures:** Courts should provide parties who are required to participate in an ADR program with full and accurate information about the process to which they are being referred;[5]

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[4] Recommendation 1 from SPIDR's report on "Mandated Participation and Settlement Coercion" provides, in part:

> "Mandating participation in non-binding dispute resolution processes often is appropriate. However, compulsory programs should be carefully designed to reflect a variety of important concerns.

Standard 5.1 of the National Standards for Court-Connected Mediation provides, in pertinent part:

> "Courts should impose mandatory attendance only when:
>
> a. the cost of mediation is publicly funded, consistent with Standard 13.0 on Funding;
>
> b. there is no inappropriate pressure to settle, in the form of reports to the trier of fact or financial disincentives to trial; and
>
> c. mediators or mediation programs of high quality (i) are easily accessible; (ii) permit party participation; (iii) permit lawyer participation when the parties wish it; and (iv) provide clear and complete information about the precise process and procedures that are being required." (15, p. 5-1)

[5] Standard 11.2 of the National Standards for Court-Connected Mediation provides:

> "Courts should provide parties who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle." (15, p. 11-2)

In Ventura, parties receive an agreement to mediate with the notice that their case has been referred to mediation (see Appendix B, VE-7). This agreement to mediate outlines the terms of the mediation for the parties.

- **Include Opt-Out Provisions:** ADR programs in which participation is mandatory should include some procedure for exemption from the program.[6] Opt-out provisions serve to mitigate the consequences of over-broad, especially categorical, mandated referrals (13, p. 25). It is further suggested that exemption requests be resolved quickly. The interest of the public in the outcome, the presence of novel issues of law, and the ability of the parties to participate effectively in an ADR process are among the factors which should be taken into account in determining whether to grant a particular exemption request (13, p. 25);

- **Do Not Charge User Fee:** Commentators are virtually unanimous in recommending that parties should not be required to pay a fee, beyond the normal court filing fee, for participation in a mandatory court-related ADR program.[7] Because mandatory ADR has the same compulsory character as a trial, the public commitment to providing a forum for trial free of user fees should extend to mandatory dispute resolution programs as well. The only exception to this is the initial filing fee (13, p. 16; 15, p. 5-1);

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[6] Recommendation 6 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides, in part:

> "Procedures for compulsory referrals should . . . provide for timely consideration of motions for exclusion." (13, p. 24)

Similarly, Standard 11.1 of the National Standards for Court-Connected Mediation provides, in part:

> "Courts should institute appropriate provisions to permit parties to opt out of mediation." (15, p. 11-1)

[7] Principle 12 adopted by the Judicial Council of California, effective July 1, 1992, provides:

> "Court should have discretion to mandate ADR in appropriate cases, but not when the parties would be required to pay a fee to a dispute resolution provider" (17, p. 2).

The State Bar of California's 1991 Alternative Dispute Resolution Action Plan recommended that courts be authorized to make only no-cost referrals to ADR programs (p. 19).

Standard 5.1 of the National Standards for Court-Connected Mediation provides, in pertinent part:

> "Courts should impose mandatory attendance only when. . . the cost of mediation is publicly funded, consistent with Standard 13.0 on Funding" (15, p. 5-1);

Recommendation 2 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides:

> "Funding for mandatory dispute resolution programs should be provided on a basis comparable to funding for trials" (13, p. 16).

- **Individually Assess Cases For Referral to Program:** Ensuring that inappropriate cases are not referred to ADR becomes more important when parties may not decline to participate. Therefore, mandatory court-related ADR programs should utilize individualized case assessment techniques to minimize the inclusion of inappropriate cases. (See IV.D.5.a., below regarding individualized assessment vs. categorical inclusion in an ADR program.)[8] It is further recommended that the assessment criteria used include the parties' relative knowledge, experience and resources (15, p. 5-2) and any additional delay or expenses which might result from such a referral (20, p. 58);

- **Provide Quality Program and Neutrals:** Issues of quality control, both in terms of neutrals and in terms of the program as a whole, are heightened when parties are required to participate in a court-related ADR program[9](11, p. 181; 13, pp. 20, 76-77; 15, p. 5-1);

- **Do Not Include Incentives to Settle:** Combining a mandatory participation requirement with program elements designed to act as incentives to settle might

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8 Standard 5-2 of the National Standards for Court-Connected Mediation provides:

> "Courts may use a variety of mechanisms to select cases for mandatory referral to mediation. Any mechanism chosen should provide for: individual assessment of each case to determine its appropriateness for mediation, which takes into account the parties' relative knowledge, experience and resources" (15, p. 5-2).

Recommendation 6 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides, in part:

> "Procedures for compulsory referrals should include, to the extent feasible, case assessment by a person knowledgeable about dispute resolution procedures. . ." (13, p. 24).

9 One of the three central principles from the April 1989 Report of SPIDR's Commission on Qualifications is that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements [for neutrals] should be. As a consequence SPIDR recommends that:

> "Where public or private entities operate programs that offer no choice of process, program or neutral, an appropriate public entity should set standards or qualifications for such programs and for neutral..." (27, p. 2).

Recommendation 4 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides, in part:

> "Mandatory participation should be used only when a high quality program . . is readily accessible . ." (13, p. 20).

effectively eliminate at least to some extent the parties' freedom of choice respecting settlements. It is thus recommended that mandatory mediation programs not include such incentives to settle, and further that incentives to settle in programs using other ADR processes (e.g., arbitration) be carefully designed [10] (See discussion IV.J.1., below regarding incentives to settle in general.);

- **Perform Periodic Program Evaluation:** In order to determine whether a mandatory court-related ADR program is having a negative impact on parties, the courts or the public, it is important that the program be evaluated on a periodic basis.[11] It has been suggested that, during the early period of a mandatory program, it is especially important to collect data which reflects whether the program is meeting the planners' goals (13, pp. 14 and 22). As part of this process, the effect of the program on such matters as the parties' costs, interests, and satisfaction as well as the effect on court resources should be examined. In addition, data should be gathered "to determine whether a substantial number of the participants believe that mandated participation has been so burdensome for them to pursue a trial or so injurious to other interests that, in their view, the costs of the mandate outweigh the benefits" (15, p. 5-4).

b. The Specifics of the Mandate

Once a policy decision has been made to mandate participation in a court-related ADR program, program planners must determine the specifics of the mandate: who is required to participate in the ADR process and what are they required to do in order to comply with this mandate?

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[10] Recommendation 3 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides, in part:

> "Coercion to settle in the form of reports to the trier of fact and financial disincentives to trial should not be used in connection with mandated mediation (15, p. 5-1). In connection with court-annexed arbitration, the financial disincentives should be clear, commensurate with the interests at stake, and used only when the parties could afford to risk their imposition and proceed to trial" (13, p. 18).

[11] Standard 5.3 of the National Standards for Court-Connected Mediation Programs provides, in part:

> "Any system of mandatory referral to mediation should be evaluated on a periodic basis, through surveys of parties and through other mechanisms, in order to correct deficiencies in the particular implementation mechanism selected and to determine whether the mandate is more likely to serve the interests of parties, the justice system and the public then would voluntary referral" (15, p. 5-4).

(1) Who Must Participate in Process

When a court-related ADR program is mandatory, it is generally recommended that the parties themselves be required to participate in the ADR process. Participation gives the parties a chance to personally articulate their positions and learn about their opponents' positions (2, p. 119). In addition, studies of party satisfaction indicate that two key advantages of less formal dispute resolution processes are the parties' ability to participate directly and their increased understanding of the process as a result (13, p. 20). When a party is a business entity, it may be useful to require attendance by an individual representative with decision-making authority. If attendance is burdensome, such an individual may be required to be available by telephone (13, p. 26). Many ADR programs also require the participation of the attorneys and representatives of insurance companies. For example, Rule 222 of the California Rules of Court regarding mandatory settlement conferences provides: "Trial counsel, parties, and persons with authority to settle the case shall personally attend the conference, unless excused by the court for good cause."

In the case of mediation, it is also recommended that no one be systematically excluded from the process, including the parties' attorneys.[12] It has been noted that some parties, particularly those who are unsophisticated or lack negotiation experience, may want another person to be present during the mediation. At the same time, the process may become unwieldy if additional people are present; indeed, the participation of others may itself become an issue between the parties. Therefore, it is recommended that the parties and the neutral decide on a case-by-case basis the propriety of having other persons present (15, p. 11-3).

(2) What is the Mandate?

Some mandatory ADR program rules require "good faith participation" in the mandated ADR process. Commentators believe, that on balance, such requirements are unnecessary and may, in fact, be counter productive. Mandatory ADR programs generally have relatively high rates of settlement even without this type of requirement (13, p. 27; 11, p. 59). In addition, such requirements, especially when combined with

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12 Standard 11.3 of the National Standards for Court-Connected Mediation provides:

"Courts should not systematically exclude anyone from the mediation process. Lawyers never should be excluded if the parties want them to be present" (15, p. 11-3).

sanctions for non-compliance, may give rise to litigation over whether a party participated "in good faith" (11, pp. 49-51, 59; 13. p. 27). Such compliance battles are likely to result in an increased demand for testimony by the neutral, presenting a potential conflict with confidentiality requirements (13, p. 27; 15, p. 11-2; 11, supp. p. 42-43). Finally, "good faith participation" requirements may prolong the dispute resolution sessions even when they are not productive since parties will try to ensure that they will not be accused of participating in bad faith (13, p. 27).

Most parties seem to participate actively in mandatory ADR when attendance is the only specific requirement (13, p. 26). Other clear requirements, such as bringing specified information to the ADR session, might also be appropriate (13, p. 12).

In the case of mandatory mediation programs, the court may wish to require only that the parties attend an initial mediation session, discuss the case, and be educated about the process in order to make an informed choice about continued participation (15, pp. 5-1 and 11-2). This procedure addresses concerns about the effect of mandating participation on the essentially voluntary nature of mediation. It is similar in form to the mandatory participation requirement of the Marin and San Diego programs: the parties are required to attend an initial conference to learn about ADR, but participation in the ADR process itself is voluntary (22, p. 8).

Whatever approach is taken, the participation requirement and any sanctions for non-compliance should be clearly stated.[13] "Where compliance standards are clear and the sanctions are specified and not unreasonable, the risk of litigation over compliance seems small" (13, p. 12).

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[13] Recommendation 7 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides, in part:

> "Requirements for participation and sanctions for noncompliance should be clearly defined" (13, p. 26).

D. SELECTING CASES AND DISPUTE RESOLUTION PROCESSES

1. Introduction
2. Types of Cases Generally Considered Appropriate or Inappropriate for ADR
3. Types of ADR Processes and the Types of Cases for which Particular ADR Processes are Appropriate
4. The Range of ADR Processes to Offer and the Range of Cases Eligible for Inclusion in the Program
5. Selecting Cases to Refer to the Program

1. Introduction

Two of the first decisions program designers are likely to face are what ADR processes should be offered and what cases should be included in the program.

There is a wide variety of ADR processes being offered as part of the court-related ADR programs featured in this guide and by California courts in general. San Diego Superior Court, for example, offers mediation, arbitration, settlement conferences, and use of referees/special masters or pro tem judges. Similarly, Marin Superior Court offers arbitration, mediation, neutral case evaluation, referral to a special master and settlement conferences.

The term ADR encompasses a wide variety of processes which share the common characteristic that they offer a partial or complete alternative to traditional court adjudication for resolving disputes. Definitions of these various processes are somewhat fluid; variations may occur, for example, in what is referred to as mediation depending on program goals and the style of the individual neutral. The principal distinctions between ADR processes lie in the role played by the neutral and in the formality of the process. For example, settlement conferences are considered a distinct form of ADR process; in practice, however, the neutral conducting the conference may utilize mediation or case evaluation techniques to facilitate settlement.

Court-related ADR programs also vary widely in terms of the range of cases eligible for the program and the way in which cases are actually selected for referral to the program. For example, only cases in which the amount in controversy exceeds $50,000 are eligible

for San Francisco Superior Court's early settlement program; the cases actually referred to this program are selected either as a result of voluntary stipulation by the parties or review by the court of the pleadings on file. The types of cases eligible for Ventura's mediation program are limited to disputes involving neighbors, sexual harassment, discrimination, employment, homeowners' associations, code enforcement, businesses or partnerships, and disputes in which any party requests mediation. All cases which fall within these categories are identified and referred to mediation based upon a review by a court staff person of the pleadings filed. In Marin Superior Court, all general civil cases are scheduled for a Status/ADR Conference at which the appropriateness of ADR for the particular case and available ADR options are discussed with a judge. The decisions about whether to use ADR in an individual case, however, and which process to use are left to the parties.

There are a number of factors which may effect program designers' decisions concerning the cases that will be eligible for the program and how the cases actually referred will be selected. Deciding what types of cases will be eligible for the program may, at least to some degree, depend upon the ADR processes offered as part of the program. ADR program administrators and commentators suggest a number of criteria for matching cases to specific ADR processes (see IV.D.3, below). However, it should be noted that these case-to-process matching criteria are generalizations and have not been empirically proven or disproven. Deciding upon the procedure to be used in selecting cases for referral to ADR involves the consideration of at least two issues: (1) who should make the selection decision; and (2) whether cases should be referred by category (e.g., case type or amount in controversy) or individually assessed (see IV.D.5., below).

2. Types of Cases Generally Considered Appropriate or Inappropriate for ADR

It has been suggested that most cases lend themselves to some type of ADR at some point during the life of the dispute (23, pp. 1-9). However, the appropriateness of referring a case or category of cases to a particular ADR program will depend upon a number of factors, including such things as the nature of the dispute and the dispute resolution process offered by the program. In addition to case selection criteria for specific ADR processes (see IV.D.3., below), commentators have suggested a number of general criteria which should be applied in determining whether a case or category of cases is appropriate for referral to ADR.

a. Cases Generally Considered Appropriate for ADR

The National Standards for Court-Connected Mediation Programs suggest that in selecting cases to refer to ADR, decision-makers should be guided by the overarching premise of doing no harm (15, p. 4-1); thus only cases in which the ADR program is likely to produce an outcome equal to or better than would be produced through traditional litigation should be referred to that program. Criteria for determining appropriateness for ADR include:

- Cases or categories of cases in which there is a high probability the ADR process will be successful, both in terms of the number and the quality of settlements (15, p. 5); this will depend in large part upon the ADR process offered;

- Cases in which litigation will result in outcomes less suited to the parties' needs than would resolution through the ADR process (11, p. 225). Again, this may depend in large part upon the type of ADR process offered; for example, for parties who wish to maintain an on-going relationship or whose interests would be best served by a multi-faceted settlement, a court-related mediation program may result in an outcome more suited to these needs than would litigation;

- Cases in which the parties seek a private forum for the resolution of their dispute (2, pp. 30-31);

- Disputes whose continuation will disrupt the lives of non-parties (11, p. 225; 15, p. 5);

- Cases which will require continuing involvement by the court if not resolved through ADR, even where the probability of resolution is not high (15, p. 5); for example, the parties in some environmental or land use disputes may be able to reach an agreement through mediation which accommodates more of their underlying interests and thereby obviates the need for future litigation over the same dispute.

b. Cases Generally Considered Inappropriate for ADR

By contrast, ADR program developers and commentators suggest certain types of cases are generally inappropriate for referral to ADR. These include:

- Cases in which a party seeks to establish legal precedent (2, p. 41);
- Cases in which the public may have an overriding interest in the outcome;
- Cases in which there is a need for public sanctioning of conduct to deter such conduct in future (15, p. 5);
- Cases involving repetitive violations of statutes or regulations which need to be dealt with collectively and uniformly (15, p. 5).

3. Types of ADR Processes and the Types of Cases for which Particular ADR Processes are Appropriate

This section describes many of the most common ADR processes and the types of case which have been considered appropriate for these processes. Any generalizations respecting the types of cases appropriate for particular ADR processes are subject to the following caveats. First, there are no universally accepted definitions of these ADR processes; what one person considers mediation, another may consider case evaluation or a traditional settlement conference. Variations in the dispute resolution techniques actually employed in a particular program may occur depending on program goals,[14] the style of the individual neutral, and, in programs where the parties play a role in determining the formality of the process and the role of the neutral, the preferences of the litigants. Second, there is no empirical data affirming or refuting the criteria offered for matching an individual case to an ADR process; matching criteria often vary greatly from program to program, and may be based on intuition and guesswork (2, pp. 19-20 and 35). Finally, these criteria are, by nature, generalizations and, as such, may not be the appropriate determinants in a particular case of whether that case should be referred to ADR. Most ADR processes are fairly flexible and the circumstances of an individual

[14] For example, if the primary goal of a court-related mediation program is reducing the court's backlog, the neutrals may play a more active role in trying to encourage the parties to resolve their dispute than might be played if the primary goal were improving party satisfaction with the dispute resolution process.

case may warrant its referral to a particular ADR process even if does not fit within the general criteria identified below or, conversely may warrant a case not being referred even where it does fit these criteria.

The ADR processes described below vary from each other on a number of levels. However, the primary distinctions between processes lie in the role played by the neutral and the formality of the process. To reflect these distinctions and provide some structure for the list that follows, the ADR processes described have been organized on a continuum, so that the further one reads down the list, the greater the degree of third party involvement in the ADR process and the greater the formality of that process.

a. Mediation

(1) Description of Process

In mediation, a neutral third party assists disputing parties in reaching a mutually acceptable settlement of their dispute. The process is informal and the neutral's involvement is generally limited to trying to help the parties clarify the dispute and identify possible ways of resolving the dispute. Depending upon the mediation program and/or the mediator's individual style, the process may involve meeting with the parties jointly and/or meeting with each party separately on a rotating basis (shuttle diplomacy). Mediation techniques are frequently used in settlement conferences. There are no statutory provisions in California which specifically mandate mediation in general civil cases. However, mediation is required in all contested child custody and visitation matters, and in all matters involving petitions for step-parent or grandparent visitation (Civ. Code, §§ 4607 and 4351.5).

(2) Types of Cases for Which Mediation May Be Appropriate

Mediation may be used in any dispute in order to restore communication between the parties and clarify the dispute; however, the following types of cases have been suggested as being most appropriate for mediation:

- Cases in which the parties have an ongoing relationship (20, pp. 88-89; 2, pp. 30-31; 4 p. 22);

- Cases in which the parties have had a significant (business or personal) past relationship (20, pp. 88-89; 21, p. 9);

- Cases where there are communication problems between the parties (20, pp. 88-89; 2, pp. 30-31; 4, p. 23);

- Cases in which the principal barriers to settlement are personal or emotional (23, pp. 1-12);

- Cases in which resolving the dispute is more important than the principles (legal/moral) involved (21, p. 9);

- Cases in which parties want to tailor a solution to meet specific needs/interests (21, p. 9);

- Cases in which multi-faceted settlements are possible (e.g. structured settlements involving more than money judgments, or multi-party cases) (20, pp. 88-89; 2, pp. 30-31; 21, p. 9);

- Cases in which the law governing the dispute is well established and not challenged (20, pp. 88-89);

- Cases where subjective questions of fact (e.g., state of mind, intent) or the parties' interpretation of objective facts exist (20, pp. 88-89; 21, p. 9);

- Cases in which the parties have an incentive to settle because of time, cost of litigation, drain on productivity, etc. (21, p. 9);

- Cases in which the parties are not represented by attorneys (20, pp. 88-89);

- Cases where there are cultural differences between the parties (20, pp. 88-89);

- Cases where an evaluative process has failed to resolve the case (20, pp. 88-89);

- Cases where a court is reluctant to require parties to participate in an ADR process in which they do not have significant control over the outcome (20, pp. 88-89).

(3) Types of Cases for Which Mediation May Be Inappropriate

The following types of cases have been suggested as being inappropriate for mediation:

- Cases in which a party or parties are not able to negotiate themselves or with the assistance of counsel (15, p. 5; 23, pp. 1-13). For example:
  - When there has been physical or psychological victimization which has impaired the ability of a party to protect his/her own interests or honor his/her agreements (15, p. 5-4);[15]
  - When there is a real inequality of knowledge or sophistication between the parties which cannot be balanced in the mediation (15, p. 5-4; 4, p. 25);
- Cases in which there is significant resistance to settlement on the part of one or both parties (15, p. 5-4; 22, p. 24);
- Cases where an independent evaluation of the relative strengths and weaknesses of the parties' evidence and legal arguments is crucial to settlement (22. p. 24).

b. Case Evaluation

(1) Description of Process

In case evaluation, a neutral third party, or a panel, assesses the strengths and weaknesses of the parties' contentions and evidence based on brief written and oral

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[15] If these types of cases are mandatorily referred to mediation, it has been recommended that courts consider modifying their standard mediation procedures. Standard 11.1 of the National Standards for Court-Connected Mediation provides:

> "Courts should institute appropriate provisions to permit parties to opt out of mediation. Courts also should consider modifying mediation procedures in certain types of cases to accommodate special needs, such as cases involving domestic violence. Special protocols should be developed to deal with domestic violence cases" (15, p. 11-1).

When physical violence has occurred, for example, the parties should be permitted to opt out of face-to-face mediation sessions (15, pp. 11-1, 11-2). This modification is currently part of California's mandatory custody mediation statute (Civ. Code, § 4607.2). In other circumstances, the issue should be considered by the court on a case-by-case basis and, at a minimum, discussed by the mediator with each of the parties at the outset of the initial mediation session (15, pp. 11-1, 11-2).

presentations, and offers a valuation of the case. This process is meant to facilitate settlement of cases by providing litigants with an opportunity to hear the other side present its case, helping the parties isolate the core of the dispute, and offering litigants a confidential, frank assessment of the relative strengths and weaknesses of their positions and of the overall value of the case. The procedures utilized are fairly flexible. In some types of case evaluation, the neutral seeks to mediate the dispute following the initial presentation, and does not provide an evaluation of the case until the parties appear unable to reach a settlement. Case evaluation is often used in traditional settlement conferences. There are, however, no California statutes which specifically create court-connected case evaluation programs.

