

**ALTERNATIVE DISPUTE RESOLUTION
IN CIVIL CASES**



**REPORT OF THE
TASK FORCE ON THE QUALITY OF JUSTICE
SUBCOMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION
AND THE JUDICIAL SYSTEM**

August 1999

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**THIS REPORT IS THE WORK OF THE TASK FORCE ON THE QUALITY OF
JUSTICE: SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION
AND THE JUDICIAL SYSTEM AND MAY NOT REPRESENT THE OFFICIAL
POLICY OF THE JUDICIAL COUNCIL OF CALIFORNIA**

AUGUST 1999

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ALTERNATIVE DISPUTE RESOLUTION AND THE JUDICIAL SYSTEM
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FOREWORD

In February 1998, Chief Justice Ronald M. George appointed the Task Force on the Quality of Justice. The Task Force was divided into two subcommittees, the Subcommittee on the Quality of Judicial Service and the Subcommittee on Alternative Dispute Resolution and the Judicial System. I am pleased to submit the report and recommendations of the Subcommittee on Alternative Dispute Resolution and the Judicial System (subcommittee).

Our subcommittee, composed of 20 members with diverse backgrounds and experience, was charged with assessing and making recommendations regarding the following: the effects of alternative dispute resolution (ADR) on courts, litigants, and the public; ethical issues; and court referral of disputes. In addition to reviewing existing studies and literature, we surveyed ADR providers, held public hearings, and met together many times to share ADR information and experience. Our recommendations were reached by the subcommittee through a process of consensus and initial drafts were revised following input from multiple sources. The work of the subcommittee benefited from the extraordinary talent and effort of staff attorney Heather Anderson.

The subcommittee recommendations focus on ways to maximize the positive effects of ADR and minimize the negative effects through means that are within the general domain of the judicial branch. These include measures to encourage more voluntary use of ADR, particularly mediation, outside the courts and more opportunities for early mediation within the courts. Ethical concerns are addressed within the framework of court rules, standards and judicial ethics, rather than administrative agencies, additional regulation of professions, or criminal sanctions. We propose specific statutes and rules relating to concerns about court references, particularly in discovery matters.

ADR, as it relates to the judicial system, is a reform in progress. Additional experience will, no doubt, result in further refinements. We believe that our recommendations, if adopted, will encourage party selection of the most appropriate dispute resolution process, thus increasing satisfaction for those who seek resolution of their disputes. To the extent that these recommendations improve court-connected ADR programs and court referrals, they will enhance public perception of the courts. It is the hope of our subcommittee that our proposals will help the Council maximize the important beneficial effects of ADR as it relates to our judicial system.

Jay Folberg
Subcommittee Chair

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EXECUTIVE SUMMARY

I. INTRODUCTION

In February 1998, Chief Justice Ronald M. George appointed the Task Force on the Quality of Justice. The task force was divided into two subcommittees: the Subcommittee on the Quality of Judicial Service and the Subcommittee on Alternative Dispute Resolution and the Judicial System. This is the report of the Subcommittee on Alternative Dispute Resolution and the Judicial System (hereafter subcommittee) on alternative dispute resolution (ADR) in civil cases.

The subcommittee was charged with studying and making recommendations concerning:

- The effects of ADR on courts, litigants and the public;
- What state entity has or should have the authority to adopt ethical standards governing retired judges, attorneys, and/or nonattorneys acting as arbitrators or mediators and what ethical standards should be adopted; and
- Whether the standards governing the referral of disputes by courts to private judges or attorneys be should changed.

II. THE EFFECTS OF CIVIL ADR ON COURTS, LITIGATNS, AND THE PUBLIC

A. CONCLUSIONS

The term ADR encompasses a wide variety of processes and programs, from predispute, binding contractual arbitration to voluntary community mediation. The effects of these different processes or programs on courts, litigants, and the public vary and should be assessed separately.

1. EFFECTS ON LITIGANTS AND THE PUBLIC

While empirical information is limited, the subcommittee concluded that the availability of civil ADR processes, whether in the private, community, or court-related context, generally offers litigants and the public a number of potential benefits, including the following:

- Greater choice of ways to resolve disputes, allowing the matching of disputes to the most appropriate dispute resolution process available. Of course, the benefit of choice is not present where parties are required to use a particular ADR process;
- The potential for earlier, faster resolution than with traditional litigation;
- The potential for less costly means for resolving disputes; and
- The potential for greater satisfaction with the dispute resolution process and outcome than with traditional litigation.

With regard to private ADR in general, an often-expressed concern is that the availability of these services is creating a “two-tier” system of justice, where the wealthy use private ADR while the poor and middle class are shut out of the private ADR market and forced to stay within the court system. Further, it is thought that, as the wealthy, influential segments of society forsake the public courts, there will be less support for maintaining or improving the public justice system. While the subcommittee did not have sufficient empirical information to allay these concerns completely, there is information suggesting that the use of private ADR is not limited to the wealthy. In addition, with the advent of delay reduction and court-related civil ADR programs, the courts are providing swifter resolutions and more options to civil litigants. Finally, civil ADR services are also available to the public through community ADR programs. Clearly, however, community and court-related civil ADR programs, which are important mechanisms for providing access to civil ADR services, are not currently available in all counties.

With regard to specific private ADR processes, the subcommittee concluded that the imposition of predispute binding arbitration on consumers and employees in contracts of adhesion raises serious concerns about fairness and access to the courts. In contrast, the subcommittee heard nothing but praise for private mediation.

In the court-related context, empirical information suggests that while mandatory nonbinding civil ADR programs result in higher rates of participation, providing a greater opportunity for litigants to learn the value of ADR through participation, they also result in lower resolution and satisfaction rates than voluntary programs. In addition, mandatory programs raise concerns about courts making inappropriate referrals in particular cases and imposing costs on litigants. These concerns have been borne out in the form of perceived problems with both involuntary references, particularly discovery references, and mandatory judicial arbitration. These concerns are lessened in the context of mandatory mediation, since any party is free to withdraw and end the mediation process.

2. EFFECTS ON THE COURTS

The use of private civil ADR has the potential for benefiting the courts by reducing court workloads. However, the current impact of private ADR on court workloads is unclear. The number of cases using private ADR appears to be relatively small compared to the number of cases in the public justice system and thus, any positive effect on the courts' overall workload at this time is unlikely to be very large. At the same time, the cases in which private ADR is being used may be qualitatively different from those in the public justice system and their withdrawal from the courts may have an impact that is disproportionate to their numbers.

An oft-expressed concern about private ADR's effect on the courts is that the opportunity for potentially lucrative employment in the private dispute resolution field is luring judges to retire prematurely from the public bench. While many former judges do go into the private dispute resolution field upon retirement, the subcommittee did not find empirical support for the conclusion that this employment opportunity is the primary factor inducing judges to retire. Rather, it appears that the current compensation and retirement structure are the primary factors in judges' decisions regarding retirement. These issues have been addressed in the recommendations of the Subcommittee on the Quality of Judicial Service. What has not been addressed in any empirical study, and therefore remains unclear, is whether the availability of an alternate career in private ADR results in judges with certain backgrounds or the "best and brightest" judges being drawn off the bench at higher rates.

While statewide quantitative information about their impact is not available at this time, public testimony and other information suggest that community and governmental ADR programs benefit the courts by handling some disputes that might otherwise have to be resolved by the courts and by providing resources that help support court-related civil ADR programs.

While empirical information about court-related civil ADR programs is also limited, the subcommittee concluded that by implementing high-quality, well-administered court-related civil ADR programs, courts can expand litigants' dispute resolution options within the courts, increasing public access to ADR services and potentially raising the public's level of satisfaction with the court system. In addition, court-related civil ADR programs have the potential for resolving some cases earlier, freeing court resources to focus on those cases that do require court adjudication. However, if cases are inappropriately referred to an ADR process or if the neutrals to whom the court refers cases do not provide quality services or are perceived as engaging in unethical conduct, this may damage the public's perception of ADR and of the courts.

B. RECOMMENDATIONS

1. OVERVIEW OF SUBCOMMITTEE'S RECOMMENDATIONS

The subcommittee is making eleven recommendations intended to expand the positive effects and minimize the negative effects of civil ADR on courts, litigants and the public. These recommendations focus on court-related measures that could be taken by the Judicial Council, including measures to encourage voluntary use of civil ADR outside of the courts and measures to provide opportunities for early mediation in civil cases within the courts. Other measures to ameliorate some of the negative effects identified are discussed under the sections of the subcommittee's report relating to ethical standards for ADR providers and standards for court referrals.

2. ADR INFORMATION SHARING

To ensure that litigants in civil cases have information about ADR options and are encouraged to voluntarily use ADR:

Recommendation 1

The subcommittee recommends that the Judicial Council adopt rule 1590 et seq. of the California Rules of Court, as set forth in Appendix 1 (page 16 - 19) to:

- Require courts to provide an ADR Information Package to plaintiffs, including
 - General information about the advantages and disadvantages of ADR;
 - Information about the programs available in that court;
 - In counties with a Dispute Resolution Programs Act (DRPA) program, information about DRPA-funded programs;
 - A form on which the parties can indicate their willingness to participate in an ADR process; and
 - A form that parties can use to stipulate to ADR.
- Require that plaintiffs serve the ADR Information Package, including a completed form regarding willingness to use ADR, on all defendants and that all defendants serve the completed form regarding willingness to use ADR.

- Require in courts that do not hold case management conferences that the parties meet and confer about ADR no later than 90 days following the filing of the complaint.
- Authorize courts to cancel or continue a case management conference if the parties stipulate to use ADR.

3. COURT LISTS OF NEUTRALS

To provide civil litigants with information to assist them in selecting an ADR provider and to improve access to private civil ADR services for low-income litigants:

Recommendation 2

The subcommittee recommends that the Judicial Council adopt rule 1580.1 of the California Rules of Court, as set forth in Appendix 1 (page 14), requiring that if a court makes a list of ADR providers available to litigants:

- The list contain, at a minimum, information about the types of ADR services available from each provider; each provider's résumé, including his or her ADR training and experience; and the fees charged by each provider.
- To be included on a court list, an ADR provider must agree to serve as an ADR neutral on a pro bono or limited-fee basis in at least one case per year, if requested by the court.

4. ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENTS

To encourage further use of voluntary mediation in civil cases:

Recommendation 3

The subcommittee recommends that the Judicial Council direct the appropriate standing advisory committee to further explore options for enhancing the enforceability of mediated settlement agreements.

5. COURT REFERRALS TO VOLUNTARY MEDIATION

To enhance early voluntary mediation use in civil cases, cultivate a presumption within the legal culture that it is appropriate to try ADR, and through this presumption and experience with mediation, encourage future voluntary ADR use:

Recommendation 4

The subcommittee recommends that the Judicial Council sponsor legislation to enact Code of Civil Procedure section 1760 et seq. and adopt rule 1620 et seq. of the California Rules of Court, as set forth in Appendix 2, to authorize courts to refer general civil cases to mediation at the first case management conference or similar event, but permit parties to opt out of such a referral. As part of this legislation, provide that the parties select the neutral person and are responsible for the costs of the process, including the neutral's fees.

6. EARLY MEDIATION PILOT PROJECT

To permit limited experimentation with mandatory mediation in large cases and to complement the existing mandatory mediation program for smaller cases in Los Angeles:

Recommendation 5

The subcommittee recommends that the Judicial Council sponsor legislation to enact Code of Civil Procedure section 1780 et seq., as set forth in Appendix 3, to create a pilot project in the Los Angeles Superior Court authorizing the court to hold an early status conference at which the court could refer cases valued at over \$50,000 to

mandatory mediation. As part of this legislation, provide that the parties select the mediator and are required to pay for the mediator's services, up to the fee for a maximum number of hours agreed upon by the parties, or if the parties do not agree, up to three hours.

7. ADR EDUCATION FOR JUDGES AND COURT STAFF

To provide judges and court staff with the information they need to make appropriate referrals of civil cases to ADR processes:

Recommendation 6

The subcommittee recommends that the Judicial Council direct staff to develop proposals for additional education programs for judges and court staff on ADR, particularly on identifying cases appropriate for referral to particular ADR processes.

8. ADR PROGRAM STAFFING AND FUNDING

To provide the staff support necessary for implementation and administration of high-quality, successful, court-related civil ADR programs:

Recommendation 7

The subcommittee recommends that the Judicial Council adopt rule 1580.3 of the California Rules of Court, as set forth in Appendix 1 (page 15), requiring courts to designate a court employee who is knowledgeable about ADR to serve as ADR program administrator.

Recommendation 8

The subcommittee recommends that the Judicial Council place a high priority within the trial court funding process on requests from trial courts for additional funding for ADR program staffing.

Recommendation 9

The subcommittee recommends that the Judicial Council urge courts to place a high priority on ADR program staffing in the allocation of their court operations funding.

9. JUDICIAL COUNCIL AND AOC ROLE

To provide the council with information about the different models of court-related civil ADR programs operating in the California courts and to provide courts with information and assistance in the design, implementation, and administration of high-quality, successful, court-related civil ADR programs:

Recommendation 10

The subcommittee recommends that the Judicial Council adopt rule 1580.2 of the California Rules of Court, as set forth in Appendix 1 (page 14), requiring courts to submit information on their ADR programs to the council.

Recommendation 11

The subcommittee recommends that the Judicial Council direct the Administrative Director of the Courts to designate staff within Administrative Office of the Courts to focus on court-related ADR issues including:

- Developing and sponsoring educational programs for judges and court staff concerning ADR;
- Gathering information about court-related ADR programs in California and in other states and acting as a statewide clearinghouse to provide this information to the courts.
- Developing proposals for statewide rules of court or standards concerning court-related ADR programs.

III. ETHICAL STANDARDS AND ENFORCEMENT

A. CONCLUSIONS

The subcommittee reviewed existing ethical standards for civil ADR providers. It found that ethical standards for various types of civil ADR providers are established by a variety of sources, including the Legislature through statute, the Supreme Court through the California Code of Judicial Ethics and the Rules of Professional Conduct of the State Bar of California, for court-related programs the Judicial Council through the California Rules of Court and by local court rules, and for private providers through codes of ethics adopted by providers or professional organizations. Enforcement mechanisms also vary depending on whether or not the neutral is an attorney and what type of dispute resolution service is being provided.

1. CANON 6D ACTIVITIES: TEMPORARY JUDGES, REFEREES, COURT APPOINTED ARBITRATORS

Newly enacted Canon 6D of the Code of Judicial Ethics ensures that appropriate fundamental ethical principles relating to judicial service apply to temporary judges, referees, and court-appointed arbitrators. Canon 6D works in conjunction with rule 1-710 of the Rules of Professional Conduct for Attorneys. This rule requires that members of the Bar who serve as temporary judges, referees, or court-appointed arbitrators comply with Canon 6 and serves as the basis for the enforcement of Canon 6D through the attorney discipline system. However, while temporary judges are required to be members of the bar and are therefore subject to discipline for violations of Canon 6D, referees and arbitrators are not required to be attorneys. Those referees and court-appointed arbitrators who are not members of the bar are not subject to the authority of the attorney discipline system.

2. MEDIATORS AND EVALUATORS IN COURT-RELATED CIVIL ADR PROGRAMS

While many local courts have adopted ethical standards applicable to these neutrals, there are no current statewide requirements.

3. PRIVATE AND COMMUNITY ADR PROVIDERS

The Legislature has adopted extensive disclosure requirements that are applicable to all private arbitrators, whether they are former judicial officers, attorneys, or nonattorneys. Beyond these provisions, there are currently no statewide, governmentally mandated ethical standards for private ADR providers. However, many private providers and neutral professional associations have adopted ethical standards applicable to their panelists/members that can be enforced by removal from these panels or organizations.

B. RECOMMENDATIONS

The subcommittee focused its recommendations on measures addressing ethical standards for civil ADR providers in court-related programs or whose services directly affect the courts.

1. CERTIFICATION REQUIREMENTS FOR TEMPORARY JUDGES, REFEREES, AND JUDICIAL ARBITRATORS

To enhance compliance with and the enforceability of Canon 6D:

Recommendation 12

The subcommittee recommends that the Judicial Council amend the existing rules of court relating to temporary judges, referees, and arbitrators in the judicial arbitration program as set forth in Appendix 4 to:

- Require that they disclose any prior public State Bar discipline or court finding of violation of the California Code of Judicial Ethics and certify, on a form adopted by the Judicial Council, that they are aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and other ethical requirements.
- Add past service as an expert witness or attorney for any party to the list of specific prior relationships that must be disclosed, and, in order to correspond to the time period covered by Canon 6D's ban on acceptance of gifts, lengthen the period covered by this disclosure requirement from the prior 18 months to the prior 24 months.

- Require that any former California judicial officer must be a member (active or inactive) of the State Bar in order to serve as a referee or arbitrator in the judicial arbitration program.

2. *ETHICAL STANDARDS FOR ADR PROVIDERS IN COURT RELATED CIVIL ADR PROGRAMS*

To provide ethical guidelines for mediators and other providers in court-related civil ADR programs:

Recommendation 13

The subcommittee recommends that the Judicial Council, in the short term, adopt rules 1580.1 and 1619 of the California Rules of Court, as set forth in Appendix 5, requiring:

- Courts that maintain a panel of mediators or make a list of mediators available to litigants to adopt ethical standards applicable to the mediators on the courts' panel or list.
- Courts that maintain a panel of ADR providers or make a list of ADR providers available to litigants to require that, to be included on the list, ADR providers sign a certificate agreeing to comply with all applicable ethical requirements.

Recommendation 14

The subcommittee recommends that the Judicial Council, for the long term, appoint a task force that includes representatives of court-related mediation programs and ADR providers to develop a set of model ethical standards for court-related mediation programs for consideration by the council.

3. *NEW CANON OF JUDICIAL ETHICS RE FORMER JUDICIAL OFFICERS PROVIDING ADR SERVICES*

To encourage ethical behavior by former judicial officers who provide dispute resolution services, and thereby improve public perceptions of the judicial system:

Recommendation 15:

The subcommittee recommends that the Judicial Council submit for consideration by the Supreme Court proposed Canon 6G of the California Code of Judicial Ethics, as set forth in Appendix 6, prohibiting former judicial officers who are providing dispute resolution services from accepting gifts from a party, person, or entity whose interests have come before the former judicial officer or, with certain exceptions, from counsel for such party, person, or entity. The subcommittee recommends that this canon apply for the first five years after retirement or resignation and, thereafter, for as long as such former judicial officers indicate their former status in communications concerning their availability for employment as an ADR provider.

IV. STANDARDS FOR COURT REFERRALS TO PRIVATE JUDGES AND ATTORNEYS

A. CONCLUSIONS

The subcommittee concluded that the principal area of concern with regard to court referrals to private judges and attorneys is the nonconsensual referral of matters, particularly discovery matters, to referees pursuant to Code of Civil Procedure section 639. The subcommittee identified three major issues of concern with regard to these references:

- The perception that these references are being made in routine discovery matters;
- The method used by a court to select the referee and the perception of favoritism in this selection process; and
- The fees charged by the referees and the method used by the courts to allocate these fees among the parties.

The subcommittee also received public testimony raising concerns about inappropriate referrals to judicial arbitration.

B. RECOMMENDATIONS

To address the concerns regarding references under Code of Civil Procedure section 639 and references to judicial arbitration:

Recommendation 16

The subcommittee recommends that the Judicial Council sponsor legislation to amend the existing statutes relating to references, as set forth in Appendix 7, to:

- Clarify that discovery references should only be made when exceptional circumstances of the particular case require such a reference.
- Require that a court make a specified finding about the parties' ability to pay the referee's fees and prohibit a court from making a nonconsensual reference if the court cannot make such a finding.
- Clarify that courts may not consider counsel's ability to pay the referee's fees when determining whether the parties are able to pay these fees.
- Require that the court's reference order include the maximum hourly rate the referee may charge, and if requested by a party, the estimated maximum number of hours for which the referee may charge.
- Require that the referee's report include information about the total hours spent and the total fees charged by the referee.
- Require courts to appoint the referee agreed upon by the parties and create a procedure for the selection of a referee when the parties have not agreed.
- Require courts to forward copies of all discovery reference orders to the office of the presiding judge.
- Require the Judicial Council, by rule, to collect information on the use of discovery references and the fees charged to parties and to report to the Legislature on these issues.

Recommendation 17:

The subcommittee recommends that the Judicial Council direct staff to conduct a study of the judicial arbitration program to assess, among other things, resolution rates for the program and whether certain classes of cases appear to be more amenable to resolution through this program.

I. INTRODUCTION

A. THE SUBCOMMITTEE AND ITS CHARGE

In February 1998, Chief Justice Ronald M. George appointed the Task Force on the Quality of Justice to study the impact of private judging and court-affiliated alternative dispute resolution (ADR) services on the state courts, litigants, and the public (see Appendix 8, February 24, 1998, Judicial Council news release). The task force was divided into two subcommittees: the Subcommittee on the Quality of Judicial Service and the Subcommittee on Alternative Dispute Resolution and the Judicial System.

The Subcommittee on Alternative Dispute Resolution and the Judicial System (hereafter referred to as the “subcommittee”) is composed of 20 members who represent the judiciary and the alternative dispute resolution and legal communities. Members include representatives from the Courts of Appeal and superior courts, retired judges who provide ADR services, academics, attorneys, and labor representatives. (See the subcommittee roster following this report’s title page.)

The subcommittee was specifically charged with studying and making recommendations on the following issues:

1. **Effect of ADR on courts:**

- How has the increasing use of private alternative dispute procedures affected the justice system and the courts?
- Should any measures be adopted to ameliorate any negative effects or reinforce and expand any positive effects of private ADR?

2. **Effect of ADR on litigants and the public:**

- What effect has the increasing use of private ADR had on litigants and the public? For example, how has private ADR affected the time and cost required to resolve disputes in the courts or the public’s understanding of, and confidence in, the justice system?
- What measures might be adopted to ameliorate any negative effects or reinforce and expand any benefits of private ADR?

3. **Ethical issues:**

- Which, if any, state entity or official has the authority to adopt ethical standards, including educational guidelines, governing active and retired judges, attorneys, and/or nonattorneys acting as arbitrators or mediators?
- Where an entity has the authority, should it adopt standards and what should they be? If no entity has such authority with respect to one or more of the groups identified, can and should such authority be granted, to whom, and what standards should the entity adopt?

4. **Court referral of disputes:**

- Should the standards governing the referral of disputes by courts to private judges or attorneys be changed. If yes, how?

B. DEFINITIONS AND LIMITATIONS ON THE SCOPE OF THE SUBCOMMITTEE'S REPORT

The definition of ADR was one of the first issues considered by the subcommittee when it began to examine the scope of its charge.

In general, the acronym ADR has been used to stand for “alternative dispute resolution” processes – that is, processes for resolving disputes other than traditional litigation. Various authors and reports have objected to this definition either because they believe that it implies that litigation is better than other methods of resolving disputes (everything else is an alternative to litigation)¹ or it implies that litigation is never an appropriate option. These sources have suggested that the ADR acronym be used to stand for “appropriate dispute resolution,” thereby implying that court adjudication and other dispute resolution processes are all part of a spectrum of options from which to choose the process best suited to a particular dispute. As was stated in the 1993 Report of the Commission on the Future of the California Courts:

¹ As one commentator has observed, “Really, litigation is the alternative. . . . We could legitimately conclude that settlement is the norm, and that the alternative, the alternative form of dispute resolution, is the court system.” Randolph Lowry, *Symposium on Civil Litigation Reform* (1997) 24 *Pepperdine L. Rev.*, 887, 959–960.

Fundamental to the commission’s vision of multidimensional public justice is a wide array of appropriate dispute resolution (ADR) processes. (While “ADR” has historically been used as an acronym for *alternative* dispute resolution, the commission adopts a different meaning. Not only is “alternative” unhelpful — alternative to what? — but “appropriate” better conveys the concept of “the method best suited to” resolving the dispute....)²

In interpreting its charge and throughout this report, the subcommittee has used the term “ADR” in its general, historical meaning of dispute resolution options other than traditional litigation (see the glossary for definitions of this and various other terms used in this report). However, we do this while sharing the view that court adjudication is part of a range of dispute resolution options and supporting the goal of assisting disputants and the courts in identifying the option most appropriate for a particular dispute.

Whether ADR stands for “alternative” or “appropriate” dispute resolution, it is clear that the term does not describe just a single process for resolving disputes. Instead, ADR encompasses an entire spectrum of dispute resolution processes. These processes can range from mediation to private judging.³ Each of the processes within this spectrum is characterized by different levels of formality and different roles for the neutral person and the parties. As one of the participants in the subcommittee’s public hearings noted: “I make a distinction between mediation and arbitration. I think that the two processes rhyme. And other than that they have no similarity whatsoever.”

Because each dispute resolution process is different, it is likely to have at least some unique positive or negative effect on courts, litigants, or the public.

Just as a variety of processes are covered by the terms “ADR,” a wide range of providers perform these services. There are private providers, community-based and government programs, and court-related programs. The source of the ADR service, too, may result in unique positive or negative effect on courts, litigants, or the public.⁴

² Report of the Commission on the Future of the California Courts, *Justice in the Balance – 2020* (1993) p. 40.

³ California Center for Judicial Education and Research (CJER), *Judges Guide to ADR* (1996) p. 16–17, includes a chart entitled Continuum of Methods for Resolving Disputes, which covers negotiation, mediation, neutral evaluation, mini-trial, summary jury trial, settlement conference, neutral fact-finding, arbitration, private judging, and court adjudication.

⁴ In some cases, the division between the non-court-related providers, whether for profit or community based, and the court-related programs is somewhat blurred, as private and community

Given the range of processes and programs encompassed in the term “ADR,” the charge of the subcommittee, particularly the assessment of the effects of ADR on the courts, litigants, and the public, was extremely broad. Because of this breadth and the time frame within which the subcommittee was asked to report, the subcommittee had to determine how best to focus its limited time and resources.

The subcommittee concluded that it did not have sufficient time and resources to conduct its own empirical study of the effects of ADR on the courts, litigants, and the public. Instead, as outlined more fully in subsection C, below, the subcommittee used other methods to determine the effects of ADR, including gathering and analyzing existing empirical information and soliciting public input on these issues. In addition, the subcommittee concluded that while ADR is widely used in the family and juvenile law areas in California, the subcommittee’s study would not encompass these areas. This conclusion was based on both the subcommittee’s belief that these areas were not intended to be encompassed within the subcommittee’s charge and on the fact that alternative dispute resolution activities in these areas have been and should continue to be a focus of other groups within the Judicial Council and Administrative Office of the Courts.⁵ Finally, in formulating its recommendations, the subcommittee concluded that it should focus its efforts on issues and measures that fall most clearly within the domain of the judicial branch. For this reason, even where there was agreement that a particular issue or concern ought to be addressed, the subcommittee did not

providers may be on court panels or lists and community-based providers may provide services to the courts.