(2) Types of Cases in Which Case Evaluation May Be Appropriate

Case evaluation can be used in all types of civil cases where damages are being sought; the following types of cases, however, may be most appropriate for case evaluation:

- Cases in which one or more parties has an unrealistic evaluation of the case (20, p. 89);
- Cases in which liability is established, and the only significant issue is damages (20, p. 89);
- Cases in which technical or scientific issues exist (20, p. 89).

(3) Types of Cases in Which Case Evaluation May Be Inappropriate

The following types of cases may be inappropriate for case evaluation:

- Cases in which the principal relief sought is equitable (4, p. 30);
- Cases in which damages have not yet stabilized (4, p. 30).

c. Fact-Finding

(1) Description of Process

In fact-finding, a neutral third party reviews information submitted by the parties and/or conducts independent research regarding the facts, and submits findings to the court on specified factual issues. The neutral appointed to make findings of fact may be an expert who is expected to draw upon his or her special knowledge in evaluating or investigating information submitted by the parties. Under the statutory provisions establishing California's general reference procedure, a court may refer a case to a referee (sometimes called a special master) for ascertainment of specific facts.[16] This may occur either upon agreement of the parties (Code Civ. Proc., § 638) or, under specified circumstances without the consent of the parties (e.g., when trial on the issue would require examination of a long account) (Code Civ. Proc., § 639).

(2) Types of Cases in Which Fact-Finding May Be Appropriate

Fact-finding can be used in almost any type of dispute where there are unresolved factual issues. It may be most appropriate, however, where settlement in a civil case is frustrated because the parties cannot agree on a few important issues of fact, or where there are complicated technical/scientific issues which require expert knowledge for resolution (21, p. 10).

d. Mini-Trials

(1) Description of Process

In a mini-trial, attorneys representing the parties present their best case to the parties or to party representatives with authority to settle the case. A neutral third party is generally present to moderate the presentations, and to render non-binding opinions as to the probable resolution of specific legal, factual and evidentiary issues. The neutral

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[16] Some counties have programs in which special masters are used not only as fact-finders, but also to help with case management and settlement efforts. In San Mateo County, for example, the superior court may appoint a special master in complex cases at any stage in the proceedings and that special master, subject to the direction of the supervising judge, has the power, among other things, to require the attendance of counsel and parties at settlement conferences and to determine the procedure, time, place and duration of all settlement conferences (San Mateo Superior Court Rule 806).

may also comment on the outcome which might likely be obtained in a court proceeding. The procedures followed are flexible. The ultimate goal of a mini-trial is to facilitate a voluntary out-of-court settlement by narrowing the dispute and promoting communication between the parties.

(2) Types of Cases in Which Mini-Trials May Be Appropriate

Mini-trials can be used in any civil case; however, it may be most appropriate for the following types of cases:

- Cases where significant issues or substantial sums are at stake; this is because a mini-trial can be quite expensive (4, p. 58; 23, pp. 1-16);
- Business disputes where the parties have, or may develop, continuing relationships (4, p. 58; 23, pp. 1-16);
- Cases in which the parties are having difficulty communicating with each other (4, p. 59);
- Matters where reaching agreement fundamentally involves cost-benefit analysis and dispassionate judgment about economic self-interest (4, p. 58);
- Cases in which one or more parties is not realistically assessing their position in the case (4, p. 58).

(3) Types of Cases in Which Mini-Trials May Be Inappropriate

The following types of cases are probably inappropriate for mini-trial:

- Cases where the amount at stake does not warrant the time and resources necessary to commit to the mini-trial process (23, pp. 1-16);
- Cases which turn primarily on pure questions of law, or the trier of fact's assessment of the relative credibility of key witnesses (4, p. 59; 23, pp. 1-17);
- Cases in which the bargaining power of the parties is unequal (23, pp. 1-17);

- Cases in which one or more of the persons attempting to negotiate a resolution is heavily involved in the underlying events out of which the dispute arose (4, p. 58).

e. **Summary Jury Trials**

(1) Description of Process

Summary jury trials are abbreviated trials before a judge and an advisory jury. The format of counsel's presentation may vary from case to case. Evidentiary and procedural rules are flexible. After the presentation of the case, the jury may return a consensus verdict or individual verdicts that articulate each juror's perception of liability and damages. This verdict, or verdicts, are non-binding and meant only to aid the parties in reaching a settlement by indicating how a jury will perceive the case. Following submission of the verdict or verdicts, counsel may be permitted to question the jurors about the rationale that supported their verdict.

(2) Types of Cases in Which Summary Jury Trials May Be Appropriate

Summary jury trials are generally considered appropriate in the following types of cases:

- Cases where significant issues or substantial sums are at stake; this is because, like mini-trials, summary jury trials can be quite expensive;

- Cases in which the parties differ substantially in their opinions of the value of the case.

- Cases in which the parties differ substantially in their opinions of how a jury would interpret disputed facts as well as the law (7, p. 377);

- Cases where the parties have differing perceptions about how a jury will apply concepts such as "reasonableness and "ordinary care" to the facts (4, p. 68);

- Cases in which one or more parties (or their counsel) appear to have an unrealistic view of the merits of the case even after hearing a reasonable presentation of their opponent's arguments (4, p. 68);

- Cases in which one or more parties are reluctant to settle because they wish to have their "day in court" and receive an impartial evaluation from a jury (4, p. 68).

(3) Types of Cases in Which Summary Jury Trials May Be Inappropriate

Summary jury trials may be inappropriate in the following types of cases:

- Cases which could be tried to a real jury in a day or two (4, p. 70);
- Cases in which more convenient and less expensive settlement techniques have not yet been explored (4, p. 69).

f. Settlement Conferences

(1) Description of Process

In settlement conferences the parties meet with a neutral third party (in many cases a judge) to explore options for settling their dispute. The conference is generally informal; procedures followed vary from neutral to neutral and case to case. Frequently, mediation and case evaluation techniques are used. Generally, the neutral takes an active role in trying to guide the parties to a mutually satisfactory resolution. The ultimate decision regarding settlement, however, is left to the parties. Rule 222 of the California Rules of Court mandates settlement conferences in all long cause matters in courts with three or more judges; it also permits other or additional settlement conferences upon joint request of the parties or by order of the court.

(2) Types of Cases in Which Settlement Conferences May Be Appropriate

Settlement conferences may be used in any civil case filed in court; they may be most useful, however, in cases where the parties have not completely explored settlement options and are unlikely to do so without the assistance of a neutral. Settlement conferences may not be needed for uncomplicated cases where the parties are likely to achieve settlement on their own.

g. Arbitration

(1) Description of Process

In arbitration, a neutral third party, or a panel, hears arguments, reviews evidence and renders a decision regarding a dispute. Arbitration entails a much greater degree of neutral involvement than does mediation; in arbitration, the third party acts as an adjudicator, not merely a facilitator. Although arbitration is an adjudicatory process, it is less formal and less complex than traditional court proceedings.

California statutes have established a court-annexed arbitration program called "Judicial Arbitration" (Code Civ. Proc., § 1141.10 et seq.). Under these provisions, superior courts with 10 or more judges must, as a general rule, submit to arbitration all civil cases where the amount in controversy is less than $50,000. Other superior or municipal courts may adopt a similar program by local court rule. Any plaintiff may elect arbitration by agreeing that the arbitration award shall not exceed $50,000, and the parties may also stipulate to submit any civil case, regardless of the amount in controversy, to arbitration. The rules of evidence generally apply in the arbitration hearings, with specified exceptions set by the Rules of Court.

The awards made by arbitrators under these provisions are final unless a trial de novo is requested (Code Civ. Proc., § 1141.20). Any party may request a trial de novo, but if that party fails to obtain a more favorable judgment at trial, he or she must generally pay the costs of the arbitration, as well as certain of the other party's litigation costs (Code Civ. Proc., § 1141.21).

(2) Types of Cases in Which Arbitration May Be Appropriate

Arbitration could be used in any civil case; however, the following types of cases may be most appropriate:

- Cases in which the parties require an independent decision resolving the dispute (21, p. 10);

- Cases in which the parties have full information, but seek the opinion of a third party respecting (1) the extent of damages or (2) the credibility of witnesses (20, p. 90; 22, p. 76);

- Cases in which the parties are committed to "litigating" and are not open to negotiation (21, p. 10);

- Cases in which the parties have no relationship beyond a single incident, and in which the disputed issues involve only the amount of money damages (20, p. 90);

- Cases in which the amount at stake is relatively small and a quick third-party decision is of primary importance (20, p. 90).

(3) Types of Cases in Which Arbitration May Be Inappropriate

Arbitration may be inappropriate in cases where the parties want help improving their lines of communication, finding common ground, or working toward a creative solution to the dispute[17] (4, p. 77).

h. Adjudication by Referee/Pro Tem Judge

(1) Description of Process

As the name implies, an adjudication by a referee or pro tem judge means a hearing and decision by a neutral third party who is not a regular sitting judge. The procedures followed, although flexible, are essentially the same as would be followed if a trial judge adjudicated the case. California law contains two provisions under which a neutral third party may be appointed to adjudicate a case: (1) Article 6, Section 21 of the California

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17 Actions exempt from the judicial arbitration program are:

"(a) Actions that include a prayer for equitable relief that is not frivolous or insubstantial;
(b) Class actions;
(c) Small claims actions or trials de novo on appeal from the small claims court;
(d) Unlawful detainer proceedings;
(e) Family Law Act proceedings;
(f) Any action otherwise subject to arbitration that is found by the court to be not amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation;
(g) Any category of actions otherwise subject to arbitration but excluded by local rule as not amenable to arbitration on the ground that under the circumstances relating to the particular court arbitration of such cases would not reduce the probable time and expense necessary to resolve the litigation;
(h) Actions involving multiple cause of action or a cross-complaint if the court determines that the amount in controversy as to any give cause of action or cross-complaint exceeds $50,000." (Cal. Rules of Court, rule 1600.5.)

Constitution provides that, on stipulation of the parties, the court may order a case tried by a temporary judge who is a State Bar member;[18] (2) under California's general reference procedure, a court may refer a case to a referee for hearing and decision upon the agreement of the parties or, under specified circumstances, without the parties' consent.[19].

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18 Article 6, Section 21 of the California Constitution states:

"On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."

19 Code Civ. Proc., § 638 provides:

"A reference may be ordered upon the agreement of the parties filed with the clerk, or judge, or entered into the minutes or in the docket, or upon the motion of a party to a written contract or lease which provides that any controversy arising therefrom shall be heard by a reference if the court finds a reference agreement exists between the parties:

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision thereon;

2. To ascertain a fact necessary to enable the court to determine an action or proceeding."

Code Civ. Proc., § 639 provides:

"When the parties do not consent, the court may, upon the application of any party, or of its own motion, direct a reference in the following cases:

(a) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

(b) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

(c) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.

(d) When it is necessary for the information of the court in a special proceeding.

(e) When the court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."

(2) Types of Cases in Which Adjudication By Referee/pro Tem Judge May Be Appropriate

This process can be used in any civil case.

In Contra Costa, the court has found that two categories of cases are particularly appropriate for referees/pro tem judges: (1) smaller cases, where the trial time is limited to 4-7 days; and (2) cases governed by California Jury Instructions, Civil ("BAJI"). The certainty of trial date that the use of a pro tem or referee provides makes this procedure particularly attractive to litigants who need certainty for scheduling expert witnesses.

4. The Range of ADR Processes to Offer and the Range of Cases Eligible for Inclusion in the Program

Decisions concerning the range of ADR processes to offer and the types of cases to include relate directly to the overall scope of a court-related ADR program.

a. Range of Processes

A key threshold issue in designing a court-related ADR program is the range of ADR processes to offer. One approach is to develop and implement only one or two ADR processes on the theory that this will allow energy and resources to be focused on developing a program of consistently high quality (2, pp. 9-10). Another approach is to offer a wide menu of ADR processes, thereby enhancing prospects for referring each case to the most appropriate ADR process (2, pp. 4-5). Which approach is chosen will be a major determination of the size and scope of the program. If planners wish to start small, the processes offered should probably be limited, at least for an initial period (see III.G., above).

Resource limitations may influence this decision. Depending upon the funding, staff and volunteer resources available, as well as the costs and administrative burdens of providing various processes, a court may be forced to offer one process and not another. In this regard, it should be noted that the costs and administrative burdens of court-related ADR programs vary considerably depending on how certain basic planning and design issues such as responsibility for program administration have been addressed (see III.D.-G., above); some court-related ADR programs have been able to offer a menu of ADR options (e.g., Marin) without the need for substantial additional funding or staff.

The court's resource limitations may not be the only limitations that affect the range of processes offered; limitations on the availability of qualified neutrals may also be an important factor in deciding upon the scope of a court-related ADR program.

Finally, the range of ADR processes offered in a court-related ADR program will also be affected by the ADR program's goals and the needs which the program is designed to address. For example, if the program's principal goal is to provide a non-adjudicatory alternative which facilitates communication between litigants, program designers are likely to focus on offering mediation.

Most superior courts in California currently provide at least two ADR processes: judicial arbitration (which is required by statute in superior courts with 10 or more judges)[20] and settlement conferences (mandated by rule of court for long cause matters in all superior courts with three or more judges).[21] In some courts, settlement conferences are not traditional judge-conducted proceedings. In Sacramento Superior Court, for example, mandatory settlement conferences are conducted by a panel of two volunteer attorneys acting as pro tem judges. One is generally a plaintiffs' attorney and the other a defense attorney with expertise in the substantive law field involved in the case. In many instances, these conferences are effectively a form of neutral case evaluation.

Some courts, in addition to settlement conferences and judicial arbitration, offer one or two other ADR processes. In San Diego and Ventura, for example, the courts make referrals to mediation programs. Still other courts permit parties to select from a wide range of process options; Marin County Superior Court, for example, encourages parties to choose among binding and non-binding arbitration, mediation, neutral case evaluation and/or the use of a special master.

b. Range of Cases Eligible for the Program

As with decisions respecting the range of processes offered, program planning strategy, resource limitations and program goals may play a part in determining what cases should be eligible for the court-related ADR program (15, p. 4-1; 1, p. iv-8). The decision concerning what types of cases should be eligible for the program may also, at least to some degree, be governed by the number of ADR processes offered.

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[20] Code Civ. Proc., § 1141.11.

[21] Cal. Rules of Court, rule 222.

Court-related ADR programs appear to utilize one of three basic approaches to case eligibility:

- **All civil cases are eligible** - As suggested above, this appears to be the pattern for programs which offer a wide menu of ADR process options (e.g., Marin);

- **All civil cases are eligible, with specified exceptions** - This approach can be used to exclude cases in which ADR is generally considered inappropriate (such as domestic violence cases), or to limit eligible cases for other reasons such as availability of resources;

- **Only specified types/classes of cases are eligible** - Examples of this approach include Ventura's mediation program, which is limited to specific types of cases,[22] and San Francisco's settlement conference program, which is limited to cases in which the amount in controversy is over $50,000. This pattern can be used in single-process ADR programs to focus on cases that may be most amenable to resolution through that process, or it can be used simply to limit the scope of the program for planning strategy, e.g., to experiment with use of ADR for particular cases, or cost reasons.

5. Selecting Cases to Refer to the Program

Determining how cases that are actually referred to ADR are selected involves the consideration of several issues, including whether the case selection should be categorical or based on individual assessment, who should make the selection, and what assessment procedure should be followed.

a. Categorical Inclusion vs. Individualized Assessment

Court ADR programs appear to follow one of two basic approaches in selecting cases for referral to ADR:

- **Categorical inclusion of all cases that fall within scope of program** - In Ventura, for example, if a case is found to be one of the eligible case types, it is

[22] The types of cases eligible for referral to mediation in this program are limited to disputes involving neighbors, sexual harassment, discrimination, employment, homeowners' associations, code enforcement, businesses or partnerships, and any other dispute in which any party volunteers for mediation.

automatically referred to mediation. This approach essentially melds eligibility and selection criteria. It assumes there are categories of cases, typically identified by amount in controversy or subject matter, which are generally appropriate for referral to a particular dispute resolution process; and

- **Individualized assessment of cases within program scope to determine if they are appropriate for referral to ADR -** In San Francisco, for example, cases referred to the court's settlement program are selected individually from among those which meet the program's basic eligibility requirement -- an amount in controversy over $50,000. This approach assumes that the amenability of a particular dispute to resolution through ADR can only be determined by looking at the individual characteristics of the case.

Each of these approaches has its merits. Some of the arguments in favor of categorical inclusion are:

- Depending on the ADR process involved, it may be unlikely that a category of cases will be over-inclusive; some ADR processes such as mediation are appropriate for most cases and, even if the case does not settle, the parties may be better prepared for later settlement discussion or for discovery/trial;

- Categorical inclusion may save the court, and perhaps the parties, time and money by eliminating the need for a case-by-case review (15, p. 5-3);

- Categorical inclusion may result in more cases being referred to ADR; especially where judges and the parties are not familiar with an ADR process or its potential benefits, individualized case selection might result in under-utilization of ADR (15, p. 5-3); and

- Selection processes based upon categories of cases may be easier for the court to develop and articulate, and for litigants to understand.

The arguments in favor of individualized assessment include:

- Individualized assessment takes into account the particular needs of each case, maximizing the likelihood that only appropriate cases will be referred to ADR (2, p. 12; 13, p. 24);

- Individualized assessment minimizes the likelihood that inappropriate cases will be referred to ADR, with parties going through the motions, incurring additional costs and forming negative beliefs about ADR, and courts experiencing greater costs and administrative burdens (13, p. 24);

- Individualized assessment may facilitate the use of a range of ADR processes; categorical referrals seem more likely to result in the use of one process only (13, p. 24).

The debate concerning categorical versus individualized assessment arises in both mandatory and voluntary programs. Although, in a voluntary program, the parties ultimately choose whether to participate in a particular process, the court may still determine which cases to recommend for participation based upon a categorical or individualized assessment approach. However, concerns about categorical referrals are especially heightened in mandatory programs because the parties may be unable to decline participation even if they believe ADR is inappropriate in their case.[23] SPIDR has suggested that, ideally, mandatory programs minimize to the extent possible the inclusion of cases for which the dispute resolution process is unlikely to be helpful. They note that, although system needs in high volume programs may result in ADR referrals by case category, many courts are making mandatory referrals on a case-by-case basis in an attempt to avoid imposing unnecessary requirements on litigants and counsel (13, p. 24).

b. Who Determines Whether to Refer a Case to ADR?

The decision whether to refer a particular case to ADR -- and, if multiple processes are available, what process should be used -- can be made by the parties themselves, by a judge, by court staff or by an ADR expert. Who is chosen to make this determination may depend on factors such as the types of ADR processes offered, whether a categorical or individualized assessment approach is used, what court resources are available, and what approach the local culture and personal preferences of program designers dictate (2, p. 21).

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[23] The National Standards for Court-Connected Mediation include a recommendation that any case selection mechanism in a mandatory program provide for individual assessment of each case to determine its appropriateness for mediation. Such an assessment should take into account the parties' relative knowledge, experience and resources (15, p. 5-2).

(1) The Parties

By definition, in a voluntary ADR program, it is the parties who determine whether to participate in an ADR process offered as part of the court's program. Even in a mandatory program, however, where the court offers a menu of possible ADR processes, the choice of process can be given to the parties.

It has been suggested that parties should be the ones to select the ADR process they believe is suitable for their case because making this selection provides parties with the opportunity to discuss case management issues, the appropriate ADR process and its timing (2, p. 21). In addition, even though participation in some process is mandatory, allowing the parties to choose the process may produce some of the same positive effects as a completely voluntary program. For example, selecting the ADR process themselves may make the parties less resistant to participating. The less resistant they are, the more likely participation in ADR will be useful.

Unfortunately, allowing the parties to choose the ADR process to which a referral will be made may produce some of the negative side-effects of a completely voluntary program. For example, the selection process may become another issue over which the parties battle, spending more time and money. To address this concern, a court may wish to require that the parties make their selection within a specified timeframe, after which the selection will be made by the court.

Whether the program is a completely voluntary one or a mandatory one in which the parties select the ADR process, the parties' choice can be exercised independently or with the assistance of the court. Such assistance can take the form of written information concerning the available ADR processes or discussions with a judge, court staff person or other ADR expert at a conference.

(2) Court Staff

Using court staff to decide whether a particular case should be referred to the court's ADR program can provide a higher level of court control while conserving judicial resources. In order to perform this function, new staff or some shifting of other functions from existing staff may be required. Limitations on resources may thus affect the decision concerning staff's role in selecting cases for ADR referral. In addition, in

order to perform these duties, it is likely that the staff will require at least some training concerning program procedures and selection criteria.

Case selection by court staff is typically used in court-related ADR programs that offer only one or two ADR processes and employ a categorical case selection approach (2, p. 23). In such programs, the scope of new ADR duties may be fairly limited. Staff generally identify eligible case types based on examination of the pleadings or litigants' ADR questionnaires. In many cases, this examination can be done as part of a review of court papers already performed for other purposes. In Ventura, for example, court staff identify cases for referral to the court's mediation program as part of their regular review of the pleadings following the filing of the answer. Where the scope of ADR duties is limited in this fashion, the need for additional staff training or shifting of duties can be minimized.

Case selection by court staff can also be used where the court's program utilizes an individualized case selection approach. In these types of programs, the scope of staff's ADR duties will be fairly broad since they will be responsible for evaluating each case's appropriateness for ADR. It may be possible to base such an evaluation on litigants' answers to a detailed ADR questionnaire; court staff might also, however, have to meet personally or by telephone with the litigants to evaluate the case's ADR needs (2, p. 23). ADR duties of this scope are likely to require considerable training of staff and shifting of other staff duties.

(3) Judge

When a court elects to utilize an individualized case selection method, some think that judges themselves should be involved in the assessment procedure (2, p. 23). This has the potential of increasing the credibility of assessment with litigants. It will, however, undoubtedly be a drain on judicial resources. It has been suggested that the burden of this process on the judges can be alleviated to some degree by providing the judges with the assistance of staff or an ADR expert (2, p. 24). Using a hybrid approach to case selection -- presuming that a certain category of cases is appropriate for referral to the program, but allowing the parties to request exemption -- may also aid in alleviating the burden; judges would have to perform individualized assessments only in those cases where the parties requested exemptions.

(4) ADR Expert

A court may also employ an ADR expert to select cases for referral to the program. The major advantage to this approach is that the person selecting cases will have expertise identifying those matters appropriate for a particular ADR process. Because such expertise is not necessary to identification of case categories by amount in controversy or subject matter, ADR experts are unlikely to be used in programs which have adopted a purely categorical approach to case selection. One of the potential disadvantages of using an ADR expert may be that the court has less control over referrals to the program.

A court-related ADR program can obtain the services of an ADR case assessment expert in several ways. The expert can be hired as court staff. In the Middlesex Multi-door Courthouse Program in Cambridge, Massachusetts, for example, the program has an ADR expert on staff who performs individualized case assessment at a one hour case screening conference (22, p. 8). The expert might be "loaned" by an ADR provider administering the court's program. (See III.E.2, above for a related discussion of different administrative structures.) Several local ADR providers might provide the services of an ADR expert on a rotating basis.

Each of these approaches has advantages and disadvantages. While hiring a staff ADR expert may be expensive for the court, the court may retain a greater degree of control over the ADR program, making supervision and on-going evaluation by the court, as well as integration with other court procedures, easier. Use of a local provider or providers may impose less of a financial burden on the court, but the court may lose some degree of control over the program. In addition, if private ADR providers conduct assessment conferences, careful oversight must be maintained by the court in order to protect against the possibility of self-dealing.[24]

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[24] "When parties are required to attend an assessment conducted by a private practitioner and the purpose is to evaluate the appropriateness of using a dispute resolution process, the courts should maintain oversight. For instance, the integrity of the program may be compromised when public officials mandatorily refer the parties for advice about whether to choose to participate in a dispute resolution process to a private provider who will benefit if the parties elect to participate" (13, p. 21).

c. Options for Case Selection Procedures

Once program planners have made the policy decisions concerning whether cases referred to their ADR program will be selected categorically or through individualized assessment and who will be making these selections, the mechanics of implementing these policy decisions - the actual case selection procedures which will be used in the ADR program - must be considered. There are a number of possible case selection procedures reflecting different combinations of who selects cases for the program and whether the selection approach is categorical or based on individualized case assessment. Options include:

- **Party Meet and Confer Requirement:** The parties may be required to meet and confer to determine whether to participate in ADR and, if so, what process to use. This procedure can be used to implement a policy that the parties make an individualized assessment of the case for ADR. The meet and confer session may be followed up with a court conference if parties do not reach agreement on an ADR process;

- **ADR Assessment Conference:** The court can hold a conference conducted by a judge, court staff or an ADR expert to discuss whether participation in the ADR program is appropriate.[25] This conference procedure can be used to implement several different types of case selection policies:

  - Individualized assessment by parties with court assistance: The assessment conference can be used as a way for the court to educate litigants about available ADR options and assist them in selecting an appropriate process while the ultimate decisions concerning whether to participate in ADR and what process to use can be left to the parties' discretion. Marin County Superior Court's status/ADR assessment conference is an example of this procedure. There, the parties are required to attend a status/ADR assessment conference at which the propriety of an ADR referral and the particular process to be used are discussed. The parties, however, are free to determine if they wish to participate in ADR and what process they will use;

[25] Some commentators suggest referring all litigants in the first instance to a process such as mediation for case assessment (2, p. 20).

- Case selection by court; process selection by parties: The court can use the assessment conference procedure to gather sufficient information to determine whether to require participation in ADR, on either a categorical or individualized assessment basis, while the ultimate decision of what ADR process to use is left to the parties;

- Categorical or individualized assessment by court: The court can use the assessment conference procedure to gather sufficient information to determine whether to refer a case to ADR and, if so, to what process, either on a categorical or individualized basis;

- **Court Review of Papers:** A judge or court staff person can determine whether to refer a case to ADR, and, if so, to what process based upon a review of the papers or specific ADR questionnaires filed in the case. The case selection approach used can be either categorical, as in Ventura's Mediation Program, or individualized.

- **Referral Either Upon Stipulation of Parties or Order of Court:** A program can use a hybrid procedure permitting referrals either upon stipulation of the parties or by order of court. This procedure may potentially provide some of the advantages of both party and court selection of cases. In those cases in which referral by order of the court will be considered, the court's selection of cases can be made either upon a categorical or individualized assessment basis and either the conference or pleading review procedures described above could be utilized. In San Francisco Superior Court's settlement program, for example, parties in cases that meet basic program eligibility requirements may stipulate to participate in the program. Other cases are ordered to the program by the court based on a court commissioner's review of the pleadings.

- **Referred by Court with Opt-Out Procedure:** A judge or member of the court staff can determine that a case meets program eligibility requirements and make a referral to an ADR process; parties can then be given the option of requesting exemption from that process. This procedure can provide some of the advantages of both categorical selection of the majority of cases, while preserving the option of individualized assessment in those cases in which the parties feel it is necessary.

This is the procedure followed in some judicial arbitration programs -- the court refers all general civil cases to the judicial arbitration program; if the parties object to the referral, an arbitration status conference is held.

Whatever the case selection procedure adopted, it is recommended that the criteria for determining which cases to refer and which processes to use be developed jointly with other trial courts.[26] These criteria and processes should, moreover, be clearly explained to court and program personnel, as well as to litigants.[27]

E. SCHEDULING ADR CONFERENCES OR SESSIONS

Administrators of court-related ADR programs who are responsible for scheduling ADR conferences or sessions may face a number of practical issues. These include how to match available neutrals to cases, how many conferences or sessions to schedule per neutral per day, and where to hold the conferences or sessions. This section briefly describes some of the ways in which the court-related ADR programs featured in this guide have addressed these issues.

Several of the settlement conference programs featured in this guide have developed interesting mechanisms for matching available neutrals to cases. In San Francisco Superior Court's settlement program, for example, all conferences are held on Fridays. Three panels, each with different subject matter expertise, are scheduled per Friday. Attorneys who volunteer as neutrals are asked to serve twice a year and must complete a form indicating what Fridays they are available. Based on this form, and information from an application form identifying their areas of practice, volunteer attorneys are assigned to a particular panel by the program administrator at the Bar Association of San Francisco. The volunteers are then sent a confirmation form listing the panel date and the cases assigned. The volunteers are required to confirm that they are available on that date, and to indicate that they have no known conflict respecting the scheduled cases. Similarly, this year in Ventura, the county bar association recruited attorneys to

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[26] Standard 32 of the Standards of Judicial Administration, adopted effective July 1, 1992, suggests that trial courts should jointly establish appropriate criteria for determining which cases should be referred to ADR, and which types of ADR are appropriate for those cases (18).

[27] The National Standards for Court-Connected Mediation note that whatever criteria are used, clear articulation will enhance thoughtful decision-making as well as understanding and acceptance by court personnel, users and the public of the choices that are ultimately made (15, p. 4-1).

serve as volunteer neutrals for the superior and municipal courts' settlement program. Volunteers were asked to serve no more than four days per year. Using these commitments, the bar association was able to cover every available court day for one full year. Once the neutrals were scheduled, the court was able to assign cases to the volunteers on their scheduled days. In Contra Costa's SMART program, the bar association sends out an request letter three times a year to volunteers who are asked to sign up for Monday SMART sessions during that four month period.

Determining the appropriate number of cases to assign per neutral per day involves balancing the desire to maximize the use of the neutrals against the need to ensure sufficient time for meaningful ADR sessions. Individual court-related ADR programs have struck this balance differently. In Marin, for example, the court schedules between five and eight status/ADR assessment conferences per judge per day. Each panel in San Francisco Superior Court's settlement conference program is assigned two to three cases per day. In Ventura's early settlement conference program, neutrals are assigned a maximum of three cases per day.

The location of the ADR conferences or sessions depends, in large part, on who is conducting them and who is administering the program. If a judge conducts a settlement conference, for example, it will almost certainly be held at the courthouse; Marin and Contra Costa superior courts' status/ADR assessment conferences are good examples of this. If the ADR program is administered by a local bar association or ADR provider or if a private ADR provider or volunteer attorney conducts the ADR session, however, it may be held at a location outside the courthouse (e.g., the neutral's office). San Francisco Superior Court's settlement program, for example, is administered by the bar association, and settlement conferences are generally held in the bar association's offices. In confirming their ability to serve on a particular panel, however, volunteer attorneys may indicate they would like to hear the conferences in their office. In selecting the site, or sites, at which ADR sessions will be held, commentators observe it is important to keep in mind the impact of the location on the parties, including factors such as travel distance, parking cost, and other incidental expenses.[28]

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[28] In their survey of judges, the Judicial Council's ADR Consultants found respondents were concerned about the location of mediation services. They noted that, especially for pro pers, another trip to the mediator might be an additional litigation expense (20, p. 28).

Standard 1.7 of the National Standards for Court-Connected Mediation recommends that "in choosing the location and hours of operation of mediation services, courts should consider the effect on the ability of parties to use mediation effectively, and the safety of mediators and parties" (15, p. 1-4).

F. TIMING OF ADR USE

1. Introduction
2. General Considerations Regarding Timing of ADR
3. Continuous Availability of ADR Processes

1. Introduction

The court-related ADR programs featured in this guide offer ADR referrals at different times during the litigation process. In some programs, ADR is offered early in the life of the case; in Ventura County Superior and Municipal Courts, for example, referral to mediation is considered approximately 110 days after the complaint is filed. If a referral is made, the mediation is scheduled approximately 20 days later, or 130 days after the complaint was filed. Other courts make referrals later in the life of a case. One example is judicial arbitration which, pursuant to statute, absent the parties' consent, cannot take place earlier than 210 days after the filing of the complaint.[29] Still other processes are offered on the day of trial; in Contra Costa Superior Court's SMART program, for example, the ADR sessions are held on the morning of the scheduled trial date. Some courts make ADR available either continuously or at several points during the litigation process; for example, both Contra Costa and Ventura offer different ADR processes at various different points between filing of the case and trial. In general, in choosing the timing of ADR in a court-related program, program designers have attempted to make their ADR process or processes available as early as they can appropriately be used by the parties.

2. General Considerations Regarding Timing of ADR

Determining when in the life of a case an ADR process should be used involves balancing the benefits of early resolution against the parties' need to develop sufficient information to make an informed choice about settlement. ADR referrals made early in the litigation process can maximize the amount of time and resources saved by both the litigants and the court. Moreover, at an early stage, parties may not have yet solidified

[29] Gov. Code, § 68616(g).

their positions or become embroiled in expensive discovery (2, p. 114). If the parties do not have sufficient information to participate effectively in the ADR process, however, resolution of the dispute is not likely. Under these circumstances, ADR becomes simply another procedural hurdle for the parties.

The type of information needed and timing of ADR in a particular program may depend, at least in part, upon the particular ADR process being utilized. The adjudicatory nature of arbitration, for example, requires that parties be permitted to engage in adequate discovery before the arbitration hearing (2, p. 114). In California's judicial arbitration program, all discovery, with the exception of the expert witness exchange must be completed no later than 15 days prior to the arbitration.[30] As a consequence, judicial arbitration generally occurs fairly late in the litigation process. By contrast, case evaluation, which can be used not only to promote settlement but also to narrow issues and provide case management, generally requires less discovery and is usually used much earlier (2, p. 114). Court-related mediation may occur at almost any point in the litigation process. For example, cases are referred to mediation in Ventura approximately 110 days after the filing of the complaint, while in Contra Costa's SMART program volunteer attorneys mediate cases on the day of trial.

Some commentators have suggested that ADR timing should be determined on a case-by-case basis. Such an individualized determination can most easily occur in a program which has adopted an individualized case selection policy. If such a case-by-case approach is taken, the timing determination should take into account both the parties' capacity to participate and the ripeness of the issues for resolution (15, p. 4-4). Some also suggest that, if participation is mandatory, the parties should have input concerning the timing of the referral (15, p. 5).

Even though the timing of ADR referral may vary from process-to-process and case-to-case, the goal should be to have ADR occur as soon as the parties are able to make informed settlement choices.[31]

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30 Code Civ. Proc., § 1141.24 and Cal. Rules of Court, rule 1612.

31 Standard 4.4 of the National Standards for Court Connected Mediation provides:

"While the timing of a referral to mediation may vary depending upon the type of case involved and the needs of the particular case, referral should be made at the earliest possible time that the parties are able to make an informed choice about their participation in mediation" (15, p. 5).

In some cases, the point at which such an informed choice can be first made may be before the case is filed. Although statutory changes would be needed to require ADR pre-filing, such pre-litigation use can be encouraged.[32] A court-related ADR program could offer such encouragement by providing brochures or other written information about ADR and requiring attorneys to provide information on ADR to their clients. (See IV.B., above for a discussion of program elements designed to educate litigants about ADR.) Court-related ADR programs could also make their services available to disputants before a complaint is filed.[33]

3. Continuous Availability of ADR Processes

A case that is not ripe for resolution at one point may be ready for settlement at some later point in the litigation process. Thus, it has been suggested that ADR services be made available on a periodic or continuing basis throughout the life of a case.[34] Several of the court-related ADR programs featured in this guide share this philosophy and have

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Principle 2 of the Alternative Dispute Resolution Principles adopted by the Judicial Council of California, effective July 1, 1992, states that "ADR is most effective when introduced at an early stage, whether within or outside of the court" (17, p. 1).

[32] Principle 6 of the Alternative Dispute Resolution Principles adopted by the Judicial Council of California, effective July 1, 1992, states: "Parties should be encouraged to attempt to resolve their disputes before filing a lawsuit" (17, p. 2). Judges surveyed by the consultants to the Judicial Council ADR Advisory Committee were virtually unanimous that courts should promote pre-filing mediation (20, p. 29).

[33] Standard 4.3 of the National Standards for Court-Connected Mediation provides:

> "Courts should make available or encourage the availability of mediation to disputants before they file their cases in court as well as after judgment to address problems that otherwise might require re-litigation" (15, p. 5).

The Commentary to this Standard notes that courts can play an important role in promoting the availability of mediation before filing by opening court-connected mediation programs to cases pre-filing or post-judgment, working directly with agencies and individuals in the community to encourage mediation, and by advocating publicly through bar associations and otherwise for the increased availability of such services. It also notes that court statistical methods may have to be modified to encourage pre-filing mediation, so that the court receives recognition for the services provided (15, p. 4-3).

[34] Standard 4.5 of the National Standards for Court-Connected Mediation provides:

> "Courts should provide the opportunity on a continuing basis for both the parties and the court to determine the timing of a referral to mediation" (15, p. 5).

The Commentary to Standard 4.5 notes the danger that a case assessed initially as not ready for mediation will be allowed to languish, with consequent hardening in the parties' positions and early resolution opportunities lost (15, p. 4-4).

incorporated it into their program design. A representative of the Ventura court administrator's office, for example, has observed that the litigation process is like a funnel - large numbers of cases enter the system, but only a few are tried. Accordingly, the court believes it should assist the resolution as soon as possible of as many cases as possible. It also believes that the more opportunities provided for parties to consider a resolution of the dispute, the more likely it is the case will settle. To that end, Ventura's overall ADR program now includes a mandatory mediation program at approximately 110 days after filing, an early settlement conference program at approximately 150 days, judicial arbitration at 210 days, and the availability of pro tem judges for trials. In other courts, the philosophy favoring continuous availability of ADR is implemented by making settlement conferences available any time they are requested by the parties or considered appropriate by the judge.

G. INTEGRATION OF ADR WITH OTHER COURT PROCEDURES

1. Introduction
2. What Relationship Should Be Established Between ADR Programs and the General Pretrial Procedures?
3. Integration of Multiple ADR Programs Within a Court

1. Introduction

As described in more detail below, courts in California have integrated ADR with their other procedures, both general pretrial procedures and existing ADR processes, in various ways. Integrating ADR into existing court procedures generally requires consideration not only of concerns about minimizing delay or other disruption in existing court procedures, but also concerns about the effectiveness of the ADR process and how that might be affected by its integration into the court system.

2. What Relationship Should Be Established Between ADR Programs and General Pretrial Procedures?

There is general agreement that court-related ADR programs should be coordinated with a court's existing case management procedures (2, p. 120). A coordinated approach

will avoid duplicative or conflicting efforts to resolve a case, and produce a more complete, coherent and less costly system.

In 1986, California adopted the Trial Court Delay Reduction Act.[35] Pursuant to this act, California trial courts are attempting to reduce delay in their proceedings by adopting continuous court management of cases. This is generally in harmony with suggestions that courts manage cases throughout the ADR process.[36] However, some commentators have expressed concern that fitting ADR processes within existing delay reduction deadlines may unduly constrain their effectiveness and contribute to a perception that ADR is just one more hurdle which must be overcome to get to trial (2, p. 120). In contrast, other commentators have suggested that because most ADR processes take only a brief period of time, it is generally not difficult to complete them within courts' existing delay reduction time frames (20, p. 67).[37] It appears that in virtually all court-related ADR programs in California, the ADR processes are expected to be conducted within the court's delay reduction time frames.[38]

In addition to working within delay reduction time-frames, courts in California have integrated ADR with their other procedures in various ways. Many courts, for example, including Contra Costa, San Diego and Marin, have modified existing forms, such as the at-issue memorandum and case management conference statement, to incorporate information or questions regarding ADR. Several courts which utilize an individual assessment approach to ADR referrals, including San Diego, Marin and Contra Costa,

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35 Gov. Code, § 68600 et seq.

36 Judicial case management has been identified as paramount to the success of court-annexed ADR (12, p. 8).

37 On a related subject, Standard 4.7 of the National Standards of Court-Connected Mediation suggests that courts establish presumptive deadlines for completion of the ADR process, which may be extended upon a showing that continuation of the process will assist in reaching resolution (15, p. 6). The Commentary to this Standard notes that since mediation is voluntary in the sense that parties are free to settle or not, its continuation can be assumed to reflect the parties' judgment that the negotiations are productive. At the same time, courts have a clear interest in managing their cases and preventing delay. Balancing these interests requires presumptive deadlines integrated into existing case management procedures and time frames. They also suggest that courts should freely grant requests for extensions if the parties can show that continuation will be helpful in reaching resolution. Since good mediation takes time, courts should not be unduly restrictive in establishing deadlines (15, p. 4-5).

38 In their survey of judges the consultants to the Judicial Council's ADR Advisory Committee found that the judges responding to the survey generally felt referral to ADR must not interfere with or delay other court-imposed deadlines. The judges also generally agreed that deadlines enhance the likelihood of settlement, so that to the extent ADR interferes with existing deadlines, it becomes self-defeating (20, p. 29).

have expanded existing status/case management conferences to include consideration of ADR. Where court staff are responsible for identifying cases for referral to ADR, some courts, such as Ventura, have incorporated this review into the normal staff review of the pleadings in a case.

3. Integration of Multiple ADR Programs Within a Court

If a court offers more than one ADR process,[39] these processes must be integrated not only with the court's other general pretrial procedures, but with each other. Some court-related ADR programs have been specifically designed to provide an ADR option in cases not eligible for other existing ADR programs; San Francisco's Early Settlement Program, for example, only handles cases with amounts in controversy over the $50,000 limit for judicial arbitration. However, in many cases, the eligibility criteria for different ADR processes overlap. Where a case is eligible for more than one court-related ADR process, it appears that some California courts view these ADR processes not as alternatives, but as options which can be used consecutively in appropriate cases. The most common example of this pattern is the referral to settlement conferences of cases in which a trial de novo has been requested following judicial arbitration. If ADR processes are to be available on a periodic or continuing basis, as discussed in IV.F., above, the option of consecutive referrals may also be helpful.

There appears to be general consensus, however, that a case should not automatically be referred to a subsequent ADR process simply because it was not successfully settled through the first process. Consecutive referrals should be discretionary and should be made only in cases in which the later referral is likely to have a beneficial effect. One of the principles the Judicial Council adopted specifically suggests that "courts should have discretion to exempt actions from judicial arbitration when the parties have participated in another form of dispute resolution, such as mediation" (17, p. 2). This model of discretionary exemptions from judicial arbitration would appear to apply more broadly to other processes as well.

[39] As discussed in IV.D.4., above concerning the range of ADR processes offered, most superior courts in California currently offer at least two ADR processes, judicial arbitration and settlement conferences, and many courts also offer additional ADR processes.