⁵ The Judicial Council and Administrative Office of the Courts (AOC) are involved in a variety of ADR-related efforts in both the family and juvenile law areas. For example, in the family law area, the AOC has conducted and continues to conduct longitudinal evaluation studies of mediation services provided under California’s mandatory child custody and visitation mediation program (see for example *Client Baseline Study* and *Client Follow-Up Studies* from 1991, 1993, and 1996). In 1991, the council adopted Section 26 of the Standards of Judicial Administration establishing recommended uniform standards of practice for court-connected child custody mediation. Effective July 1, 2001, this standard will be replaced by a new rule of court establishing mandatory standards of practice for these mediation programs. (See Cal. Fam. Code §§ 1850, which delineates the council’s duties relating to statewide coordination of family mediation services, and 3160 et seq., which mandates mediation in contested custody or visitation cases.) In the juvenile law area, the council recently co-sponsored a conference on restorative justice in juvenile delinquency cases. The AOC will also be preparing an evaluation of victim offender mediation programs in Los Angeles, Mendocino, Orange, Santa Barbara, Santa Clara, and Sonoma counties, which will be presented to the Legislature in January 2000. As part of its court improvement program, the AOC recently conducted a needs assessment which concluded that mediation should be a component of juvenile dependency proceedings. Through court improvement grants, the council is providing funding for dependency mediation programs and family group conferences in several courts. In addition to the efforts of the council and AOC, many local courts have implemented other ADR programs in the family and juvenile law areas.

formulate recommendations regarding matters in the private or community/governmental ADR fields that had no direct connection with the judicial system.

The subcommittee's recommendations reflect certain other underlying principles or values. First, the subcommittee believed that, to the extent possible, parties should be given the opportunity to choose among available dispute resolution processes and providers.⁶ Second, the subcommittee believed that courts are responsible for the quality of their court-connected ADR programs and that the degree of responsibility increases with the level of the court's control over the program and providers.⁷

C. METHODOLOGY

The subcommittee used the following methods to gather and assess information about the areas within its charge:

Review of existing laws – The subcommittee reviewed existing laws relating to civil ADR, both from California and from other states and other countries.

Review of existing studies and literature – The subcommittee reviewed existing studies and literature regarding the use of civil ADR processes and the effects of various civil ADR processes and programs on courts, litigants, and the public, as

⁶ This is consistent with Standard 7.1 of the National Standards for Court-Connected Mediation Programs (1992) drafted by the Center for Dispute Settlement and the Institute for Judicial Administration under a grant from the State Justice Institute, which provides in part: "To enhance party satisfaction and investment in the process of mediation, courts should maximize parties' choice of mediator, unless there are reasons why party choice may not be appropriate."

⁷ This is also consistent with the National Standards for Court-Connected Mediation, *supra*, Standard 2.0, which provides:

The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves.

- a. The court is fully responsible for mediators it employs and programs it operates.
- b. The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.
- c. The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.

This is also consistent with one of the tenets in the Report of the Society for Professionals in Dispute Resolution's Commission on Qualifications — that the greater the degree of choice the parties have over the dispute resolution process, program, or neutral, the less mandatory any qualification requirements for neutrals should be.

well as reports and articles on the design and implementation of court-related civil ADR programs. The review included previous empirical studies sponsored by the Judicial Council and other studies of civil ADR in California and other states.

Survey of ADR providers – The subcommittee distributed a survey to approximately 90 ADR providers in California, including large, private ADR-provider organizations such as JAMS/Endispute and the American Arbitration Association; individual private judges, arbitrators, and mediators; and community dispute resolution programs. (See Appendix 9 for a copy of the survey and a summary of results.)

Public hearings – The subcommittee held two public hearings, one in Los Angeles and one in San Francisco, to solicit input regarding the issues within the subcommittee’s charge. Forty-four individuals testified at these public hearings. In addition, the subcommittee received written materials from 40 individuals and organizations. (See Appendix 10 for a list of the public-hearing participants and those who submitted written testimony.)

Subcommittee member presentations and discussions – The members shared information about their experiences relating to the use and effects of ADR.

Proposal input – The subcommittee sought the informal input of various groups on its draft legislative and rule change proposals, including administrators of court-related civil ADR programs, the ADR Subcommittee of the Judicial Council’s Civil and Small Claims Advisory Committee, the ADR Subcommittee of the California Judges Association Civil Committee, and members of the Consumer Attorneys of California, California Defense Counsel, and the California Dispute Resolution Council.

Based upon the information gathered through these efforts, the subcommittee reached the conclusions and makes the recommendations to the Judicial Council set forth below in the body of this report.

II. THE EFFECTS OF CIVIL ADR ON COURTS, LITIGANTS, AND THE PUBLIC

This part of this report summarizes the subcommittee's conclusions concerning the positive and negative effects of civil ADR on courts, litigants, and the public and outlines the subcommittee's recommendations for expanding the positive and ameliorating the negative effects.

The discussion of civil ADR's effects has been divided into sections relating to civil ADR in general and to specific ADR processes and programs. The latter is organized by type of provider or program (private, community/ governmental, or court-related) and then, within those categories, by type of ADR process (private judging, arbitration, mediation, and so forth). Each of these subsections provides a brief overview or description of the type of civil ADR and lists purported effects identified by members of the subcommittee, participants in the public hearings, written testimony submitted to the subcommittee, and literature reviewed by the subcommittee. Available empirical information that supports or detracts from these purported effects of civil ADR is also discussed. As noted above, the subcommittee did not have the time or the resources necessary to conduct its own empirical assessment of civil ADR's effects, so the empirical information summarized is drawn from existing studies and reports reviewed by the subcommittee.

While some of the effects discussed below are broad societal effects arising from the fact that civil ADR options are available to the public, most are benefits or drawbacks that inure only to those disputants who use a civil ADR process.

A. EFFECTS OF CIVIL ADR IN GENERAL

The potential general effects of civil ADR are identified below. However, as discussed in the introduction, the term "ADR" covers a multitude of different processes and programs. In practice, the exact effects of an ADR process or program will vary depending upon the specifics of that particular process or program – whether participation is mandatory or voluntary; whether the process is facilitative, evaluative, or adjudicatory; whether the outcome is binding or nonbinding; and so on. The process-specific effects identified by the subcommittee are discussed in subsections B-C below.

1. EFFECTS ON LITIGANTS AND THE PUBLIC

i. Positive Effects

The subcommittee concluded generally that the availability of civil ADR processes, no matter if they are provided in the private, community, or court-related context, offers litigants and the public these potential benefits:

- **Greater choice of dispute resolution methods** – One of the principal positive effects of civil ADR is that it offers litigants and the public a choice in dispute resolution methods. Choice is basic to the concept, noted briefly in the introduction, of matching disputes with the most appropriate dispute resolution processes or, as noted ADR author Frank Sander has called it, matching “the forum to the fuss.”⁸ This concept of providing disputants with more dispute resolution options was noted by participants in the subcommittee’s public hearings,⁹ was endorsed in the Report of the Commission on the Future of the California Courts,¹⁰ and is embodied in current California statutes.¹¹

⁸ F.E.A. Sander and S. B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure* Negotiation Journal 10 (January 1994): 49.

⁹ As one participant noted: “ADR has enormous potential to improve the quality of dispute resolution through the use of processes that are appropriate to the dispute and that allow for the furtherance of values beyond public adjudication, such as civility and the preservation of continuing relationships.”

¹⁰ “Appropriate dispute resolution is central to providing effective, affordable, satisfying justice to all Californians. . . . For many disputes, both today and tomorrow, adjudication — a trial to a judge or jury — is the most appropriate resolution method. For many others, however, nonadjudicatory processes allow the parties greater involvement in the resolution of their conflicts, produce results that are equally or more satisfying, and often cost less. Fundamental to the commission’s vision of multidimensional public justice is a wide array of appropriate dispute resolution (ADR) processes.” Report of the Commission on the Future of the California Courts, *supra* footnote 2, at p. 40.

¹¹ Cal. Bus. & Prof. Code § 465 provides, in relevant part:

The Legislature hereby finds and declares all of the following:

(a) The resolution of many disputes can be unnecessarily costly, time-consuming, and complex when achieved through formal court proceedings where the parties are adversaries and are subjected to formalized procedures.

(b) To achieve more effective and efficient dispute resolution in a complex society, greater use of alternatives to the courts, such as mediation, conciliation, and arbitration should be encouraged.

Similarly, Code Civ. Proc. § 1775 provides, in relevant part:

The Legislature finds and declares that: . . .

(b) In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.

By its nature, of course, the benefit of choice among dispute resolution options is limited to circumstances where participation in ADR is voluntary. Required participation in a particular ADR process, whether mandated by law or by a contract provision not voluntarily agreed to, does not enhance choice for litigants.

- **Broader range of interests and concerns can be taken into account** – Compared to litigation, many civil ADR processes, particularly facilitative processes such as mediation, allow a broader range of interests and concerns to be taken into account.¹² Because many ADR processes do not focus exclusively on legal rights, disputants can directly address other interests, including such things as emotional needs and the desire to maintain business or personal relationships. A recent survey concerning mediation found that support for mediation among business lawyers and executives was based on the overwhelming belief (80 percent) that mediation preserves business relationships.¹³ While these same interests are often present in litigation, there is little room in litigation for these interests to be aired, acknowledged, and addressed.
- **Broader range of available remedies** – Many ADR processes, particularly facilitative processes such as mediation, offer a broader range of possible remedies than litigation.¹⁴ Litigation focuses on legal remedies, primarily the payment of monetary damages. In ADR processes, parties can fashion other types of remedies, including ones that reflect the non legal interests that may have been raised in the ADR process.
- **Earlier, faster resolution of disputes** – One of the most frequently cited positive effects of civil ADR processes is that they offer the possibility for more expeditious resolution of disputes, both within and outside of the court system.¹⁵ The reason is twofold: ADR can typically be used relatively early in

¹² *Guide to Early Dispute Resolution: Making ADR Work For You* (State Bar of California, Office of Research, 1994) pp. 3-10.

¹³ John Lande, *Relationships Drive Support for Mediation*, *Alternatives* 15, no. 7 (July/August 1997).

¹⁴ See for example Warren Knight, Coleman F. Fannin, Sally Grant Disco, and Richard Chernick, *California Practice Guide; Alternative Dispute Resolution* (Rutter Group, 1997), Chapter 1, Section 1.9; *Guide to Early Dispute Resolution*, *supra* footnote 12, at p. 3-11.

¹⁵ See for example Knight et al., *California Practice Guide*, *supra* footnote 14, at Section 1.6 and *Guide to Early Dispute Resolution*, *supra* footnote 12, at p. 3-2. See also the results of a survey of judges and court employees conducted by the Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, which rated time savings as one of the top benefits of ADR. Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, *Report to the Legislature on the Impact of Alternative Dispute Resolution on the Massachusetts Trial Court* (February 1998) p. 42.

the life of a dispute—before filing of a lawsuit in some cases and well before the “eve of trial,” when many cases otherwise settle—and ADR processes generally take relatively little time compared to litigation.

There has been little empirical research about whether the use of private ADR actually results in quicker resolutions than litigation;¹⁶ however, time savings is one of the most frequently given reasons for the use of ADR by businesses¹⁷ and by those using private judging and other private dispute resolution processes.¹⁸ While some empirical information indicates otherwise,¹⁹ court-related civil ADR programs also appear to have the potential for reducing the time needed to resolve disputes. In a recent report to the Massachusetts Legislature concerning the effects of ADR, the Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution concluded, based on available empirical studies, that ADR can improve the

¹⁶ One study found that the time to resolution in private mediation and private arbitration was significantly shorter than in cases where a public trial was held, but that the time to resolution in private judging was slightly longer than where a public trial was held. Janice Roehl, Robert Huitt, and Henry Wong, *Private Judging: A Study of Its Volume, Nature, and Impact on State Courts* (1993) prepared by the Institute for Social Analysis under a grant from the State Justice Institute, p. 27. Other, more anecdotal information also supports this conclusion; in a presentation at a recent symposium, Professor Randolph Lowry, Director of the Straus Institute for Dispute Resolution, quoted the president of claims for Farmers Insurance as noting that when they litigate cases, it typically takes six to nine months to get them resolved, while on average mediation takes only an hour and forty-two minutes to reach resolution. Lowry, *Symposium on Civil Litigation Reform*, *supra* footnote 1, at p. 957.

¹⁷ In a recent survey of the legal counsel to Fortune 1000 companies, approximately 80 percent of respondents said that private mediation and arbitration save time. David Lipsky and Ronald Seeber, *Top General Counsels Support ADR*, *Business Law Today*, 8 (March/April 1999): 26. Another recent survey found that business lawyers and executives believe that mediation can save time and money over litigation. Lande, *Relationships Drive Support for Mediation*, *supra* footnote 13.

¹⁸ In a survey of litigants and attorneys who used private dispute resolution services, speed was cited as the most important factor in deciding to use private judging. Speed was also among the top reasons given for using private mediation and arbitration. Roehl et al., *Private Judging*, *supra* footnote 16, at p. 26.

¹⁹ A recent study by the RAND corporation concerning court-connected mediation and neutral evaluation programs in the federal courts found no strong statistical evidence that time to disposition was significantly affected by mediation or neutral evaluation in any of the six programs studied. James Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND Institute for Civil Justice, 1996). However, the methodology and findings of this study were widely criticized by knowledgeable professionals; the Summer 1997 issue of *Dispute Resolution Magazine*, published by the American Bar Association Section on Dispute Resolution, is devoted to this topic. But see also the 1992 Evaluation of Massachusetts Middlesex Multi-Door Courthouse, which found no apparent difference in case-processing time. Robert Lowe and Susan Keilitz, *Middlesex Multi-Door Courthouse Evaluation Project, Final Report*, National Center for State Courts (March 1992).

pace of litigation and that this finding is fairly consistent across different types of court-connected ADR programs.²⁰ Another compilation of empirical studies on court-connected civil mediation, early neutral evaluation, and arbitration programs prepared by the National Center for State Courts and the State Justice Institute indicates that results on this issue have been mixed, with studies of some programs showing shorter disposition times for cases in these ADR programs than in the study control groups while studies of other programs show no reduction in disposition time.²¹ Available empirical information from civil ADR programs in California's state²² and federal courts²³ generally supports the conclusion that ADR can save litigants time.

- **Reduced costs** – Another frequently cited positive effect of civil ADR on litigants and the public is that it offers a less costly means for resolving disputes.²⁴ Through simplified procedures and earlier resolution ADR can

²⁰ Massachusetts Supreme Judicial Court/Trial Court Standing Committee, *Report to the Legislature*, *supra* footnote 15, at p. 46.

²¹ Susan Keilitz (ed.), *National Symposium on Court-Connected Dispute Resolution Research; A Report on Current Research Findings — Implications for Courts and Future Research Needs*, National Center for State Courts and State Justice Institute (1994) pp. 7, 13, and 41. See also Joshua Rosenberg and H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis* 46, no. 6 *Stanford L. Rev.* 1487, 1497 (July 1994).

²² A report on the effectiveness of judicial arbitration adopted by the Judicial Council in November 1983 concluded that “Judicial arbitration generally appears to reduce disposition time of cases.” Judicial Council of California, *Annual Report to the Governor and the Legislature* (1984) p. 9. While the available studies of California's court-connected mediation programs have not compared actual time to disposition between mediated and non mediated cases, two studies have asked for participants' estimates of court time saved, which can be a measure of time saved to both the court and the litigants. In the Judicial Council's study of the Civil Action Mediation Pilot Program, survey respondents who had participated in mediation estimated that court days had been saved in 18 percent of cases and increased in only 6 percent of cases. Of those estimating there was a savings, 82 percent estimated a savings of one or more court days, with an average estimated savings of .76 court days (Judicial Council of California, *Civil Action Mediation Act: Results of the Pilot Project* (November 1996) pp. 5–6). In the evaluation of the pilot phase of San Mateo's MAP program, 77 percent of participants responding thought the program had saved court days (*Multi-Option ADR Project Pilot Evaluation Highlights*, January-June 1997).

²³ In the recent evaluation of the ADR program in the Federal District Court for the Northern District of California, more than 60 percent of attorneys surveyed believed that program reduced disposition time, and resolving the dispute more quickly was among the top three reasons attorneys in the program gave for selecting an ADR process. Donna Stienstra, Molly Johnson, and Patricia Lombard, *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 (January 24, 1997) pp. 173 and 188.

²⁴ See for example Knight et al. *California Practice Guide*, *supra* footnote 14, at Chapter 1, Section 1.9; *Guide to Early Dispute Resolution*, *supra* footnote 12, at p. 3-3; Lynch, *California Negotiation Settlement Handbook* (Bancroft-Whitney, 1991) section 4.15; Donovan, *Leisure*,

reduce attorney fees and other costs associated with litigation, such as discovery, motions, court conferences, and witness preparation. In addition, ADR can save money by providing flexibility in scheduling and firm dates for ADR sessions, thereby reducing the loss of productive time often associated with litigation.

While there has also been little empirical research on this topic,²⁵ a great deal of anecdotal and opinion information supports the conclusion that the use of private civil ADR is actually less costly than litigation. In recent survey of legal counsel to Fortune 1000 companies, 80 percent of respondents said that mediation saves money and a slightly smaller number said that arbitration saves money.²⁶ In 1988, 61 leading U.S. corporations estimated that they saved a total of \$49 million in legal costs by using ADR.²⁷ Another survey of general and outside counsel in large corporations reported that over 70 percent of those who had used ADR said that it saved them money, typically between 11 percent and 50 percent of the costs of litigation.²⁸ Still other surveys have found that cost saving is among the top reasons given by businesses and attorneys for using ADR.²⁹

In the area of court-related civil ADR, empirical research, while not uniform in this finding,³⁰ also generally supports the conclusion that court-connected ADR

Newton & Irvine, *ADR Practice Book* (Wiley Law, 1993) pp. 1–18; Trotter *In Your Client's Best Interest*, California Litigation 5, no. 4 (Spring 1992): 11, 12.

²⁵ One study found that the average estimated attorney fees were lower for cases that went to both private arbitration and mediation than they were for cases that went to public trials. Roehl, et al. *Private Judging*, *supra* footnote 16, at Table 5.

²⁶ Lipsky and Seeber, *Top General Counsel's Support ADR*, *supra* footnote 17, p. 26.

²⁷ Bates, *Using Mediation to Win for Your Client*, Practical Lawyer 38, No. 23 (March 1992): 24.

²⁸ *Survey of Corporate ADR Use Shows High Familiarity, Moderate Satisfaction*, World Arbitration and Mediation Reports, 4, no.11 (November 1993): 265. See also information summarized in Michael Weinzierl, *Wisconsin's New ADR Law: Why It Is Needed and Its Potential for Success*, (Spring 1995) 78 Marquette L. Rev. 583, footnotes 30 – 37 and accompanying text.

²⁹ In a 1996 national survey conducted by Deloitte & Touche, both in-house counsel and law firms pointed to cost savings as a reason for using ADR. Gregory Higgins and William O'Connell, "Mediation, Arbitration Square Off," *National Law Journal* (March 24, 1997) p. B18. Another survey of business lawyers and executives found that they believed that mediation can save time and money over litigation. Lande, *Relationships Drive Support for Mediation*, *supra* footnote 13.

³⁰ The RAND report, cited above, concerning court-connected mediation and neutral evaluation programs in the federal courts found no strong statistical evidence that attorney work hours, which are a proxy measure for litigant costs, were significantly affected by mediation or neutral evaluation in the six programs studied. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation*, *supra* footnote 19. Similarly, a study of an early neutral evaluation program in Massachusetts, while finding that cases in the program had resolved earlier, found no difference in the amount of attorney time required. Robert Lowe, *Assessment of the*

can save litigants money. The Massachusetts report cited earlier concluded that studies of court-related ADR programs, which typically use surveys of attorneys and litigants to measure litigant costs, generally find that ADR programs have saved litigants money.³¹ Similarly, in the National Center for State Courts and the State Justice Institute analysis of empirical studies on civil mediation programs, a much higher proportion of attorneys and litigants reported that ADR processes decreased their costs than reported that ADR increased their costs.³² Some individual studies of court arbitration³³ and multidoor courthouse programs³⁴ have also identified cost savings to litigants. Available empirical data from civil ADR programs in California's state³⁵ and federal courts³⁶ generally supports the conclusion that ADR can save litigants money.

- **Greater satisfaction with the dispute resolution process and outcome** – ADR appears to offer litigants and the public the potential for a less stressful

Massachusetts Motor Vehicle Tort Litigation Case Evaluation Program, National Center for State Courts, (February 1992).

³¹ Massachusetts Supreme Judicial Court/Trial Court Standing Committee, *Report to the Legislature*, *supra* footnote 15, at p. 49. The results varied depending upon whether or not the dispute was resolved in the ADR process.

³² Keilitz, *National Symposium*, *supra* footnote 21, at p. 9.

³³ A RAND Corporation study of the U.S. District Court arbitration program for cases up to \$150,000 found a savings of about 20 percent to each litigant, or approximately \$5,075 per case. Halderman, *Alternative Dispute Resolution in Personal Injury Cases* (1993).

³⁴ The 1992 study of the Middlesex multi-door courthouse found that 25 percent more attorney hours were reported, one third more motions were filed, and more documents per case were processed for cases remaining in the traditional litigation track. Lowe and Keilitz, *Multi-Door Courthouse Evaluation Project*, *supra* footnote 19.

³⁵ The November 1996 Judicial Council Report to the Legislature concerning the Civil Action Mediation pilot project indicates that survey respondents reported a decrease in litigant costs in a larger proportion of mediation cases than those in which they reported an increase in costs. Respondents from San Diego reported decreased litigant costs in 22 percent of mediation cases as compared with increased litigant costs in 12 percent of the cases. Respondents from Los Angeles reported decreased litigant costs in 16 percent of mediation cases as compared with increased litigant costs in 12 percent of these cases. The average overall effect of mediation was an estimated net savings for parties of \$1,398 per case, or a total of \$1.3 million for all cases (925) in which savings were reported. Judicial Council of California *Civil Action Mediation Act*, *supra* footnote 22, at pp. 5–6.

³⁶ In the recent evaluation of the ADR program in the Federal District Court for the Northern District of California, 62 percent of attorneys surveyed believed that ADR had decreased their litigation costs. The estimated savings was as high as \$500,000, with a median of \$25,000 and a mean of \$43,000. Attorneys were more likely to report a decrease in costs if their case settled in ADR and if the parties had selected their own ADR process. In addition, reducing costs was among the top three reasons attorneys in the program gave for selecting an ADR process. Stienstra et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at pp. 173 and 188.

and more satisfying dispute resolution experience.³⁷ This greater satisfaction and reduced stress are likely to be cumulative effects of the other benefits attributable to ADR (such as greater choice and time and cost savings).

Empirical research from the private, court-related, and community ADR fields provides consistent support for the conclusion that ADR processes can result in high levels of satisfaction. As part of its 1993 report on private judging in California, the Institute for Social Analysis, under a grant from the State Justice Institute, surveyed users of various dispute resolution processes, including public trials, private judging, private arbitration, and private mediation. On the total score for measures of procedural justice, all of the private ADR processes scored higher than public trials, primarily because public trials scored very low with regard to the convenience of the process.³⁸ The recent report by the Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution cited overwhelming support by available empirical studies for the finding that participants in ADR are comfortable and satisfied with the process compared with litigation.³⁹ The National Center for State Courts/State Justice Institute compilations of empirical studies on court-connected civil and small claims mediation, early neutral evaluation, and arbitration programs reached similar conclusions, with most of these studies finding higher satisfaction among ADR participants than among those who did not participate in ADR.⁴⁰ Studies of civil ADR programs in California's state⁴¹ and federal courts⁴² have also found indications of high rates of satisfaction with ADR processes and outcomes.

³⁷ See, for example, Knight et al., *California Practice Guide*, *supra* footnote 14, at Chapter 1, Section 1.9; *Guide to Early Dispute Resolution*, *supra* footnote 12, at p. 3–15.

³⁸ Roehl, et al., *Private Judging*, *supra* footnote 16, at Table 6.

³⁹ Massachusetts Supreme Judicial Court/Trial Court Standing Committees, *Report to the Legislature*, *supra* footnote 15, at p. 45.

⁴⁰ Keilitz, *National Symposium*, *supra* footnote 21, at pp. 9, 14, 25, and 42.

⁴¹ The November 1996 Judicial Council Report to the Legislature concerning the Civil Action Mediation pilot project found very high satisfaction rates among participants in both the mediation (96 percent) and judicial arbitration (84 percent) programs. In addition the vast majority of participants in both the mediation and judicial arbitration programs stated they would use these processes again (mediation: Los Angeles, 95 percent; San Diego, 93 percent; arbitration: Los Angeles, 94 percent). Judicial Council of California, *Civil Action Mediation Act*, *supra* footnote 22, at pp. 6–7.

⁴² In the recent evaluation of the ADR program in the Federal District Court for the Northern District of California, 98 percent of attorneys thought the ADR procedures used were fair and 80 percent were somewhat or very satisfied with the outcome of their case. In addition, 83 percent of the attorneys surveyed believed the benefits of being involved in ADR outweighed the costs and 94 percent said they would volunteer a future case for ADR. Stienstra, et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at pp. 206–207.

The National Center for State Courts/State Justice Institute also prepared a compilation of empirical studies on community mediation programs. All the studies in this compilation found high levels of satisfaction with the outcome and procedure in community mediation.⁴³ Another review of multiple studies on community mediation programs by the National Institute of Justice found very high satisfaction rates among users of the programs.⁴⁴

ii. Negative Effects

In a context where parties can choose the dispute resolution process they want to use, what are listed below as the negative effects of civil ADR on litigants and the public are really those positive characteristics of court adjudication that parties must typically trade off if they choose to use ADR. The items listed below really only become negative effects, as opposed to potential tradeoffs, when parties do not have the option of choosing court adjudication. As discussed more fully in the section on private arbitration, serious public policy questions are raised when, as in the case of predispute binding arbitration provisions in contracts of adhesion, the option of going to court is foreclosed without the parties' consent.

- **Fewer procedural protections** – ADR processes typically do not provide the same procedural protections as litigation. For example:
 - Less formal discovery is typically available in ADR than in litigation;
 - The rules of evidence are generally relaxed; and
 - If a binding adjudicatory process, such as binding arbitration, is used, there is virtually no ability to appeal the decision.

- **Secrecy** – Some participants in the subcommittee's public hearings and some commentators have expressed concerns that ADR proceedings and the settlements reached in ADR are secret.⁴⁵ In particular, reservations have been voiced where the substantive issues in the dispute could affect public health and safety.

⁴³ Keilitz, *National Symposium*, *supra* footnote 21, at pp. 118–119.

⁴⁴ Daniel McGillis, *Community Mediation Programs: Developments and Challenges*, National Institute of Justice, Issues and Practices in Criminal Justice (July 1997) pp. 53-55.