H. NEUTRALS

1. Introduction
2. Degree of Court Involvement in Providing Neutrals
3. Recruitment of Neutrals
4. Quality Control
5. Do Neutrals Sit In Panels/Individually?
6. Choosing a Neutral
7. Retention of Neutrals
8. Compensation of Neutrals

1. Introduction

A key issue which must be faced by any court-related ADR program is how neutral services will be provided. The programs featured in this guide have adopted various approaches in addressing this issue: some programs maintain lists of private ADR providers from which the parties may choose; other programs maintain panels of volunteers who serve as neutrals; still others have arranged to have a community ADR center provide neutral services for the court's program.

This section identifies the issues program planners may wish to consider in obtaining neutrals for their court-related ADR program.

2. Degree of Court Involvement in Providing Neutrals

One of the first policy issues which program planners must face in considering neutral services for a court-related ADR program is the degree to which the court will be involved in providing these services. There are at least four alternative approaches to the provision of neutrals, each reflecting a different degree of court involvement. Which of these approaches is taken will be affected, in part, by the availability of ADR services in the jurisdiction; the availability of funding (1, p. iv-11), and may also be affected by who is responsible for administering the program (see II.E., above for general discussion of program administration). These approaches include:

- **Staff neutrals:** Programs desiring the maximum level of court involvement in the provision of neutral services can use judges or members of court staff as the

neutrals for the program. The most common example of this approach is judges themselves conducting settlement conferences. Another option would be to hire new staff or train existing staff to act as neutrals. None of the programs highlighted in this guide utilizes this approach. This may be due in part to the cost of adding staff and to current fiscal constraints facing the California court system.[40] If funds are available to compensate neutrals, one suggested consideration in determining whether to adopt this option is whether the current or projected ADR caseload justifies hiring and training such staff neutrals (15, p. 13-5);

- **Court-provided volunteer neutrals:** The second highest level of court involvement is for the court to develop a panel of individual neutrals to whom cases are referred. Depending upon the quality control measures implemented by the court, this approach could vary from a relatively low level of court involvement in providing neutrals to a relatively high level; courts may select the providers or neutrals with little or no screening or training or it may adopt a comprehensive quality control program. In Ventura, for example, the court implemented a number of quality control measures, including minimum qualifications, screening and training, for its mediator panel;

- **Agreement with outside provider:** An agreement or understanding between the court and an outside ADR provider to supply neutral services represents a lower level of court involvement in the provision of neutrals. Such an arrangement may be reflected in a formal contract or an informal understanding. In San Diego, for example, the court has a non-contractual arrangement with the San Diego Mediation Center ("SDMC") under which the court refers cases to SDMC and SDMC provides the first mediation session in these cases at no charge to the parties;

- **Lists of providers/neutrals:** Simply maintaining a list of neutrals the parties may contact represents the lowest level of court involvement in the provision of neutrals. Among programs adopting this approach, as with the previous approach, the level of court involvement can vary further depending upon the quality control

[40] Some federal courts in California use staff neutrals. For example, the Ninth Circuit Court of Appeals has six staff neutrals. We have not researched the question of whether state courts would require additional statutory authority to employee new staff or use existing staff as neutrals.

measures which were applied in creating these lists.[41] Courts can require providers to meet specified qualification criteria and/or they can undertake a detailed screening of providers' qualifications. At the other end of the spectrum, all available providers who apply may be included on the list. In Marin County, for example, lists of neutrals are maintained by the county bar association. All providers who submit applications are included (for information included on lists, see Appendix B, MA-5); no screening is done. The San Diego Superior Court compiles its list of pro tems in the same manner.

Which of these approaches is taken by a program will be affected, in part, by the availability of ADR services in the jurisdiction and the availability of funding (1, iv-11). The degree to which a court is involved in providing neutrals may also be inter-related with who is responsible for administering that program (see II.E, above for a discussion of program administration). Suggested criteria for selecting an approach to the provision of neutral services include:

- Which approach makes it more likely that the program can attract and retain qualified, experienced neutrals?
- Which approach will produce a greater diversity of neutrals in terms of race, sex, age, and experience? and
- Which approach will maximize the parties choice among neutrals? (15, p. 13-5)

The degree to which a court is involved in providing neutrals may itself have an impact on other program design issues. For example, a court that plays a direct role in providing neutrals may be in a better position to control and monitor its ADR program and implement quality control measures.

3. Recruitment of Neutrals

a. Introduction

As stated in the State Bar Office of Legal Services Pro Bono Primer, "recruitment is the heart of any pro bono program and to ensure its success, efforts must be ongoing" (16,

[41] See IV.H.3., below for a more detailed discussion of the quality control issues.

p. 23). This is equally true with respect to recruitment of neutrals for court-related ADR programs. Recruitment of neutrals is particularly important for court-related ADR programs which intend to rely predominantly on volunteer neutrals. Given current fiscal constraints, most federal and state court ADR programs rely on volunteer neutrals. Where these volunteers are attorneys, bar association involvement is typically key in obtaining, training and retaining an adequate pool of neutrals.

How recruitment is organized and sustained may depend on a number of factors including the level of the court's involvement in the ADR program, the type of ADR process(es) being offered, the nature and caseload of the proposed program, whether the program is mandatory or voluntary, the size of the local bar, the geography of the jurisdiction, the availability of court resources (2, p. 62) and the availability of neutral services in the geographic area.

b. General Recruitment Strategies

Program developers in both the ADR and pro bono legal services areas have suggested several general strategies which may be helpful in recruiting neutrals:

- Clearly define the neutrals' time commitment and responsibilities and provide support mechanisms, including training and mentoring programs, especially for neutrals who lack experience in traditional areas. Additionally, where appropriate, inform volunteers of other services for which volunteers are needed, e.g., providing ADR case screening, intake or information dissemination;

- Develop a strong recruitment message:

  - Define the need for ADR and support it with facts, statistics and anonymous case scenarios from the community;[42]

  - Emphasize the benefits of doing ADR work, e.g., the chance to enhance professional skills, develop new contacts in the ADR/legal community, provide better services to clients, achieve greater involvement with the

[42] Much has been written on this, including summary statements of ADR needs and accomplishments, e.g., the State Bar's Mediation Week Proclamation.

community, foster personal satisfaction by assisting persons who would not otherwise have access to the legal system (16, pp. 23-24);

- Appeal to the responsibility of the bar, community mediators and private ADR providers to assist the court;

- Seek support for the program and recruitment efforts from the bench, bar and community at large (16, p. 24);

- Consider coordinating recruitment efforts with other similar programs/legal services providers (16, p. 24);

- Time recruitment to coincide with other efforts that raise the visibility of ADR activities, e.g., during Pro Bono Month, Mediation Week or Settlement Week (16, p. 25);

- Establish the program's credibility and maintain its visibility, e.g., newsletters, press releases, brochures, open house, recruitment packet and other promotional activities (see Chapter VI., below for a general discussion of program promotion).

(1) Specific Recruitment Methods

Court-related ADR programs have used two principal methods to reach their recruitment target audience: (1) inviting all those who meet basic qualification criteria to apply; or (2) inviting the court, bar committees, or other groups to nominate individuals they consider qualified (or well qualified) under the criteria for selection of neutrals (2, p. 62). The first of these options may offer the program a larger, more diverse pool of potential neutrals from which to draw. However, it may be administratively burdensome if responses to recruitment efforts are voluminous. The second approach offers the advantage of reflecting the respect with which selected individuals are regarded, as well as providing an indicator, albeit subjective, of an individual's ability and reputation. There are examples of both these approaches among the court-related ADR programs featured in this guide. In Marin, for example, the bar association recruits neutrals through a variety of sources, and places all those interested on the list of neutrals. In San Francisco, in contrast, only attorneys specifically recommended by current settlement officers or the court are recruited as neutrals.

A number of specific methods can be used to recruit neutrals for a court-related ADR program:

- Recruitment letters signed by judges, local bar presidents, or ADR leaders. They will be most effective if an enrollment form is enclosed and if followed up by telephone (16, p. 25);
- Presentations at bar and ADR provider functions (16, p. 25);
- Joint bench/bar CLE and training programs relating to ADR and the role of neutrals;
- Personalized recruitment, i.e., identify key individuals who can make personal and informal contacts with their peers (16, p. 26).[43]

Other recruitment methods which a program may wish to consider include:

- Advertisements in local newspapers (16, p. 26);
- Open houses (16, p. 26);
- An advisory committee whose function is to recruit neutrals from identified groups.

In San Diego, there has been one recruiting drive for the pro tems who act as neutrals in the court's settlement program. This recruitment drive was launched by a letter from the bar association when the program was inaugurated. In Marin, an announcement and invitation to those interested in serving as ADR neutrals was sent to Bay Area bar associations, ADR providers, provider organizations and newspapers. Ventura solicited mediators through an "invitation to apply" for its new court-connected mediation program during the planning stages.

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[43] Telephone or face-to-face recruitment is generally acknowledged to be much more effective than written recruitment materials by themselves.

4. Quality Control

a. Introduction

A key issue concerning neutrals for court-related ADR programs is what measures the program will take to ensure the quality of these neutrals. Quality control includes such things as requiring that neutrals meet qualification and training criteria; it also includes ongoing monitoring and evaluation of neutrals. Quality control is an issue in all court-related ADR programs. As has been noted, it is of special concern when parties are mandated to participate (15, p. 6-5).

Some of the programs profiled in this guide require neutrals to meet certain minimum qualifications, such being attorneys or having a minimum number of years of practice, while others impose no such criteria. Some programs engage in qualification-based screening while others conduct no formal screening at all. Some require various amounts of training while others have no training requirements. Two of the programs featured in this guide have adopted formal standards of practice for their neutrals. At least two of these programs have also adopted some level of neutral monitoring/evaluation.

These individual quality control measures can be combined into a comprehensive program for ensuring the quality of neutrals in an ADR program. Ventura, for instance, has adopted a comprehensive quality control program for the neutrals in its mediation program which includes qualification criteria, screening, training, and standards of practice. The San Diego Mediation Center, in collaboration with San Diego SPIDR representatives, members of the San Diego Bar Association ADR Section, the San Diego Superior Court and others, have recently developed a comprehensive mediator credentialing program which can be used by any ADR program (14, pp. 1-5). The elements of the credentialing program are:

- A written application;
- A minimum of 25 hours skills training;
- Completion of a minimum number of mediations (6) within the past 3 years; and
- Satisfactory completion of a simulated mediation under observation.

b. Qualifications

The issue of establishing minimum qualifications for those who act as neutrals, such as a specified degree or practice for a specified number of years, is a topic of ongoing public debate.[44] The Judicial Council, in reference to education and experience qualifications, suggests that "criteria should be established for dispute resolution providers to whom the court makes referrals, even if they receive no fees" (17, p. 2).

(1) Pros and Cons of Qualifications Criteria

On the positive side, establishing neutral qualification criteria can:

- Protect the consumer;
- Protect the integrity of the dispute resolution processes;
- Offer disputants an objective measure of neutrals' knowledge respecting the subject matter and the resolution of disputes. If this is available, litigants may be more likely to use neutrals.[45]

Negatives of qualification criteria for neutrals include that they:

- Create barriers to entry into the field;
- Limit the broad dissemination of peace-making skills in society (15, p. 6-1);
- Do not necessarily ensure competent performance by neutrals (15, p. 6-3).

Marin County's experience reflects the tensions inherent in establishing qualifications. Currently, the program does not require that its neutrals meet any specified qualification criteria. Minimum qualifications were suggested originally, but, when the project was presented to the bar, this was the one issue which caused the most concern.

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[44] For example, SPIDR established a special commission to study and report on qualifications. This Commission issued a report in 1989 and recently has been reconvened to further study the issue (27).

[45] In addition to these direct benefits, there is a concern about the possible impact of a lack of qualification/credentials on the credibility of the program.

(2) Traditional Approach vs. Performance-Based Qualifications

Traditionally, court-related ADR programs have required that neutrals be lawyers, whether they serve as arbitrators, mediators or case evaluators. With respect to lawyer neutrals, programs have focused on how long the lawyer has been admitted to the bar, whether a particular area of practice is required, and whether training is required in addition to or as a substitute for legal experience (2, p. 63). This approach is used in several of the featured counties. Contra Costa, for example, appoints only senior attorneys who are known to the court as neutrals for its various ADR programs. In San Francisco's Early Settlement Program, settlement officers must have 10 years' litigation experience.

Approximately half of the judges responding to the Judicial Council survey, however, suggested that bar membership should not be the primary factor in selecting mediators (20, pp. 26-27). A growing number of states are moving away from attorney-based eligibility requirements towards "performance based" qualifications (2, p. 63). This is the approach advocated by the National Standards for Court-Connected Mediation and the SPIDR Commission on Qualifications, which suggest that qualifications be based on skills acquired through training, experience, and skills-based education (15, p. 6-4, 27, p. 2).

An additional issue concerning neutral qualifications is whether different types of cases may require different types and levels of qualifications (15, p. 6-1). Several groups have developed lists of neutral skills which they suggest should be considered by courts and applied depending on the type of case involved (15, p. 16-3).

c. Screening Neutrals

The National Standards for Court-Connected Mediation Programs state that courts should be responsible for determining that the neutrals to whom they refer cases are qualified (15, p. 6-5). Screening is the process used to make this determination about potential neutrals -- do they have the qualifications to act as neutrals in the program.

(1) Methods of Screening

A variety of methods exist to screen for qualifications. These include:

- Questionnaires/paper screening;
- Curriculum vitae/paper screening;
- Individual interviews;
- Performance-based testing (15, p. 6-5);
- Mentoring program;
- Certification by an outside organization; and
- Approval of a small pool of neutrals after consultation with all interested bar associations and provider organizations.

These methods can be used singly or in combination Often the level of screening depends upon the type of case involved. For example, a higher level of screening may be needed for domestic relations cases (15, p. 6-5).

When Ventura was setting up its new mediation program, it established a screening program for potential mediators. The court asked three ADR providers to provide lists of mediators. These mediators were sent invitations to apply. Applications were then reviewed by a panel of qualified mediators who conducted interviews of individuals that qualified (see Appendix B, VE-6).

(2) Who Conducts the Screening?

A number of different individuals can conduct the screening of neutrals:

- Judge;
- Program administrator;

- Bar association;
- Standing Panel on ADR; and
- Committees of judges, attorneys, ADR providers and county ADR administrators. (20, p. 76)

Who conducts the screening of neutrals may be largely dependent upon who is primarily responsible for administering the ADR program (see III.E., above for general discussion of responsibility for program administration). Several of the different options listed above are being used by the court-related ADR programs featured in this guide. In Contra Costa, the initial screening was done by the judge instrumental in establishing the court's ADR programs. In San Francisco, neutral screening is done by the Bar Association's program administrator. The screening for Ventura's mediation program, as noted above, is done by a panel of mediators (see Appendix B, VE-6).

(3) Screening and Training Interface

In order to better promote the goals of excluding inappropriate neutrals and assuring the best qualified pool, participants in the National Conference on Emerging ADR Issues in State and Federal Courts suggested that any neutral selection system be supplemented by systematic recruitment efforts and a thorough training program (12, pp. 88-89).

d. Training

In addition to setting minimum qualifications which may include general educational requirements, some court-related ADR programs require that neutrals have completed certain training requirements. Programs with training requirements typically conduct their own training courses which potential neutrals are required to attend. Where a law degree/specified experience is not a qualification criterion, training may be of particular importance (2, p. 66). Of the courts discussed in this guide, only a few have specific training requirements. In Ventura, for example, mediators are required to have 32 hours of training, plus 4 to 6 hours of court orientation. They are also required to have conducted 8 mediations. Mediators who serve San Diego's court program must have a year of training and must observe other mediators for practical training.

The general content and duration of training courses varies from program to program and jurisdiction to jurisdiction. One source recommends that training courses should include information regarding court procedures, training in particular ADR skills and techniques, and role playing with feedback, where appropriate (15, p. 6-4).

In California, all DRPA funded programs are required to provide their neutrals with a minimum of 25 hours of classroom and practical training. Classroom training involves a minimum of 10 hours of lecture and discussion, addressing 12 specific topics outlined in the California Code of Regulations, section 3622.[46] Practical training, also a minimum of 10 hours, includes role playing in connection with simulated disputes, and observation of actual dispute resolution proceedings.

Courts can contact their local bar association and/or DRPA-funded program to explore possible training assistance. The State Bar's Office of Legal Services Program Development Unit also has available a list of trainers and a limited number of sample training manuals.

e. Standards of Practice

Another quality control mechanism is to require that neutrals, once selected to participate in the program, adhere to certain standards of practice. At least two of the court-related ADR programs featured in this guide have adopted standards of practice for their neutrals. All of the DRS settlement officer programs in Los Angeles have rules specifically relating to conflicts of interest: settlement officers must have no conflict of interest in connection with cases assigned to them; and, if a conflict is discovered, the settlement officer must withdraw from the case. Ventura has adopted ethical standards for its mediators which cover conflicts of interest, as well as such things as impartiality, advertising, confidentiality, and knowledge of the process (see Appendix B, VE-8).

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[46] The topics include: (1) the history of dispute resolution as a problem solving technique and its relationship to the traditional justice system; (2) the Act and Regulations; (3) an overview of the structure of the California justice system and the traditional methods of processing civil and criminal cases; (4) the structure, design, practice, and theory of dispute resolution proceedings and services; (5) communication skills and techniques; (6) problem identification and disagreement management skills; (7) techniques for achieving agreement or settlement; (8) general review of fact patterns present in typical disputes; (9) administrative and intake skills related to dispute resolution services; (10) the role and participation of attorneys and witnesses in dispute resolution proceedings; (11) the organization and administration of dispute resolution programs; and (12) the necessity of the voluntary and consensual nature of a disputant's participation in any dispute resolution proceedings (Cal. Code of Regs., tit. 16, § 3622(c).).

Several courts in other states have also developed standards of practice for neutrals to whom they refer cases. Commentators have noted that, as the public sector encourages and even requires the use of ADR, support for standard setting and enforcement seems to be growing (11, p. 179). The National Standards on Court-Connected Mediation Programs recommend that courts develop their own set of ethical standards for neutrals. Such standards can address impartiality, conflicts of interest, advertising, disclosure of fees, confidentiality, and the role of mediators in settlement (15, p. 8-1). Currently, the American Arbitration Association, the ABA's Dispute Resolution Section and SPIDR are developing a joint ethics code.

The Northern and Southern California Mediation Associations, as well as other professional provider groups, are currently in the process of developing ethical standards and may be able to provide guidance to court-related ADR programs seeking further information in this area.

f. Monitoring and Evaluation of Neutrals

Monitoring and evaluating the performance of neutrals to whom cases are referred may be as important as initial screening in ensuring consistently high quality performance. While recognizing the importance of this element, most of the programs featured in this guide do not have formal neutral monitoring or evaluation systems in place as yet.[47] The San Diego Mediation Center, which receives mediation referrals from the San Diego Superior Court, conducts follow-up calls with both the parties and the attorneys which include questions about the service provided by the mediator.

There are a number of direct monitoring mechanisms available to court-related programs which allow programs to evaluate neutral performance on an ongoing basis. Options include:

- Peer review and supervisor observation (e.g., in the Contra Costa program, the program coordinator observes mediation sessions on a random basis);
- Client surveys/evaluation forms (e.g., both the Marin and Ventura programs use these (see Appendix B, MA-6 for Marin's evaluation form));

[47] Most programs that receive DRPA funding conduct some form of follow up assessment and monitoring of their neutrals.

- Feedback from judges who make referrals;

- Outcome data, such as the number of cases settled (e.g., in the Los Angeles program the ADR provider, DRS, collects this.)

In addition to these forms of monitoring, some recommend that parties have access to a complaint mechanism which includes, in appropriate cases, a procedure for removing neutrals from a panel or list (15, p. 2-6).

Long-range monitoring can be provided through a requirement that neutrals engage in ongoing training, study and practice.

5. Do Neutrals Sit in Panels/Individually?

One of the program design issues ADR program planners will face concerning neutrals is whether these neutrals should sit individually or in panels. This decision may be affected by the type of ADR process being used; for example, mediators generally sit individually while case evaluators and arbitrators often sit in panels.

The determination that neutrals will serve individually or on panels may also impact a number of other program design elements, including neutral recruiting, scheduling and compensation. Having neutrals serve individually can minimize the need for recruiting and also minimize administrative complications associated with neutral scheduling. For certain types of cases and processes, e.g., neutral evaluation, a panel approach which couples a plaintiff's with a defense attorney may cancel out potential biases and increase the credibility of the program. Such an approach requires, however, a larger pool of neutrals, therefore increasing the recruitment burden, and may complicate scheduling. An example of the panel approach is the San Francisco Bar Association's Early Settlement Program. Each panel consists of two volunteer settlement officers. According to a BASF representative, the team technique is particularly advantageous since it maintains volunteers' interest while assisting in settling cases.

6. Choosing a Neutral

Another important issue related to neutrals which those planning or implementing a court-related ADR program must address is how the neutral or neutrals to be used in a particular case will be chosen. The main variable and area of controversy in choosing a

neutral is how much involvement litigants or the courts have in the selection process (2, p. 73).

a. The Pros and Cons of Party and Court Selection of Neutrals

There are several recognized advantages to having the parties choose their own neutral:

- It enhances party satisfaction;
- It increase the parties' investment in the process; court choice may alienate the parties, and make them hostile to the process;
- It helps ensure the quality of the neutrals;
- It guards against possible judicial favoritism (2, p. 75);
- It may reduce the time and effort court staff must expend administering the program.

There are several recognized advantages to having the court choose the neutral(s). These include:

- Court selection may give the process greater "dignity and legitimacy" (15, p. 7-2);
- Quality control may be superior because the court may be better informed than the parties concerning the qualifications of neutrals and the types of neutrals best suited for particular cases;
- The court may have a particular public policy objective which is furthered by court selection of neutrals;
- In certain cases, it may be important to maintain maximum control over the choice of neutral, e.g., politically sensitive cases (2, p. 74);
- There may be significant inequality in the knowledge or experience of the parties relevant to the selection of a neutral;

- The judge selects the neutral but affords the parties a right to object;

- Court staff selects the neutrals, without input from the parties or the judge, based on availability, rotation, or particular expertise.

The court-related ADR programs featured in this guide have adopted a variety of these different option for choosing neutrals. In Contra Costa and San Francisco, neutrals are assigned by the court or the bar association.[48] In Marin, by contrast, the parties may choose a neutral from lists of providers maintained by the bar association or may select other neutrals. In San Diego's settlement and pro tem trials programs, court staff suggest certain pro tems whose expertise would be beneficial for the particular case; based on that recommendation, the parties select the neutral. In Ventura, mediators are assigned by the court on a rotating basis -- the next mediator on the court's list who is available that day receives the next case.

c. Other Issues Respecting Choice of Neutrals

Two other issues which a court-related ADR program should consider with respect to choosing neutrals are:

- Whether mandatory referral to a particular neutral who must be paid by the parties is appropriate? Where the neutral will receive a fee, and the parties are mandated to participate, some recommend that referral not be made to a particular individual except in unusual circumstances and that the parties be given a choice so that the court is not seen as favoring a particular provider (13, p. 17);

- What role should the "marketplace" play? When parties are not free to select the neutral, the "word-of-mouth" referrals or reputation which the "marketplace" affords as a quality control check are absent, and may have to be replaced by other safeguards (11, p. 59).

7. Retention of Neutrals

Like strong recruitment, retention of neutrals is crucial to the survival of an ADR program, particularly where those neutrals receive little or no compensation for their

[48] The exception is Contra Costa's TOT program, where parties choose the pro tem judge.

services. Effective management and recognition of neutrals are two key retention factors.

a. Managing Neutrals

Effective management of volunteer neutrals requires good program administration. Good administration begins with a clear statement of the program's goals and objectives. This statement can be included as one section in a manual or set of guidelines for the volunteers. A manual or guidelines provide volunteers with a reference guide to turn to as they encounter problems or questions in their work.

Those experienced in the use of volunteer neutrals advise that volunteers should be carefully managed to avoid burnout. Thus, assignments should be of limited duration and frequency. It is also important to secure clear commitments from volunteers concerning the total number of hours they are willing to devote to the program, as well as their availability for ADR sessions at a particular time. In Contra Costa's SMART program, for example, neutrals are asked, three times a year, to indicate what days they would like to serve in the next four month period. Similarly, in San Francisco's Early Settlement Program, neutrals are asked to serve only twice a year and must complete a form indicating when they are available. Complete records should also be kept of individual volunteers' participation so that program administrators do not overuse particular volunteers and know which volunteers are not taking assignments. This information is also important for providing recognition to volunteers who have performed services during a particular period. One source recommends that volunteers be recruited, supervised, coordinated and managed by paid staff (2, pp. 51-52). San Diego and Los Angeles' DRS programs use this model.

Other strategies to reduce volunteer burnout include establishing large pools of volunteers to serve as neutrals; rotating volunteers; promoting experienced volunteers to the status of "expert" trainers when new volunteers are recruited; allowing neutrals the opportunity to become involved in different aspects of the program, where appropriate; and keeping in regular touch with neutrals, by phone or in person (16, p. 82).

Finally, the program should be periodically reevaluated to devise fresh approaches to managing and recruiting neutrals. One option for strengthening volunteer management may be to affiliate with an existing non-profit provider experienced in volunteer management and development.

b. Recognizing/Rewarding Neutrals

It is important to give public and private recognition to individuals serving as volunteer neutrals; volunteers need to feel appreciated and useful. They should receive periodic thank you letters and/or certificates of appreciation. Additionally, program administrators should share with volunteers client comments concerning their performance compiled from evaluation forms.

Public recognition is equally important and helps encourage others to volunteer. To this end, the program should consider publishing a list of current volunteers in the local paper, in a bar association newsletter or similar publication. An annual recognition event can be important for both recruitment and retention.

8. Compensation of Neutrals

a. Introduction

Consideration of compensation for neutrals in court-related ADR programs involves deciding a number of questions, including whether neutrals in these programs should be paid or volunteers and, if they are to be paid, who should provide their compensation. The courts featured in this guide have approached compensation of neutrals in a number of ways. As noted above, some rely entirely on volunteer neutrals. Others rely entirely on private, paid ADR providers. Others use both volunteer and paid neutrals. The compensation scheme selected may depend on the program structure implemented including whether the program is voluntary or mandatory (2, p. 48) and how the neutral is chosen. The compensation scheme adopted may also be affected by other factors, including: how frequently the neutrals serve, the degree of complexity involved in the cases targeted for ADR, the length of typical assignments, whether neutrals serve individually or on panels, and common practice in the region (2, p. 48).

b. The Pros and Cons of Paid vs. Unpaid Neutrals

There are differing opinions about whether court-related ADR programs should rely on volunteer neutrals or should utilize paid neutrals.

(1) The Arguments for Paid Neutrals

Those favoring compensating neutrals argue that:

- Volunteer based programs are inherently limited. Several ADR proponents believe that exclusive reliance on volunteers can cause the demise of an ADR program, or a severe dilution in quality. This is particularly true after initial enthusiasm has waned and the original pool of high quality volunteers has lost interest or been overused. (See, e.g., 2, pp. 56-57; 15, p. 3-2.) The California Judicial Council has stated that "an effective ADR program cannot rely on volunteer providers alone" (17, p. 2). The Council's ADR consultants' report identifies some of the built-in limitations of such an approach:

  - As volunteer programs handle more cases, they will begin to exhaust their supply of volunteers;

  - As individual volunteers become more proficient, they will likely begin to seek compensation;

  - When courts begin to make significant use of ADR, the demand for providers may skyrocket. To depend entirely on volunteers to meet the increased demand may effectively stunt the quality and growth of ADR (20, p. 73).

- If ADR is to develop into a profession, the neutrals that provide these services must be reasonably compensated. Exclusive reliance on volunteers as neutrals depreciates what should be a profession into a hobby (2, p. 56; 15, p. 13-1).

(2) The Arguments for Volunteer Neutrals

Those favoring the use of volunteer neutrals argue that:

- The majority of court-related ADR programs, both state and federal, rely on volunteer neutrals and this approach is successful in many jurisdictions (2, p. 49). Most of the programs featured in this guide rely exclusively on volunteers (DRS's settlement officer programs in Los Angeles, San Francisco Superior Court's Early Settlement Program, Contra Costa Superior Court's various ADR programs, and

Ventura's mediation and settlement conference programs). The success of a court-related ADR program may depend less upon the fact the program relies upon volunteers than it does upon the efforts a program makes to recruit and retain neutrals and to ensure quality control (see IV.H.3., 4., and 7., above);

- Use of volunteer neutrals can reduce the overall cost of a court-related ADR program (see III.F.4.c, above);

- Use of volunteer neutrals can provide attorneys with an opportunity to fulfill their commitment to pro bono service and their responsibility to the court (2, p. 49);

- Compared to a court-related ADR program which has a low compensation rate for neutrals, a well crafted volunteer program may be able to attract more highly qualified neutrals as volunteers, by focusing on the prestige of service.

c. Options for Compensating Neutrals

If neutrals in a court-related ADR program are to be compensated for their services, one of the first issues which arises is who should be responsible for paying these neutrals, the court or the parties? This is a recurring policy question in designing court-related ADR programs.

(1) Paid by the Court

Despite the policy support for the public funding of ADR programs, compensation of neutrals by the court is relatively rare in federal and state court-related ADR programs (2, p. 51). California law does not explicitly give courts the authority to expend public funds on ADR neutrals. The only exceptions to this are the statutory judicial arbitration and child custody mediation programs.[49] Assuming a court has the authority to pay neutrals, it may be nonetheless difficult for the court to obtain or earmark sufficient funds for this purpose. If a court does have available resources with which to compensate neutrals, these funds could be used either to hire staff neutrals or to compensate private neutrals accepting referrals from the court (see IV.H.2., above for a general discussion of the different degrees of court involvement in providing neutrals). The National Standards for Court-Connected Mediation Programs suggest that where

[49] Civ. Code, § 4607; Code of Civ. Proc., § 1141.28.

public funds are used to pay private neutrals, the court should establish fee schedules for these neutrals (15, p. 13-5). Options for such schedules include per case or per day fees (2, p. 49). It has been noted that when public funds are used to compensate neutrals, the fees paid often fall below market rates; the most common example of this is the fees paid to court-connected arbitrators (2, p. 50).

(2) Paid by the Parties

Requiring the parties to compensate the neutral in a court-related ADR program raises a number of issues. First among these is the extent to which a requirement that the parties pay the neutral's fees will act as a barrier to the appropriate use of ADR processes. The Society for Professionals in Dispute Resolution (SPIDR) points out that substantial fees may effectively coerce parties who cannot afford them to settle (2, p. 58). In addition, regardless of a litigant's ability to pay, the public justice system may create a bias against the use of ADR if it imposes significant fees for ADR services while offering adjudication at no cost or in exchange for modest filing fees (2, p. 58).

These access-related concerns are heightened when a court-related ADR program is mandatory. Most commentators recommend that litigants not be charged neutral fees or other significant ADR costs in the context of a mandatory ADR program. As has been noted, "when the program is mandatory it may not be fair or legal to compel users of the public justice system to use certain alternatives processes and then bill them for the costs" (2, pp. 57-58). (See III.F.4.d. and IV.C.5.a., above for discussions of user fees in mandatory ADR programs.) For example, some suggest that requiring litigants to pay substantial supplemental fees for mandatory court-connected ADR may unduly impair constitutionally protected jury trial rights (2, p. 58).

Other questions raised by requiring that the parties pay compensation for neutrals include:

- Who sets the fees?[50]
- On what basis?

[50] Where a program is mandatory, many suggest that fees should be set by the court (13, p. 17).

- How are costs allocated among the parties?[51]

- What provisions, if any, are made for low-income and indigent litigants? (2 p. 53)

a) Options for Setting Party-Paid Fees

There are a number of options for setting the fees paid to neutrals by parties:

- Some jurisdictions leave fee arrangements to the marketplace, letting the parties and the private ADR provider agree upon an appropriate fee. Some argue that such an approach assures quality services. This assumes that the parties are in the best position to select the neutral most appropriate for each case and that the "marketplace in the geographic location of the parties will determine the rates to be offered by neutrals for their services" (2, pp. 54-55). Standard 13.4.b. of the National Standards for Court-Connected Mediation Programs recommends this approach when parties elect to pay a private mediator (15, p. 13-6). Marin is an example of this approach;

- Providers can adopt a sliding scale fee schedule. Under the DRPA Regulations, if a grantee charges fees, such fees must be assessed on a sliding scale basis, according to income and financial need. A grantee may not collect fees from disputants who are indigent, as defined in the Act.[52] The grantee must explain fully to all disputants, in advance of furnishing services, the basis for and the amount of any fees and costs that may be charged.

- Fees could be set by statute or court rule. No California statute does this or provides authority for court rules to regulate neutral fees.

b) Monitoring Fees

Even where party fees are set by the marketplace, there are a number of ways the ADR program can monitor the fees to ensure the fairness of the compensation scheme. Some

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[51] For example, is there a presumption that the parties will split the costs on an equal basis (15, p. 13-1). Insurance companies, defending their insureds, may also be willing to fund the cost of an ADR process.

[52] Cal. Code Regs., tit. 16, § 3618.

courts require that neutrals file their fee schedules with the court. Additionally, courts should consider whether they wish to review the "reasonableness" of any negotiated fee (15, 13-5). Courts can encourage the use of daily rather than hourly fees (2, p. 55), and they may wish to require that neutrals offer no fee or reduced fee services based on the financial resources of the parties referred.

(3) Other Payment Options

In addition to payment solely by the parties or solely by the court, a variety of hybrid payment options exist:

- In programs that generally do not require compensation by the parties, the possibility of compensation could be left open when ADR service involves more substantial or extended intervention (2, p. 50);

- An ADR provider could agree to conduct an initial ADR session or a certain number of hours of ADR services without charge, with the parties paying for any additional sessions or time. This is the approach used in San Diego's mediation program;

- Courts can require attendance at a free, preliminary educational session, but provide that if parties thereafter elect ADR, they must pay for it. This is the system used in Middlesex County, Massachusetts. The Marin and Contra Costa superior courts' case management/ADR assessment conference achieves a similar result.

I. CONFIDENTIALITY

1. Introduction
2. The Pros and Cons of Confidentiality in General
3. Confidentiality Concerns Regarding Communication Between ADR Neutral and Judge
4. Commentators' Recommendations Concerning Confidentiality Policies

1. Introduction

Confidentiality as it concerns court-related ADR programs involves whether information revealed during the ADR process should be shared with the other party, the public or the court, as well as whether the outcome of the ADR process should be revealed to the court or the public. Since confidentiality may involve matters of privilege or the admissibility of evidence in other proceedings, it is generally addressed by statute. In California, there are several confidentiality statutes which may be applicable to court-related ADR programs. Whether and how these confidentiality statutes are applied is an issue of program design.

Court-related ADR programs in California appear to address confidentiality in one of three ways:

1) **Confidentiality is not specifically addressed in program rules or procedures:** Marin's ADR program, for example, utilizes this approach;

2) **Confidentiality is specifically provided for through the application of general statutory provisions establishing confidentiality for offers of compromise[53] and/or for communications and documents used in mediation**

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[53] Evid. Code, § 1152, generally provides:

"Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service to another who has sustained or will sustains or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

proceedings:[54] For example, Los Angeles Superior Court's JASOP rules explicitly provide that both of these provisions will apply to program settlement conferences (see Appendix B, LA-4 and LA-1).[55] The provisions concerning confidentiality in mediation are also applicable to all programs funded through the Dispute Resolution Programs Act;[56] or

3) **Confidentiality is specifically addressed in the statute establishing the program:** The judicial arbitration statute, for example, contains a specific provision concerning confidentiality.[57]

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[54] Evid. Code, § 1152.5, provides:

"(a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:
(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.
(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.
(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.
(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.
(d) This section does not apply where the admissibility of the evidence is governed by Section 4351.5 or 4607 of the Civil Code or by Section 1747 of the Code of Civil Procedure.
(e) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d). Nothing in this section limits the confidentiality provided pursuant to Section 65 or the Labor Code.
(f) Paragraph (2) of subdivision (a) does not limit either of the following:
(1) The admissibility of the agreement referred to in subdivision (c).
(2) The effect of an agreement not to take a default in a pending civil action."

[55] The JASOP rules state:

"All statements made during the settlement conference and any documents produced in the course of the conference, are to be held confidential. All participants in the conference will required to sign a Confidentiality Agreement pursuant to California Evidence Code Sections 1152 and 1152.5."

[56] The Dispute Resolution Programs Act makes all proceedings conducted by a program funded under the act, whether mediations, arbitrations or other types of processes, subject to Evidence Code section 1152.5 (Bus. & Prof. Code, § 467.5).

[57] "Any reference to the arbitration proceedings or arbitration award during any subsequent trial shall constitute an irregularity in the proceedings of the trial for purposes of Section 657." (Code Civ. Proc., section 1141.25) (Section 657 lists the grounds for vacating judgments). California Rules of Court governing

Determining what the appropriate confidentiality rule should be for a particular court-related ADR program involves balancing the level of confidentiality needed to ensure an effective ADR process against the parties', the court's and the public's need for information. It is recommended that, at a minimum, policies governing confidentiality in court-related ADR programs provide no less protection than is afforded in connection with settlement conferences generally (13, p. 9-2).

2. The Pros and Cons of Confidentiality in General

a. Arguments for Confidentiality

The arguments favoring confidentiality include:

- Confidentiality encourages the use of ADR and candor within sessions and, thus, encourages settlements (11, p. 99; 2, p. 82; 15, pp. 9-1, 9-2);

- Confidentiality is said to be essential to the effectiveness of some ADR processes, particularly mediation (2, p. 82). A mediator's ability to ascertain the parties' underlying interests and concerns may require discussion and sometimes admissions of fact disputants would not make without being assured they were confidential (15, pp. 9-1, 9-2);

- Confidentiality helps ensure the neutral's continued neutrality, since he or she cannot testify in favor of either party (15, pp. 9-1, 9-2).[58] Neutrals who testify or

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judicial arbitration specifically provide that if a trial de novo is requested:

> "The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and note of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial" (Cal. Rules of Court, rule 1616).

[58] California law currently makes both arbitrators and mediators generally incompetent to testify in subsequent civil proceedings about what occurred at the arbitration or mediation. Evidence Code, § 703.5, as amended by stats. 1993, ch. 114 (AB 1757), provides:

> "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

convey information to investigative agencies may be viewed as biased and therefore be ineffective (11, p. 99);

- Disputants often speak with the expectation that they will not be bound by what they say in another forum (15, pp. 9-1, 9-2);
- Without confidentiality, volunteers may be hesitant to act as neutrals given the possibility of future subpoenas to testify (11, p. 99);
- Broad confidentiality prevents a represented party from using ADR as a deposition of an unrepresented party (11, p. 99).

b. Arguments Against Confidentiality

The arguments against confidentiality in court-related ADR programs include:

- Confidentiality may deprive other parties of information needed to pursue claims or correct perceived injustices (2, p. 82; 11, pp. 100 and 146; 15, pp. 9-1, 9-2);
- Confidentiality may deprive the public at large of access to information generated through use of the public justice system, including important information regarding hazardous products, environmental dangers, professional malpractice and official wrongdoing[59](2, p. 82, 98-99; 11, pp. 100 and 146; 15, pp. 9-1, 9-2);
- Confidentiality may prevent disclosure of information regarding the commission of past or future crimes (15, pp. 9-1, 9-2); and
- Confidentiality removes a potential check on the integrity and fairness of the ADR process (11, pp. 100 and 146; 15, pp. 9-1, 9-2).

Commission on Judicial Performance, or (d) give rise to disqualification proceedings under (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section shall not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3155) of Part 2 or Division 8 of the Family Code."

[59] Policies on confidentiality in cases referred to ADR by the court may conflict with policies regarding the public's right of access to certain information. Although it has been held that the First Amendment public right of access to trials does not normally apply to court ADR proceedings (see, Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d 900 (6th Cir. 1988)), the potential conflict involved has been infrequently addressed by the courts.

3. Confidentiality Concerns Regarding Communication Between ADR Neutral and Judge

Some court-related ADR programs distinguish between revelation of information to other parties and the public and revelation of information by the neutral to the court. California's mandatory child custody mediation statute, for example, provides for the general confidentiality of communications made during mediation,[60] but authorizes mediators, consistent with local rules, to make recommendations to the court concerning custody and visitation.[61] Other non-statutory programs, including Contra Costa's EASE and SMART programs, also require reports by the neutral to the court.

The principal argument in support of such reports is that they may be helpful to the court in later settlement efforts. The neutral's opinion as to why a case did not settle or recommendations concerning an appropriate outcome may help the court focus on the central issues in a dispute immediately, without duplicating efforts already made by the neutral.

Those who argue against such reports, however, believe the potential harm to the ADR process outweighs any efficiencies the court may achieve. Opponents raise all of the general arguments for confidentiality discussed above, including, in particular, the concerns about loss of candor in the ADR sessions (13, p. 18) and compromising the neutrality of the "neutral" (13, p. 18; 15, pp. 9-1 to 9-3, 12-1, 12-2 and 12-3). Additional concerns include the possibility neutrals will have to testify,[62] the potential for transforming ADR into an investigatory process (15, p. 12-2), the likelihood neutrals' reports will be given undue weight (13, p. 19), and the potential effect of deterring recruitment of neutrals who feel confidentiality is an ethical obligation and critical to the process. Moreover, opponents suggest a neutral's recommendations may not provide a proper basis for judicial resolution. Mediators, for example, do not hear evidentiary

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[60] Civ. Code, §§ 4351.5(d) and 4607(c) provide that:

"Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code."

[61] Civ. Code, §§ 4351.5(f) and 4607(e).

[62] A California court of appeal has held that allowing a child custody mediator to submit a report to the court denies a litigant's right to due process unless cross examination of the mediator is permitted. McLaughlin v. Superior Court (1983) 140 Cal.App.3d 473, 482-483.

presentations; similarly, presentations to arbitrators are likely to be summary in nature and generate a less comprehensive record than litigation (13, p. 19; 15, p. 12-1). Finally, a neutral's recommendations may generate inappropriate pressure to settle. Such pressure may be felt disproportionately by unrepresented parties and contribute to class-based inequality (11, p. 80).[63] Although these arguments have been made primarily in the context of court-related mediation programs, the issues raised appear applicable to court-related ADR programs generally.

The National Standards for Court-Connected Mediation Programs specifically suggest that mediators not make recommendations to the court concerning the substance or outcome of a case.[64] They recommend that if a case is settled through ADR, any required report respecting the terms of the settlement be consistent with the jurisdiction's policies governing settlements in general. If a case is not settled, they urge that the lack of settlement be reported to the court without comment or recommendation.[65] The Standards also suggest that, in order to insulate the mediator from the court, the neutral's communication with the court during the ADR process be limited to necessary procedural matters.[66] Finally, the Standards suggest that neutrals

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63 See IV.J., below for a discussion of incentives to settle in general.