⁴⁵ See for example Michael Wagner, "Private Judges Arbitrate More Consumer Suits," *Los Angeles Times* (March 8, 1998); "The Price of Secrecy," *Los Angeles Times*, (June 12, 1998) p. B8; Kenneth Reich, "\$100-Million Question: Is Settlement Secrecy Proper?" *Los Angeles Times*, (June 11, 1998) p. B5. Others, however, view this aspect of ADR processes as acquisition of "privacy" or "confidentiality" and consider it one of the benefits of ADR, promoting more open communication between parties. See, for example, *Guide to Early Dispute Resolution*, *supra* footnote 12, at pp. 3–14.

Generally speaking, this concern is not limited to resolutions reached through ADR processes but applies to all resolutions reached outside of the courts. Many disputes, both those that have taken the form of cases filed in the courts and those that have not, are resolved through direct negotiations between the parties and/or their attorneys. These negotiations and the terms of any resolutions reached in these negotiations are typically not matters of public record. Thus the concern about secrecy is not based on whether the resolution came about through mediation, arbitration, or some other form of ADR, but that the parties have chosen not to use the public courts to pursue a court adjudication or to enter their settlement as a public judgment. This concern becomes ADR-specific only when a party who would otherwise choose to seek a public court resolution is prevented from doing so through the involuntary imposition of an ADR process.

- **No creation of legal precedent** – Related to the issue of secrecy is a concern that resolutions reached in ADR do not provide legal precedent or, stated more globally, do not establish public norms for future behavior.⁴⁶ Again, this appears to be a concern applicable to any resolution not reached through a court adjudication. Further, as a 1994 RAND study of private ADR in the Los Angeles area concluded, the ADR caseload is relatively small and therefore does not appear to pose a threat to the public sector’s ability to establish precedent and reinforce social norms.⁴⁷ There is concern, however, that through the involuntary imposition of ADR processes in contracts of adhesion, a powerful private interest may be able to divert a particular category of cases from the courts, hindering the development of law in that particular area.

2. *EFFECTS ON COURTS/THE JUSTICE SYSTEM*

i. **Positive Effects**

- **Reduced workload** – The most frequently suggested positive effect of civil ADR on the courts is that it will result in reduced court workload.⁴⁸ As one of the participants in the subcommittee’s public hearings stated:

⁴⁶ See for example Charley Roberts, “As a Private Civil Justice System Grows, So Does Anxiety About It,” *Daily Journal* (April 19, 1995) p. 1.

⁴⁷ Elizabeth Rolph, Erik Moller, and Laura Petersen, *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles* (RAND Institute for Civil Justice, 1994) p. 58.

⁴⁸ See for example an article authored by California Supreme Court Justice Kathryn Werdegarr suggesting that “For the courts, ADR offers benefits as well. First, the use by litigants of ADR relieves the courts of some of the pressure created by an ever-increasing caseload; it helps to control a judicial backlog that, if allowed to grow unchecked, could ultimately have severe

I think that's a very positive thing. I think it results in people getting invested in making their own decisions to resolve their disputes. That has a spillover, I believe, for the court in the long term. I think we are going to see the pendulum move back to the time not everything came to court to have some third party make the decision, but people will say, "You know, we can resolve this."

By helping parties resolve some disputes that might otherwise result in court filings and by resolving some court cases earlier, it is suggested, ADR will reduce the workload of the courts and allow judges to concentrate on those cases that do require adjudication in a public court.

Available empirical studies that address the effects of private⁴⁹ and community⁵⁰ ADR on the courts generally conclude that the use of these ADR options is not having an appreciable effect on courts' overall workload at this time. While suggesting that private ADR or community ADR programs may have a greater impact in the future if they are used in a larger number of cases, these studies have concluded that, the number of disputes being resolved through these types of ADR is currently too small to diminish the courts' overall workload. However, these conclusions are based strictly on the aggregate number of cases in private or community ADR compared to the aggregate number in the public courts. It may be that the cases in which ADR is being used are in some way qualitatively different and thus the withdrawal of these cases from the public justice system might have a differential impact on the courts. For example, the civil cases in which ADR is being used could,

consequences for our entire system of justice." Hon. Kathryn Werdegar, *The Courts and Private ADR: Partners in Serving Justice*, *Dispute Resolution Journal* 51, (September 1996). See also the results of the Massachusetts survey of judges and court employees in which the most highly rated benefits of ADR to the courts were reduced trial docket and time savings for the courts.

Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, *Report to the Legislature*, *supra* footnote 15, at p. 42.

⁴⁹ The 1994 RAND study of private ADR in Los Angeles concluded that "At the moment, private ADR cannot be lightening the civil caseload of the courts in Los Angeles to any appreciable degree. The private caseload is simply too small. However, our findings suggest that it does have considerable potential for accomplishing this goal eventually, because it is such a rapidly growing component of all dispute resolution activity." Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at p. 57.

⁵⁰ A review of studies relating to community mediation programs concluded that, because they are only handling a small percentage of cases that would otherwise go to the courts, these programs have not been found to have an appreciable effect on the courts' workload. Keilitz, *National Symposium*, *supra* footnote 21, at p. 117. A similar conclusion was reached in a study of community mediation programs in North Carolina, which is summarized in McGillis, *Community Mediation Programs*, *supra* footnote 44, p. 62.

on average, be more complex or more emotionally charged cases that would have consumed a higher-than-average amount of court resources. Studies of the private ADR field have tried to assess differences in the private civil ADR and public court caseloads,⁵¹ but conclusive information regarding this issue is not available.

Empirical studies that have considered the effects of court-related civil ADR programs on courts' overall workload have reached mixed conclusions. In its recent report, the Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution indicated that some empirical studies of court-connected ADR programs show a reduction in court workload while others do not.⁵² Similarly, the National Center for State Courts/State Justice Institute compilations of empirical studies on court-connected ADR indicate that workload was reduced through the use of civil and small claims mediation program's while results with regard to court arbitration programs were mixed.⁵³ In studies of civil ADR programs in California's state⁵⁴ and federal⁵⁵ courts, generally, a greater number of program participants estimated that there were decreases in measures of court workload (court days, number of motions filed) than increases.

⁵¹ The 1994 RAND study of private ADR in the Los Angeles area looked at the value and type of cases using private ADR as compared to the public justice system. It found that the cases using private ADR appeared to be higher value cases (over 60 percent of the cases involved claims of over \$25,000 as compared to 14 percent of the cases in the courts) and that the ADR caseload had a higher percentage of automobile personal injury and a lower percentage of other personal injury claims. Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at pp. 20-22 and 24-26.

⁵² Massachusetts Supreme Judicial Court/Trial Court Standing Committee, *Report to the Legislature*, *supra* footnote 15, at p. 48.

⁵³ Keilitz, *National Symposium*, *supra* footnote 21, at pp. 8, 25, and 41-42.

⁵⁴ The November 1996 Judicial Council Report to the Legislature concerning the Civil Action Mediation pilot project calculated impact of both the mediation pilot project and judicial arbitration on the courts based upon participants' estimates of court days saved (or added) as a result of being referred to the dispute resolution process. Survey respondents who had participated in mediation estimated that court days had been saved in 18 percent of cases and increased in only 6 percent of cases. Of those estimating there was a savings, 82 percent estimated a savings of one or more court days. The average estimated savings was .76 court days, or 713 court days for the 935 cases in which savings were reported. Using a cost figure of \$3,943, it was calculated that this savings in court days corresponded to a \$2.8 million in savings to the courts. For judicial arbitration participants estimated that they saved court days in 20 percent of cases and increased court days in 6 percent of cases. However, these estimates are somewhat suspect, as they were provided before the deadline for filing requests for trial de novo. Judicial Council of California, *Civil Action Mediation Act*, *supra* footnote 22, at p. 6.

⁵⁵ In the recent evaluation of the ADR program in the Federal District Court for the Northern District of California, 42 percent of the attorneys surveyed believed that ADR decreased the number of motions filed, while only 3 percent believed ADR had increased the number of motions. Stienstra et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at pp. 203-204.

- **Positive example** – Some participants in the subcommittee’s public hearings, as well as other commentators, have suggested that ADR, like a successful competitor in the private marketplace, can provide the courts with a positive example of ways in which the courts can better serve litigants and the public. As was stated in a recent article authored by Supreme Court Justice Kathryn Werdegar:

ADR serves to benefit the courts by way of example. ADR is consumer driven. It exists and flourishes because it provides something the courts don’t... Observing the success of ADR, the courts are motivated to devise similar diverse and flexible alternatives to full-scale litigation.⁵⁶

ii. Negative Effects

All of the negative effects of civil ADR on the courts identified by the subcommittee relate to specific ADR processes or programs, such as private contractual arbitration or nonconsensual references, not to civil ADR as a whole. These negative effects are discussed in the sections below relating to these specific processes.

B. EFFECTS OF PRIVATE ADR

This section discusses the effects of private ADR services on courts, litigants, and the public. For purposes of this discussion, the term “private ADR” refers to dispute resolution services provided for a fee by neutral persons outside of the court system or a community/governmental dispute resolution program.⁵⁷ The term “private judging” is sometimes used almost synonymously with private ADR, to refer to all private dispute resolution activities, particularly those services provided by former judicial officers.⁵⁸ In this report “private judging” refers only

⁵⁶ Werdegar, *The Courts and Private ADR*, *supra* footnote 48.

⁵⁷ This is consistent with the definition of private ADR used by RAND in its study of private ADR in Los Angeles county (Rolph, et al., *Escaping the Courthouse*, *supra* footnote 47, at p. 2), except that we have also distinguished private ADR from community/governmental programs.

⁵⁸“The term “private judging” has been applied to a variety of dispute resolution procedures, including every type of dispute resolution process conducted by a retired judge (settlement conferences, mediation, etc.) and all types of private dispute resolution (fact-finding, mediation, arbitration, mini-trials, etc.)” Roehl et al., *Private Judging*, *supra* footnote 16, at p. 9.

to cases adjudicated in private settings⁵⁹ and “private ADR” to the entire range of private dispute resolution services performed by any private dispute resolution service provider (retired judge, attorney, or nonattorney).

1. OVERVIEW OF PRIVATE ADR IN CALIFORNIA

The private ADR market in California is composed of a combination of individuals who offer their services as neutrals and firms, such as the American Arbitration Association (AAA) and JAMS/Endispute, that have panels of neutrals who provide ADR services. The 1994 RAND study of private ADR in the Los Angeles area identified nine firms providing private ADR services and estimated that there were approximately 1,200 individual ADR providers in that area.⁶⁰ The firms accounted for approximately 55 percent of the total private ADR caseload, and the individual providers approximately 45 percent.⁶¹ Almost 90% of the individual providers surveyed by RAND indicated that they were on at least one ADR firm’s panel (i.e. they received cases from the private firm).⁶² The study also found that more than half of all the individual providers handled fewer than 10 cases per year while less than 10 percent of the providers were handling more than half of the total private caseload.⁶³ Eighty-six percent of all the providers also stated that they had additional employment besides ADR.⁶⁴ This suggests that while there are a few “heavy hitters” who are handling a large volume of cases; most neutrals provide ADR services on only a part-time basis and handle only a few cases a year. Approximately 8 percent of the neutrals surveyed were former judges, 67 percent were attorneys, and 25 percent had other backgrounds.⁶⁵ However, 46 percent of the “heavy hitters” were former judges, 49 percent were attorneys, and only 5 percent had other backgrounds.⁶⁶

⁵⁹ As discussed below in subsection 3.a., we use the term “private judging” to refer only to proceedings in which parties agree to have their case adjudicated by a neutral person compensated by the parties and appointed either as a temporary judge pursuant to either Article VI, Section 21 of the California Constitution or as a referee pursuant to Code Civ. Proc. § 638.

⁶⁰ Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at p. 36

⁶¹ *Id.* at p. 18.

⁶² *Id.* at p. 14. Some firms have exclusive arrangements with the neutrals on their panels, so that those neutrals may only handle cases from that firm. Other firms do not require exclusivity; neutrals on their panels may receive cases from multiple sources. In order to determine the market split between firms and individual providers, the researchers asked neutrals to distinguish between cases received from firms and cases received from other sources.

⁶³ *Id.* at p. 49.

⁶⁴ *Id.* at p. 14.

⁶⁵ *Id.* at p. 48.

⁶⁶ *Id.* at p. 50.

Private ADR providers offer a wide variety of dispute resolution services, but the majority of the services actually provided are arbitration and mediation. In its 1994 report on the private ADR industry in the Los Angeles area, RAND found that private providers offered mediation, mini-trials, summary jury trials, voluntary settlement conferences, neutral fact-finding, arbitration, and private judging.⁶⁷ However, they also found that mediation and arbitration dominated the mix of services actually provided by both private ADR firms and individual providers.⁶⁸ This is fairly consistent with the finding in the Institute for Social Analysis study that arbitration was by far the ADR service most frequently provided by retired judges and other private ADR providers, followed in order by settlement conferences, private mediation, discovery references, and private judging.⁶⁹ The conclusion that arbitration and mediation are still “the big two” in the private ADR marketplace is supported by the subcommittee’s survey of ADR providers, which indicated that arbitration and mediation were the ADR processes most commonly used by California providers.⁷⁰

Comprehensive statistical information on the private ADR market is not available. However, information that is available suggests that private ADR is a growing industry. The 1994 RAND report estimated that the private ADR caseload grew at an average of approximately 15 percent per year between 1988 and 1993.⁷¹ Data concerning two of the largest private ADR providers confirms an overall growth trend. JAMS’ nationwide caseload reportedly grew by more than 2,300 percent from 1987 to 1993; in 1987, it handled fewer than 1,200 cases during the whole year, while in 1993, it averaged 1,200 cases per month.⁷² Nationwide data from the American Arbitration Association (AAA) indicate that its caseload increased by 100 percent between 1967 and 1996.⁷³ From 1996 to 1998 AAA’s nationwide total caseload increased 12 percent, with the arbitration caseload rising by 11 percent and the mediation caseload rising by 21 percent.⁷⁴ Perhaps because California was in the forefront of the initial development of the private ADR industry, there are some indications that the growth rate may now be slower in

⁶⁷ Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at p. 36. Please see the glossary for descriptions of these processes.

⁶⁸ *Id.* at pp. 36-38. The private ADR firms caseload was 65 percent arbitrations, 24 percent mediations, 11 percent all other ADR services. Private neutrals had 53 percent arbitrations, 21 percent mediations 12 percent voluntary settlement conferences, and 7 percent private judging (note that, under the definition used in this study, this latter figure includes nonconsensual references under Code Civ. Proc. § 639, including discovery references).

⁶⁹ Roehl et al., *Private Judging*, *supra* footnote 16, at p. 22.

⁷⁰ See Appendix 9. Others services mentioned included references, voluntary settlement conferences, and mini-trials.

⁷¹ Rolph et al., *Escaping the Courthouse* *supra* footnote 47, at p. 18.

⁷² Richard Reuben, “The Dark Side of ADR,” *California Lawyer* (February 1994) pp. 53, 55.

⁷³ Peter Allen, “Reshaping ADR,” *California Lawyer* 18 (February 1997) p. 25.

⁷⁴ AAA *Case Filing Hit All-Time High*, *Dispute Resolution Journal*, 53 (August 1998): 6.

California. AAA's California caseload grew at an overall rate of approximately 4 percent between 1996 and 1998, with the arbitration caseload remaining fairly constant and the mediation caseload increasing by approximately 14 percent.⁷⁵ In addition, the number of private judges listed in the Daily Journal's Directory of California Lawyers, which some studies and articles have looked to as one indicator of the size of the ADR industry in California, is about the same in the January 1999 edition as it was in 1991 (275 compared to 274) after having grown to 397 in the 1995 edition.⁷⁶

Despite the apparent growth trend in private ADR caseloads, based upon the 1994 RAND study and some more recent information about the California caseloads of several of the large private ADR firms, the absolute number of cases in the private ADR market does not appear to be very large relative to the number of civil disputes filed in the California's public courts. The RAND study calculated that the private ADR industry in Los Angeles handled approximately 23,672 disputes in 1993 while 465,578 civil cases were filed in the Los Angeles area's public courts that year.⁷⁷ Thus, the private market was handling only approximately 5 percent of the total volume of civil disputes. Information from five of the largest ADR firms in California⁷⁸ indicates that their combined statewide caseloads in 1997 were approximately 19,900 cases. Even if it were assumed that these firms provided only 20% of the private dispute resolution services in the state,⁷⁹ the total private ADR caseload in California in 1997 would have been approximately 95,500 cases. During fiscal year 1997-98, total statewide civil filings in superior and municipal courts were 1,686,493.⁸⁰ Based upon the above estimate, the private ADR caseload represented only approximately 5.4 percent of the California's total volume of civil disputes in 1997.

⁷⁵ Figures provided by the American Arbitration Association.

⁷⁶ See Roehl et al., *Private Judging*, *supra* footnote 16, at 2; Roberts, "As a Private Civil Justice System Grows," *supra* footnote 46, at p.1; and *Directory of California Lawyers*, Daily Journal Corporation (January 1999) pp. PJ1-PJ20. See also Anthony Aarons, "Packaging ADR," *California Lawyer* (February 1998) p. 27, which discusses the profitability of the private ADR market.

⁷⁷ Rolph et al., "*Escaping the Courthouse*," *supra* footnote 47, at p. 18.

⁷⁸ AAA, JAMS/Endispute, Judicate West, ARC, and Action Dispute Resolution. This information was collected through a combination of the subcommittee's survey of ADR providers and other information supplied by these companies.

⁷⁹ This should be a fairly generous assumption. The 1994 RAND study indicates that ADR firms provided approximately 55 percent of the total private ADR services in the Los Angeles area. The 1997 information collected by the subcommittee includes caseload statistics from five of the nine firms included in the RAND study, including both of the firms with the largest California caseloads and two of the three firms with medium-sized California caseloads.

⁸⁰ In fiscal year 1997-1998, there were a total of 943,276 civil filings in municipal courts and 743,217 civil filings in superior courts. Judicial Council of California, *1999 Court Statistics Report*.

The 1994 RAND study of private ADR in the Los Angeles area also looked at the value and type of cases in which private ADR was used as compared to cases in the public justice system. This study concluded that the cases using private ADR appeared to be higher value cases (over 60 percent of the cases involved claims of over \$25,000 as compared to 14 percent of the cases in the courts) and that the ADR caseload had a higher percentage of automobile personal injury and a lower percentage of other personal injury claims.⁸¹ The Institute for Social Analysis study found value of the case appeared to vary depending on the ADR process being used; a large proportion of the cases in which private judging was used were relatively high-valued (50 percent involved claims of \$250,000 or more) while a large proportion of those using private mediation and arbitration were relatively low-valued (52 percent and 71 percent, respectively, involving claims of less than \$50,000).⁸² This study also found that average settlement amounts in private arbitration, mediation, settlement conferences, and private judging were lower than the average judgment in public trials.⁸³

2. EFFECTS OF PRIVATE ADR IN GENERAL

i. Effects on Litigants and the Public

a. Positive Effects

In addition to time and cost savings and the other potential benefits of civil ADR for litigants and the public discussed earlier, private ADR can offer litigants more control over the dispute resolution process.⁸⁴ In private ADR, the parties may be able to negotiate about the nature of the dispute resolution process to be used, permitting them to design a process that best fits their particular situation:

⁸¹ Rolph et al., “*Escaping the Courthouse*,” *supra* footnote 47, at pp. 20-22 and 24-26. The 14 percent figure for the courts is based upon the proportion of civil cases filed in superior courts (where the jurisdictional threshold is \$25,000) compared to municipal courts. The researchers also note that the data they had regarding the caseload of ADR firms, as opposed to individual providers, was from a firm that specialized in higher-value cases. *Id* at page 20.

⁸² Roehl et al., *Private Judging*, *supra* footnote 16, at Table 1. This study did not provide a comparative breakdown of cases filed in the courts, but did provide comparison information for cases in which public trials were held. Of the cases in which public trials were held, only 23 percent involved claims of \$50,000 or less, a considerably smaller percentage that for private mediation or arbitration. Forty-six percent of the cases going to trial involved claims of \$250,000 or more, approximately the same proportion as for private judging. It should be noted, however, that the total number of cases examined in this study was fairly small.

⁸³ *Id* at Table 5.

⁸⁴ See, for example, Knight et al, *supra* footnote 14, Chapter 1, § 1.8; *Guide to Early Dispute Resolution*, *supra* footnote 12, at pp. 3-6 to 3-10.

- Parties can pick the process to be used – mediation, neutral evaluation, arbitration, and so forth;
- Parties can pick the neutral who will conduct the process and can choose one with specific expertise in the subject matter of the dispute;
- Parties can select the time when the process will be used, reducing some of the scheduling uncertainty associated with litigation; and
- Parties can determine whether the outcome of the process will be binding or nonbinding.

This increased control over the dispute resolution process is an extension of the greater choice benefit discussed earlier and, like that benefit, is not manifested where participation in a specific ADR process is mandated.

b. Negative Effects

While not a concern widely raised in the public testimony received by the subcommittee, ADR literature has frequently suggested that the availability of private ADR options is creating a two-tiered justice system, with the wealthy able to pay their way into (higher-cost but higher-quality) private ADR while the poor are stuck in the (lower-cost but lower-quality) public court system.⁸⁵ This concern appears to be founded on two basic assumptions, both of which can be questioned based upon current information:

- **Only the rich are using private ADR or have access to ADR services** – The subcommittee found no empirical study that provided direct information about the demographic characteristics of those who are actually using private ADR.⁸⁶ However, indirect and anecdotal information suggests that the wealthy are not the sole users of private ADR services. Some commentators look to the value of the dispute as a proxy measure of the disputants’ income. As noted above, information about the characteristics of the disputes handled in the private market indicates that, while on average these cases may be of higher value than cases filed in the courts, many are still of relatively low value.⁸⁷ In addition,

⁸⁵ See for example Roberts, “As a Private Civil Justice System Grows,” *supra* footnote 46; Roehl et al., *Private Judging*, *supra* footnote 16, at p. 5; Philip Carrizosa, “Chief Justice Forms Panel to Study Rent-a-Judging,” *Daily Journal* (February 25, 1998) p. 1.

⁸⁶ The private judging study attempted to address litigant characteristics but was unable to draw any conclusions because of the small number of responses received. Roehl et al., *Private Judging*, *supra* footnote 16, at p. 25.

⁸⁷ See footnotes 81-83 and accompanying text. The RAND study found that 40 percent of the cases in private ADR involved claims of less than \$25,000. Rolph, *Escaping the Courthouse* *supra* footnote 47, at pp. 20-22. The Institute for Social Analysis study found that 52 percent of the cases in which private mediation was used and 71 percent of the cases in which private arbitration was used involved claims of less than \$50,000. Roehl et al., *Private Judging*, *supra*

public testimony from private ADR providers indicates that their clients are not limited to the wealthy. Several participants in the subcommittee's public hearings said that they serve a mix of clients similar to that in the public courts.⁸⁸ This is consistent with testimony received by the Judicial Council's Task Force on Private Judging in 1989, indicating that the caseloads of private providers included relatively low value cases involving middle-class individuals.⁸⁹ Some even suggested, referring back to the fact that ADR has the potential to reduce the time and cost associated with resolving disputes, that the less wealthy are the most likely to need and use private ADR because they cannot bear the costs of litigation.⁹⁰

Private ADR is also not necessarily the only way that litigants and the public can access ADR services. As discussed more fully below in subsections C and D, in many (though not all) areas of the state, ADR services are now available to the public through both community and court-related ADR programs.

- **The dispute resolution services offered by the courts constitute a less desirable tier of justice** – In discussing the concern about two-tiered justice, many commentators describe the public justice system in very negative terms—slow, inflexible, costly.⁹¹ Some have suggested that one of the main reasons for the growth of private ADR in California is the great delay in getting disputes resolved in the public courts.⁹² But the courts have changed and are continuing to change this reality. No longer do cases typically wait for three, four, or five years before they approach a trial date in California's courts; by fiscal year 1997-1998, in superior courts, 76 percent of general civil cases were being resolved in 18 months or less from the time of filing and 86 percent in 24 months or less;⁹³ in municipal courts, 88 percent of general civil cases were being resolved in 18 months or less from the time of filing, 93 percent in 24 months or less.⁹⁴ In addition, many courts have moved to

footnote 16, at Table 1. See also Richard Chernick, Helen Bendix, and Robert Barrett, *Private Judging: Privatizing Civil Justice*, Briefly (National Legal Center for the Public Interest) 7. (March 1997): 35.

⁸⁸ For example, one retired judge testified, "When I went into doing private mediation, I will tell you, and I took a look at who was in front of me in the last week, I had a single mother, a crane rigger, housewife, a dentist, an Iowa farmer, two entrepreneurs who became millionaires, three teenagers, a young professional couple, a retired physician and his wife. These are exactly the same people I saw in the trial court. So I don't think we're seeing different people. They're exactly the same people."

⁸⁹ Chernick et al., *Private Judging*, *supra* footnote 87, at pp. 35-36.

⁹⁰ *Ibid.*

⁹¹ See for example, Roberts, "As a Private Civil Justice System Grows," *supra* footnote 46.

⁹² *Ibid.* See also Roehl et al., *Private Judging*, *supra* footnote 16, at p. 5.

⁹³ Judicial Council of California, *1999 Court Statistics Report*, p. 158.

⁹⁴ *Id.* at page 251.

increase litigants' options within the courts by developing court-related ADR programs. Taken together, these efforts make the public courts a generally more desirable place to resolve disputes than they may have been in past years.

Furthermore, the characterization of the public courts as a "lower" tier of justice implies that pursuing litigation in the public court system is never the best, most appropriate choice for dispute resolution. We disagree with this conclusion. Adjudication in the public courts, with its due process protections, right to appeal, and public opinions, is, and probably always will be, the most appropriate way to resolve some disputes. If this were not the case, there would not be the public, press, and academic concern about the imposition of binding arbitration foreclosing the option of court adjudication.

In this regard, it should be noted that there is also another, almost polar opposite, formulation of the two-tier justice concern. Some commentators have expressed fear that because of the high cost of pursuing litigation, those who are not wealthy will be forced out of the public courts and relegated to using ADR to resolve their disputes. While these two formulations of the issue seem to be in conflict, they both stem from the same fundamental concern—that those with fewer financial resources not be foreclosed from the most appropriate process for resolving their disputes, whether that be mediation, arbitration or a public trial.

ii. Effects On Courts/The Justice System

a. Positive Effects

As discussed above, the most frequently cited positive benefit of both private and other forms of ADR is that some cases are resolved without court intervention, thereby relieving the courts of some caseload pressure and allowing them to focus on the cases requiring court assistance to reach resolution. However, as also discussed above, the actual impact of private ADR on court workload is unclear. The numbers of cases using private ADR appears to be relatively small compared to the numbers of cases in the public justice system and thus, any positive effect on the courts' overall workload at this time is unlikely to be very large.⁹⁵ At the same time, the cases in which ADR is being used may be qualitatively different from those in the public justice system⁹⁶ and their withdrawal from the courts may have an impact that is disproportionate to their numbers. Based in part on their conclusion that cases in ADR are of relatively high-value, the 1994 RAND study

⁹⁵ See footnote 49 and accompanying text.

⁹⁶ See footnotes 81 – 83 and accompanying text.

of private ADR in the Los Angeles area notes that private ADR holds even greater potential for reducing the demands on the courts than might initially be expected.⁹⁷ This suggests that more information is needed before the exact nature of private ADR's impact on court workloads can be assessed.

b. Negative Effects

- **Brain drain** – Probably the most frequently cited negative effect of private ADR on the courts is that it is luring judges from the public bench to pursue careers as private ADR providers, thereby drawing the “best and the brightest” from the public bench.⁹⁸ Some information suggests that judges are now retiring from the bench at a younger age⁹⁹ and many retired judges are choosing to engage in private dispute resolution activities following retirement. However, available empirical studies suggest that, in general, it is financial disincentives to continued public service that are the primary motivators for judicial retirement. What has not been addressed in any empirical study, and therefore remains unclear, is whether the availability of an alternate career in private ADR results in judges with certain backgrounds or the “best and brightest” judges being drawn off the bench at higher rates.¹⁰⁰

The 1994 RAND study of private ADR in the Los Angeles area determined that most retired judges offering services as neutrals in the Los Angeles area retired from the bench after 20 years of service, the maximum number of

⁹⁷ Rolph et al. *Escaping the Courthouse*, *supra* footnote 47, at p. 57.

⁹⁸ See for example Charley Roberts “Fears of ‘Brain Drain’ Are Following Expansion of the Private Bench,” *Daily Journal* (April 20, 1995) p. 1.

⁹⁹ *Ibid.* This article indicates that, according to the California Judges Association, of the judges who retired between 1985 and 1995, 23.7 percent took deferred retirement — that is, left the bench before they were old enough to begin collecting retirement benefits. By contrast, in 1980, only 8.3 percent took deferred retirement. However, the greater percentage of deferred retirement may also stem from the fact that judges are being appointed to the bench at a younger age, and thus reaching the maximum years of service for the retirement benefit cap at a younger age. A more recent California Judges Association poll of its members who had retired between September 1983 and December 1997 found that, while 24 percent elected to receive deferred retirement, there was no difference in the average length of service (17.8 years) of those taking deferred retirement and those retiring at eligibility.

¹⁰⁰ For example, it is often suggested that judges with civil trial experience are being drawn from the bench at a higher rate and this is seen as particularly problematic as fewer attorneys with civil litigation backgrounds have sought and been appointed to the bench in recent years (see 1991 position paper from the California Judges Association, Hon. Warren Conklin, *Maintaining a Quality Judiciary in California; The Case for Improved Judicial Salaries*, pp. 20 and 24). The subcommittee is not aware of any empirical study assessing this issue or whether the “best and the brightest” are leaving the bench at a higher rate. Studying the latter issue would involve the difficult task of assessing the quality of those on the public bench compared with those that have retired and entered private ADR.

service credit years for retirement purposes. The study concluded that these judges did not retire prematurely. However, the study also noted that it was unclear whether these individuals would have stayed on the bench longer if the option of working in private ADR had not existed and that researchers were not able to address the issue of whether the “best talent” was being “stripped” from the bench.¹⁰¹

As part of its 1993 study on private judging, the Institute for Social Analysis conducted a survey of retired judges, which, among other things, asked them to rank their reasons for retirement. Opportunities in private dispute resolution ranked well below the most frequent reasons cited for retirement—desire for rest and relaxation and dissatisfaction with service in the public justice system.¹⁰² In an effort to determine if a higher proportion of judges were retiring to work in private ADR, the researchers also compared the percentages of judges who retired before 1986 and after 1986 who were engaging in private ADR. They found no significant difference between these groups in terms of their experience with any private ADR procedure.¹⁰³ They also found no significant difference between the average age at retirement of the retired judges who reported working as private judges (62.4 years) and those who did not report private judging (63 years).¹⁰⁴

A recent California Judges Association “exit poll” of its members who retired between September 1983 and December 1997 also suggests that the lure of private dispute resolution practice is not the primary reason for leaving the bench; the primary motivation for retirement appears to be that the judges have reached the cap on increases in retirement benefits based on years of service.¹⁰⁵ Seventy five percent of the judges polled had retired based upon age and service, and 24 percent had elected to receive deferred retirement. In both these groups, the average length of service was 17.8 years. Seventy-one percent of those retiring based on age and service indicated that a reason for their retirement was that they had reached the maximum possible pension, while only 21 percent indicated that they were making a career change. Among those electing deferred retirement, 46 percent indicated that career change was among the reasons for their retirement. When asked about their

¹⁰¹ Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at pp. 57-58.

¹⁰² Roehl et al., *Private Judging*, *supra* footnote 16, at p. 34.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ As one retired judge explained to a reporter, once he had reached the maximum years of service and age for retirement, if he stayed on the bench, he would essentially have been working for 17 percent of his salary (salary minus 75 percent pension minus continued 8 percent pension deduction), “That’s a tremendous disincentive to stay.” Roberts, “Fears of ‘Brain Drain,’” *supra*, footnote 98, at p. 1.

most likely activities following retirement, the option most frequently selected by judges retiring based on age and service was recreation and travel; the second most frequently selected option was serving on assignment; private dispute resolution activities ranked third among the possible postretirement activities. Among those taking deferred retirement, recreation and travel and private dispute resolution activities were selected with equal frequency.

Earlier information also suggests that the cap on retirement benefits is a stronger incentive for retirement than pursuing a career in private ADR. A 1993 consultant's report to the Judicial Council's Select Committee on Judicial Retirement regarding the significance of various incentives and disincentives to judicial service similarly found that judges rated retirement at the maximum pension level as the most important consideration in deciding when to retire; salary was ranked second and desire to pursue other interests was ranked third.¹⁰⁶ Likewise, a 1988 study conducted by the National Center for State Courts for the California Judges Association covering 1988 and 1989 indicated that no significant number of judges retired early solely because of the availability of a career in private dispute resolution; even when private ADR was a factor in the decision to retire, other factors were present.¹⁰⁷ Here, too, the study found that a predominant reason for retirement was the requirement that judges continue to pay retirement contributions even after they have reached eligibility for maximum benefits.¹⁰⁸

Although the subcommittee received little testimony on this issue, the testimony that was received supported the same conclusion: financial disincentives built into the retirement system are the primary motivating force for judges leaving the public bench.¹⁰⁹ The issue of retirement benefits and other incentives for continued judicial service has been addressed by the report of the other subcommittee of the Task Force on the Quality of Justice, the Subcommittee on the Quality of Judicial Service, which was submitted to the Judicial Council earlier this year.

¹⁰⁶ Hildebrand, Inc., *Report on Significance of Various Incentives and Disincentives of Judicial Service* (March 1993) p. 20.

¹⁰⁷ S. D'Amico, P. Friedman, M. Oram, and H. Schmidt, *California Judicial Retirement Study*, National Center for State Courts (1988), pp. 4–5.

¹⁰⁸ *Ibid.*

¹⁰⁹ As one person at the subcommittees' public hearings stated "The problem here is that judges who have spent their 20 years before they're 60, if they're going to stay on the bench, they have to keep contributing to the retirement fund, and they don't get any increased benefit. So it is really unrealistic to ask a judge to sit on the bench, and stay there, contributing to a retirement system that's not going to give them any increased benefits, and if there's an opportunity outside to go back to the practice of law, or to go into private judging, then I don't blame them for taking it."

- **Lowered support for the public justice system** – Some commentators have suggested that the advent of the private dispute resolution market and the resultant exodus of cases from the public justice system will result in lowered support for the public justice system and lowered incentive to improve it.¹¹⁰ This concern is based on the theory that the wealthy and those with influence will no longer use the public justice system and therefore have no interest in supporting it. While some disputants are clearly deciding that private ADR is the most appropriate option for their disputes, the fact that the number of cases in which private ADR is actually being used is relatively small compared to the court’s caseload cuts against the conclusion that the public is abandoning the public justice system. In addition, recent developments in court reform, including state funding of the trial courts, an increased number of authorized judgeships, trial court unification, and the authorization for mediation pilot projects in the courts suggest that the public is still interested in improving the public courts.

3. EFFECTS OF SPECIFIC PRIVATE ADR PROCESSES

The subsections below outline the positive and negative effects of specific private civil ADR processes on the courts, litigants and the public. The discussion is not intended to provide a comprehensive taxonomy of the forms of private civil ADR. The processes included here are those that were discussed in the testimony received by the subcommittee and that were the subject of the greatest attention in the ADR literature reviewed by the subcommittee: private judging, contractual arbitration, and private mediation.

i. Private Judging

As noted earlier, in this report the term “private judging” refers only to proceedings in which parties agree to have their case adjudicated by a neutral person compensated by the parties and appointed by the court as either as a temporary judge pursuant to article VI, section 21 of the California Constitution or as a referee pursuant to Code of Civil Procedure section 638.¹¹¹ As used here, the

¹¹⁰ See for example Roberts, “Fears of ‘Brain Drain” *supra* footnote 98, at p. 1.

¹¹¹ This is consistent with the definition of “private judging” used by the Institute for Social Analysis in its study of private judging (Roehl et al., *Private Judging*, *supra* footnote 16, at p. 9), However, unlike the Judicial Council’s Advisory Committee on Private Judging (Judicial Council of California, *The Report and Recommendations of the Judicial Council Advisory Committee on Private Judges* (1990) p. 5), and RAND in its study of private ADR in Los Angeles County (Rolph et al. *Escaping the Courthouse*, *supra* footnote 47, at p. 33), we do not include within this

term does not include arbitration, mediation, voluntary settlement conferences, involuntary discovery references or other ADR services provided by retired judges.

a. Description of Process

Article VI, section 21 of the California Constitution permits parties to stipulate to having their case tried by a temporary judge on a privately compensated basis. Similarly, Code of Civil Procedure section 638 allows parties, on a consensual basis, to have a privately compensated referee try any or all issues in their case. The person selected as either a temporary judge or referee is appointed by the public court and hears the matter and renders a decision in essentially the same manner as would a judge in the public court system. Both of these types of proceedings are referred to as private judging. Compared with other ADR processes, the unique feature of private judging is that the decision of the privately compensated temporary judge or referee is entered as the decision of the public court, and the parties have all the same appellate rights as they would with any public court decision.

In 1993, based on the recommendations of its Advisory Committee on Private Judging, the Judicial Council adopted rules relating to temporary judges and referees.¹¹² Among other things, these rules establish disclosure requirements, prohibit the use of public court facilities by private judges without a finding by the presiding judge that such use would further the interests of justice, and provide for public access to privately judged proceedings.

Private judging appears to represent a very small part of the private ADR services rendered in California. The 1993 Institute for Social Analysis study concluded that in 1991 somewhere between 200 and 300 civil cases were heard in private trials statewide, with the total probably closer to 200 than 300.¹¹³ In its 1994 study of private ADR in the Los Angeles area, RAND found that private judging constituted only 7 percent of the services rendered by the providers it surveyed, and this rate included nonconsensual references, which we do not include within

term nonconsensual references under Code of Civ. Proc., § 639. References under section 639 are made without the parties' consent and therefore cannot include referring the whole case for decision by a private neutral, also known as a general reference (*Aetna Life Insurance Company v Superior Court* (1986) 182 Cal.App.3d 431, 435–436). Instead, in a non-consensual reference, the referee prepares a report and/or recommendation that must be independently considered by the public court, not simply entered as the decision of the court (see *Ellsworth v. Ellsworth* (1954) 42 Cal.2d 719; Knight et al., *California Practice Guide*, *supra* footnote 14, at Chapter 6, Subdivision C, and cases cited therein).

¹¹² Cal. Rules of Court, rules 244, 244.1, 535, and 532.1.

¹¹³ Roehl et al., *Private Judging*, *supra* footnote 16, at p. 20.

our definition of private judging.¹¹⁴ Similarly, in the subcommittee’s survey of ADR providers, only a handful of provider organizations and individual providers indicated that they handled any consensual references under Code of Civil Procedure section 638, and these would include not only private trials, but other types of consensual references.¹¹⁵

b. Effects on Litigants and the Public

Private judging offers litigants all the procedural benefits of a public court trial, including the right to appeal an adverse decision. At the same time, it permits parties to select the person who will decide the case and schedule an uninterrupted trial at a time convenient to them.

The reasons for using private judging most frequently given by litigants and attorneys surveyed as part of the Institute for Social Analysis study were speed, finality of the outcome, experience of the private judge, convenience, and cost.¹¹⁶ Although speed was the top reason given, the study actually found that private judging was no faster than public trials in reaching final resolutions. In the cases reviewed in the study, while the average hearing time for private trials (3 hours) was less than that for public trials (5.4 hours), the total time from filing the “at-issue memo” to final disposition took, on average, about 18 months for publicly tried cases and about 20 months for privately judged cases.¹¹⁷ With regard to the relative cost of private judging, the average attorney fees reported were higher for private judging than for public trials, arbitration, or mediation.¹¹⁸ However, the researchers suggested that this attorney fees information should be viewed with caution because of the small number of responses upon which it was based.

c. Effects on Courts/The Justice System

Because the absolute number of cases in which private judging is used appears to be very small, this process is unlikely to have any appreciable impact on court workloads. As noted earlier, the RAND study of private ADR in the Los Angeles area concluded that, because of the relatively small number of cases using these processes, the private ADR market as a whole had minimal impact on court workloads, and private judging constituted a very small percentage of the private market.¹¹⁹ In addition, the Institute for Social Analysis report concluded that private judging has had no more than minor effects, positive or negative, on court

¹¹⁴ Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at p. 38.

¹¹⁵ See Appendix 9.

¹¹⁶ Roehl et al. *Private Judging*, *supra* footnote 16, at 26.

¹¹⁷ *Id.* at p. 27.

¹¹⁸ *Id.* at pp. 28 and 30.

¹¹⁹ Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at p. 57.

calendars, workloads, and judicial resources.¹²⁰ The consensus of judges and court administrators surveyed as part of that study was that private judging had a minimal impact on the civil calendar.¹²¹

Even though private judging appears to be a little-used ADR process, its impact on the public justice system has been the subject of considerable discussion in ADR literature. In large part this may be due to the loose use of terminology. As noted above, the term “private judging” is often used to refer to the entire private ADR field, resulting in broader concerns, such as the creation of a two-tier justice system and the “brain drain” on the public judiciary, being attributed to “private judging.” However, it also appears that some of this attention stems from the unique intertwining of the public court system and private ADR that occurs in the context of private judging. No other private ADR process results in a decision that is treated as the decision of the public courts for purposes of appeal. This distinction has raised concerns about the degree to which private judging should be treated as a public or a private proceeding, including whether public facilities and resources should be used for privately judged proceedings, whether the public should have access to these proceedings, and what ethical standards should apply to persons conducting these proceedings. Within the constitutional and statutory framework that permits private judging to occur, the Supreme Court and the Judicial Council have tried to address these concerns through the adoption of Canons of Judicial Ethics¹²² and rules of court¹²³ covering private judging.

ii. Contractual Arbitration

Contractual arbitration, principally predispute agreements for binding arbitration in contracts of adhesion, was the subject of the largest proportion of the public testimony received by the subcommittee and is the focus of a great deal of the current ADR literature.

a. Description of Process

In arbitration, whether private or provided by a community or court-related program, a neutral person or a panel reviews evidence, hears arguments, and renders a decision. Although arbitration is an adjudicatory process, it is typically less formal than court adjudication, with relaxed procedural and evidentiary rules. Unless the parties’ arbitration agreement so requires, the arbitrator is not required to

¹²⁰ Roehl et al., *Private Judging*, *supra* footnote 16, at p. 33.

¹²¹ *Ibid.*

¹²² Cal. Code Jud. Ethics, canon 6D. This canon is discussed in detail in Part III of this report.

¹²³ Cal. Rules of Court, rules 244, 244.1, 532, and 532.1, discussed above.

base his or her decision on the law applicable to the dispute and is not required to provide an explanation for the decision. Depending on the parties' agreement, the decision rendered by the arbitrator may be either binding or nonbinding.

Contractual arbitration, as its name implies, is arbitration conducted pursuant to the terms of a contract. Arbitration agreements may provide for the submission of an existing dispute (submission agreements) or future disputes (predispute agreements) to arbitration. Both state and federal law explicitly provide that written submission or predispute agreements for arbitration are valid, enforceable, and irrevocable, except on the grounds that exist for the revocation of any contract.¹²⁴ The California Arbitration Act (CAA)¹²⁵ applies to all submission or pre-dispute agreements for arbitration. The Federal Arbitration Act (FAA)¹²⁶ preempts the CAA and governs arbitration under contracts involving interstate or foreign commerce or maritime transactions that provide for the settlement of controversies by arbitration.¹²⁷ The phrase "involving commerce," and thus the reach of the FAA, has been broadly interpreted as embodying the intent of Congress "to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."¹²⁸

Unless specifically provided otherwise in the arbitration agreement, contractual arbitration awards are treated as final and binding. The grounds for judicial review of these awards are limited to the bases for correcting¹²⁹ or vacating¹³⁰ an award. In

¹²⁴ Cal. Code Civ. Proc. § 1281; 9 USCA § 2.

¹²⁵ Cal. Code Civ. Proc. §§ 1280–1294.2.

¹²⁶ 9 U.S.C.A. §§ 1–14

¹²⁷ *Southland Corp. v. Keating* (1984) 465 U.S. 1, 12, 104 S. Ct. 852, 859, 79 L. Ed. 2d 1; *Volt Info. Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468, 478–479, 109 S. Ct. 1248, 103 L. Ed. 2d 488.

¹²⁸ *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 115 S. Ct. 834, 841; *Perry v. Thomas* (1987) 482 U.S. 483, 490, 107 S. Ct. 2520, 96 L. Ed. 2d 427.

¹²⁹ The CAA and FAA contain similar grounds for correction of a contractual arbitration award. The CAA provides that such an award may be corrected by the court on the basis of:

- An evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award.
- The arbitrators exceeded their powers, but the award may be corrected without affecting the merits.
- The award is imperfect in form, not affecting the merits. (Cal. Code Civ. Proc. § 1286.6)

Similarly, the FAA permits correction when:

- There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- The arbitrators awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- The award is imperfect in a matter of form not affecting the merits of the controversy (9 U.S.C.A. § 11).

1992, the California Supreme Court held that contractual arbitration awards are reviewable only on these statutory grounds, even if an error of law apparent on the face of the award causes substantial injustice.¹³¹ In contrast, some federal courts have allowed arbitration awards to be challenged for “manifest disregard of the law.”¹³²

Court involvement in contractual arbitration proceedings is limited to proceedings:

- To compel arbitration when a party to an arbitration agreement refuses to arbitrate voluntarily;
- To stay court proceedings of issues that are subject to an arbitration agreement;
- For provisional remedies in connection with arbitrable controversies;
- To appoint an arbitrator when the parties cannot agree on a method of appointment; and
- To confirm, correct, or vacate an arbitrator’s award.

¹³⁰ The CAA and the FAA also contain similar grounds for vacating an arbitration award. The CAA includes the following grounds:

- The award was procured by corruption, fraud, or other undue means.
- Corruption was evident in any of the arbitrators.
- The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
- The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
- The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor, or by the refusal of the arbitrators to hear evidence material to the controversy, or by other conduct of the arbitrators contrary to the provisions of the CAA. (Cal. Code Civ. Proc., § 1286.2).

The FAA includes the following grounds:

- The award was procured by corruption, fraud, or undue means.
- Partiality or corruption was evident in the arbitrators.
- The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. (9 U.S.C.A., § 10(a)–(d)).

¹³¹ *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 12.

¹³² See *Todd Shipyards Corp. v. Cunard Line, Ltd.* (9th Cir. 1991) 943 F.2d 1056, 1060.

As discussed above, the RAND study of private ADR in the Los Angeles area, the Institute for Social Analysis study, and the subcommittee's own survey of providers all found that private arbitration dominated the mix of services actually provided by private ADR providers.¹³³ Although the subcommittee is not aware of any empirical studies examining the actual number of contracts with these provisions, many sources suggest that an increasing number of businesses and institutions have inserted provisions calling for the binding arbitration of future disputes in consumer, employment, medical insurance, and other contracts of adhesion.¹³⁴ Individual providers responding to the subcommittee's survey indicated that approximately 35 percent of their arbitration cases stemmed from pre-dispute agreements to arbitrate and ADR firms indicated that approximately 63% of their arbitration cases stemmed from such agreements.¹³⁵

b. Effects on Litigants and the Public

1) Positive Effects

Proponents of contractual arbitration point to the finality of the arbitration award as one of this process' primary benefits to the disputants and the public: the dispute gets resolved completely, and the disputants and society can move on. This finality also contributes to arbitration's speed and lower cost compared with litigation. As with private judging, the ability to select the decision-maker is also considered a benefit of this process.

In the survey of private ADR users completed as part of the Institute for Social Analysis' study of private judging, participants rated the finality of the outcome as the most important reason for using private arbitration, with cost, convenience and speed immediately behind.¹³⁶ The public testimony received by the subcommittee similarly pointed to the finality of the arbitrator's decision,¹³⁷ time and cost savings,¹³⁸ and the ability to select an arbitrator with expertise in the subject area

¹³³ See footnotes 68 – 70 and accompanying text. The RAND study found that private ADR firms caseload was 65 percent arbitrations, 24 percent mediations, 11 percent all other ADR services. Private neutrals were 53 percent arbitrations, 21 percent mediations 12 percent voluntary settlement conferences, and 7 percent private judging. Rolph et al., *Escaping the Courthouse*, *supra* footnote 47, at pp. 36-38.

¹³⁴ See for example Reuben, "The Dark Side of ADR," *supra* footnote 72, at p. 53; Roberts, "As a Private Civil Justice System Grows," *supra* footnote 46 at p. 1.

¹³⁵ See Appendix 9.

¹³⁶ Roehl et al., *Private Judging*, *supra* footnote 16, at p. 26.

¹³⁷ For example, one participant stated, "Ultimately, the finality of the arbitration decision is one of its primary benefits."

¹³⁸ One letter received by the subcommittee stated "Pre-dispute binding arbitration helps reduce the time and costs consumed by litigation in three major ways: it reduces the opportunity for parties to attempt to frustrate their adversaries through motions and other mischief that drag out

of the dispute¹³⁹ as the benefits offered by private arbitration. With regard to time savings, the Institute for Social Analysis study found that private arbitration hearings were the shortest of any of the dispute resolution processes reviewed, including public trials, private judging, and private mediations,¹⁴⁰ and that the total time from the filing of the at-issue memo until the closing of the case was shorter in arbitration than in any of the other processes except mediation.¹⁴¹ With regard to cost savings, this study found that the average estimated attorney fees were lowest for cases that went to private arbitration.¹⁴²

2) *Negative Effects*

While the subcommittee heard nothing concerning any negative effects stemming from the voluntary use of private arbitration, it received a great deal of testimony and reviewed a great deal of literature about the negative effects of predispute agreements mandating the use of binding arbitration, particularly in employment, consumer, or other contracts of adhesion. The concerns raised include:

- **Involuntary relinquishment of access to the courts** – Many of those who submitted testimony to the subcommittee and many commentators in the ADR literature reviewed by the subcommittee raise the concern that where there is unequal bargaining power, as in the case of a contract of adhesion, the agreement to use binding arbitration is not truly consensual and parties are essentially forced to give up their right to seek redress in the public courts.¹⁴³ Lost with their access to the public courts are the parties’ rights to:
 - Trial by jury or by a publicly elected judge who is subject to the Canons of Judicial Ethics;
 - The procedural and evidentiary protections of a public court trial;
 - A public trial and public decision;
 - A decision based upon law or for which an explanation is provided; and
 - The right to an appeal or, under the *Moncharsh* decision, to any substantive review of the decision.

litigation and drive up costs; it provides a final adjudication of the controversy not subject to the kinds of broad appeal that can be used as a leverage in litigation; and as a result of these first two benefits, it encourages early settlement in a way traditional litigation does not.

¹³⁹ As one participant in the public hearing stated “One of the reasons arbitration is so time efficient is the expertise of the arbitrator or arbitrators, These panelists are familiar with medical terminology and the law and do not need days of education on these basic concepts required by a lay jury. Importantly, the parties have the opportunity to agree on the individuals who will decide their case.”

¹⁴⁰ Roehl et al., *Private Judging*, *supra* footnote 16, at p.28.

¹⁴¹ *Id.* at p. 27 and Table 4.

¹⁴² *Id.* at Table 5.

¹⁴³ Werdegar, *The Courts and Private ADR*, *supra* footnote 48.

Beyond the basic concern about the unfairness (the unconstitutionality according to some) of these involuntary waivers of the right to seek redress in the public courts, it was also suggested that forcing parties into binding arbitration creates a host of ancillary litigation about whether the waiver was voluntary and whether the arbitration process is fair.¹⁴⁴

- **Secrecy and lack of legal precedent** – As participants in the public hearings and the ADR literature point out, not only the litigants themselves, but also the rest of society have an interest in the public resolution of disputes. When a powerful party can force all disputes of a certain type into private arbitration, the courts, the legislature, and the public as a whole may be robbed of information vital to analyzing and responding to the issues in dispute. This, in turn, may inhibit the development of standards for products and for appropriate conduct to cover the types of interactions that were the source of the disputes.
- **Exemption from public policy** – Because an arbitration agreement can delineate the powers of the arbitrator, including what remedies the arbitrator may order, some who submitted testimony expressed concern that those with the power in the contracting relationship will be able to exempt themselves from enforcement of laws and sanctions, such as punitive damages, designed to regulate their activities.¹⁴⁵
- **Repeat user bias** – One of the concerns most frequently raised in the public testimony received and in ADR literature reviewed by the subcommittee is that privately compensated arbitrators have an inherent financial incentive to favor the institutions or individuals who will be repeat users of their services.¹⁴⁶ Several of those who submitted testimony to the subcommittee suggested that the repeat users of arbitration services may screen and select arbitrators based on the favorability of their decisions.¹⁴⁷

¹⁴⁴ As one participant in the public hearing stated, “And if people don’t want to be there, your courts will be busy, as they are today, litigating knowingness, voluntariness, conscionability and bias every step of the way.”

¹⁴⁵ For example, one participant states, “We are concerned with mandatory binding arbitration provisions that place specific limits against recovery of legal fees, expenses, exemplary damages, involving parties of substantially unequal bargaining power.”

¹⁴⁶ See for example Michael Wagner, “Private Judges Arbitrate More Consumer Suits,” *Los Angeles Times* (March 8, 1998) p. A3; Reuben, “The Dark Side of ADR,” *supra* footnote 72, p. 53.

¹⁴⁷ For example, one participant in the public hearing stated, “Players like Kaiser, other HMOs, banks, employers, and securities firms have a practical ability to blackball arbitrators who rule in favor of claimants or rule in favor of claimants too often.”