64 Standard 9.4 provides:

"Mediators should not make recommendations regarding the substance or recommended outcome of a case to the court" (15, p. 9-3).

65 Standard 12-2 provides:

"When the mediation has been concluded, the court should be informed of the following:

a. If the parties do not reach an agreement on any matter, the mediator should report the lack of any agreement to the court without comment or recommendation.

b. If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general.

c. With the consent of the parties, the mediators' report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of settlement" (15, p. 12-3).

66 Standard 12.1 provides:

"During a mediation the judge or other trier of fact should be informed only of the following:

a. the failure of a party to comply with the order to attend mediation;

should, as a general matter and to the extent possible, avoid direct communication with the judge.[67] This will prevent any appearance of impropriety or threat to confidentiality.

4. Commentators' Recommendations Concerning Confidentiality Policies

With regard to the substance of confidentiality policies, commentators recommend, at a minimum, that policies concerning confidentiality in court-related ADR programs provide no less protection than the confidentiality policies generally applicable to settlement conferences (13, p. 9-2). A court's policy respecting settlement conference confidentiality reflects its balancing of the competing interests discussed above. Since other ADR processes have the same ultimate purpose as do settlement conferences, this existing confidentiality policy may be an appropriate baseline to use in considering confidentiality for other ADR processes.

It has also been recommended that confidentiality policies not interfere with necessary program monitoring and evaluation (see Chapter V., below for a discussion of program monitoring and evaluation).[68] Regardless of the confidentiality policy adopted, parties

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b. any request by the parties for additional time to complete mediation;

c. if all parties agree, any procedural action by the court that would facilitate mediation; and

d. the mediator's assessment that the case is inappropriate for mediation" (15, p. 12-1).

[67] Standard 12.3 provides:

"Whenever possible, all communications with the judge who will try the case should be made by the parties. Where the mediator must communicate with the trial judge, it is preferable for such communications to be made in writing or through administrative personnel" (15, p. 12-4).

The Commentary to Standard 12.3 notes that communicating in writing or through administrative personnel offers mediators the most complete protection against judicial questioning. This, in turn, offers parties the most complete assurance of confidentiality, and insulates the eventual outcome of their case from the influence of the mediator's observations. The Commentary does not endorse the practice of keeping the mediator's identity or even the fact of the mediation from the judge. This, it says, goes too far, by prohibiting mediators, where the parties agree, from communicating with the judges or their law clerks about procedural matters, such as the need for discovery extensions, and by failing to educate judges about the value of mediation in general and the performance of individual mediators in particular (15, p. 12-4).

[68] Standard 9.5 of the National Standards for Court-Connected Mediation provides:

"Policies relating to confidentiality should not be construed to prohibit or limit effective monitoring, research or program evaluation" (15, p. 9-4).

and neutrals in a court-related ADR program must understand what the program's policy is. They must know whether oral and written communications or records generated in connection with ADR will remain confidential, and under what circumstances disclosure of these or the outcome of the ADR process may be permitted or required (2, p. 100; 15, p. 9-3). Commentators generally recommend that court-related ADR programs have clear written policies respecting confidentiality[69] covering: (1) the neutrals and cases protected by confidentiality; (2) the extent of the confidentiality protection; (3) who may assert or waive the confidentiality protection; and (4) any exceptions to this protection (2, pp. 93-94; 15, p. 9-1).

Because it can be extremely difficult to accurately communicate an ADR program's confidentiality policy, commentators also recommend that there be written policies concerning the way confidentiality rules are communicated to parties.[70] Finally, since it is the neutrals who will generally be responsible for communicating and implementing a program's confidentiality policy, commentators have noted the importance of ensuring that neutrals understand the policy.[71] For this reason, it is recommended that confidentiality be covered thoroughly in training programs and/or orientation materials (15, pp. 9-2, 9-3).

The Commentary to Standard 9.5 notes that effective research, monitoring and program evaluation may not only require the collection of aggregate statistics, but also access to individual case files and/or observation of actual mediation sessions. Interviews with parties, mediators and mediation program personnel may be essential, and courts must balance the need for this kind of data against the need for confidentiality. The commentary suggests several ideas for balancing these two interests, including: (1) Data can be made available only to officially sanctioned research and evaluation efforts, and the researchers and evaluators can themselves be bound by the court's confidentiality policies; (2) Protocols can be developed to ensure, for example, that names are replaced by numbers and that specific identifying data is altered to protect individual parties; (3) Procedures can be devised to provide that mediation sessions are observed only with the parties' permission (15, p. 9-4).

69 Standard 9.1 of the National Standards for Court-Connected Mediation provides, in part:

"Courts should have clear written policies relating to the confidentiality of both written and oral communications in mediation consistent with the laws of the jurisdiction. . ." (15, p. 9-1).

70 Standard 9.3 of the National Standards for Court-Connected Mediation Program provides:

"Courts should develop clear written policies concerning the way in which confidentiality protections and limitations are communicated to parties they refer to mediation."

71 Standard 9.2 of the National Standards for Court-Connected Mediation Programs provides, in part:

"Courts should ensure that their policies relating to confidentiality in mediation are communicated to and understood by mediators to whom they refer cases" (15, p. 9-2).

J. INCENTIVES TO SETTLE IN THE ADR PROCESS

1. Introduction
2. Procedures and Practice Which Operate as Incentives to Settle in the ADR Process
3. The Pros and Cons of Incentives to Settle in a Court-Related ADR Program
4. Commentators' Recommendations

1. Introduction

All litigation carries with it certain inherent incentives to settle. These include the cost, time and stress of trial and pretrial processes as well as the uncertainty of an adjudicated outcome. ADR neutrals, including settlement conference judges, typically use these normal settlement incentives to move parties toward a realistic assessment of litigation's costs and risks as compared with the benefits and burdens of settlement.

Additional incentives to settle can be built into a court-related ADR program's design. Several statutorily authorized ADR programs include such additional incentives; in judicial arbitration, for example, if the party who does not accept the arbitration award fails to obtain a better result at trial, he or she must pay the other party's costs. Several of the court-related ADR programs featured in this guide similarly build in incentives to settle. In Ventura's settlement conference program, for example, in the event there is no settlement, the volunteer neutral is required to report to the court each side's best good faith settlement offer and demand and any areas of agreement reached.

Commentators caution that in mandatory ADR programs, particularly mediation programs, such incentives may impede the parties' right to make an informed and free choice between settlement and adjudication (11, p. 79). Such concerns are generally not raised in connection with voluntary ADR programs because the parties may decline to participate if they are not comfortable with the effects of such incentives.

2. Procedures and Practices Which Operate as Incentives to Settle in the ADR Process

In the context of a court-related ADR program, the following procedures and practices may create incentives, beyond normal litigation pressures, for parties to settle:

- Financial sanctions for not obtaining a better result at trial (11, p. 79);[72]
- Delay in trial or judgment; for example, placing a case that has not settled in ADR on a long trial list (11, p. 79; 15, p. 11-4);
- Reports or recommendations from the neutral to the trier of fact (11, p. 79; 15, p. 11-4);[73]
- Public disclosure of information concerning the case (11, p. 79);
- Med-arb arrangements (process begins with mediation, but if the case does not settle, the neutral renders a decision as in arbitration) (11, p. 79);
- Judicial pressure created by having the judge who will hear the case act as settlement officer/mediator (11, p. 79).

3. The Pros and Cons of Incentives to Settle in a Court-Related ADR Program

Determining whether additional incentives to settle should be built into a court-related ADR program requires balancing the potential that parties will take ADR more seriously against the possibility such incentives will negatively impact the fairness of the process.

a. Arguments for Incentives to Settle

Arguments supporting inclusion of incentives to settle in the design of a court-related ADR program include:

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[72] As in the case of the judicial arbitration program, financial incentives to settle are generally established by statute.

[73] See IV.I.3, above for a discussion of confidentiality concerns relating to such reports or recommendations.

- Courts have an interest in encouraging settlement, and having these incentives as part of the ADR process may produce more settlements (11, p. 79);

- Incentives to settle may encourage the parties to take the ADR process more seriously and "think twice" before proceeding to trial (13, p. 18);

- Incentives to settle may reduce the number of parties who refuse to participate meaningfully in ADR (13, p. 18);

- Incentives do not appear to affect parties' and attorneys' generally favorable response to ADR processes (11, p. 83).

b. Arguments Against Incentives to Settle

The arguments against incentives to settle include:

- Incentives to settle in the context of a mandatory ADR process may, as a practical matter, remove the parties' option to forego settlement (13, p. 14);

- The fairness of the ADR process may be challenged because the ability to decline settlement provides protection against unfairness (13, p. 14);

- If the parties do not freely consent to the settlement, it is less likely that their interests will be served by it or that they will voluntarily comply with it (13, p. 14);

- Financial incentives to settle may have a disparate effect on those who cannot afford or even risk such penalties; this may affect procedural fairness and contribute to class-based inequality by increasing the degree to which access to trial depends on wealth (11, p. 80; 13, pp. 14 and 19);

- The effectiveness of financial incentives in producing settlements has been questioned (11, p. 77 and 83, fn. 42; 13, p. 19);

- Incentives to settle may produce satellite litigation challenging the validity of the program (11, p. 81);

- In the case of mediation, settlement incentives may change the dynamics of the process, and make it more like adjudication (11, pp. 82-83);

- Incentives to settle in the form of reports to the trier of fact may more adversely affect unrepresented parties, and therefore contribute to class-based inequality (11, p. 80);

- Informal incentives, such as delaying trial dates, may be imposed in an ad hoc fashion, raising issues of uneven application (11, p. 80).

4. Commentators' Recommendations

Commentators generally recommend that incentives to settle not be included in mandatory mediation programs, and that any financial incentives in mandatory arbitration programs be clear, proportional to the interests at stake, and used only when they will not prevent parties from choosing to go to trial.[74] Commentators also suggest that because incentives to settle can affect the parties' ability to forgo settlement, mandatory ADR safeguards, such as quality control (11, pp. 181 and 184), become even more important when the mandatory program includes incentives to settle. (See IV.C.5.a., above for a discussion of these suggested safeguards.) Finally, in order to reduce the likelihood of undue pressure being placed on parties to settle, settlement rates should not be the sole criterion for funding ADR programs, evaluating neutrals, or evaluating programs (15, pp. 11-3, 11-4).

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[74] Standard 11.5 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides, in part:

> "There should be no adverse response by courts to non-settlement by the parties in mediation" (15, p. 11-4).

Recommendation 3 from SPIDR's report "Mandatory Participation and Settlement Coercion" provides:

> "Coercion to settle in the form of reports to the trier of fact and financial disincentives to trial should not be used in connection with mandated mediation. In connection with court-annexed arbitration, the financial disincentives should be clear, commensurate with the interests at stake, and used only when the parties could afford to risk their imposition and proceed to trial" (13, p. 18).

K. ENFORCEABILITY OF SETTLEMENTS REACHED

As a general matter, settlements reached through a court-related ADR program are enforceable in the same manner as are other settlements. They can be enforced as written or oral contracts. Alternatively, if the parties have stipulated to settlement before the court orally or in writing, the agreement can be enforced as the judgment of the court pursuant to Code of Civil Procedure section 664.6[75] (6, p. 12.40 et seq.). To emphasize the enforceability of settlements achieved through ADR, some courts have adopted procedures for submitting the settlement agreements to the court as stipulations pursuant to Code of Civil Procedure section 664.6. Under the rules governing Sacramento Superior Court's settlement conference program, for example, the terms of the settlement are placed on the record with a reporter or reflected in a minute order so that they may be enforced pursuant to Code of Civil Procedure, section 664.6 [Sacramento Superior Court Rule 41(e)]. Similarly, in the Los Angeles Superior Court JASOP program, parties may elect to enter into written settlement agreements which are placed on the record by the supervising judge [DRS Joint Association Settlement Officer Program Information Statement, p. 2].

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[75] Code Civ. Proc., § 664.6 provides:

"If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

V. PROGRAM MONITORING AND EVALUATION

A. Introduction
B. Importance of Considering Monitoring and Evaluation at the Program Design Stage
C. Information Collection
D. Program Monitoring
E. Program Evaluation

A. INTRODUCTION

There is growing recognition of the importance of program monitoring and evaluation in ensuring appropriate and effective implementation and in assessing the effect of court-related ADR programs.[1] Although program monitoring and evaluation both serve the same ultimate purpose of ensuring program quality, they tend to have different focuses. Program monitoring generally involves ongoing assessment of how a program is operating, and whether policies and procedures are being implemented as intended (2, p. 103; 15, p. 16-1). Evaluation generally involves a one-time or periodic assessment to determine whether a program is meeting its articulated goals and how its performance compares with the performances of other actual or potential programs (15, p. 16-1). Often the same type of information, such as the timing of ADR use and program settlement rates, may be useful both for program monitoring and evaluation. For this reason, ongoing program monitoring may facilitate a later evaluation of the program. This chapter outlines the elements of program monitoring and evaluation and the options planners may consider when addressing this subject.

Most court-related ADR programs have implemented some level of program monitoring, such as maintaining statistical information on the number of cases settled in the program. However, although evaluation is generally viewed as a beneficial element of program

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1 Standard 16.0 of the National Standards for Court-Connected Mediation provides:

"Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes." (15, p. 16-1)

design, few of the California court-related ADR programs featured in this guide have been evaluated.[2] This is in large part because most of these programs are relatively new. The San Francisco Superior Court Early Case Evaluation Program, which was established in 1985, did conduct an initial evaluation after the first year to ensure it was meeting program goals (see Appendix B, S.F.-4 for a summary of evaluation results). Currently however, there are insufficient funds to perform further evaluations. Marin County Superior Court is beginning to collect information for an evaluation; it is distributing a new ADR evaluation form with its other ADR materials at filing (see Appendix B, MA-6). The information obtained from the evaluation forms will be used to assess party satisfaction with and overall effectiveness of the program, to handle complaints and to improve the program. Ventura is also planning to evaluate their ADR program with assistance from students at Pepperdine Law School.

To assist new programs in their consideration of evaluation techniques, SPIDR's research committee is collecting evaluation, assessment and research instruments that have been used in other programs.

B. IMPORTANCE OF CONSIDERING MONITORING AND EVALUATION AT THE PROGRAM DESIGN STAGE

Commentators have suggested that, for several reasons, it is important to consider program monitoring and evaluation at the program design stage and build these processes into the program design:

- Program monitoring and evaluation are inter-related with the program goals and design. As noted in Chapter II., above program goals and their prioritization can dramatically affect what criteria are used to monitor and evaluate a program's success (12, p. 67). Similarly, key decisions in the design phase will make it easier or harder to collect good data concerning a program (12, p. 218). Consideration of monitoring and evaluation at the program design stage will facilitate the formulation and articulation of goals against which a program's performance can

[2] The Early Neutral Evaluation program of the U.S. District Court for the Northern District of California was recently evaluated. See "Report to the Task Force on Alternative Dispute Resolution and Civil Justice Reform Act Advisory Group Regarding the Early Neutral Evaluation Program" (December 1992).

be measured and the integration of data collection with other program procedures;

- Unless evaluation is begun at the outset, it may be impossible to accurately determine the effects of a new ADR program since needed information, particularly comparative information, may not be available at a later time;

- Early thinking about the particular uses of empirical data may avoid the expense of unfocused research (12, p. 208);

- Incorporation of monitoring and evaluation into a program's design from the outset facilitates the development of feedback mechanisms to translate findings from these processes into program improvements.

C. INFORMATION COLLECTION

1. Type of Information to Collect

The National Standards for Court-Connected Mediation Programs recommend that, as a general rule "programs should be required to collect sufficient, accurate information to permit adequate monitoring on an ongoing basis and evaluation on a periodic basis" (15, p. 16-3).

Ideally, programs should collect both qualitative and quantitative information. Magistrate Judge Wayne Brazil notes that both 'hard' statistical data and reviews, critiques, and suggestions from users and neutrals are important. An exclusive focus on quantitative efficiency, e.g., number of settlements and time consumed, can increase inappropriate pressure to settle in ADR or the perception that ADR is an inferior form of justice (15, p. 16-1).

a. Qualitative Information

Gathering qualitative information is generally considered an important aspect of program monitoring or evaluation. This type of information can provide unique insights into the operation and results of ADR programs which are not captured by quantitative information (15, p. 16-2). However, unlike quantitative information which can be

objectively measured, qualitative information is generally subjective by nature; it is composed of the perceptions of participants, neutrals, and others involved in or observing the ADR program (27, pp. 17-19). There is also no universally recognized definition of what constitutes a "quality" program. Despite these difficulties, it is still important to measure these intangibles in some fashion. Otherwise, the evaluation will be based largely on quantitative cost and efficiency criteria. Qualitative evaluation also provides an independent check on participants' perceptions (12, pp. 213-214).

Examples of qualitative information include:

- Participant satisfaction;
- Legitimacy and fairness of the process;
- Quality or fairness of settlements or outcomes (15, p. 16-1).

b. Quantitative Information

It has been recommended that court-related ADR programs collect quantitative information that captures the timing and outcomes of key events in the program and permits program monitoring and evaluation, both in the short and the long term (15, p. 16-3). The type of information suggested includes:

- Date of the ADR reference;
- Date of appointment of the neutral;
- Dates of any ADR meetings;
- Date and kind of outcome reached (settled/not settled);
- Whether the agreement was a partial or complete resolution of the case;
- Types of issues that were resolved or unresolved;
- Whether the parties complied with the settlement agreement;

- Date and status of the case upon return to the court's docket (2, p. 104 and 15, p. 16-3).

The San Francisco Superior Court Early Settlement Program, for example, maintains statistics on case disposition, types of cases and panelists.

2. Methods of Collecting Information

A variety of data collection methods have been used successfully by court-related ADR programs, sometimes in combination. These include:

- Maintaining ADR scheduling and other information as part of the court's general case management information system or in a separate ADR program docketing system;
- Having participants and neutrals complete exit surveys or questionnaires;
- Conducting interviews with randomly selected litigants, attorneys and neutrals;
- Observing ADR sessions;
- Establishing an advisory panel of attorneys and other litigant representatives to monitor the use and success of court ADR programs (2, p. 104).

For example, the first year evaluation of the San Francisco Superior Court Early Settlement Program consisted of a questionnaire to all panelists, a questionnaire to all participants and an examination of court records to determine the disposition of those cases that did not settle at the conference (see Appendix B, SF-4).

D. PROGRAM MONITORING

As noted above, program monitoring generally involves the ongoing assessment of how a program is actually operating and whether the program's policies and procedures are being implemented as originally intended. Program monitoring is generally an internal program function (15, p. 16-1). It is the way programs try to answer questions such as are cases being referred to ADR within the timeframe established by the program

policies, are the neutrals following program procedures in their sessions, what percentage of cases are settling in the program and are participants complying with settlements reached in the program.

Ongoing program monitoring is an important aspect of ensuring the quality of the programs to which courts refer cases (15, p. 16-1). Monitoring also provides a feedback mechanism for quickly identifying problems with the program or its implementation and making necessary adjustments (2, p. 103).

E. PROGRAM EVALUATION

Evaluation, in contrast to monitoring, is often conducted by an external entity. As noted above, evaluation is generally a one-time or periodic assessment to determine, from a policy perspective, whether a program is meeting its goals. It also generally involves a comparison of the program's performance to the performance of other existing or potential programs (15, p. 16-1). Thus, in the context of court-related ADR programs, evaluation often involves comparing the results of the ADR program to the results of ordinary court litigation procedures on one or more levels. Evaluation is the way programs try to answer questions such as are cases settling faster in the ADR program than in ordinary litigation, are the parties more satisfied with the ADR process than with ordinary litigation, and does it cost the parties and/or the court less to resolve a case in the ADR program than through ordinary litigation.

Evaluation of ADR programs can range from rigorous collection and analysis of a comprehensive empirical data base, to periodic review of individual case files, to surveys of participants concerning their experience and satisfaction. The level of evaluation will depend upon court resources, program goals, the type of program being evaluated and the importance program planners place on evaluating program results (15, p. 16-2).

1. Reasons for and Limitations of Evaluation

a. Why Conduct an Evaluation?