- **Arbitration not always faster** – As the circumstances in the *Engalla* case¹⁴⁸ suggest, arbitration is not always a fast process; it can be delayed intentionally or unintentionally. In some cases, particularly low-value cases that might be subject to simplified procedures in the public courts, arbitration may not be faster than litigation. Disputants who are forced to use arbitration, rather than given a choice of dispute resolution options, may end up in a process that is slower and more costly for them.

- **Spillover opposition to other forms of ADR** – The public does not always distinguish between different ADR processes; whether it is arbitration or mediation, binding or nonbinding, mandatory or voluntary, it may all get painted with the same broad brush. The negative effects of predispute clauses requiring binding arbitration have the potential for creating a backlash of negativity about all forms of ADR, hindering the acceptance of ADR processes that do not have the same negative effects.

Recent court decisions have addressed some of these concerns.¹⁴⁹ Some ADR providers¹⁵⁰ and ADR users¹⁵¹ have also moved to make changes in their practices

¹⁴⁸ *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951. This case involved lengthy delay in the appointment of an arbitrator, and thus in the handling of the case, by the party whose medical services agreement required the use of arbitration.

¹⁴⁹ See, for example, *Engalla v. Permanente Medical Group, Inc.*, *supra* [Medical plan may waive right to compel arbitration through unreasonable delay and bad faith in choosing arbitrators]; *Sobremonte v. Superior Court of Los Angeles*, 61 Cal. App. 4th 980 (1998) [bank waived its right to compel arbitration through unreasonable delay in seeking to compel arbitration]; *Badie v. Bank of America* 67 Cal.App.4th 779 (1998) [Customers' consent to allow the bank to change terms did not constitute consent to an ADR clause which the bank sought to add to existing account agreements by sending its customers a "bill stuffer" insert with their monthly account statements, as original agreement did not address dispute resolution. There was also no waiver in any customer's failure to stop using an account after receiving the insert, since the insert was not designed to achieve knowing consent to the ADR clause.]; *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), cert. denied, 119 S.Ct. 445 (1998) [Mandatory arbitration clause in employment agreement does not apply to statutory employment discrimination claims; but see *Sues v. John Nuveen & Co.*, 46 F.3d 175 (3rd Cir. 1998), upholding application to such claims].

¹⁵⁰ Both AAA and JAMS/Endispute have adopted companywide policies regarding disputes involving consumers (Tom Drewlyer, "Consumer Retorts," *Los Angeles Daily Journal*, (June 29, 1998) p. 5); AAA also announced that it will no longer administer mandatory arbitrations of patients' health-care disputes (Margaret Jacobs, Group Won't Arbitrate Patients' Disputes," *Wall Street Journal* (July 1, 1998), p. B2).

¹⁵¹ The Securities and Exchange Commission recently eliminated a requirement that employees from securities firms arbitrate claims of statutory job discrimination. Patrick McGeehan, "SEC Lifts Arbitration Rule About Job Discrimination," *Wall Street Journal*, (June 24, 1998).

that address these concerns. In addition, there have been, and continue to be, legislative efforts to address these concerns.¹⁵²

c. Effects on Courts/The Justice System

As noted above, the number of cases in which private ADR, including arbitration, is used appears to be relatively small and so is unlikely to have any appreciable impact on courts' overall workload. However, it is unclear whether the cases in which private arbitration is being used are qualitatively different in some way that results in their withdrawal from the public courts impacting the courts in a way that is disproportionate to their overall numbers. In addition, some of the public testimony received by the subcommittee suggests that the negative backlash associated with predispute mandatory binding arbitration provisions may not just taint other ADR processes but may also negatively affect public confidence in the justice system.

iii. Private Mediation

In contrast with what the subcommittee heard about predispute provisions for binding arbitration, the comments concerning private mediation were universally positive, even from those who spoke most forcefully about the negative effects of arbitration.

a. Description of Process

Mediation is a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement.¹⁵³ The mediators' role generally consists of assisting the parties in communicating with each other, clarifying the issues in contention, and identifying options for resolving the dispute. The mediator does not impose or compel a settlement or a particular result; the disputants themselves decide whether to resolve the dispute and on what terms. Mediators may also help the parties explore their underlying interests, issues, or feelings, such as anger or hurt, that may be fueling the dispute. Mediators may use a variety of techniques, such as having the parties describe what is important to them, validating the legitimacy of each

¹⁵² California Senate Bill 19 from the 1997–98 Legislative session included, at one point, provisions that would have modified the standard of review used by courts in considering whether to vacate an arbitration award in the case of certain consumer contracts. Assembly Bill 858 from the 1999–2000 legislative session would prohibit the inclusion of predispute provisions for binding arbitration in certain types of contracts.

¹⁵³ Code of Civ. Proc. § 1775.1 and Evid. Code, § 1115. See also Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, (1984) pp. 7-8.

party's interests and concerns, and helping each side understand and express its understanding of the other's position. Depending on the mediator's individual style, the process may involve meeting with the parties jointly and/or separately on a rotating basis (caucusing).¹⁵⁴

Unlike for arbitration, there is no statutory scheme that establishes the enforceability of agreements to use mediation or settlement agreements reached in mediation. While there are statutes that mandate the use of mediation in certain circumstances, the main statutory provisions regarding mediation establish the confidentiality of the process.¹⁵⁵ Beyond this, private mediation is not a statutorily circumscribed process.

As noted above, mediation appears to be the second most commonly used process in the private ADR market.¹⁵⁶ Mediation also appears to represent a growing proportion of the private ADR market. The 1994 RAND study of private ADR in the Los Angeles area notes that anecdotal information suggests that mediation is growing in popularity and neutrals whom they surveyed confirmed that mediation is receiving a growing share of the private ADR market.¹⁵⁷ This conclusion is also supported by information from AAA. From 1996 to 1998 AAA's nationwide overall caseload increased 12 percent, while the mediation caseload rose by 21 percent.¹⁵⁸ Similarly, within California, AAA's caseload grew at an overall rate of approximately 4 percent between 1996 and 1998, while the mediation caseload increased by approximately 14 percent.¹⁵⁹

b. Effects on Litigants and the Public

Those testifying at the subcommittee's public hearings said that private mediation is working in a wide variety of contexts.¹⁶⁰ In addition to the increased choice, time and cost savings, and other benefits of ADR described above, the specific benefits attributed to using mediation include improving communication between parties and preserving ongoing business or personal relationships. Because the

¹⁵⁴ Jay Folberg and Alison Taylor, *supra*, at pp. 38-72.

¹⁵⁵ California Evid. Code, § 1115 et seq.

¹⁵⁶ See footnotes 68 – 70 and accompanying text.

¹⁵⁷ Rolph, *Escaping the Courthouse*, *supra* footnote 47, at page 39.

¹⁵⁸ AAA *Case Filing Hit All-Time High*, *supra* footnote 74.

¹⁵⁹ Figures provided by the American Arbitration Association.

¹⁶⁰ For example, one person at the subcommittee's public hearings stated, "Mediation is working. It's working with all kinds of mediators, in-house employer-type generated mediators, outside mediators, people like me, who tend to be involved more in the statutory discrimination disputes, all kinds of people are succeeding, and I think that it's a good kind of thing to do." Another participant testified, "Mediation, on the other hand, I agree with other speakers before. It's not broke. The private market, the private mediation market, is not broke. There's nothing out there to fix."

parties formulate their own resolutions, they can also more easily tailor a multifaceted solution to meet specific needs or interests, such as a structured settlement or one that calls for more than payment of money. And because the process itself is facilitative and consensual, allowing the parties to determine whether and on what terms to resolve their dispute, the concerns regarding involuntary waiver of the right to trial are not present with mediation.

In the Institute for Social Analysis's survey of private ADR users, the highest-ranked reasons for using private mediation were convenience and speed. A recent survey of business lawyers and executives cited speed and cost but additionally found wide support for mediation based on the overwhelming belief (80 percent) that mediation preserves business relationships.¹⁶¹ These are similar to the reasons for using mediation given by attorneys and litigants in other recent studies.¹⁶²

In addition to the reasons for using various ADR processes, the Institute for Social Analysis study also collected information about speed, cost and participants' satisfaction with ADR.¹⁶³ With regard to time savings, participants estimated that private mediations averaged only two hours in length; this was considerably shorter than the time required for a public trial (5.5 days) or private judging (3 days), but was slightly longer than the average for private arbitration (slightly less than 2 hours).¹⁶⁴ However, the total time from the filing of the at-issue memo until the closing of the case was shorter in mediation than in any of the other processes studied.¹⁶⁵ With regard to cost savings, this study found that the average estimated attorney fees in mediated cases were lower than those for cases that went to a public trial or private judging but were slightly higher than the fees for cases that went to private arbitration.¹⁶⁶ With regard to participant's satisfaction, private mediation received the highest overall rating from litigants and attorneys on measures of procedural justice.¹⁶⁷ In particular, it ranked considerably higher than any of the other processes studied on convenience, the participants' ability to tell

¹⁶¹ Lande, *Relationships Drive Support for Mediation*, *supra* footnote 13.

¹⁶² In the recent study of the ADR program in the Federal District Court for the Northern District of California, litigants and attorneys rated reducing cost, resolving the case more quickly, and facilitating settlement as the top three reasons for using all of the available ADR processes (mediation, arbitration, early neutral evaluation, and settlement conference with a magistrate judge), but users of mediation ranked obtaining more flexibility higher than users of other processes. Stienstra, et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at p. 188.

¹⁶³ The dispute resolution processes included within this comparison were public trial, private judging, rent-a-judge (a specific program in Los Angeles Superior Court at the time the study was conducted), settlement, private arbitration, and private mediation.

¹⁶⁴ Roehl et al., *Private Judging*, *supra* footnote 16, at p. 28

¹⁶⁵ *Id.* at p. 27 and Table 4.

¹⁶⁶ *Id.* at Table 5.

¹⁶⁷ *Id.* at Table 6.

their stories, faith in the process, and whether participants would be willing to use the process again.¹⁶⁸

None of the public testimony received by the subcommittee identified any negative effects of private mediation on litigants or the public. A few participants suggested that mediators should disclose potential conflicts of interest to parties. However, it was also noted that many ADR firms have established ethical standards applicable to mediators on their panels that require such disclosures and that many individual providers also make such disclosures.

c. Effects on Courts/The Justice System

The subcommittee received no specific comments about the effects of private mediation on the courts.

C. EFFECTS OF COMMUNITY ADR

This section discusses the effects of ADR services provided by community-based organizations and governmental entities on courts, litigants, and the public.

1. OVERVIEW OF COMMUNITY-BASED AND GOVERNMENTAL ADR PROGRAMS IN CALIFORNIA

While the basic nature of ADR processes, such as civil mediation, provided through community-based organizations and governmental entities is the same as in the private ADR market, community-based and governmental programs tend to have somewhat different overall goals. These programs often have among their principal objectives the improvement of the public's access to justice, the empowerment of local residents by providing them with tools to resolve their own disputes, and the reduction of court caseloads.¹⁶⁹ In order to promote access, these programs typically provide their ADR services for free or charge low or sliding-scale fees.¹⁷⁰ In addition, because these programs rely primarily on local volunteers to provide their ADR services, the programs also typically provide dispute resolution training to members of the public.

¹⁶⁸ *Ibid.*

¹⁶⁹ Keilitz, *National Symposium*, *supra* footnote 21, at p. 115.

¹⁷⁰ *Dispute Resolution Directory; Programs and Resources*, State Bar of California, Office of Legal Services (1992), p. 3.

According to the Dispute Resolution Directory published by the State Bar of California, as of early 1998, there were approximately 100 governmental and community-based dispute resolution programs in California. The programs listed in this directory provide a wide variety of services, including conciliation, mediation, and arbitration, in a wide variety of cases, including neighbor/neighbor, landlord/tenant, consumer/merchant, employer/employee, public policy, family, and minor criminal disputes. Many of these programs also accept voluntary referrals from local courts. Of the programs listed in the directory, approximately one-third indicated that they received referrals from the superior, municipal, or small claims courts.

Many of the community-based and governmental ADR programs in California receive partial funding through the Dispute Resolution Programs Act (DRPA).¹⁷¹ This act, adopted by the Legislature in 1986, permits counties to add between \$1 and \$8 to the initial court filing fees in civil cases in order to raise a pool of funds for grants to community and governmental dispute resolution programs. In 1998, approximately \$8 million was collected on a statewide basis through this mechanism (approximately \$3.4 million of this was collected in Los Angeles).¹⁷² The DRPA funds collected in a county remain in that county and are allocated by the county, through a designated “county coordinator,” to local dispute resolution programs. To be eligible to receive a grant, a program must meet statutory and regulatory criteria, including that the program sponsor is a governmental entity or a nonprofit, nonpartisan corporation, that the program provides dispute resolution services on a sliding-scale basis, with no fees charged to indigent persons, and that the program’s neutrals meet specified training requirements. The 1998 California Dispute Resolution Programs Act Directory, prepared by the Department of Consumer Affairs, lists 78 programs receiving grants under the DRPA. These DRPA-funded programs are spread among 29 of California’s 58 counties. Among the programs receiving DRPA funding are the civil ADR programs in several courts, including the program in the Los Angeles Superior Court.¹⁷³

Although the statute and implementing regulations require DRPA grant recipients to collect certain information,¹⁷⁴ there is no current statewide data on the number

¹⁷¹ Bus. & Prof. Code, § 465 et seq.

¹⁷² Information supplied by the California Administrative Office of the Courts, Finance Bureau.

¹⁷³ However, DRPA implementing regulations specifically prohibit the use of DRPA funds from being used to support judicial arbitration pursuant to section 1141.10 et seq. of the Code Civ. Proc. or any other formal or mandatory judicial arbitration program (Cal. Admin. Code, Title 16, § 3660).

¹⁷⁴ Bus. & Prof. Code, § 471.5 provides that:

Each program funded pursuant to this chapter shall annually provide the county with statistical data regarding its operating budget; the number of referrals, categories, or types of

of cases being handled by DRPA grant recipients or other community or governmental organizations providing ADR services. Until recently, there have been no consistent statewide definitions of the data elements that the DRPA programs are supposed to collect. For this reason, data from different programs were not comparable. The DPRA county coordinators planned to implement a set of statewide definitions as of July 1, 1999.

While it may not be comparable across counties or programs, available information about the DRPA programs in specific counties is helpful in providing a general sense of the scale of services being provided through these programs. The 1997-1998 annual report on DRPA grants in Los Angeles County (which has the largest amount of grant funding) indicates that a total of 10,656 matters were referred to the county's DRPA-funded programs; 89 percent of these referrals came from the courts. These DRPA-funded programs resolved a total of 9,669 disputes in that fiscal year, for an overall resolution rate of approximately 91 percent¹⁷⁵ Several of the programs funded by Los Angeles County provided court-related services, including small-claims mediation programs in Glendale, Beverly Hills, and Van Nuys municipal courts.¹⁷⁶ A number of the funded programs also provided training in dispute resolution for members of the community.¹⁷⁷ The 1997 annual report for San Bernardino County indicates that its DRPA grantees

cases referred to the program; the number of persons served by the program; the number of disputes resolved; the nature of the disputes resolved; rates of compliance; the number of persons utilizing the process more than once; the duration of and the estimated costs of the hearings conducted by the programs; and any other information that the county may require. The data shall maintain the confidentiality and anonymity of the persons employing the dispute resolution process.

Cal. Admin. Code, Title 16, § 3635 also requires that:

- (a) Yearly or on a more frequent basis, Grantees shall conduct follow-up surveys of disputants who have used their services.
- (b) The surveys shall request the disputants' evaluations of:
 - (1) the dispute resolution services provided by the Grantee;
 - (2) the fairness or adequacy of the settlement agreement or award;
 - (3) any particular difficulties experienced by the disputant in carrying out and obtaining compliance with the settlement agreement or award;
 - (4) the disputant's willingness to use the Grantee's services in the future;
 - (5) the disputant's willingness to recommend the Grantee's services to others who are involved in disputes.
- (c) The survey results shall be submitted as part of the yearly statistical report to the Board of Supervisors or its designee in compliance with section 471.5 of the Act. Copies of the survey results shall also be forwarded by the Grantees to the Department of Consumer Affairs at the time of submission to the Board of Supervisors or its designee.

¹⁷⁵ *Los Angeles County Dispute Resolution Program 1997-98 Annual Report*, page 3.

¹⁷⁶ *Id.* at p. 6.

¹⁷⁷ *Id.* at pp. 5-11.

resolved a total of 2,344 cases.¹⁷⁸ The 1996-1997 annual report for San Diego County indicates that its DRPA-funded programs conducted a total of 1,880 mediations, conciliations, and mitigations, and that 1,582 of these (84 percent) resulted in agreements that settled the disputes.¹⁷⁹ Eleven community or governmental programs also provided 1997 caseload information in their responses to the subcommittee's survey. The number of proceedings handled by these community providers ranged from a high of 4,403 to a low of 19, with an average of 1016.

2. *EFFECTS ON LITIGANTS AND THE PUBLIC*

Community-based and governmental ADR programs offer litigants and the public a number of benefits, including:

- **Increased access to ADR services** – By providing litigants and the public with low-or no-cost ADR services, community-based and governmental programs increase overall access to these services. In addition, because they are less formal and use community volunteers, these programs may be less intimidating and more accessible than the courts.¹⁸⁰
- **High resolution rates** – Community mediation programs generally have high resolution rates. A National Institute of Justice summary of recent empirical studies of community mediation programs in a variety of locations indicates that the average resolution rate was approximately 88 percent.¹⁸¹ This is similar to the results of another compilation of studies which found an average resolution rate of approximately 90 percent in cases where community mediation sessions were held.¹⁸² It is also consistent with the information from the Los Angeles and San Diego County DRPA annual reports, noted above which indicated overall resolution rates of approximately 91 and 84 percent, respectively. These high resolution rates may be due, in large part, to the fact that participation in these community programs is voluntary.

¹⁷⁸ *San Bernardino County Dispute Resolution Programs Act Annual Report; Calendar Year 1997* (March 31, 1998) p. 9.

¹⁷⁹ *County of San Diego Report on Alternative Dispute Resolution; Fiscal Year 1996–97*, p. 3.

¹⁸⁰ The DRPA's legislative intent section notes, "Community dispute resolution programs and increased use of other alternatives to the formal judicial system may offer less threatening and more flexible forums for persons of all ethnic, racial, and socioeconomic backgrounds." Bus. & Prof. Code § 465.

¹⁸¹ McGillis, *Community Mediation Programs*, *supra* footnote 44, at p. 51.

¹⁸² Keilitz, *National Symposium*, *supra* footnote 21, at p. 117.

- **High participant satisfaction** – Community and governmental ADR programs also generally report high rates of satisfaction among users of their services. The National Institute of Justice study cited above found high satisfaction rates among program users in the community mediation programs studied, among which was a program in Los Angeles in which an average of 89 percent of users indicated that they were satisfied with the mediation process.¹⁸³ The State Justice Institute summary of studies also found high levels of satisfaction with the outcome and procedure in community mediation in all the studies reviewed.¹⁸⁴ This finding is consistent with testimony received by the subcommittee from a community provider indicating that reactions to its program had always been extremely positive, with a satisfaction rate of approximately 95 percent. Again, this high rate of satisfaction may stem in part from the users’ voluntary participation.

3. *EFFECTS ON COURTS/THE JUSTICE SYSTEM*

Community and governmental ADR programs also appear to offer courts both current and potential future benefits:

- **Reduced overall workload** – As was mentioned above, court caseload reduction is often one of the goals of community ADR programs. Because there is no statewide information about the total number of cases in California in which community and governmental ADR programs are being used, assessing these programs’ current potential for affecting overall court workloads in California is difficult. However, given the number of cases handled by those providers for which information is available, the statewide total of cases using community and governmental providers is probably fairly small relative to the total civil caseload in the courts. As is discussed in subsection A above, available empirical studies concerning the effects of community ADR suggest that where the community providers’ caseloads are relatively small, these programs do not have an appreciable effect on courts’ overall workload.¹⁸⁵ However, these studies do suggest that there is a potential

¹⁸³ McGillis, *Community Mediation Programs*, *supra* footnote 44, at pp. 53–55.

¹⁸⁴ Keilitz, *National Symposium*, *supra* footnote 21, at pp. 118–119.

¹⁸⁵ A review of studies relating to community mediation programs concluded that, because they are handling only a small percentage of cases that would otherwise go to the courts, these programs have not been found to have an appreciable effect on the courts’ workload. Keilitz, *National Symposium*, *supra* footnote 21, at p. 117. A similar conclusion was reached in a study of community mediation programs in North Carolina that is summarized in McGillis, *Community Mediation Programs*, *supra* footnote 44, at p. 62.

for affecting the courts' future workload if the number of cases going to community ADR programs increases.

- **Collaborative efforts with the courts** – From the available information, it appears that many community and governmental ADR programs are working in partnerships with their local courts to expand access to dispute resolution services in the community. As noted above, the courts make direct referrals to many of these programs. While these referrals may not appreciably decrease the overall number of cases in the courts, by taking these referrals, the community and governmental programs are providing a critical forum for disputes in which the courts might not provide the most appropriate dispute resolution process. Many community programs are also serving as partners in court-related civil ADR programs¹⁸⁶ and as the trainers for neutrals who may also then serve on local court panels. In addition, county DRPA funders have provided some of the critical seed money permitting courts to start up their own court-based civil ADR programs and/or hire professional staff.¹⁸⁷ These collaborative efforts increase the public's access to ADR services through the courts, which, in turn, is likely to increase the public's satisfaction with the justice system.¹⁸⁸ Several court administrators who testified at the public hearings said they believed that the community programs in their areas were providing valuable assistance to the courts. When specifically asked if the DRPA funding should be used to support administrators of court programs rather than community programs, these administrators unanimously opposed the idea, indicating that the DRPA funds were well spent on community-based ADR services.

¹⁸⁶ For example, the Multi-Option Appropriate Dispute Resolution Program (MAP) in San Mateo Superior Court has been from the outset, and continues to be, jointly supported by the court, the local county bar association, and a local community dispute resolution provider. Many community programs also provide small claims mediation services; see section D.3.iii.a.3) on small claims mediation, *infra*.

¹⁸⁷ For example, DRPA funding helped the Superior Court of Contra Costa County hire its first program administrator. The Los Angeles Superior Court program is currently receiving DRPA funding to help support the administration of its court-related ADR programs, and the DRPA coordinator in that county has made court-community program collaboration a high priority. *Los Angeles County Dispute Resolution Program 1997–1998 Annual Report*, p. 4.

¹⁸⁸ Nanci Klein, *Community Mediation and the District Court: A Collaboration That Is "Two Thumbs Up,"* (February 1996) 75 Mich. Bar J. 158.

D. EFFECTS OF COURT-RELATED CIVIL ADR

This section discusses the effects of court-related civil ADR programs on courts, litigants, and the public. For purposes of this report, the term “court-related ADR program” is used fairly broadly to refer to court-sponsored or sanctioned efforts to offer or encourage the use of ADR processes. The term includes programs administered by a court that provide direct ADR services, providers or programs not administered by the court but to which the court makes referrals, and court policies and programs designed to provide litigants and their attorneys with information about ADR options outside the courts. As noted in the introduction, the subcommittee considered ADR programs in the areas of family and juvenile law to be outside its charge, and so court-related programs in those areas are not discussed in this report.

1. OVERVIEW OF COURT-RELATED CIVIL ADR IN CALIFORNIA

California trial courts offer a wide variety of court-related civil ADR programs. These include some programs, such as judicial arbitration and Code of Civil Procedure section 639 references (discussed in greater detail below), that are quite familiar to most judges and attorneys. However, there are also many other programs, including local requirements regarding sharing of ADR information and litigant preferences; meet and confer requirements that encompass ADR discussions; case management or other conferences that include an assessment of the case for ADR purposes; the availability of lists of ADR providers at the court; mandatory and voluntary mediation programs; settlement conference programs using volunteer attorneys as temporary judges; and special masters for complex cases.

Like the private civil ADR field, court-related civil ADR appears to have grown in the last 10 years:

- A 1990 survey of ADR programs in California conducted for the Institute of Judicial Administration found at that time only 13 court-connected ADR programs for civil cases (9 small claims programs and 4 other civil programs) exclusive of family law and judicial arbitration programs.¹⁸⁹

¹⁸⁹ Margaret Shaw, *Alternative Dispute Resolution Programs in California*, Institute of Judicial Administration (funded by State Justice Institute) (1990) pp. 4–9.

- In 1995, information collected jointly by the Administrative Office of the Courts, Center for Judicial Education and Research, the State Bar, and the California Judges Association found that 25 counties had court-related or bar-sponsored civil ADR programs (not including judicial arbitration).¹⁹⁰
- In 1999, the subcommittee's own review of local court rules and other materials concerning civil ADR programs in California courts found a total of 51 different civil ADR programs (other than judicial arbitration) in the superior courts of 29 counties and judicial arbitration programs in the superior courts in 44 counties.¹⁹¹

While the subcommittee was able to identify that these court-related programs exist, we know very little about most of them. A few programs have been described in some detail or assessed at either the local or state level, but comprehensive descriptive or evaluative information concerning most of them is not available. Even for some of the larger, statutory programs, little recent information has been collected on the numbers of cases in which these programs are used and their outcomes. For example, data about the number of cases referred to judicial arbitration and the percentage in which a trial de novo is subsequently conducted have not been collected at the statewide level for over a decade. While some baseline data will be collected in the future through the implementation of the new Judicial Branch Statistical Information System (JBSIS),¹⁹² such information was not available to the subcommittee. In drawing its conclusions about the effects of court-related civil ADR programs, the subcommittee relied on existing empirical studies and other information about civil ADR programs both within and outside of California. The subcommittee also worked with staff of the Administrative Office of the Courts' Research and Planning Unit to develop and test a survey instrument that can be used in the future to collect more comprehensive descriptive information about court-related civil ADR programs on a statewide basis (see Appendix 11).

¹⁹⁰ State Bar of California, *Court ADR Resource List*, September 28, 1995.

¹⁹¹ Because some ADR programs may not be described in statute, California Rules of Court, local court rules, or other materials that the subcommittee was able to gather, we believe that this probably does not represent a complete listing of all of the court-related civil ADR programs currently operating in California's trial courts.

¹⁹² The July 1, 1999, *JBSIS Manual* section concerning civil cases provides for the collection of data on the number of cases referred to judicial arbitration, mediation, settlement conferences, or other ADR processes, the number of judgments entered after these processes, and the number of trials held in cases in which these processes were used.

2. *EFFECTS OF COURT-RELATED CIVIL ADR IN GENERAL*

This section describes the effects attributable to court-related civil ADR in general. However, the actual effects of a particular program will vary depending on many factors, including the program design (for example, whether participation is mandatory or voluntary), the process(es) used (such as arbitration, neutral evaluation, mediation, or a menu of options), the quality of the neutrals, and the program's administration.

i. **Effects on Litigants and the Public**

a. *Positive Effects*

In general, court-related civil ADR programs appear to offer litigants and the public a number of potential benefits, including:

- **Increased access to ADR services** – As noted above in connection with the discussion of whether private ADR will create a “two-tier” system of justice, court-related ADR programs are an important mechanism for increasing the public's access to ADR services. Providing access to these services through the courts can bring these theoretical private and public justice “tiers” closer together.
- **Faster resolution of disputes** – As discussed earlier, many court-related ADR programs appear to reduce the time to resolution.¹⁹³
- **Reduced dispute resolution costs** – Many court-related programs also appear to reduce litigants' costs.¹⁹⁴
- **Greater satisfaction with the dispute resolution process and outcome** – Statistics have consistently shown high rates of satisfaction among participants in court-related ADR programs.¹⁹⁵

Studies of court-related ADR programs suggest that the degree to which these last three benefits are present may depend in part on whether participation in the program is voluntary or mandatory. By definition, mandatory court-related ADR

¹⁹³ See footnotes 19–23 and accompanying text.

¹⁹⁴ See footnotes 30–36 and accompanying text.

¹⁹⁵ See footnotes 39–42 and accompanying text.

programs have higher participation rates than voluntary programs.¹⁹⁶ Some studies have found no apparent differences in resolution rates or satisfaction rates between mandatory and voluntary programs.¹⁹⁷ However, other recent studies of court-related ADR programs for civil cases suggest that voluntary programs produce both higher resolution rates and higher satisfaction with the process. A study of a settlement week program in Ohio found that cases were more likely to be resolved where both sides had requested mediation than where only one side or neither side had requested it.¹⁹⁸ Another recent study of court-related mediation in Ohio found that in small claims matters, mandatory mediation produced fewer settlements than voluntary mediation (46 percent versus 62 percent) and, of those parties who reached settlement, those in mandatory mediation were less likely to see the mediation process as fair than those in voluntary mediation (58 percent versus 84 percent), to be satisfied with the mediation process (65 percent versus 83 percent), or to report willingness to use mediation again in a future small claims case (52 percent versus 80 percent). Similarly in larger civil cases, mandatory mediation produced fewer settlements (24 percent) than voluntary mediation (41 percent).¹⁹⁹

The Federal Judicial Center's study of the ADR program in the Federal District Court for the Northern District of California came to similar conclusions regarding party choice of ADR options. In this court's program, while participation in some form of civil ADR was mandated, one group of litigants were permitted to choose from a menu of ADR processes while another group of litigants were assigned to a particular ADR process by the court. The evaluation of the program found that the benefits of ADR, as reported by attorneys who participated in the program, were greater when litigants selected the ADR process. Attorneys who had selected the ADR process were more likely to report that their cases settled because of the ADR process (72 percent versus 49 percent), that the process lowered litigation costs (76 percent versus 50–60 percent), that the process reduced the amount of discovery and the number of motions, that the process was fair, and that the benefits of the process outweighed its costs.²⁰⁰

¹⁹⁶ *Guide to Court-Related ADR*, (State Bar of California, Office of Research, 1993) p. IV-10; Nancy Rogers and Craig McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, *Ohio State Journal on Dispute Resolution* 3, no. 3 (1998): 831, 848.

¹⁹⁷ Nancy Rogers and Craig McEwen, *Mediation Law, Policy and Practice*, Chapter 6, p. 15, footnote 12, and accompanying text.

¹⁹⁸ Roselle Wissler, *A Closer Look at Settlement Week*, *Dispute Resolution Magazine* 4, no. 4 (Summer 1998): 28.

¹⁹⁹ Roselle Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, (Summer 1997) 33 *Willamette L. Rev.* 565.

²⁰⁰ Stienstra, et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at pp. 175, 198, and 202.

A comparison of the resolution rates for various mandatory and voluntary civil ADR programs in California's state courts for which statistical information was available also suggests that resolution rates are higher in voluntary programs. The following resolution rates were reported for several mandatory mediation programs:

- Civil Action Mediation Program, primarily in Los Angeles and San Diego (1995–1996) – Mediators reported reaching full resolution in 35 percent of cases, and litigants who responded to the survey reported reaching resolution in 55 percent of cases either directly or indirectly as a result of ADR.²⁰¹
- Los Angeles Superior Court (1998) – Forty-eight percent of cases referred to mediation were considered resolved through mediation (this includes both cases resolved prior to mediation and those where the mediation was reported to result in full or partial agreement).²⁰²
- Ventura Superior Court (1998) – Twenty-eight percent of cases referred to mediation settled at or within 60 days of mediation hearing.²⁰³

The following resolution rates were reported for voluntary programs:

- San Mateo Superior Court (June 1997 – June 1998) – Reported a resolution rate of approximately 73 percent.²⁰⁴
- Santa Clara Superior Court (1998) – Providers reported full resolution in 79.6 percent of cases and partial resolution in 3.7 percent of cases; participants who responded to a survey reported 75.7 percent of cases resolved as either a direct (67.6 percent) or an indirect (8.1 percent) result of the ADR process.²⁰⁵

In addition, the Federal Judicial Center study suggests that the benefits associated with a court-related ADR program vary depending upon the quality of the neutrals. This study found that, on every measure (time, cost, effect on settlement, satisfaction with outcome, and fairness of procedure), attorneys' responses to the program varied depending upon how they rated the quality of the neutral. If the attorneys ranked the neutral near the excellent end of the scale, they were more likely to report positive outcomes on measures of the process; if they ranked the neutral low, they were more likely to report negative outcomes on these measures. The report comments that these findings reveal that the impact of a poor neutral is wide-ranging.²⁰⁶ A study of a court-connected mediation program in Florida similarly found that satisfaction rates varied depending upon the mediator.²⁰⁷

²⁰¹ Judicial Council of California, *Civil Action Mediation Act*, *supra* footnote 22, at pp. 3 and 5.

²⁰² Figures supplied by court.

²⁰³ Figures supplied by court.

²⁰⁴ Lewis, "Swifter Justice," *California Lawyer* (March 1999), p. 22.

²⁰⁵ *ADR in Santa Clara County Superior Court Civil Disputes: 1998 Year-End Report Under the Dispute Resolution Programs Act*, pp. 3–4.

²⁰⁶ Stienstra et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at pp. 207–208. Similar results are also reported in an earlier study of the Northern District's ADR program,

b. Negative Effects

If a case is inappropriately referred to an ADR process, that process can become simply another “hoop” that the litigants must jump through, adding to cost and delay rather than reducing it. Similarly, as the study information summarized above suggests, if the neutrals are of poor quality, litigants may not benefit from participation in the court’s ADR program. These concerns are heightened if participation in the process is mandatory or if the parties are required to pay additional fees for ADR. The subcommittee received a great deal of testimony concerning what were perceived as inappropriate referrals of discovery matters under Code of Civil Procedure section 639, as well as some testimony concerning inappropriate or unhelpful referrals to judicial arbitration. This testimony is summarized in more detail below in the subsections relating to these specific court-related ADR programs.

ii. Effects on Courts/The Justice System

a. Positive Effects

Court-related civil ADR program can have a number of positive effects on the courts:

- **Improve public satisfaction with courts** – As noted above, by implementing high-quality court-related ADR programs, courts can provide litigants with greater access to dispute resolution services that meet their needs. This, in turn, can improve public satisfaction with and confidence in the court system.
- **May reduce court workloads** – As discussed above in section A, some studies, including studies of court-related civil ADR programs in California, indicate that such ADR programs can reduce court workloads or costs.²⁰⁸
- **Help meet delay reduction goals** – By helping litigants resolve their disputes earlier, court-related civil ADR programs may assist the courts in meeting delay reduction time standards.

see Rosenberg and Folberg, *Alternative Dispute Resolution: An Empirical Analysis supra* footnote 21, at p. 1495.

²⁰⁷ Keilitz, *National Symposium, supra* footnote 21, at pp. 10–11.

²⁰⁸ See *supra*, footnotes 52–55 and accompanying text.

b. Negative Effects

As discussed above, if a court makes inappropriate referrals, particularly mandatory referrals, to ADR or if the quality of the neutral to whom a case is referred is questionable, litigants' perceptions of the ADR process will be affected negatively. Negative perceptions of the court's ADR program are likely to spill over and harm the public's perception of the courts as a whole. The subcommittee received testimony, discussed more fully below, suggesting that perceptions about inappropriate discovery references have led to negative perceptions of judges as shirking their responsibility to decide discovery disputes and as using their offices to funnel business to former colleagues at the expense of litigants. Perceptions about inappropriate behavior by referees or ineffectual efforts by arbitrators were also seen as reflecting back on the court that made the reference or appointed the arbitrator.

3. *EFFECTS OF SPECIFIC COURT-RELATED CIVIL ADR PROGRAMS*

The subsections below outline the positive and negative effects of specific court-related civil ADR processes on the courts, litigants, and the public. As with the earlier sections on specific private ADR processes, this discussion is not intended to provide a comprehensive taxonomy of the forms of court-related civil ADR. The programs addressed below are those that were discussed in the testimony received by the subcommittee and that were the subject of the greatest discussion in the ADR literature reviewed by the subcommittee: references, judicial arbitration, and court-related mediation programs.

i. References

After the topic of contracts imposing predispute binding arbitration, references under Code of Civil Procedure section 639 were probably the issue most frequently raised in the public testimony received by the subcommittee.

a. Description of Process

Code of Civil Procedure section 638 et seq. delineate when and how a court can refer a case or parts of a case to a "referee." As discussed above in section B.3.i.a.

on private judging, Code of Civil Procedure section 638,²⁰⁹ which provides for voluntary, or consensual, references, is one of the bases through which private judging occurs in California. This code section also permits other types of references, including consensual references of discovery disputes. Section 639 permits courts to order involuntary, or nonconsensual, references in certain specified circumstances,²¹⁰ including, as specified in subsection (e), “[W]hen 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.” Several recent court decisions discuss when it is “necessary” for a court to make a nonconsensual discovery reference, all of which indicate that such references should not be used routinely.²¹¹

²⁰⁹ Code Civ. Proc., § 638 states: “A reference may be ordered upon the agreement of the parties filed with the clerk, or judge, or entered in 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.

²¹⁰ 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.

²¹¹ See for example *Taggares v. Superior Court of San Diego County* (1998) 62 Cal.App.4th 94 [Unless both parties in litigation have agreed to a reference, the court should not make blanket orders directing all discovery motions to a discovery referee except in the unusual case where a majority of factors favoring reference are present. These factors include: (1) multiple issues are to be resolved; (2) multiple motions are to be heard simultaneously; (3) the present motion is only one in a continuum of many; (4) the number of documents to be reviewed (especially in issues based on assertions of privilege) make the inquiry inordinately time-consuming. In making its decision, the trial courts need to consider that the statutory scheme is designed only to permit reference over the parties’ objections where that procedure is necessary, not merely convenient (Code Civ. Proc. § 639, subdivision (e)). Where one or more of the above factors unduly affect the court’s time or limited resources, the court is within its discretion to make an appropriate reference.]; *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279 [Plaintiff’s discovery motion did not raise complex or time-consuming issues of a degree sufficient to warrant appointment of a

Under this statutory scheme, the court is authorized to appoint as referee the person or persons, not exceeding three, agreed on by the parties, or if they do not agree, a court commissioner or other person(s) selected by the court.²¹² The appointment procedure is further delineated by the California rules of court, which require in consensual references that the parties include the name of the referee in their proposed reference order,²¹³ and in nonconsensual references that the court accept nominations for referees from the parties and provide a sufficient number of names so that the parties may choose the referee by agreement or elimination.²¹⁴ The court is also authorized to order the parties to pay the referee's fees "in any manner determined by the court to be fair and reasonable."²¹⁵ Recent decisions also address issues concerning the selection of the referee and the procedures to be followed when litigants claim they are not able to pay the referee's fees.²¹⁶

b. Effects on Litigants and the Public

1) Positive Effects

The testimony received by the subcommittee indicated that, although parties sometimes feel pressured to agree to a "consensual reference" under Code of Civil Procedure section 638, truly consensual references are seen as a helpful tool litigants can use, particularly in complex cases or cases in which substantive expertise would assist in the resolution of the dispute.²¹⁷

referee to resolve them. Neither the document request nor the response was voluminous or complicated.]; and *Hood v. Superior Court* (1999) 85 Cal.Rptr.2d 114 [Trial court order appointing referee to resolve discovery disputes was improper and could not stand, where no finding was made that case presented circumstances out of the ordinary that made reference "necessary,"]

²¹² Code Civ. Proc. § 640.

²¹³ Cal. Rules of Court, rules 244.1 and 532.1.

²¹⁴ Cal. Rules of Court, rules 244.2 and 532.2.

²¹⁵ Code Civ. Proc. § 645.1 provides: "The court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed pursuant to Section 1023, in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties."

²¹⁶ See for example *Taggares v. Superior Court, supra* [The trial court abused its discretion when it ordered that a specific private discovery referee handle a discovery dispute and all future discovery disputes and that the defendants assume the responsibility for all the referees' fees because the plaintiff was an indigent. The order was not "fair and reasonable" as required by Code Civ. Proc. § 645.1. Unless a court makes a cost-free option available to the parties in such cases, it may not order a referee.]; and *Hood v. Superior Court, supra* [No basis existed for court's refusal to accept declaration by plaintiff, who was an attorney and was proceeding pro se, that he was unable to pay a referee's fees.]

²¹⁷ As one participant in the public hearing stated, "I am generally content with 638, because the marketplace is working, and if you don't like what you get, don't do it. You have the choice."

2) *Negative Effects*

In contrast, the subcommittee heard many concerns about nonconsensual references, particularly discovery references, including:

- **Referral of routine discovery matters** – Both the public testimony received by the subcommittee and ADR literature reviewed by the subcommittee suggest that some judges are sending virtually all discovery disputes, even routine matters, to referees.²¹⁸ The perception among litigants is that these references are being made not because they are “necessary,” but because the judge wants to clear his or her docket or just does not like dealing with discovery disputes.²¹⁹
- **Selection of the referee** – The subcommittee also received testimony that some judges are ignoring parties’ preferences and are appointing individuals of their own choosing to serve as referees.²²⁰ The perception among litigants is that some judges are engaging in cronyism, sending matters to their friends and former colleagues.²²¹
- **High fees** – Both the ADR literature and the testimony received by the subcommittee point to the high fees charged by referees and the impact of these fees on low and moderate income litigants.²²² Litigants perceived that some judges exercise very little oversight over the referee’s hourly fee and the total charges. It was also suggested that, in the absence of such oversight, some referees may engage in “churning,” unnecessarily expanding the time they take to complete the reference.²²³

²¹⁸ See for example Teresa Beaudet, “Litigation Section Survey on L.A. Superior Court References Reveals Serious Problems,” *Litigation Section Newsletter* (Winter 1994) p. 1; and Ned Good, “The Cost of Injustice,” *Advocate* (April 1998) p. 15.

²¹⁹ As one participant in the subcommittee’s public hearings stated, “The perception, again, is that very often these references are made not necessarily because they’re necessary at the time. It just seems that perhaps the judges don’t want to deal with the unfortunate wrangling that goes on sometimes in discovery disputes.”

²²⁰ One participant in the public hearing related a “horror” story of having agreed with the other party on a particular person to be a referee and having the judge say no to the parties’ choice and instead appointing someone the judge had selected.

²²¹ One participant in the public hearing stated, “There is also the unfortunate perception that so many of the references are made on the basis of the good old boy network.”

²²² See for example Good, “The Cost of Injustice,” *supra* footnote 218, at p. 15; and Reuben, “The Dark Side of ADR,” *supra* footnote 72, at p. 53.

²²³ One participant in the public hearing stated, “I don’t care how much you hedge it in, you’ve got a conflict of interest, because the appointed person, particularly if they’re not busy, has an interest in keeping these things going in particular cases, and satisfying the judges who appoint them, and that makes me queasy.”

c. Effects on Courts/The Justice System

1) Positive Effects

Judges considered nonconsensual references to be an important tool to have in appropriate cases. When used in an appropriate manner, nonconsensual references were viewed as helpful in managing difficult or complex cases and in providing specific expertise on certain issues.

2) Negative Effects

The inappropriate use of references was seen as damaging to the public's perception of the judicial system. The perceived abuses of this process outlined above lead to perceptions that some judges avoid their responsibility for handling routine discovery matters and for monitoring appointed referees. They also lead to the perception that some judges are using this process to financially benefit friends and former colleagues who are private ADR providers. All this leads to diminished respect for and confidence in the public court system as a whole.²²⁴

ii. Judicial Arbitration

a. Description of Process

Judicial arbitration is a mandatory, nonbinding arbitration program established by statute.²²⁵ Under this program, superior courts with 10 or more judges, or 18 or more judges in a county in which there is no municipal court, must submit to arbitration most civil cases, other than limited civil cases, in which the amount in controversy is \$50,000 or less.²²⁶ Other superior courts and municipal courts may

²²⁴ As one participant in the subcommittee's public hearings stated, "That really shakes the confidence of the trial bar in the use of the reference, and if it shakes the confidence of the trial bar, you can only imagine what it does to the confidence of the public who is involved in this system and having to foot the bill."

²²⁵ Cal. Code Civ. Proc. § 1141.10 et seq. Implementing rules are found in Cal. Rules of Court, rule 1600 et seq.

²²⁶ Code Civ. Proc. § 1141.11; Cal. Rules of Court, rule 1600. In municipal courts that have adopted judicial arbitration programs, motor vehicle accident cases involving single defendants must also be submitted to judicial arbitration. Code Civ. Proc. § 1141.11(d). Actions exempt from judicial arbitration include those in which equitable relief is sought; class actions; small claims actions, or trials de novo on appeals from such actions; unlawful detainer proceedings; family law proceedings; and actions involving multiple causes of action or a cross-complaint if the court

adopt a similar program by local court rule.²²⁷ Based upon these statutes, judicial arbitration programs are required in 16 superior courts.²²⁸ The subcommittee's review of local court rules indicates that superior courts in 28 other counties have also voluntarily adopted judicial arbitration programs.²²⁹

In any court in which a judicial arbitration program has been established, parties may stipulate to submit any civil case to the program, regardless of the amount in controversy. Cases in which the plaintiff elects arbitration and agrees that the arbitration award will not exceed \$50,000 are also subject to arbitration.²³⁰

Unless the parties stipulate that a nonattorney may serve as the arbitrator, the arbitrators in judicial arbitration programs must be retired judges, retired court commissioners who were licensed to practice law before appointment as a commissioner, or members of the State Bar.²³¹ The court is required to create a panel of arbitrators for personal injury cases and other panels as determined by the presiding judge. These panels must be composed of active members of the State Bar and retired judges.²³² If the parties do not designate an arbitrator within 15 days of the case's placement on the arbitration hearing list, the administrator of the arbitration program must select an arbitrator according to the procedures set forth in the California Rules of Court or in the court's own local rules.²³³

Arbitrators in judicial arbitration are paid by the court at a rate of \$150 per case or per day, whichever is greater, unless this compensation is waived.²³⁴ Many large counties, including Alameda and Santa Clara, are now asking these arbitrators to serve without compensation. In fiscal year 1996–1997, the courts paid approximately \$3.5 million in arbitration fees and in fiscal year 1997–1998 approximately 3.4 million.²³⁵

determines that the amount in controversy as to any given cause of action or cross-complaint exceeds \$50,000. Code Civ. Proc. § 1141.15; Cal. Rules of Court, rule 1600.5.

²²⁷ Code Civ. Proc. § 141.11(b)–(c).

²²⁸ Alameda, Contra Costa, Fresno, Kern, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Barbara, Santa Clara, and Ventura.

²²⁹ Amador, Butte, Calaveras, Colusa, El Dorado, Humboldt, Imperial, Kings, Lake, Madera, Marin, Mendocino, Monterey, Nevada, Placer, Plumas, San Benito, San Luis Obispo, Santa Cruz, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Tulare, Tuolumne, Yolo, and Yuba.

²³⁰ Code Civ. Proc. § 1141.12; Cal. Rules of Court, rule 1600.

²³¹ Code Civ. Proc. § 1141.18.

²³² Cal. Rules of Court, rule 1604.

²³³ Cal. Rules of Court, rules 1605 and 1605.5.

²³⁴ Code Civ. Proc. § 1141.18(b).

²³⁵ Figures supplied by California Administrative Office of the Courts, Finance Bureau.

The awards made in judicial arbitration are final and become the judgment of the court unless a trial de novo is requested.²³⁶ Any party may elect to have a trial de novo within 30 days of the filing of the award with the clerk.²³⁷ If, however, the party who requested the trial does not obtain a more favorable judgment at trial, that party must pay the costs of the arbitration as well as certain of the other party's litigation costs.²³⁸

As was mentioned above, comprehensive statewide information about the number of cases referred to judicial arbitration or resolved through this process is not available. The subcommittee did gather the following information from several superior courts, although it may not be representative of the state as a whole:

Table 1. Superior Court Cases Referred to Judicial Arbitration in 1998²³⁹

	Cases Referred to Arbitration	% of General Civil Filings
Contra Costa	537	13%
Los Angeles	6,964	14%
San Diego	813	7%
San Mateo	945	22%
Santa Clara	2,206	29%
Ventura	940	33%

Table 2. Superior Court Cases Referred to Judicial Arbitration From 1994 to 1998²⁴⁰

	1994	1995	1996	1997	1998
Contra Costa	1,235	1,247	997	802	537
San Diego	1,343	1,396	1,333	1,163	813
Santa Clara	4,020	3,524	2,641	2,618	2,206
Ventura	1,349	1,038	757	701	940

Table 1 indicates that the proportion of the civil caseload currently being referred to judicial arbitration varies a great deal from court to court. Table 2 also suggests

²³⁶ Code Civ. Proc. § 1141.20(a).

²³⁷ Code Civ. Proc. § 1141.20. The judgment then has the same force and effect in all respects as a judgment in a civil matter or proceeding, except it is not subject to appeal. Cal. Rules of Court, rule 1615(c). The only way a judgment based on a judicial arbitration award may be challenged is by a motion to have the judgment vacated.

²³⁸ Code Civ. Proc. § 1141.21.

²³⁹ All arbitration data for this table was supplied by the individual courts; filing data is from the Judicial Council's *1999 Court Statistics Report*.

²⁴⁰ All data for this table was supplied by the individual courts.

that the absolute number of cases being referred to judicial arbitration has been declining over time on a fairly consistent basis. The apparent decline in referrals over time could be due to a number of factors, including declines in civil filings overall or a decline in the proportion of civil cases that meet the \$50,000-or-lower qualification for referral. However, again, it should be cautioned that the courts from which the subcommittee received data may not be representative of the rest of the state. For example, all these courts have additional court-related civil ADR programs that may be drawing away cases from judicial arbitration.²⁴¹

Table 3. Superior Court Cases Resolved Through Judicial Arbitration in 1998²⁴²

	Cases Settled Before Arbitration Award		Arbitration Awards Entered as Judgments		Trials De Novo Held	
	# of Cases Settled	% of Cases Referred to Arbitration	# of Awards Entered	% of Cases Referred to Arbitration	# of Trials De Novo	% of Cases Referred to Arbitration
Superior Court						
Los Angeles	638	12% ²⁴³	729	14% ²⁴⁴	n/a	
San Diego	329	40%	128	16%	37	4.5%
San Mateo	327	35%	77	8%	12	1%
Santa Clara	406	18%	198	9%	n/a	

Table 3 suggests that the proportion of cases in which the judicial arbitration award is accepted is fairly low. However, this does not provide a complete picture of the effect of the judicial arbitration program on these cases. The judicial arbitration program may also contribute to settlement in some portion of the cases that settle both before and after the arbitration hearing.

b. Effects on Litigants and the Public

The effects of California’s judicial arbitration program on litigants and the public are unclear. The subcommittee received varied testimony concerning the judicial arbitration program — some suggesting that it could have positive effects, but much more suggesting that it was having negative effects on litigants. As noted above, very little current empirical information about the program is available to

²⁴¹ This is particularly true for San Diego, where the Civil Action Mediation program has been implemented. This program specifically authorizes referrals to mediation of cases otherwise eligible for judicial arbitration.

²⁴² All data for this table was supplied by the individual courts.

²⁴³ This is calculated using the number of arbitration cases completed, not referred.

²⁴⁴ This is calculated using the number of arbitration cases completed, not referred.

provide a basis for assessing this testimony.²⁴⁵ The empirical information from studies of court-annexed arbitration programs in other states also suggests that the effects of these programs are unclear.

- **Time savings** – Although a 1983 report on the effectiveness of California’s judicial arbitration program concluded that it generally appears to reduce disposition time of cases,²⁴⁶ no more recent studies have assessed this issue. Testimony at the subcommittee’s public hearings indicates some litigants believe this process does not save time; rather, because it rarely resolves the dispute, they believe judicial arbitration actually adds time to the litigation process.²⁴⁷ However, some of the concerns about added time may be linked to more specific concerns (discussed below) about inappropriate referrals to arbitration and the quality of unpaid arbitrators in the program. A National Center for State Courts analysis of multiple studies of court-annexed arbitration programs concludes that the evidence on these programs’ effects on the pace of litigation is mixed: studies of some programs showed that arbitration cases were resolved faster than cases in control groups, while other studies found the arbitration cases were resolved at the same rate or slower than the cases in the control groups.²⁴⁸
- **Cost savings** – Testimony at the subcommittee’s public hearings suggested that judicial arbitration may actually increase litigation costs. The subcommittee is not aware of any study of California’s program that specifically addressed this issue. The National Center for State Courts analysis of multiple studies of court-annexed arbitration programs in other states concludes that research has not clearly shown that arbitration results in cost savings for litigants: one study found cost reductions in cases that settled

²⁴⁵ The most recent study of the program was in 1989 by the RAND Institute for Civil Justice; researchers in that study noted that the greatest need in the program was for an ongoing means of monitoring and evaluating the performance of the program. The report recommended that local courts resume reporting of data to the Judicial Council for compilation and analysis in the council’s annual report. David Bryant, *Judicial Arbitration in California: An Update* RAND Institute for Civil Justice, 1989, pp. 40–41.

²⁴⁶ Judicial Council of California, *Annual Report to the Governor and the Legislature*, (1984) p. 9. The 1989 RAND study of the program, *supra*, found that the time to disposition in arbitrated cases was shorter than for cases that went to trial; however, they acknowledged that since most cases would settle anyway rather than go to trial, this comparison does not indicate the effect of judicial arbitration on the overall time to disposition. Bryant, *Judicial Arbitration in California supra* footnote 245, at pp. 21–22.

²⁴⁷ One participant in the public hearing testified, “If you know that you have an arbitration that isn't going to be binding, to be followed by a trial, all that happens is you spend a lot of extra money, a lot of extra time, and usually one side or the other isn't going to be happy, so they want to go again, and you've got a big delay.”