There are a number of reasons for evaluating an ADR program:

- To determine whether the program is meeting the needs of the parties, the justice system and the public (13, p. 22);

- To determine whether the program is meeting the specific goals articulated for it and is of consistently high quality (15, p. 16-1);

- To assist in adjusting and improving the program through identification of problems and possible solutions;

- To inform decisions about a program, including whether the program should be continued;

- To advance knowledge about dispute resolution;

- To persuade skeptics to fund or support ADR;

- To meet the requirements of a granting agency. (12, pp. 208, 210-211)

b. Limitations of Evaluation Research

Although there are many reasons for conducting an evaluation, it will not provide the answer to every question, nor the solution to every problem. It is important that program developers understand not only the benefits of evaluation research but also its limitations. These limitations include:

- Evaluation research will not by itself make policy decisions, such as whether a program should be continued, although it may provide data useful to those who must make these decisions;

- Evaluation will most clearly answer narrow, factual questions, not global ones such as "is the process fair?";

- Evaluation provides limited comparisons only of those options that were included in the study;

- Relying on the statistical summaries, such as averages, produced by evaluation research may disguise the fact that all cases are not alike;

- If a single evaluation criterion is used, e.g., number of cases resolved, program developers should be sensitive to the inherent limitations of such an evaluation;

- Especially during the early stages of a program, evaluation results may be skewed by innovation effects, e.g., the excitement and challenge of change may make the program more successful than it will be later when it is taken for granted. Conversely, early resistance to change may produce overly negative results. (12, pp. 212-214, 221-224)

2. Successful vs. Unsuccessful Evaluations: Issues to Consider

When designing an evaluation, it is worthwhile to consider factors which often differentiate a successful ADR evaluations from an unsuccessful one. Factors that contribute to a successful evaluation include:

- Ensuring that program goals are susceptible to measurement;

- Describing the ADR program and process in detail; because there are no universal definitions of ADR processes, simply referring to a program as "mediation" or "case evaluation" is not sufficient to understand what is being evaluated or to permit comparisons across different programs;

- Identifying the specific purposes of the evaluation research to be conducted;

- Articulating clear criteria which, if met, will indicate program success;

- To the extent possible, designing ADR programs as true experiments with control groups (see V.E.3.a.(1), below for discussion of experimental design) (12, pp. 105-107);

- Understanding that evaluation research works best in assessing patterns among large numbers of cases.[3]

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[3] To have scientifically valid results, it may be necessary to have larger and more costly samples than are needed for other purposes. Scientific validity may be not be necessary, however, for some purposes (12, p. 219). Regardless of the actual numbers involved, it is best to review a wide cross-section of cases handled by several different neutrals (12, p. 30).

3. Evaluation Design Options

As noted above, there are many different levels of program evaluation, ranging from fairly informal, periodic review of ADR case files to formal, comprehensive evaluations designed as controlled experiments. The level of evaluation conducted by a court-related ADR program will depend upon a number of factors, including court resources, program goals, the type of program being evaluated and the importance of the evaluation to program planners (15, p. 16-2). This section discusses issues related to some of the more formal evaluation design options, as well as issues concerning coordinated program evaluations.

a. Formal Evaluation Design Options

(1) Experimental Design

One formal evaluation option being used in several federal courts, is a experimental design using a control group. Under this design option a set of similar cases are treated differently: some cases are voluntarily or mandatorily referred to ADR while a control group of similar cases is excluded from ADR. The results in these two groups are then compared.

It has been suggested that everything about an evaluation is substantially less difficult and more clear and compelling if it is designed as a true experiment using a control group (12, p. 218). An experimental design approach clearly has certain advantages, including:

- It is generally very simple to set up the experimental and control groups;
- ADR results can be compared with those achieved in the regular court track for similar cases during the same time period;
- Good court records will generally already contain sufficient information to evaluate many issues of pace and settlement. Thus, under an experimental design, much of the data collection can be done at a relatively low cost as part of the normal court record-keeping;

- Experiments are short-lived and can be repeated once the program is routinized (12, p. 218).

There are also some disadvantages to using an experimental design:

- It may entail certain administrative costs for maintaining the different procedures and records for the experimental and control groups;

- Depending upon the scale and timing of the experiment, it may provide misleading results. For example, if the experiment involves only a small number or limited type of case, results indicating, for instance, that cases in the program are settled faster may not mean that the program will have any significant effect on the overall pace of cases in the court. In addition, if the program is evaluated only once at the outset, the results may skewed by innovation effects: the excitement and challenge of instituting the program may result in it being more successful at the outset than it will be later, or participants' resistance to the program may result in it being less successful at the outset than it will be later (12, pp. 218, 223-224).

- Ethical and equal protection concerns have been raised about "controlled experimentation" - treating similarly situated litigants differently - in a justice system. However, options such as informed consent, or opt-in/out-out provisions can sometimes allay these concerns (2, pp. 107-108).

(2) Comparison Group

If experimental design is impossible and all cases are assigned to ADR, another design option for formal evaluation is to construct a comparison group (2, p. 107). The comparison group can consist of:

- Cases from another court; however this may be misleading because of differences in program implementation and rules from court to court (12, pp. 215-216);

- Cases litigated prior to the initiation of the ADR program which are similar in nature to the cases referred to ADR; however this may also be misleading if other factors affecting these cases have changed over time (12, p. 30).

Thus, although a comparison group design can be used to conduct some of the same types of evaluation of relative effectiveness as an experimental design, it may be difficult to make these comparisons meaningful because the groups must be constructed of cases from a different court or time. In addition, it may be costly and difficult to construct these comparison groups (matching case characteristics, etc.) and to collect the necessary data.

b. Coordinated Program Evaluations

Many courts have more than one ADR program. Other courts may be coordinating their ADR program(s) with another court either within their jurisdiction or in a neighboring jurisdiction. In such courts, one of the issues that must be considered in designing an evaluation is whether to evaluate on a program-by-program basis or to evaluate the overall effects of all ADR programs operating in that court or in the different courts with which it is coordinating. Although program-by-program evaluation may be more costly, it provides more information respecting various ADR processes and compensates for design differences in assessing program effects (15, p. 16-2).

4. Evaluation Criteria

An evaluation, by definition, includes an assessment of whether a program is meeting its goals. Thus the criteria used to evaluate a court-related ADR program will depend in large part on the goals of that program. Of course, an evaluation may also examine issues beyond the program's performance toward its goals. For example, it has been suggested that the evaluation of a mandatory program should include an examination of the effect of the program on such matters as the parties costs, interest, and satisfaction, the effect on court resources, and whether a substantial number of the participants believe that the mandated participation has been so burdensome as to make it impractical for them to pursue a trial or so injurious to other interests that, in their view, the costs of the mandate outweigh the benefits (13, p. 23). Several of the most common program goals/evaluation criteria include:

- Faster Case Processing

- **Court Cost Reduction:** Court cost comparisons are among the most difficult in ADR evaluation. Typically, the comparison desired is between the cost of processing cases through ADR and the costs of regular court procedures. Difficulties include:

  - The cost of processing a civil case in the courts depends on how the costs are allocated; this will vary from court to court and from case to case;

  - Even though ADR costs may be easier to compute than general court costs, there are complications -- e.g., whether administrative costs are involved, how to value of volunteer time, etc.;

  - Cost comparisons may tend to devalue the intangible goals of ADR (12, p. 217).

- **Reduction of Parties' Costs:** Comparisons of the costs to the parties can also be the focus of an evaluation, especially if one program goal was to reduce litigants' costs. Like comparisons of court costs, comparisons of the cost to the parties can devalue the intangible goals of a program. In addition, it may be difficult to obtain complete, accurate information of litigants costs.

- **Increased Settlement Rates:** Although settlement rates or appeal rates may be the easiest to measure, such statistics provide evaluators with little information about program quality (12, pp. 213-214). Consequently, they should be used carefully and in tandem with other more qualitative measures. The National Standards for Court-Connected Mediation advise that "settlement rates should not be the sole criterion for . . . program evaluation" (15, p. 11-3). Use of this evaluation measure may also result in undue settlement pressure being exerted on parties so that the existence of programs and services can be justified.

5. Who to Conduct Evaluation?

A final issue which must be addressed when considering the evaluation of a court-related ADR program is who should conduct this evaluation.

VI. EDUCATION AND OUTREACH

A. Introduction
B. Options for Educating Judges
C. Educational Programs for Attorneys
D. Educating the Public

A. INTRODUCTION

When a court-related ADR program is initiated, a sustained public information effort should be mounted to publicize the program to litigants and the public at large. Promotion plays an important role in legitimizing and institutionalizing ADR in general and the program in particular. In addition, litigants and potential litigants need sufficient information about the benefits of ADR and the specific ADR procedures available through the courts to feel comfortable using them. Promotion of the program on a continuing basis should also be considered.

Judges responding to the Judicial Council survey stressed that education is the single, best way to promote ADR. They suggested that educational efforts are necessary to educate lawyers about the use of ADR and encourage them to use it on a regular basis in resolving their clients' disputes (12, p. 61). Another impediment to court-related ADR programs is judges' lack of understanding of the benefits of ADR, of the specifics of ADR processes and when their use is appropriate. Consequently, judicial education should also be a focus of any informational effort.

Subjects for public information include the benefits of ADR and the procedures of a specific ADR program. Other subjects that may be useful include: (1) participant's perspective/satisfaction; (2) court perspective of the program; (3) evaluation results, including success rates; (4) special appreciation events for neutrals; (5) program staff and their functions; (6) events that promote ADR to attorneys, judges or the public; and (7) awards or honors that the program receives.

Educational efforts directed to current litigants are discussed above in Chapter IV, Section B. This chapter describes information that court-related ADR programs can provide to potential participants in the program including judges, attorneys, and other members of the public.

B. OPTIONS FOR EDUCATING JUDGES

Several options exist for educating judges about court-related ADR and specific programs that are planned for their court.

- The court could sponsor a forum for judges at which judges and others particularly knowledgeable about ADR can discuss the benefits and mechanics of ADR processes and respond to questions;
- The court could seek the assistance of the California Judicial Education and Research staff in designing an ADR educational program;
- The court could sponsor role-playing exercises in which judges observe others conduct mock ADR processes or participate in them themselves;
- The court could make information on ADR available to judges, including reference books on court-related ADR.

C. EDUCATIONAL PROGRAMS FOR ATTORNEYS

There are also number of options for educating attorneys about court-related ADR processes:

- Conduct bench/bar forums on ADR and planned or existing ADR programs;
- Conduct court-organized workshops for attorneys on the ADR processes and procedures;
- Provide information on ADR and the court's ADR program to the legal press;

NOTICE TO PLAINTIFFS

All civil actions filed on or after January 1, 1988 (except juvenile, probate, domestic relations, unlawful detainer, and asset forfeiture cases under Health and Safety Code Section 11470 et seq. and extraordinary writs) are included in the Court's Civil Trial Delay Reduction Program. Local Rule 5 requires that you meet certain time lines for filing documents which must be strictly observed. Failure to comply with the program rules may result in the imposition of sanctions and will result in the issuance of an order to show cause why you have not complied.

YOU MUST SERVE THE FOLLOWING DOCUMENTS, WHICH YOU WILL RECEIVE FROM THE CLERK'S OFFICE, WITH THE COMPLAINT, ON ALL OTHER PARTIES:

A copy of both sides of this Notice;
A copy of the Notice of First Status Conference;
A copy of the Alternative Dispute Resolution (ADR) Information Sheet;
A blank Status Conference Questionnaire; and
A blank ADR Stipulation Form.

Service must be accomplished, and proof of service must be filed with the court, within 60 days of the filing of the complaint.

IN ALL ACTIONS FILED ON OR AFTER JULY 1, 1993 CLAIMING DAMAGES FOR PERSONAL INJURY, INCLUDING EMOTIONAL DISTRESS AND/OR WRONGFUL DEATH, THE PARTIES MUST ALSO COMPLY WITH REVISED LOCAL RULE 5(g), WHICH IS REPRINTED ON THE BACK OF THIS NOTICE.

The first status conference will be held within 140 days of the filing date of the original complaint. The exact date is indicated on the form you received from the Clerk's Office when you filed your complaint. <u>If all parties agree, an earlier status conference may be requested. Please contact the Court Administrator's Office at 646-2356 to request assignment of an earlier date.</u>

Possible referral of this case to alternative dispute resolution (ADR) will be discussed at the first status conference. Examples of ADR programs offered in Contra Costa County are described in the ADR Information Sheet. IT IS IMPORTANT THAT YOU REVIEW THESE ADR PROGRAMS WITH YOUR CLIENT AND THAT YOU VERIFY THAT YOU HAVE DONE SO ON THE STATUS CONFERENCE QUESTIONNAIRE. Use of ADR may increase the possibility of your client's case being resolved at an early, and less expensive, stage of the proceedings. All judges in the Civil Trial Delay Reduction Program are supportive of the use of ADR programs.

The Court's ADR coordinator is available to consult with the parties prior to the first status conference to assist in selecting the most appropriate dispute resolution mechanism for your case. You may contact the ADR Coordinator at 646-2127.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA 725 COURT ST. MARTINEZ CALIFORNIA 94553 (510)646-2356	COURT USE ONLY
AINTIFF:	
DEFENDANT:	

NOTICE OF FIRST STATUS CONFERENCE	CASE NUMBER:

1. Notice is given that the First Status Conference has been scheduled as follows:

DATE:	DEPARTMENT:	TIME:

THIS FORM, A COPY OF THE NOTICE TO PLAINTIFFS, THE ADR INFORMATION SHEET, A BLANK STATUS CONFERENCE QUESTIONNAIRE, AND A BLANK ADR STIPULATION FORM ARE TO BE SERVED ON OPPOSING PARTIES. ALL PARTIES SERVED WITH SUMMONS AND COMPLAINT/CROSS-COMPLAINT OR THEIR ATTORNEY OF RECORD MUST APPEAR.

2. You may stipulate to an earlier status conference. If all parties agree to an early status conference, please contact the court administrator's office at 646-2356 for assignment of an earlier date.

3 You must be familiar with the case and be fully prepared to participate effectively in the status conference and to discuss the suitability of this case for the EASE Program, private mediation, binding or non-binding arbitration, and/or use of a Special Master.

4. At any status conference the court may make pretrial orders, including the following:

a. an order establishing a discovery schedule;
b. an order referring the case to arbitration;
c. an order transferring the case to the municipal or justice court;
d. an order dismissing fictitious defendants;
e. an order scheduling exchange of expert witness information;
f. an order setting subsequent conferences and the trial date;
g. an order consolidating cases;
h. an order severing trial of cross-complaints or bifurcating trial of issues;
i. an order determining when demurrers, motions to strike and other motions will be filed.

SANCTIONS

If you do not file the Status Conference Questionnaire or attend the status conference or participate effectively in the conference, the court may impose sanctions (including dismissal of the case and payment of money).

STEVEN L. WEIR, County Clerk, County of Contra Costa

I declare under penalty of perjury that I am not a party to this action, am at least 18 years [illegible] e, and that I personally delivered or mailed a copy of this Notice of First Status [illegible]erence with the conference date and hearing time inserted to _____, [illegible]erson representing the plaintiff/cross-complainant.

Dated: _____

_____, Deputy

CONTRA COSTA COUNTY SUPERIOR COURT
ALTERNATIVE DISPUTE RESOLUTION INFORMATION SHEET

Contra Costa County Superior Court offers numerous alternative dispute resolution options to civil litigants at various stages of a case. These options encourage the parties to resolve their dispute instead of proceeding to trial. This information sheet explains the nature of the various alternative dispute resolution options and the procedures used in each of the court's alternative dispute resolution programs.

With the exception of binding arbitration, as explained below, participation in any of these programs does not affect the right of any party to proceed to trial, including the right to call and examine witnesses. In all of the court's programs, counsel and clients are expected to participate in the proceedings.

THE "EASE" PROGRAM
Extra Assistance to Settle Early

At the first status conference, either by stipulation of the parties or by direction of the court, a civil case may be referred to the EASE program. In this program, the case is assigned to a specially appointed neutral evaluator who will review the case in detail with all parties and their counsel. The evaluator will spend approximately two hours with the parties analyzing the issues involved in the case, investigating the strengths and weaknesses of the various arguments presented by all sides, and exploring the possibility of an early settlement. If the case does not settle, the evaluator considers options for streamlining discovery and other pretrial proceedings. Following the evaluation session, the evaluator prepares a confidential written report for the assigned judge.

EASE evaluators are experienced volunteer attorneys with expertise in the subject matter of the assigned cases. There is no fee charged to EASE participants. Once the referral is made, EASE evaluation sessions are scheduled by the evaluator and ordinarily take place at the evaluator's office within 45 days of the first status conference. Formal EASE statements must be received by the evaluator and by the court's ADR Coordinator no later than five court days before the evaluation session. The statements must contain the same information as the first portion of an Issue Conference Statement (Local Rule 5(k)(2)(a)). Unless excused by the judge at the status conference, the evaluation session shall be attended by all principals or clients and all claims representatives.

JUDICIAL ARBITRATION

Under California Code of Civil Procedure, Section 1141.10 et seq., all cases in which the amount in controversy does not exceed $50,000 must be submitted to judicial arbitration. A plaintiff may stipulate to limit his or her recovery to $50,000, in which case the matter will be submitted to judicial arbitration. The parties may also stipulate to judicial arbitration regardless of the amount in controversy.

Cases submitted to judicial arbitration are heard by an arbitrator selected from the approved list of arbitrators maintained in the Court Administrator's office. Parties are generally able to select an arbitrator of their choice from the list, but if they cannot agree an arbitrator will be assigned. Unless the fee is waived, arbitrators are paid $150 per case by the county. Arbitrators may receive additional compensation for cases lasting longer than one day by making a special application.

The arbitration is less formal than a trial, and usually takes place in the arbitrator's office. The arbitrator listens to argument and to the testimony of witnesses taken under oath, but formal rules of evidence do not apply. The arbitrator then renders a decision. Unless the parties stipulate that the arbitration will be binding, either party may request a trial de novo. If a new trial is not requested within 30 days, or such lesser period as the parties may agree, the decision becomes an enforceable final judgment in the case.

BINDING PRIVATE ARBITRATION

At any time during the pendency of the case, the parties may stipulate to <u>binding</u> private arbitration. If the parties so stipulate, the case is removed from the court's docket. By agreeing to binding arbitration, the parties give up their right to judicial review of the arbitrator's decision, except for the limited reasons set forth under California Code of Civil Procedure, Section 1286.2. The rules for the conduct and enforcement of binding arbitration are similar to the rules for judicial arbitration and are set forth in California Code of Civil Procedure, Section 1280 et seq.

Arbitrators may be selected from the approved list maintained by the Court Administrator's office for non-binding judicial arbitrations. Unlike judicial arbitration, however, the parties are responsible for paying the arbitrator's fees. The parties are also free to select an arbitrator not on the court's approved list if they so desire.

PRIVATE MEDIATION

Mediation is a facilitated negotiation process. In a mediation, a neutral third party helps the parties focus on their underlying interests and aids in the communication between the disputants. The mediator has no authority to issue a decision as to who is right or wrong. There is no winner or loser in a mediation; the goal of mediation is to reach a negotiated resolution acceptable to all parties.

Most mediators require that the parties themselves, as well as their counsel, personally attend the mediation session. Although mediator's styles differ, most mediators will question the parties and their lawyers carefully about their true goals and interests in proceeding with the case, and will explore the strengths and weaknesses of the case in order to ensure that a realistic assessment of the risks and possible benefits is being considered. Frequently, parties become fixed on their competing positions and a neutral third party, trained in dispute resolution techniques, can assist in finding areas of agreement and compromise. In order to promote an open exchange of ideas and information, most mediators require that the mediation be made completely confidential under California Evidence Code Section 1152.5 and that no report of the mediator's impressions is disclosed to anyone, including the court.

The mediation session ordinarily takes place in the mediator's office. Most mediators charge fees for their services, which the parties are responsible for paying, although there are a number of non-profit groups in Contra Costa County offering free or low cost mediation services. The court's ADR Coordinator is available to discuss available mediation services.

Although private mediation is often most effective at the early stages of a case, the parties may stipulate to mediation at any stage of the proceedings. The court generally will not, however, alter fast track deadlines in order to accommodate a private mediation.

SPECIAL MASTER

A special master is a private lawyer, retired judge, or other person appointed by the court to perform any of a wide variety of tasks such as case management, resolution of discovery disputes, fact-finding, and settlement negotiations. Special masters are especially useful in the organization of large, multiparty disputes such as construction cases. The precise

authority of the master is set forth in the court's order of appointment. The master generally issues a report and recommendations to the court, and parties are given an opportunity to object.

Special masters are usually appointed based on the stipulation of the parties and are paid by the parties. In a limited number of situations set forth in California Code of Civil Procedure Section 639, the court may appoint a special master/referee without the consent of the parties and order the parties to pay the reasonable costs of the appointment.

THE "SMART" PROGRAM
Special Mediators Actively Resolving Trials

On the morning of trial, either by stipulation of the parties or by direction of the court, a civil case may be referred to the SMART program. In this program, the case is assigned to a mediator who will conduct a settlement conference on behalf of the court. The mediator will spend from one and a half to three hours reviewing the issues, analyzing the case with the parties, and making settlement recommendations when appropriate. Accordingly, on the morning of trial, unless excused by the judge at the issue conference, all parties shall have in attendance all principals or clients and all claims representatives.

SMART program mediators are selected from volunteer attorneys provided by the Contra Costa County Bar Association. They are highly experienced attorneys who generally have background in the subject matter of the cases they are assigned. SMART mediators are provided with copies of the issue conference statements in advance of the settlement discussions, and they ordinarily have reviewed with the judge any prior settlement discussions that have occurred under the direction of the court. Although confidential information may be shared with the mediator and not disclosed to the other side, any information provided to the mediator may be shared with the judge. When appropriate, the mediator may choose to involve the judge directly in the settlement discussions.

THE "TOT" PROGRAM
Trials On Time

Either in advance of trial or, if a courtroom is unavailable, on the morning of trial, the parties may stipulate to participation in the TOT program. In this program, the parties agree that their case may be heard by a Pro Tem Judge appointed under Article 6, Section 21 of the State Constitution and Rule 244 of the California Rules of Court. If the parties so agree, the program guarantees a date certain for the trial (usually within three months) and a trial judge who will hear the case from 9:00 a.m. to 5:00 p.m. each day. The parties obtain a jury panel from the regular jury pool and preserve their right of appeal. A bailiff and clerk are provided on the first day of trial only, and the parties must provide their own court reporter.