²⁴⁸ Keilitz, *National Symposium, supra* footnote 21, at p. 41.

before the arbitration hearing, but none of the studies found savings for the overall arbitration caseload.²⁴⁹

Specific concerns raised in the public testimony included:

- **Referral of cases over \$50,000** – A number of public hearing participants suggested that some courts are referring cases valued at over \$50,000 to judicial arbitration without the parties’ consent. This was viewed as both inappropriate under the statute and as counterproductive, resulting in increased time and cost for litigants.²⁵⁰
- **Unpaid or underpaid arbitrators** – Some of the public testimony suggested that arbitrators who receive low pay or no pay have little incentive to make the process productive.²⁵¹

c. Effects on Courts/The Justice System

The effects of judicial arbitration on the courts are also unclear.

- **Court workload/costs** – Without more complete information, it is difficult to assess whether, on balance, the judicial arbitration program is having a positive, neutral, or negative effect on court workloads and costs. At this time, we do not know how many cases are resolved in whole or in part as a result of participation in judicial arbitration, nor do we know what the rate of trials de novo is and whether this rate is lower than the trial rate among cases that do not go to judicial arbitration. All of these issues are important in trying to assess the program’s effect on court workloads.

²⁴⁹ *Ibid.*

²⁵⁰ One participant in the public hearing testified, “The second topic I briefly want to address is the rampant abuse of discretion we are seeing with courts referring cases out to judicial arbitration. The statute clearly provides that the value of the case has to be \$50,000 or less, without regard to issues of liability and comparative negligence. It is just commonplace now for blanket referrals to judicial arbitration. In many courts, the judge has abdicated the responsibility and the discretion to his clerk, who runs a calendar call and just sends cases out to arbitration. Judicial arbitration in the inappropriate case, it’s an expense [and a] waste of time, [and] it complicates the case by terminating discovery in the larger cases.”

²⁵¹ One participant in the public hearing testified, “I have found that the mandatory arbitration system or programs with uncompensated, arbitrators, is a failure, is an absolute farce. Most of the arbitrations become a skylarking session in the lawyer’s conference room, and they exchange briefs, and that’s the end of that. It then goes to a mandatory, and both sides are dissatisfied. So what it does is it prevents settlement. It’s anti-productive. And the reason for it is, there’s no motivation, and here again I go back to my theme of motivating people, and that is, if you give them just \$150, most conscientious lawyers feel that they have an obligation to do it righteously, and if they’re paid nothing, somehow that motivation is diminished to the point where it’s ineffective.”

- **Public perception of the courts** – While we do not have overall information about judicial arbitration’s effect on litigants’ perception of the courts, it is clear that what litigants see as inappropriate referrals to judicial arbitration have a negative effect on perceptions of the courts. The public hearing participants suggested that judges were referring cases over \$50,000 because they had abdicated responsibility for making judgments about whether the cases were really appropriate for judicial arbitration. This perception does not contribute to a positive view of the public justice system.

iii. Mediation

a. *Description of Process*

As described above, mediation is a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement.²⁵² A number of different mediation programs for civil cases are operating in California’s trial courts.

1) *Civil Action Mediation Program*

Civil Action Mediation is a mandatory mediation program established by statute.²⁵³ Under the statute, this program is required in Los Angeles County trial courts and any other court may elect to implement this program at the option of the presiding judge. Based on a review of local court rules, it appears that, in addition to trial courts in Los Angeles County, the superior courts in El Dorado, Nevada, San Diego, Shasta, and Solano Counties and the municipal court in Mono County have implemented this program.

Under this program, a participating court can refer to mediation any action in which judicial arbitration would otherwise be required (i.e., the amount in controversy does not exceed \$50,000 for each plaintiff), including an action containing a prayer for equitable relief or in which a public agency is a party.²⁵⁴ In addition, parties can stipulate to participate in this mediation program regardless of the amount in

²⁵² Code Civ. Proc., § 1775.1 and Evidence Code § 1115. See also Folberg and Taylor, *Mediation: A Comprehensive Guide*, *supra* footnote 158, at pp. 7-8.

²⁵³ Code Civ. Proc., §§ 1775–1775.16; implementing rules are found in Cal. Rules of Court, rules 1630–1639.

²⁵⁴ Code Civ. Proc., § 1775.3; Cal. Rules of Court, rule 1631.

controversy.²⁵⁵ Mediation in this program is an alternative to arbitration; any action ordered to judicial arbitration may not be ordered to mediation and vice versa.²⁵⁶

The parties are free to select a mediator, but if they are unable to agree on one within 15 days of the submission, the court may make the selection from a panel of mediators identified by the court.²⁵⁷ In compiling the panel, the court is required to consider the criteria set forth in Section 33 of the California Standards of Judicial Administration,²⁵⁸ relating to neutral qualifications, and in Title 16, California Code of Regulations, section 3622, relating to the qualifications of neutrals in programs funded by the Dispute Resolution Programs Act (DRPA).²⁵⁹ The compensation of court-appointed mediators is required to be the same as for arbitrators in the judicial arbitration program and may be paid from funds allocated to pay those arbitrators.²⁶⁰

Within ten days of the conclusion of the mediation, the mediator is required to file a statement advising the court whether the mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case.²⁶¹ If the case is not resolved in mediation, it is placed back on the civil calendar.²⁶²

Table 4 provides statistics for the Civil Action Mediation Program in the San Diego and Los Angeles Superior Courts.

Table 4. Civil Action Mediation Program Statistics for 1998²⁶³

	Cases Referred to Mediation	Cases Disposed of Prior to Mediation		Mediations Completed		Cases Settled in Mediation		Cases Settled within 90 Days of Mediation	
		# of Cases	% of Cases Referred	# of Cases	% of Cases Referred	# of Cases	% of Cases Completed	# of Cases	% of Cases Completed
Los Angeles	4,044	321	8%	2,365	58%	625	26%	N/A	
San Diego	831	150	18%	458	55%	214	47%	81	18%

²⁵⁵ Cal. Rules of Court, rule 1631.

²⁵⁶ Code Civ. Proc., § 1775.4.

²⁵⁷ Code Civ. Proc., § 1775.6; Cal. Rules of Court, rules 1632 and 1633.

²⁵⁸ Cal. Rules of Court, Appendix Division I.

²⁵⁹ Cal. Rules of Court, rule 1632.

²⁶⁰ Code Civ. Proc., § 1775.8.

²⁶¹ Code Civ. Proc., § 1175.9; Cal. Rules of Court, rule 1635.

²⁶² Code Civ. Proc., § 1175.9.

²⁶³ All figures for this table were supplied by the individual courts.

2) *Other General Civil Programs*

As noted at the beginning of the discussion of court-related civil ADR programs, a number of programs have been adopted by local courts. Below are brief descriptions of some of the mandatory and voluntary mediation programs of which the subcommittee is aware.

The Superior Court of Ventura County has adopted a mandatory mediation program by local rule.²⁶⁴ Cases are automatically referred to the program if they fall into certain designated case types, including those involving neighbors, homeowner associations, businesses or partnerships, sexual harassment, employment, discrimination, or code enforcement. The mediators in the program serve on a pro bono basis. In 1998, 315 cases were referred to the mediation program and 89, or 28 percent of those cases settled at or within 60 days of the mediation session.²⁶⁵

The Superior Court of San Mateo, San Mateo County Bar Association, and Peninsula Conflict Resolution Center co-sponsor the Multi-Option Appropriate Dispute Resolution Program (MAP). This is a voluntary, market-rate program: parties in civil cases are encouraged to stipulate to use an ADR process and, if they proceed with ADR, they are responsible for paying for the ADR services. If the parties do not agree to an ADR process, an initial case management/ADR assessment conference is scheduled. To assist parties in selecting an ADR provider, the ADR program maintains lists of mediators and other neutrals that meet specified minimum requirements. The list includes information about the neutrals' training experience and fees. Staff is also available to discuss available ADR options with the parties. To date, in the majority of cases in which the parties have agreed to use ADR, mediation has been the process chosen. The program reported a resolution rate of approximately 73 percent between June 1997 and June 1998.²⁶⁶ Several other superior courts have adopted programs that use a similar voluntary, market-rate approach, including those in San Francisco, Santa Barbara and Santa Clara Counties.

The Superior Court of Contra Costa has a mediation program called EASE (Extra Assistance to Settle Early). The first two hours of mediation services in this program are provided on a pro bono basis. The number of cases referred to this program has grown steadily for the last four years, from 131 in 1994 to 700 in 1998.²⁶⁷

²⁶⁴ Ventura Superior Court Rule 3.24.

²⁶⁵ Figures supplied by court.

²⁶⁶ Lewis "Swifter Justice," *supra* footnote 204, p. 22.

²⁶⁷ Figures supplied by court.

3) *Small Claims Programs*

A number of courts also have small claims mediation programs. In a 1992 survey of municipal and justice courts, 33 of the 124 courts responding (approximately one-quarter) indicated that they had some form of ADR program for small claims cases.²⁶⁸ Twenty-two of these courts said they actively sponsored or participated in a process for resolving disputes other than by a trial before a small claims judge, and all but one of these twenty-two offered mediation.²⁶⁹ In 91 percent of these mediation programs, participation was voluntary.²⁷⁰ Estimated resolution rates averaged 83 percent, with one court reporting 25 percent and all others reporting 71 percent or higher.²⁷¹ In about one-third of these programs, if the case was not resolved in mediation, it went to a judge for trial that same day.²⁷² Most of these small claims mediation programs were offered through the local community mediation program and were located outside of the courts.²⁷³ The mediators in most of the programs were required to meet specified training requirements.²⁷⁴

b. Effects on Litigants and the Public

1) Positive Effects

Court-related mediation programs offer litigants and the public all of the benefits of private mediation discussed above:²⁷⁵ greater choice, time savings, cost savings, greater satisfaction, improved communication between parties, preservation of ongoing business or personal relationships, and ease of in creating multifaceted solutions to meet specific needs or interests. These court-related programs also improve access to dispute resolution services.

- **High satisfaction** – The testimony received by the subcommittee emphasized mediation’s participatory model of dispute resolution and the greater satisfaction some parties may feel when they can control the process and craft their own solutions. As noted above, studies of court-related civil mediation programs in California and in other states have found uniformly high levels of satisfaction with the process. The National Center for State Courts’ compilation of studies of general civil mediation programs and small claims mediation programs found

²⁶⁸ Judicial Council of California, *Report and Recommendations on Alternative Adjudication of Small Claims Actions* (July 1992) Appendix, p. 48.

²⁶⁹ *Id.* at pp. 48–49.

²⁷⁰ *Id.* at p. 51.

²⁷¹ *Id.* at pp. 53 – 54.

²⁷² *Id.* at p. 54.

²⁷³ *Id.* at p. 49.

²⁷⁴ *Id.* at pp. 51-52.

²⁷⁵ See *supra*, subsection B.3.iii.

high rates of participant satisfaction with both.²⁷⁶ In a survey of participants in California's Civil Action Mediation program, a very high percentage said that they would be willing to use mediation again (Los Angeles County, 95 percent; San Diego County, 93 percent).²⁷⁷ In a 1995 evaluation of Ventura County's mandatory mediation program, 70 percent of participants who responded to the survey said they were satisfied or very satisfied with their experience in mediation, compared with only 11 percent who indicated they were dissatisfied; 72 percent of participants said they would voluntarily choose to use mediation again, while only 5 percent said they would not.²⁷⁸ In the evaluation of the pilot phase of San Mateo's County MAP program,²⁷⁹ 96 percent of participants responding to a survey indicated that they were satisfied with the process, 99 percent said that they would use the neutral again, and 100 percent expressed satisfaction with the ability to structure the outcome and with the fairness to the parties.²⁸⁰

- **Cost savings** – While the studies of court-connected mediation programs in other states have shown mixed results on this issue,²⁸¹ studies of programs in California have found that a higher percentage of participants believe that the mediation program reduced litigant costs than believe that the program increased such costs. In a survey concerning the Civil Action Mediation program, program participants in San Diego County reported decreased litigant costs in 22 percent of mediation cases as compared with increased litigant costs in 12 percent of the cases. Los Angeles participants reported decreased litigant costs in 16 percent of mediation cases as compared with increased litigant costs in 12 percent of these cases. The average overall effect of mediation was an estimated net savings for parties of \$1,398 per case, or a total of \$1.3 million for all cases (925) in which savings were reported.²⁸² In the evaluation of the pilot phase of San Mateo County's MAP program, 73 percent of participants responding believed that the program reduced costs, with savings estimates ranging as high as \$25,000; only one person thought the process increased costs, and that by only \$250.²⁸³

²⁷⁶ Keilitz, *National Symposium*, *supra* footnote 21, at pp. 9–10 and 25.

²⁷⁷ Judicial Council of California, *Civil Action Mediation Act*; *supra* footnote 22, at pp. 6–7.

²⁷⁸ Pepperdine University School of Law, *Ventura Courts Mediation Program Report* (February 1995).

²⁷⁹ Although this program offers other processes as well as mediation, the vast majority of participants choose to use mediation.

²⁸⁰ *January-June 1997 Multi-Option ADR Project Pilot Evaluation Highlights*.

²⁸¹ Keilitz, *National Symposium*, *supra* footnote 21, at p. 9.

²⁸² Judicial Council of California, *Civil Action Mediation Act*, *supra* footnote 22, at pp. 5–6.

²⁸³ *Multi-Option ADR Project Pilot Evaluation Highlights*, *supra* footnote 280.

- **Time savings** – Studies of court-connected mediation programs in other states have reached mixed results on whether mediation reduces overall disposition time.²⁸⁴ While the available studies of California’s court-connected mediation programs have not compared actual time to disposition of the mediated and nonmediated cases, two studies have asked for participants’ estimates of court time saved, which can be a measure of time saved by both the court and the litigants. In the Civil Action Mediation study, survey respondents who had participated in mediation estimated that court days had been saved in 18 percent of cases and increased in only 6 percent of cases. Of those estimating a savings, 82 percent estimated a savings of one or more court days, with an average estimated savings of .76 of a court day.²⁸⁵ In the evaluation of the pilot phase of San Mateo County’s MAP program, 77 percent of participants responding thought the program had saved court days.²⁸⁶

2) *Negative Effects*

The concerns that were raised about court-related mediation in the public testimony received by the subcommittee—and they were few—related only to mandatory mediation.

- **Inappropriate referrals.** – It was suggested that, as with judicial arbitration, some cases above the \$50,000 limit are being referred to the Civil Action Mediation program.²⁸⁷ Other testimony received by the subcommittee disputed this contention. The subcommittee is not aware of any study that has assessed this issue.
- **The quality of the mediators** – The subcommittee received some testimony suggesting that insufficient standards on qualifications of mediators have been established for some panels of mediators and that the low pay or lack of pay for such panelists ultimately results in highly qualified mediators leaving the panel.²⁸⁸

²⁸⁴ Keilitz, *National Symposium*, *supra* footnote 21, at pp. 7–8.

²⁸⁵ Judicial Council of California, *Civil Action Mediation Act*, *supra* footnote 22, at p. 5–6.

²⁸⁶ *Multi-Option ADR Project Pilot Evaluation Highlights*, *supra* footnote 280.

²⁸⁷ One person stated, “The second complaint I hear about mandatory mediation most frequently, and I hear this both from the litigators as well as the practitioners, is a lot of anger about the fact that a lot of cases that are being ordered are well in excess of \$50,000.”

²⁸⁸ One person stated, “Part of that bad experience also comes, I think, from the fact that the court panels of mediators, because it’s an unpaid occupation, for the most part, tend to be less well trained and less experienced, and the result is less good and less acceptable, and I’m not sure, given the economic realities, how you get around that.”

c. Effects on Courts/The Justice System

The sense of those who testified concerning this issue was that court-related mediation programs are beneficial to the courts.²⁸⁹ These programs can:

- **Increase public satisfaction with courts** – By improving public access to appropriate dispute resolution options within the courts, courts may raise the public’s level of satisfaction with the services provided by the courts. This benefit is likely to be diminished, however, if litigants perceive that the court is referring cases to the program inappropriately, or if the quality of the program or neutrals is questionable.

- **Decrease court workload/costs** – Studies of programs in California and in other states indicate that court-related civil mediation programs can reduce court workloads. As noted above, the participants in both the Civil Action Mediation program and San Mateo County’s MAP program estimated that these programs resulted in savings of court days.²⁹⁰ Studies of programs in Maine and Minnesota found indicators of reductions in court workload.²⁹¹ Even where a mediation program does not effect a court’s overall workload, it may help the court in processing cases that would otherwise prove difficult or time-consuming for the court. In a study of Washington, D.C.’s court-connected mediation program, researchers concluded that mediation did not appear to have a significant effect on reducing the court’s caseload but that it did remove bitter, emotionally complex cases from the court.²⁹²

²⁸⁹ One participant testified that the Los Angeles Superior Court ADR Committee agreed strongly that the Civil Action Mediation program has been an enormous success and a blessing for the Los Angeles Superior Court.

²⁹⁰ See *supra*, footnotes 271–286 and accompanying text.

²⁹¹ Keilitz, *National Symposium*, *supra* footnote 21, at p. 8.

²⁹² Michael Fix and Philip Harter, *Hard Cases, Vulnerable People: An Analysis of Mediation Programs at the Multi-Door Courthouse of the Superior Court of the District of Columbia* (1992) p. 156.

E. RECOMMENDATIONS FOR EXPANDING THE POSITIVE EFFECTS AND AMELIORATING THE NEGATIVE EFFECTS OF CIVIL ADR

1. OVERVIEW OF THE SUBCOMMITTEE'S RECOMMENDATIONS

This section of the report discusses the subcommittee's recommendations for expanding the positive effects and minimizing the negative effects of civil ADR on courts, litigants, and the public.

The subcommittee concluded that the best overall strategy for addressing the effects of civil ADR is to encourage greater voluntary use of civil ADR processes outside of the courts, whether in the private or community arenas, while at the same time expanding the availability and use of mediation in civil cases within the courts. For the public and for litigants, the subcommittee believes that this general approach will expand access to ADR services and improve the court services, thus lessening concerns about a "two-tier" system of justice. In addition, the subcommittee believes that this approach will improve the public's perception of the courts and increase the possibility that private, community, and court-connected civil ADR programs can fulfill their potential for reducing court workloads. The subcommittee also developed specific recommendations to address negative effects or concerns that were identified. Some of these specific proposals are discussed in this section; others that address ethical standards for ADR providers and standards for court referrals to civil ADR are discussed in Parts III and IV of this report, respectively.

The subcommittee believes this overall approach is consistent with the general tenor of the public testimony it received. The sense from this testimony was that while there are problems that should be addressed, as a whole, the availability of civil ADR is a good thing for courts, litigants, and the public and voluntary ADR use should be encouraged.²⁹³ The encouragement of voluntary ADR use is also consistent with the general principles adopted by the California Dispute Resolution Council, which support widespread access to and voluntary participation in ADR processes as well as public education by the courts about

²⁹³ As one speaker stated, "Despite these very real concerns, ADR has enormous potential to improve the quality of dispute resolution through the use of processes that are appropriate to the dispute and that allow for the furtherance of values beyond public adjudication, such as civility and the preservation of continuing relationships. The availability of such options should be furthered."

ADR options.²⁹⁴ The expansion of high-quality court-connected civil ADR program is consistent with the Judicial Councils' Long Range Strategic Plan, which provides:

Support the appropriate development, maintenance, and expansion of successful alternative dispute resolution programs administered either by the courts alone or in conjunction with professional or community-based organizations.²⁹⁵

In formulating these recommendations, the subcommittee focused on issues that appeared to fall most squarely in the domain of the judicial branch and on court-related measures the Judicial Council could take to address these issues. Because of this focus, the subcommittee did not develop proposals to address all of the effects of civil ADR on the public. The impact of this decision is probably most noticeable in regard to private contractual arbitration. While the subcommittee believes strongly that the negative effects of predispute agreements for binding arbitration in contracts of adhesion should be addressed, it is not recommending Judicial Council action in this area. The subcommittee concluded that the fundamental issues and proposed solutions in this area are rooted in matters of substantive contract and private arbitration law and do not fall within the auspices of court administration, practice, and procedure. The subcommittee notes that there are ongoing legislative and other efforts by others who have a strong, direct interest in addressing these issues.²⁹⁶

2. ADR INFORMATION SHARING

To ensure that litigants in civil cases have information about ADR options and are encouraged to voluntarily use ADR:

²⁹⁴ California Dispute Resolution Council, *Dispute Resolution Principles*.

²⁹⁵ Judicial Council of California, *Long-Range Strategic Plan* (as updated on April 29, 1999), Goal IV, Policy Direction 5.

²⁹⁶ As California Supreme Court Justice Kathryn Werdegar noted in her recent article, while there are clearly issues relating to the fairness of private ADR processes that need to be addressed, “not all of these issues are within the purview of the courts; some must be resolved by legislation, some by market forces and the sound judgment of ADR providers.” *Werdegar, The Courts and Private ADR*, *supra* footnote 48.

Recommendation 1

The subcommittee recommends that the Judicial Council adopt rule 1590 et seq. of the California Rules of Court, as set forth in Appendix 1 (page 16 et seq.), to:

- **Require courts to provide an ADR Information Package to plaintiffs, including**
 - **General information about the advantages and disadvantages of ADR;**
 - **Information about the programs available in that court;**
 - **In counties with a Dispute Resolution Programs Act (DRPA) program information about DRPA-funded programs;**
 - **A form on which the parties can indicate their willingness to participate in an ADR process; and**
 - **A form that parties can use to stipulate to ADR.**

- **Require that plaintiffs serve the ADR Information Package, including a completed form regarding willingness to use ADR, on all defendants and that all defendants serve the completed form regarding willingness to use ADR.**

- **Require in courts that do not hold case management conferences that the parties meet and confer about ADR no later than 90 days following the filing of the complaint**

- **Authorize courts to cancel or continue a case management conference if the parties stipulate to use ADR.**

These recommendations focus on providing litigants in civil cases with information about ADR and with multiple opportunities to consider using ADR. The intent is to educate and promote discussions between attorneys and their clients about ADR early in the litigation process and to encourage them to voluntarily agree to ADR.

The subcommittee recommends that parties in civil cases be required to exchange information about ADR and about their willingness to participate in an ADR process at the time of service of the initial pleadings. In conjunction with existing and proposed requirements for discussing ADR at a mandatory meet-and-confer and the requirement for considering ADR at the case management conference,²⁹⁷ this would create layered opportunities for the parties in civil cases to consider and agree to the use of ADR. The recommendation that courts be authorized to cancel or continue a scheduled case management conference if the parties stipulate to the

²⁹⁷ Cal. Rules of Court, rules 212 and 512, as amended, effective July 1, 1999.

use of ADR is intended to give litigants additional incentive to agree to ADR. This proposal is modeled in part after local court rules in Fresno, Santa Clara, and Sonoma Counties that require plaintiffs in civil cases to serve ADR information on defendants along with the complaint.²⁹⁸ Local court rules and forms in Fresno and Sonoma Counties require parties to share information about their willingness to participate in ADR and require courts to provide an ADR stipulation form.

The idea of having courts provide parties in civil cases with information about ADR is by no means new. A number of statutes, rules of court, standards of judicial administration, and other provisions already require or urge courts, under various circumstances, to provide parties with information about ADR:

- Statutes of 1996, chapter 942 requires that in counties that elect to participate in the DRPA, parties be notified of the availability of the programs funded pursuant to the DRPA “in a manner that is determined by the Judicial Council.”
- Rule 1639 of the California Rules of Court, requires courts that are participating in the Civil Action Mediation program to “make available educational material, adopted by the Judicial Council, or from other sources, describing available ADR processes in the community.”
- Section 32.5 of the California Standards of Judicial Administration (adopted effective January 1, 1999) urges courts to “take appropriate measures to ensure that the parties are aware of and consider ADR processes early” in all cases where the court determines that ADR may be appropriate; at a minimum, courts are urged to provide the parties with “information about the ADR methods available, the advantages and disadvantages of each method for the case, the procedures for selecting neutrals, and the identity of court staff who can assist the parties with the selection of an ADR method.”²⁹⁹

²⁹⁸ It is also similar to recommendations made in a 1992 consultants’ report to a Judicial Council Advisory Committee on ADR. See Jay Folberg, Joshua Rosenberg, and Robert Barrett, *Use of ADR in California Courts: Findings and Proposals* (Spring 1992) 26 U.S.F. L. Rev. 343, 409.

²⁹⁹ The Judicial Council also recommended in its July 1992 *Report to the Legislature on Alternative Adjudication of Small Claims Actions* that, if adequate funding is available, the courts should work with ADR providers, the State Bar, local bar associations, small claims advisor programs, and other appropriate groups to determine the most efficient and effective way to provide information to disputants about existing ADR programs. The information may be disseminated in person and by recorded phone messages, written brochures, videotapes, and other appropriate methods. This report also recommended pilot projects to test referral of small claims disputes to ADR programs, including distribution of educational materials describing the local ADR programs and encouraging their use.

- Section 32 of the Standards of Judicial Administration urges courts to “jointly develop ADR information and provide education programs for parties who are not represented by counsel.”
- The General Principles concerning court-related ADR that were approved by the Judicial Council in May 1992 state that “Education about ADR is needed for parties, their attorneys, and judges” and that “Educational materials, such as brochures and videotapes, explaining ADR should be available at the court.”

The subcommittee’s proposal is designed to tie this patchwork of provisions together and establish a more global requirement that courts provide parties with this information.

The subcommittee discussed but ultimately rejected the idea of proposing a rule requiring attorneys to provide information about ADR to their clients. The subcommittee believed that this approach could interfere with the attorney-client relationship, create enforcement problems and ancillary disputes and, absent other incentives, would not necessarily result in litigants being encouraged to consider ADR options. Instead, the subcommittee ultimately concluded that the best way to promote discussions of ADR between attorneys and clients is to create an atmosphere in which the consideration and use of ADR is a normal part of the dispute resolution process. The subcommittee believes that attorney-client discussions of ADR will occur as a natural consequence of such an atmosphere, without the necessity that they be mandated or policed.

3. COURT LISTS OF NEUTRALS

To provide civil litigants with information they need to select an ADR provider and to improve access to private civil ADR services for low-income litigants:

Recommendation 2

The subcommittee recommends that the Judicial Council adopt rule 1580.1 of the California Rules of Court, as set forth in Appendix 1 (page 14), requiring that if a court makes a list of ADR providers available to litigants:

- **The list contain, at a minimum, information about the types of ADR services available from each provider; each provider’s résumé, including his or her ADR training and experience; and the fees charged by each provider.**

- **To be included on a court list, an ADR provider must agree to serve as an ADR neutral on a pro bono or limited-fee basis in at least one case per year, if requested by the court.**

This proposal is intended to ensure that if a court makes a list of ADR providers available to civil litigants, the list contains information that helps litigants make an informed choice among providers. The requirement that, in order to be included on the list, providers accept at least one pro bono or modest-means case from the court each year is intended to increase access to ADR services for low-income litigants and help to mitigate concerns about a “two-tier” justice system.