The TOT program is designed principally for jury trials of not more than five days in length with issues controlled by BAJI. In special circumstances, however, the court will consider assignment of longer cases and court trials to the TOT program. Pro Tem Judges are selected by the parties from a list of experienced volunteer attorneys.

Alternative Dispute Resolution Act of 1998 (as codified)[1]

United States Code
Title 28. Judiciary And Judicial Procedure
Part III—Court Officers And Employees
Chapter 44—Alternative Dispute Resolution

§ 651. Authorization of alternative dispute resolution

(a) Definition.—For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

(b) Authority.—Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

(c) Existing alternative dispute resolution programs.—In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter.

(d) Administration of alternative dispute resolution programs.—Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

(e) Title 9 not affected.—This chapter [28 U.S.C.A. § 651 et seq.] shall not affect title 9, United States Code.[2]

(f) Program support.—The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.

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1. [Editor's note: Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (Supp. 1998)).
2. [Editor's note: 9 U.S.C. §§ 1–307 (1994) (federal arbitration statute that provides *inter alia* for the enforcement of arbitration agreements made in certain kinds of transactions).]

§ 652. Jurisdiction

(a) Consideration of alternative dispute resolution in appropriate cases.—Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

(b) Actions exempted from consideration of alternative dispute resolution.—Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult with members of the bar, including the United States Attorney for that district.

(c) Authority of the Attorney General.—Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States courts, or with any delegation of litigation authority by the Attorney General.

(d) Confidentiality provisions.—Until such time as rules are adopted under chapter 131 of this title [28 U.S.C.A. § 2071 et seq.] providing for the confidentiality of alternative dispute resolution processes under this chapter [28 U.S.C.A. § 651 et seq.], each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

§ 653. Neutrals

(a) Panel of neutrals.—Each district court that authorizes the use of alternative dispute resolution processes shall adopt appropriate processes for making neutrals available for use by the parties for each category of process offered. Each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels.

(b) Qualifications and training.—Each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process. For this purpose, the district court may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution processes. Until such time as rules are adopted under chapter 131 of this title [28 U.S.C.A. § 2071 et seq.] relating to the disqualification of neutrals, each district court shall issue rules under section 2071(a) relating to the disqualification of neutrals (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards).

§ 654. Arbitration

(a) Referral of actions to arbitration.—Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

(1) the action is based on an alleged violation of a right secured by the Constitution of the United States;

(2) jurisdiction is based in whole or in part on section 1343 of this title; or

(3) the relief sought consists of money damages in an amount greater than $150,000.

(b) Safeguards in consent cases.—Until such time as rules are adopted under chapter 131 of this title relating to procedures described in this subsection, the district court shall, by local rule adopted under section 2071(a), establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a)—

(1) consent to arbitration is freely and knowingly obtained; and

(2) no party or attorney is prejudiced for refusing to participate in arbitration.

(c) Presumptions.—For purposes of subsection (a)(3), a district court may presume damages are not in excess of $150,000 unless counsel certifies that damages exceed such amount.

(d) Existing programs.—Nothing in this chapter is deemed to affect any program in which arbitration is conducted pursuant to section [sic][3] title IX of the Judicial Improvements and Access to Justice Act (Public Law 100-702), as amended by section 1 of Public Law 105-53.

§ 655. Arbitrators

(a) Powers of arbitrators.—An arbitrator to whom an action is referred under section 654 shall have the power, within the judicial district of the district court which referred the action to arbitration—

(1) to conduct arbitration hearings;

(2) to administer oaths and affirmations; and

(3) to make awards.

(b) Standards for certification.—Each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such standards and this chapter. The standards shall include provisions requiring that any arbitrator—

(1) shall take the oath or affirmation described in section 453; and

(2) shall be subject to the disqualification rules under section 455.

(c) Immunity.—All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

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3. [Editor's note: The word "section" probably should not appear or the intent was to refer to a section of Title IX of the Judicial Improvements and Access to Justice Act, which authorized mandatory arbitration programs for ten district courts and voluntary arbitration programs for another ten district courts. *See supra* Appendix A.2.]

§ 656. Subpoenas

Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

§ 657. Arbitration award and judgment

(a) Filing and effect of arbitration award.—An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall be filed promptly after the arbitration hearing is concluded with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(b) Sealing of arbitration award.—The district court shall provide, by local rule adopted under section 2071(a), that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated.

(c) Trial de novo of arbitration awards.—

(1) **Time for filing demand.**—Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.

(2) **Action restored to court docket.**—Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.

(3) **Exclusion of evidence of arbitration.**—The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

   (A) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or

   (B) the parties have otherwise stipulated.

§ 658. Compensation of arbitrators and neutrals

(a) Compensation.—The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.

(b) Transportation allowances.—Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses necessarily incurred in the performance of duties under this chapter.

Court-Based ADR Processes

Type of Procedure	Description of Procedure	Type of Outcome
Arbitration	1 or 3 arbitrators hear presentations by attorneys or parties and give a decision	A decision based on law and/or facts
Mediation	A mediator facilitates discussion among the parties aimed at resolving the dispute	A resolution negotiated by the parties
Early Neutral Evaluation	A neutral evaluator hears presentations by the attorneys and gives an opinion about the strengths and weaknesses of the case	An assessment aimed at helping the parties settle the case or plan their next steps
Summary Jury or Bench Trial	A jury or judge hears presentations from each side and gives a decision	An advisory decision, which parties may accept or reject
Settlement Week	Trial activities are halted for one or two weeks and mediators are brought to the courthouse to help the court settle numerous trial-ready cases	A resolution negotiated by the parties
Multi-Door Courthouse	A court offers an array of ADR options, such as those above	Type of outcome depends on type of ADR process selected

Adjudicatory vs. Consensual ADR Processes

Process Feature	Adjudicatory (e.g., arbitration)	Consensual (e.g., mediation)
Role of parties	To persuade decisionmaker	To find a mutually acceptable outcome
Role of neutral	To decide the issues	To help parties reach an agreement
Nature of outcome	Decision on disputed facts or law	Party agreement based on resolution of conflicting interests
Standard used	Objective, legal standards	Parties' subjective needs
Perspective	Looks back	Looks ahead

Interest-Based vs. Rights-Based ADR Processes

Process Feature	Interest-Based (e.g., mediation)	Rights-Based (e.g., arbitration)
Focus	Satisfy parties' underlying interests, find inventive solutions	Predict the legal outcome
Process	Expand discussion beyond legal issues to deal with underlying interests	Narrow issues, refine legal arguments
Role of neutral	Facilitate party decisionmaking	Make assessments and predictions
Locus of authority	The parties	The neutral

Mandatory vs. Voluntary Referral to ADR

Process Feature	Mandatory	Voluntary
Role of court	Judge or court rules direct parties to use ADR	Court accepts parties' decision about whether ADR will be used
Role of parties	Parties are subject to judge or court's direction (usually with opportunity to show cause why ADR is not appropriate for the case)	Parties decide whether ADR is appropriate for the case

Binding vs. Nonbinding ADR Processes

Process Feature	Binding	Nonbinding
Role of neutral	Renders a decision the parties must accept (unless there is a right to appeal)	Renders a decision the parties may accept or reject Renders no decision but only facilitates party decisionmaking
Role of parties	Subject to decision of the neutral (unless there is a right to appeal)	Parties decide whether to accept the decision

Summary of the Alternative Dispute Resolution Act of 1998

Public Law 105-315
Signed October 30, 1998
Codified at 28 U.S.C. §§ 651–658

1. Section-by-section summary
2. Summary by type of duty required of the courts
   a. Requirements to be incorporated into local rules
   b. Other provisions, requirements, and prohibitions
      (1) Definitions, general authorization, program administration
      (2) ADR neutrals
      (3) Arbitration
   c. Other

The requirements, provisions, and prohibitions of the Alternative Dispute Resolution Act of 1998[1] can be summarized in a number of different ways. Two types of summaries are provided here. The items listed under each are essentially the same but are arranged differently.

The first summary sets out the ADR Act's principal provisions, following the order in which they appear in the Act. The second groups the ADR Act's requirements by the level of duty required of the courts, in part to highlight matters the courts must address in local rules.

The ADR Act of 1998 is codified at 28 U.S.C. §§ 651–658 (Supp. 1998). Before passage of the ADR Act, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting out provisions for implementing those arbitration programs under the provisions of the Judicial Improvements and Access to Justice Act of 1988.[2] The ADR Act of 1998 does not affect any program in which arbitration is conducted under the 1988 Act (*see* 28 U.S.C. § 654(d) (1998)), authorizes ADR more generally for the district courts, and provides requirements for the referral of cases to arbitration other than under the 1988 Act.

1. Section-by-section summary

Section 651: Authorization of Alternative Dispute Resolution

- **Definition of ADR.** Alternative dispute resolution (ADR) includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party assists in resolving the dispute, through processes such as early neutral evaluation, mediation, minitrial, and arbitration (28 U.S. C. § 651(a) (1998)).

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1. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (Supp. 1998)).
2. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–62 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)).

- **Requirement to Authorize Use of ADR.** Each district court shall by local rule authorize use of ADR in all civil actions, including adversary proceedings in bankruptcy (§ 651(b)).
- **Requirement to Implement an ADR Program.** Each district court shall by local rule devise and implement its own ADR program to encourage and promote use of ADR (§ 651(b)).
- **Existing ADR Programs.** Courts with existing ADR programs shall examine their effectiveness and adopt such improvements as are consistent with the Act (§ 651(c)).
- **Program Administration.** Each district court shall designate an employee or judicial officer who is knowledgeable in ADR practices and processes to implement, administer, oversee, and evaluate the ADR program. This person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators (§ 651(d)).
- **Title 9.** The ADR Act of 1998 shall not affect the federal arbitration statute that is codified at Title 9 of the United States Code.
- **Federal Judicial Center and Administrative Office Support.** The Federal Judicial Center and the Administrative Office of the U.S. Courts are authorized to assist the district courts in the establishment and improvement of ADR programs by identifying particular practices used in successful programs and providing additional assistance as needed and appropriate (§ 651(f)).

Section 652: Jurisdiction

- **Requirement That Litigants Consider ADR.** Each district court shall by local rule require litigants in all civil cases to consider using ADR at an appropriate stage in the litigation (§ 652(a)).
- **Requirement to Provide at Least One ADR Process.** Each district court shall provide litigants in all civil cases at least one ADR process, including but not limited to mediation, early neutral evaluation, minitrial, and arbitration (§ 652(a)).
- **Compelled Use of ADR.** Any district court that elects to require use of ADR in certain cases may do so only with respect to mediation, early neutral evaluation, and, with party consent, arbitration (§ 652(a)). The ADR Act does not, however, affect any program in which arbitration is conducted under the 1988 Act (§ 654(d)).
- **Cases Exempt From ADR.** Each district court may exempt specific cases or categories of cases from ADR, but shall consult with the bar, including the U.S. Attorney, in defining these exemptions (§ 652(b)).
- **Authority of the Attorney General.** Nothing in section 652 of the ADR Act (as codified) shall alter or conflict with the authority of the Attorney General or any federal agency to conduct litigation (§ 652(c)).
- **Confidentiality.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall by local rule provide for the confidentiality of the ADR processes and prohibit disclosure of confidential ADR communications (§ 652(d)).

Section 653: Neutrals

- **Panel of Neutrals.** Each district court shall adopt appropriate processes for making neutrals available for use by the parties for each category of ADR process offered and must promulgate its own procedures and criteria for the selection of neutrals on its panels (§ 653(a)).
- **Qualifications of Neutrals.** Each neutral should be qualified and trained in the appropriate ADR process. The district court may use, among others, magistrate judges who have been trained in ADR processes, professional neutrals from the private sector, and persons trained to serve as ADR neutrals (§ 653(b)).
- **Disqualification of Neutrals.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall issue rules on disqualification of neutrals, including where appropriate disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)).

Section 654: Arbitration

- **Referral to Arbitration.** A district court may allow referral to arbitration of any civil action, including any adversary proceeding in bankruptcy, when the parties consent, except: in cases alleging violation of a Constitutional right; when jurisdiction is based in whole or part on 28 U.S.C. § 1343; or when the relief sought consists of money damages greater than $150,000 (§ 654(a)).
- **Safeguards in Consent Cases.** Until such time as national rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, the district court shall by local rule establish procedures to ensure that, in any civil action in which arbitration by consent is allowed, consent is freely and knowingly obtained, and no party or attorney is prejudiced for refusing to participate in arbitration (§ 654(b)).
- **Presumption Regarding Monetary Damages.** A district court may presume damages are not in excess of $150,000 unless counsel certifies otherwise.
- **The 1988 Act's Authorization for Twenty Arbitration Programs.** Nothing in the ADR Act of 1998 is deemed to affect any arbitration program conducted under the 1988 Act.[3] (§ 654(d)).

Section 655: Arbitrators

- **Powers of Arbitrators.** An arbitrator shall have the power to conduct arbitration hearings, administer oaths and affirmations, and make awards (§ 655(a)).
- **Certification of Arbitrators.** Each district court that authorizes arbitration shall establish standards for certification of arbitrators and shall certify arbitrators to perform services in accord with those standards. The standards shall include provisions requiring arbitrators to take an oath and to be subject to the disqualification rules of 28 U.S.C. § 455 (§ 655(b)).

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3. *Id.*

- **Immunity for Arbitrators.** Arbitrators are performing quasi-judicial functions and are entitled to the immunities and protections afforded to persons serving in such a capacity (§ 655(c)).

Section 656: Subpoenas

- **Subpoenas.** Federal Rule of Civil Procedure 45 applies to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing (§ 656).

Section 657: Arbitration Award and Judgment

- **Filing and Effect of Arbitration Awards.** An arbitration award shall be filed promptly with the clerk of the district court and shall be entered as the judgment of the court after the time for requesting a trial de novo has expired. The judgment shall have the same force and effect as a judgment in a civil action, except it shall not be subject to review in any other court by appeal or otherwise (§ 657(a)).
- **Sealing of the Arbitration Award.** The district court shall by local rule provide that the contents of any arbitration award shall not be made known to any judge who might be assigned to the case until the court has entered final judgment or the action has otherwise terminated (§ 657(b)).
- **Trial De Novo.** Any party may file a written demand for a trial de novo within thirty days after the filing of the arbitration award. The action shall be restored to the docket and treated as if it had not been referred to arbitration. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any arbitration award, or any matter concerning the conduct of the arbitration proceeding unless it would be admissible under the Federal Rules of Evidence or the parties otherwise stipulate (§ 657(c)).

Section 658: Compensation of Arbitrators and Neutrals

- **Compensation of Neutrals.** Subject to regulations approved by the Judicial Conference, the district court shall establish the amount of compensation, if any, that each arbitrator or neutral shall receive (§ 658(a)).
- **Transportation Allowances.** Under regulations prescribed by the Administrative Office of the U.S. Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses incurred in performing their duties (§ 658(b)).

Authorization of Appropriations

- **Appropriations.** The ADR Act authorizes such appropriations for each fiscal year as may be necessary to carry out the Act.[4]

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4. § 11, 112 Stat. at 2998.

2. Summary by type of duty required of the courts

a. Requirements to be incorporated into local rules

- **Requirement to Authorize Use of ADR.** Each district court shall by local rule authorize use of ADR in all civil actions, including adversary proceedings in bankruptcy (28 U.S.C. § 651(b) (1998)).
- **Requirement to Implement an ADR Program.** Each district court shall by local rule devise and implement its own ADR program to encourage and promote use of ADR (§ 651(b)).
- **Requirement That Litigants Consider ADR.** Each district court shall by local rule require litigants in all civil cases to consider using ADR at an appropriate stage in the litigation (§ 652(a)).
- **Confidentiality.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall by local rule provide for the confidentiality of the ADR processes and prohibit disclosure of confidential ADR communications (§ 652(d)).
- **Safeguards in Consent Cases.** Until such time as national rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, the district court shall by local rule establish procedures to ensure that, in any civil action in which arbitration by consent is allowed, consent is freely and knowingly obtained, and no party or attorney is prejudiced for refusing to participate in arbitration (§ 654(b)).
- **Sealing of the Arbitration Award.** The district court shall by local rule provide that the contents of any arbitration award shall not be made known to any judge who might be assigned to the case until the court has entered final judgment or the action has otherwise terminated (§ 657(b)).
- **Disqualification of Neutrals.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall issue rules on disqualification of neutrals, including where appropriate disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)).

b. Other provisions, requirements, and prohibitions

(1) Definitions, general authorization, program administration

- **Definition of ADR.** Alternative dispute resolution (ADR) includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party assists in resolving the dispute, through processes such as early neutral evaluation, mediation, minitrial, and arbitration (§ 651(a)).
- **Existing ADR Programs.** Courts with existing ADR programs shall examine their effectiveness and adopt such improvements as are consistent with the Act (§ 651(c)).
- **Program Administration.** Each district court shall designate an employee or judicial officer who is knowledgeable in ADR practices and processes to implement, administer, oversee, and evaluate the ADR program. This person may

also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators (§ 651(d)).

- **Requirement to Provide at Least One ADR Process.** Each district court shall provide litigants in all civil cases at least one ADR process, including but not limited to mediation, early neutral evaluation, minitrial, and arbitration (§ 652(a)).
- **Compelled Use of ADR.** Any district court that elects to require use of ADR in certain cases may do so only with respect to mediation, early neutral evaluation, and, with party consent, arbitration (§ 652(a)). The ADR Act does not, however, affect any program in which arbitration is conducted pursuant to the 1988 Act (§ 654(d)).
- **Cases Exempt From ADR.** Each district court may exempt specific cases or categories of cases from ADR, but shall consult with the bar, including the U.S. Attorney, in defining these exemptions (§ 652(b)).

(2) ADR neutrals

- **Panel of Neutrals.** Each district court shall adopt appropriate processes for making neutrals available for use by the parties for each category of ADR process offered and must promulgate its own procedures and criteria for the selection of neutrals on its panels (§ 653(a)).
- **Qualifications of Neutrals.** Each neutral should be qualified and trained in the appropriate ADR process. The district court may use, among others, magistrate judges who have been trained in ADR processes, professional neutrals from the private sector, and persons trained to serve as ADR neutrals (§ 653(b)).
- **Disqualification of Neutrals.** Until such time as rules are adopted under the Rules Enabling Act codified at chapter 131 of Title 28, each district court shall issue rules on disqualification of neutrals, including where appropriate disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)).
- **Compensation of Neutrals.** Subject to regulations approved by the Judicial Conference, the district court shall establish the amount of compensation, if any, that each arbitrator or neutral shall receive (§ 658(a)).
- **Transportation Allowances.** Under regulations prescribed by the Administrative Office of the U.S. Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses incurred in performing their duties (§ 658(b)).

(3) Arbitration

- **Referral to Arbitration.** A district court may allow referral to arbitration of any civil action, including any adversary proceeding in bankruptcy, when the parties consent, except: in cases alleging violation of a Constitutional right; when jurisdiction is based in whole or part on 28 U.S.C. § 1343; or when the relief sought consists of money damages greater than $150,000 (§ 654(a)).
- **Presumption Regarding Monetary Damages.** A district court may presume damages are not in excess of $150,000 unless counsel certifies otherwise.

- **The 1988 Act's Authorization for Twenty Arbitration Programs.** Nothing in the ADR Act of 1998 is deemed to affect any arbitration program conducted under the 1988 Act.[5] (§ 654(d)).
- **Powers of Arbitrators.** An arbitrator shall have the power to conduct arbitration hearings, administer oaths and affirmations, and make awards (§ 655(a)).
- **Certification of Arbitrators.** Each district court that authorizes arbitration shall establish standards for certification of arbitrators and shall certify arbitrators to perform services in accord with those standards. The standards shall include provisions requiring arbitrators to take an oath and to be subject to the disqualification rules of 28 U.S.C. § 455 (§ 655(b)).
- **Immunity for Arbitrators.** Arbitrators are performing quasi-judicial functions and are entitled to the immunities and protections afforded to persons serving in such a capacity (§ 655(c)).
- **Subpoenas.** Federal Rule of Civil Procedure 45 applies to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing (§ 656).
- **Filing and Effect of Arbitration Awards.** An arbitration award shall be filed promptly with the clerk of the district court and shall be entered as the judgment of the court after the time for requesting a trial de novo has expired. The judgment shall have the same force and effect as a judgment in a civil action, except it shall not be subject to review in any other court by appeal or otherwise (§ 657(a)).
- **Trial De Novo.** Any party may file a written demand for a trial de novo within thirty days after the filing of the arbitration award. The action shall be restored to the docket and treated as if it had not been referred to arbitration. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any arbitration award, or any matter concerning the conduct of the arbitration proceeding unless it would be admissible under the Federal Rules of Evidence or the parties otherwise stipulate (§ 657(c)).

c. Other

- **Title 9.** The ADR Act of 1998 shall not affect the federal arbitration statute that is codified at Title 9 of the United States Code.
- **Federal Judicial Center and Administrative Office Support.** The Federal Judicial Center and Administrative Office of the U.S. Courts are authorized to assist the district courts in the establishment and improvement of ADR programs by identifying particular practices used in successful programs and providing additional assistance as needed and appropriate (§ 651(f)).
- **Authority of the Attorney General.** Nothing in section 652 of the ADR Act (as codified) shall alter or conflict with the authority of the Attorney General or any federal agency to conduct litigation (§ 652(c)).
- **Appropriations.** The ADR Act authorizes such appropriations for each fiscal year as may be necessary to carry out the Act.

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5. § 901(a), 102 Stat. at 4659–63.