This proposal is modeled in part on local court rules from Santa Clara and Sonoma Counties. Several courts, including those in Marin, San Mateo, Santa Clara, and Sonoma Counties, make lists of ADR providers available to litigants. The proposal does not specify how this list is to be maintained; some courts are currently maintaining such lists themselves, while others are relying on local county bar associations to maintain them. Policies in both San Mateo and Santa Clara Counties require a pro bono commitment from providers similar to that proposed by the subcommittee.

The subcommittee discussed proposals to add a provision to this rule addressing local requirements on the qualifications of providers, including proposals requiring that local lists of mediators not be limited to attorneys. The subcommittee supported the concept that courts should establish reasonable qualification criteria for providers on court lists and that lists of mediators should not be limited to attorneys. However, the subcommittee noted that section 33 of the Standards of Judicial Administration already sets forth recommendations concerning identification of neutral persons for court lists or panels.

4. ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENTS

To encourage further use of voluntary mediation in civil cases:

Recommendation 3

The subcommittee recommends that the Judicial Council direct the appropriate standing advisory committee to further explore options for enhancing the enforceability of mediated settlement agreements.

Currently, if parties to a private mediation in which no civil complaint has been filed in court enter into a settlement agreement and one party subsequently fails to honor that agreement, the other party's only legal remedy is to pursue a contract action in court. The subcommittee believes that further use of private mediation could be encouraged if there were a way for courts to expedite enforcement of such mediated settlement agreements. The subcommittee considered various approaches to this issue, including (1) amending Code of Civil Procedure section 664.6, which permits the entry of settlements as judgments in cases that have been filed in court; (2) adoption of provisions similar to Code of Civil Procedure section 1132 et seq., which establishes a procedure for entry of money judgments where no action has been filed; and (3) amending the contractual arbitration statutes to provide for such enforceability, an approach under consideration by a committee of the National Conference of Commissioners on Uniform State Laws, which is currently developing a proposed uniform state law on mediation.

The subcommittee was not able, in the time available, to agree on the best way to enhance the enforceability of mediated settlement agreements, but it believes that this concept has merit and should be further pursued.

5. COURT REFERRALS TO VOLUNTARY MEDIATION

To enhance early voluntary mediation use in civil cases, cultivate a presumption within the legal culture that it is appropriate to try ADR, and through this presumption and experience with mediation, encourage future voluntary ADR use:

Recommendation 4

The subcommittee recommends that the Judicial Council sponsor legislation to enact Code of Civil Procedure section 1760 et seq. and adopt rule 1620 et seq. of the California Rules of Court, as set forth in Appendix 2, to authorize courts to refer general civil cases to mediation at the first case management conference or similar event, but permit parties to opt out of such a referral. As part of this legislation, provide that the parties select the neutral person and are responsible for the costs of the process, including the neutral's fees.

This proposal would authorize all trial courts to implement a voluntary, market-rate civil mediation program similar to those of courts in San Mateo and Santa Clara Counties and other counties, but with an opt-out rather than an opt-in referral mechanism.

This proposal is designed to achieve a number of different goals. First, it is intended to increase public access to dispute resolution services by permitting all trial courts to refer civil cases to voluntary mediation. This, in turn, should increase civil litigants' opportunities to experience the benefits of ADR, improve the public's perception of the courts, and, by improving the services available in the public courts, address concerns about the private ADR market's creating a "two-tier" system of justice.³⁰⁰

Second, the proposal embodies the basic presumption that it is appropriate for the parties to try some form of ADR to help resolve the dispute as early as possible.³⁰¹ It is intended, along with recommendations 1 and 2, to help foster a cultural shift toward the voluntary use of ADR, to overcome the legitimacy barrier that still appears to interfere with litigants' willingness to voluntarily pursue ADR. One study has found that court adoption of an ADR program helps to legitimize ADR use within the local legal community; attorneys who practice in a county in which the local court has an ADR program are less hesitant to refer clients to mediation.³⁰² On a practical level, the proposal also attempts to achieve this goal by providing civil litigants with an opportunity to experience mediation. This same study noted above found that experience in mediation helps overcome the cultural obstacles to the future use of ADR; prior experience in mediation was the strongest predictor of whether lawyers would subsequently refer clients to mediation.³⁰³

Finally, this proposal is intended to foster the apparent benefits of a voluntary program—higher resolution rates and higher satisfaction—while at the same time fostering high rates of participation in the program. To achieve these goals, the proposal is structured to make all general civil cases eligible for referral to mediation, but also to permit any party to opt out of participating in the mediation. This maintains the voluntary nature of the program—any party who does not want to participate in mediation can simply opt out—but should also result in the use of mediation in a greater proportion of civil cases than if litigants were required to opt in to a mediation referral. Studies have found that while litigants rarely choose

³⁰⁰ The subcommittee notes that this statutory authorization alone is not sufficient for this promise to be fulfilled. Courts will need assistance and encouragement to implement high-quality mediation programs. The subcommittee is therefore recommending that this referral authority be coupled with judicial education efforts (recommendation 6), the designation of knowledgeable staff within the courts to oversee the ADR programs (recommendation 7), funding for such staff (recommendations 8 and 9), and the designation of staff at the Administrative Office of the Courts to assist in these efforts (recommendation 11).

³⁰¹ This is similar in concept to the Federal Alternative Dispute Resolution Act on 1998 (28 U.S.C.A. § 651), which requires each Federal District courts to authorize the use of ADR in all civil actions.

³⁰² Rogers and McEwen, *Employing the Law*, *supra* footnote 196, pp. 831, 842–845.

³⁰³ *Ibid.*

to opt in to an ADR program, they also rarely choose to opt out once they have been referred to it.³⁰⁴

The subcommittee considered, but ultimately chose not to recommend, a proposal authorizing all courts to make mandatory referrals to mediation. While such an approach would ensure high participation rates, as noted above, the subcommittee wanted to achieve the greater participant satisfaction and higher resolution rates that appear to be present in voluntary programs. In addition, current law already establishes a program for mandatory mediation of civil cases valued at \$50,000 or below that courts may implement.

The subcommittee also considered, but ultimately chose not to recommend, authorizing voluntary referrals of civil cases to a wider range of ADR processes. While the subcommittee believed parties should consider all available ADR options, it thought that, for court referrals, mediation was a good starting point. Because mediation is a consensual, facilitative process at the other end of the dispute resolution continuum from adjudication, its addition to the courts' menu of dispute resolution options enhances litigants' awareness of alternatives to adjudication and greatly expands litigants' range of choices. And probably because it is a facilitative, consensual process, mediation was universally praised and supported by those who submitted testimony to the subcommittee.

Consistent with the subcommittee's approach of maximizing disputants' choices and its specific recommendations in the area of references (see section IV of this report), this proposal embodies the basic rule that the neutral is to be selected by the parties. Selection of the neutral by the court would be a backup only when the parties fail to select the neutral. This approach is consistent with testimony to the subcommittee³⁰⁵ and with the Dispute Resolution Principles of the California Dispute Resolution Council (CDRC), which provide that, to the maximum

³⁰⁴ See Rosenberg and Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, *supra* footnote 21, at p.1538 [Despite the fact that over 80 percent of the attorneys said they would select (ENE) Early Neutral Evaluation in other cases if it were available, no attorney whose case was not administratively assigned to ENE requested to participate in the program. However, few of those whose cases were assigned to ENE opted out of this process even though they could.]; *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers*, Federal Judicial Center and the CPR Institute for Dispute Resolution (1996) [The voluntary arbitration courts with opt-out procedures had significant caseloads compared with those that had opt-in procedures.]

³⁰⁵ As one person stated, "The parties should always have an opportunity to have input and freely select their neutral, as long as they've met the minimum qualification that the court lays out. This is probably — this is one of, I think, the two major complaints about judicial reference or mediation, court-ordered mediation, in some of those statutory areas that allow for it. What you hear, is "I didn't get a say." Parties should always have a free opportunity, first, to determine and to have input about who their referee or their mediator will be."

practical extent, parties should be free to select providers of ADR services for their disputes.

Perhaps the most controversial aspect of this proposal is that it would require the parties to pay the mediators' fees. However, a number of protections are built into the proposal to prevent the reoccurrence here of the kinds of problems discussed in connection with nonconsensual references. First, participation in mediation under this proposal is voluntary; if any party does not feel that participation would be worth the cost of mediation, he or she is not required to participate.³⁰⁶ Second, the mediation process itself is consensual; unlike a in reference, parties are free to end a mediation at any time if they no longer wish to participate. Third, if a party does want to participate, but cannot afford the mediators' fees, under the subcommittee's recommendation 3 above, the courts can request pro bono or low-cost services from a mediator on the court's list. Finally, the parties select the mediator and are therefore free to take into account the mediator's fees in making that selection. Where a court does not have the resources to provide reasonable compensation to ADR providers, the subcommittee believes that this market rate plus pro bono approach balances concerns about access to ADR services and concerns about attracting and keeping highly qualified providers in court-connected civil ADR programs.

6. EARLY MEDIATION PILOT PROJECT

To permit limited experimentation with mandatory mediation in large civil cases and to complement the existing mandatory mediation program for smaller cases in Los Angeles:

Recommendation 5

The subcommittee recommends that the Judicial Council sponsor legislation to enact Code of Civil Procedure section 1780 et seq., as set forth in Appendix 3, to create a pilot project in the Los Angeles Superior Court authorizing the court to hold an early status conference at which the court could refer cases valued at over \$50,000 to mandatory mediation. As part of this legislation, provide that the parties select the mediator and are required to pay for the

³⁰⁶ This is consistent with the General Principles relating to ADR adopted by the Judicial Council in May 1992 and with the National Standards for Court-Connected Mediation Programs developed in 1992 by the Center for Dispute Settlement and the Institute of Judicial Administration, under grant from the State Justice Institute, both of which suggest that parties not be required to pay fees if participation in an ADR process is mandated by the court.

mediator's services, up to the fee for a maximum number of hours agreed upon by the parties, or if the parties do not agree, up to three hours.

The Judicial Council sponsored a bill in the 1997–1998 legislative session to create this same pilot project; the subcommittee recommends that the council renew its sponsorship of this proposal. It would allow limited experimentation with early, mandatory mediation in civil cases in Los Angeles Superior Court. The implementation in Los Angeles will allow the court to match its current Civil Action Mediation program for cases of \$50,000 and under with this program for larger cases.

The controversial aspect of this proposal is that it would require the parties to pay the mediator's fees up to the specified cap. Unlike the program outlined in the subcommittee's recommendation 5, participation in this program would be mandatory. However, this proposal includes other protections against the imposition of large fees on the parties. As in the subcommittee's other proposed mediation program, the parties select the neutral, they can withdraw from the process at any time, and pro bono services would be available. In addition, the parties' financial obligation for the mediation would be capped by setting a maximum number of hours of mediation in the referral order.

The subcommittee understands that the Legislature has recently enacted a bill authorizing the creation of civil mediation pilot programs in four courts, including two programs in which the courts are authorized to make mandatory referrals of civil cases to mediation and can compensate the mediators from court funds.³⁰⁷ The subcommittee believes that its proposed pilot program is sufficiently different to merit continued support from the council. Unlike the other pilot programs, this is a party-paid model—an option which courts may want to explore if court funds are not available to pay mediators. Implementation of both types of pilots at the same time will permit the council to compare results of both the court-paid and the party-paid models.

7. ADR EDUCATION FOR JUDGES AND COURT STAFF

In order to provide judges and court staff with the information they need to make appropriate referrals of civil cases to ADR processes:

³⁰⁷ Chapter 67, Statutes of 1999 (Assembly Bill 110S), Section 4.

Recommendation 6

The subcommittee recommends that the Judicial Council direct staff to develop proposals for additional education programs for judges and court staff on ADR, particularly on identifying cases appropriate for referral to specific ADR processes.

The subcommittee believes that if courts are to help parties make appropriate choices among ADR process and are to knowledgeably exercise their own power to make referrals to ADR, both judges and court staff must be educated about ADR. Many of the concerns expressed about current court-related civil ADR programs stemmed from what were perceived as inappropriate referrals by the courts. Rather than saving litigants time and money and increasing their satisfaction, inappropriate referrals may end up costing litigants more time and money and decreasing their satisfaction with the particular dispute resolution process and with the courts overall. Education about ADR, particularly about which processes are most appropriate for certain types of civil disputes, may help the courts assist the parties in selecting the most appropriate ADR process.

8. ADR PROGRAM STAFFING

To provide the staff support necessary for implementation and administration of high-quality, successful, court-related civil ADR programs:

Recommendation 7

The subcommittee recommends that the Judicial Council adopt rule 1580.3 of the California Rules of Court, as set forth in Appendix 1 (page 15), requiring courts to designate a court employee who is knowledgeable about ADR to serve as ADR program administrator.

Recommendation 8

The subcommittee recommends that the Judicial Council place a high priority within the trial court funding process on requests from trial courts for additional funding for ADR program staffing.

Recommendation 9

The subcommittee recommends that the Judicial Council urge courts to place a high priority on ADR program staffing in the allocation of their court operations funding.

The subcommittee believes that appropriate staff support is an essential element of a high-quality, successful court-related civil ADR program. In the Federal Judicial Center’s study of ADR programs in several federal courts, survey participants identified professional management of the ADR program as one of the conditions needed to make the ADR programs work.³⁰⁸ The need for courts to have professional ADR program staff and the funding to support such staff were also noted in the public testimony received by the subcommittee.³⁰⁹ All the court-related civil ADR programs that appear to be most highly regarded have professional staff.

The subcommittee debated whether to recommend a rule of court requiring the designation of knowledgeable staff or a standard of judicial administration urging courts to designate such staff. The subcommittee concluded that, as is currently the case for the judicial arbitration program, designation of staff for the administration of court-related civil ADR as a whole should be required by rule. In fact, as has occurred in several courts, administration of the existing judicial arbitration can be integrated into overall civil ADR program management, with one professional staff person overseeing all civil ADR programs.

A number of superior courts, including those in Contra Costa, Los Angeles, San Mateo, Santa Clara, and Ventura Counties have civil ADR program administration staff. The funding for these positions has been created in a variety of ways. Some courts, such as in Ventura County, have shifted existing court positions in order to provide ADR program staff. The Multi-Option Appropriate Dispute Resolution Program (MAP) in San Mateo is supported by contributions from the court, the county bar association, and local community dispute resolution center. Some courts, such as in Contra Costa and Los Angeles Counties, have received at least initial funding for staff support through a DRPA grant. While the subcommittee supports and admires the creative efforts undertaken to provide staff support for these court-related civil ADR programs, not all courts have been able to provide such staffing. The subcommittee believes it is important that funds be made

³⁰⁸ Stienstra et al., *Report to the Judicial Conference Committee*, *supra* footnote 23, at p. 192.

³⁰⁹ One person noted that the obvious corollary to the suggestion for expanding ADR is that budget resources need to be made available to support this effort. “ADR cannot simply be made an add-on task of an already overworked court administrator. It must be given the dignity and priority in each county — and throughout the appellate system — it deserves if it is to be taken seriously.”

available to hire such staff. We therefore recommend that funding for civil ADR program administrative staff be given a high priority both by the council in the consideration of requests for new funds and by courts themselves in the allocation of their trial court operations funding.

9. JUDICIAL COUNCIL AND AOC ROLE

To provide the council with information about the different models of court-related civil ADR programs operating in the California courts and to provide courts with information and assistance in the design, implementation, and administration of high-quality, successful, court-related civil ADR programs:

Recommendation 10

The subcommittee recommends that the Judicial Council adopt rule 1580.2 of the California Rules of Court, as set forth in Appendix 1 (page 14), requiring courts to submit information on their ADR programs to the council.

Recommendation 11

The subcommittee recommends that the Judicial Council direct the Administrative Director of the Courts to designate staff within Administrative Office of the Courts to focus on court-related ADR issues including:

- **Developing and sponsoring educational programs for judges and court staff concerning ADR;**
- **Gathering information about court-related ADR programs in California and in other states and acting as a statewide clearinghouse to provide this information to the courts.**
- **Developing proposals for statewide rules of court or standards concerning court-related ADR programs.**

As became clear when the subcommittee began its task, there is almost no current statewide information on court-related civil ADR programs in California. The subcommittee believes that, in addition to professional staffing, ongoing program monitoring and evaluation are essential to maintaining high-quality court-related ADR programs. Such information collection is also essential to determine what program models are most successful so they can be replicated. While some civil ADR programs are collecting statistics at a local level, the data collected by

different courts is not necessarily comparable. The subcommittee believes that the Judicial Council/Administrative Office of the Courts can play an important coordinating role by collecting, analyzing, and disseminating this information on a statewide basis. Collecting this information will also allow California to provide national leadership in civil ADR and serve as a constructive model for other states.

As it recommended for the courts, the subcommittee believes it is important for the Administrative Office of the Courts (AOC) to designate staff within its office to focus on court-related civil ADR. Such staff could coordinate the statewide data collection and analysis, monitor developments in the field of court-related civil ADR in California and in other states, and serve as a resource for trial courts on these topics. The subcommittee's recommendation is similar to one made in a consultant's 1992 report to a Judicial Council Advisory Committee on Alternative Dispute Resolution.³¹⁰ The subcommittee understands that, in conjunction with the newly authorized mediation pilot projects, funds for some AOC staff focusing on civil ADR has already been included in the budget beginning in January 1999.

³¹⁰ Folberg et al., *Use of ADR in California Courts*, *supra* footnote 298, p. 343. This consultant's report recommends, among other things, that the Judicial Council should provide ongoing statewide coordination of court-related ADR, including:

- Continuing development and refinement of criteria for ADR providers regionally and statewide;
- Coordinating local efforts to develop complete listings of available qualified providers;
- Overseeing, coordinating, helping to fund, and reporting on local ADR grants and pilot programs;
- Updating ADR information for all courts;
- Coordinating ADR development with the State Bar and other appropriate agencies;
- Encouraging coordination of high-profile ADR initiatives in California courts; seeking additional funding from the Institute of Judicial Administration, National Institute for Dispute Resolution, and other funding sources.

III. ETHICAL STANDARDS AND ENFORCEMENT

This section of the report discusses the subcommittee's conclusions and recommendations relating to what entity has or should have the authority to adopt ethical standards for retired judges, attorneys, and/or nonattorneys acting as arbitrators or mediators and what ethical standards, if any, should be adopted by that entity.

To help in its task of identifying appropriate regulatory entities and gaps in existing ethical standards, the subcommittee constructed a table that identifies the major categories of civil ADR providers and existing ethical rules and authorities governing those providers (see Appendix 12). The table covers both court-connected civil ADR activities (including use of temporary judges, references, judicial arbitration, and court-ordered mediation) and private ADR activities (including contractual arbitration and mediation). Under each ADR activity, the table notes if that activity must be performed by a member of the State Bar or retired judicial officer, as opposed to a layperson, since this effects what enforcement mechanisms are available.

As this table shows, no one body is responsible for establishing ethical standards for ADR providers. Ethical standards for various types of civil ADR providers are established by a variety of bodies, including by the Legislature through statute, by the Supreme Court through the California Code of Judicial Ethics and the Rules of Professional Conduct of the State Bar of California for court-related programs by the Judicial Council through the California Rules of Court and by local courts through local rules, and for private providers through codes of ethics adopted by providers or professional organizations. Enforcement mechanisms also vary depending on whether or not the ADR provider is an attorney and what type of dispute resolution service is being provided.

A. CANON 6D ACTIVITIES: TEMPORARY JUDGES, REFEREES, COURT-APPOINTED ARBITRATORS

Because persons serving as temporary judges, referees, and court-appointed arbitrators all fall under the new Canon 6D of the Code of Judicial Ethics, these three categories of ADR providers are discussed together.

Canon 6D of the Code of Judicial Ethics, as recently revised, applies certain provisions of the Code of Judicial Ethics and similar requirements to all persons, both attorneys and nonattorneys, serving as temporary judges, referees, and court-

appointed arbitrators.³¹¹ Canon 6D includes disclosure and disqualification requirements and bans on the acceptance of gifts from persons whose interests have come before the neutral. The application of Canon 6D's requirements is staggered, with almost all the same restrictions that apply to sitting judges applying to temporary judges, referees, and court-appointed arbitrators while they are actually presiding in a proceeding or communicating with the parties, counsel, or court personnel. Fewer restrictions apply as the time period is extended to: 1) the entire period of appointment; 2) until the matter is no longer pending in court; 3) until two years after the case is no longer pending in court; and 4) indefinitely. A corresponding rule of the Rules of Professional Conduct requires that members of the Bar who serve in any of these capacities comply with Canon 6.³¹² This rule serves as the basis for the enforcement of Canon 6D through the attorney discipline system.³¹³

The subcommittee believes that Canon 6D applies appropriate fundamental ethical principles relating to judicial service to temporary judges, referees, and court-appointed arbitrators. The subcommittee is therefore not recommending any changes to Canon 6D except for the recommendation outlined in subsection C below.

The subcommittee is recommending amendments to the California Rules of Court it believes will expand the available enforcement authority, increase compliance with Canon 6D's provisions, and enhance the disclosure requirements applicable to persons serving in these capacities:

³¹¹ See Appendix 12 for a summary of the provisions of Canon 6D.

³¹² Cal. Rules Prof. Conduct, rule 1-710 provides:

(A) For purposes of this rule:

(1) "Temporary judge" means a member who serves or expects to serve as a judge once, sporadically, or regularly on a part-time basis under a separate court appointment for each period of service or for each case hear;

(2) "Referee" means a member who is acting as a judicial officer to try or all of the issues in an action or proceeding, whether of fact or law, pursuant to Code Civ. Proc. §§ 638 or 639; and

(3) "Court-appointed arbitrator" means a member who is acting as a judicial officer to conduct proceeding pursuant to Code of Civ. Proc. § 1141.11.

(B) A member who is serving as a temporary judge, referee, or court-appointed arbitrator shall comply with Canon 6 of the Code of Judicial Ethics.

³¹³ Because of the backlog of attorney discipline cases resulting from prior staff and budget reductions at the State Bar, the Bar is currently investigating and presenting only high priority matters. It is not clear at this time how complaints relating to violations of Canon 6D will be prioritized during the backlog reduction period.

Recommendation 12

The subcommittee recommends that the Judicial Council amend the existing rules of court relating to temporary judges, referees, and arbitrators in the judicial arbitration program as set forth in Appendix 4 to:

- **Require that they disclose any prior public State Bar discipline or court finding of violation of the California Code of Judicial Ethics and certify, on a form adopted by the Judicial Council, that they are aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and other ethical requirements.**
- **Add past service as an expert witness or attorney for any party to the list of specific prior relationships that must be disclosed, and in order to correspond to the time period covered by Canon 6D's ban on acceptance of gifts, lengthen the period covered by this disclosure requirement from the prior 18 months to the prior 24 months.**
- **Require that any former California judicial officer must be a member (active or inactive) of the State Bar in order to serve as a referee or arbitrator in the judicial arbitration program.**

To inform potential temporary judges, referees, and court-appointed arbitrators about Canon 6D and encourage compliance, the subcommittee is recommending that temporary judges, referees, and court-appointed arbitrators certify that they are aware of and will comply with Canon 6 of the Code of Judicial Ethics and other applicable ethical requirements.

As noted above, Canon 6D works in conjunction with Rule of Professional Conduct 1-710, which gives the State Bar the ability to impose sanctions for violations of Canon 6D. While temporary judges are required to be members of the State Bar and are therefore subject to the authority of the attorney discipline system for violations of Canon 6D, referees and court-appointed arbitrators are not required to be members of the State Bar. Those that are not members of the bar are not subject to the authority of the attorney discipline system. Retired judges are among those who frequently serve in these capacities but who often are not members of the bar.³¹⁴ In order to make enforcement of Canon 6D through the

³¹⁴ Under the California Constitution, while holding office, judges are not members of the Bar; Article 6, section 9 of the California Constitution provides: "The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." It is the subcommittee's understanding that when judges leave office, they are sent a notice asking if they

attorney discipline system an option for a greater proportion of referees and court-appointed arbitrators, the subcommittee is recommending that former judicial officers be required to be members of the bar in order to be appointed as referees or court-appointed arbitrators. Since the authority of the attorney discipline system extends to both active and inactive bar members, retired judges could reinstate themselves as inactive members of the bar. This would not create a financial burden on retired judges, as the fee for inactive membership in the State Bar is only \$50. In addition, the requirement would not affect the ability of retired judges to serve on assignment; retired judges who are inactive members of the bar are still eligible to participate in the Assigned Judges Program.

Even with this proposed change, some referees and court-appointed arbitrators would not be members of the bar and thus would be outside the reach of the attorney discipline system. The subcommittee considered, but ultimately rejected, a proposal to provide for uniform enforcement authority by requiring that all referees and court-appointed arbitrators be members of the bar. The subcommittee believed that this would exclude qualified individuals from serving as referees or arbitrators and would cause much more harm than good. For example, accountants are sometimes appointed as referees to aid the court with financial issues. An across-the-board State Bar membership requirement would preclude such appointments. While not subject to the authority of the attorney discipline system, nonattorney referees and court-appointed arbitrators are still subject to removal by the appointing court for violation of Canon 6D.

Since the parties play a role in selecting all temporary judges, referees, and court-appointed arbitrators,³¹⁵ the marketplace also contributes to regulating the behavior of these ADR providers. To harness the power of the marketplace in encouraging compliance with Canon 6D and other ethical standards, the subcommittee recommends temporary judges, referees, and court-appointed arbitrators be required to disclose any prior public State Bar discipline or court finding of violation of the Code of Judicial Ethics. This disclosure would help parties make appropriate selection decisions and knowing that any negative finding will influence these decisions will encourage providers to comply with applicable ethical requirements.

To further assist parties in selecting an ADR provider and to clarify disclosure requirements for providers, the subcommittee recommends that the current list of specific prior relationships that must be disclosed by temporary judges, referees,

would like to reinstate their State Bar membership on either an active or inactive basis. Many do not reinstate this membership. A California Judges Association poll of its members who had retired between September 1983 and December 1997 indicated that only 4 percent had reactivated their bar memberships upon retirement from the bench.

³¹⁵ See neutral selection process in first column of table in Appendix 12 of this report.

and court-appointed arbitrators be expanded to include past service as an expert witness or attorney for any party. Although these prior relationships would probably have to be disclosed under the existing requirement for disclosure of “any facts that might be grounds for disqualification,” adding them to the list of categorical disclosures clarifies this requirement. Finally, the subcommittee recommends that the time period covered by this disclosure requirement be expanded from the prior 18 months to the prior 24 months. The 24-month period corresponds more closely with Canon 6D’s ban on acceptance of gifts for two years after a matter is no longer pending in any court, reducing somewhat the differences in record-keeping requirements for providers.

B. MEDIATORS AND EVALUATORS IN COURT-RELATED CIVIL ADR PROGRAMS

The second group of ADR providers discussed by the subcommittee are mediators and neutral evaluators serving in court-connected programs for civil cases. These providers are not covered by Canon 6D or any other statewide ethical requirements. Many courts, including superior courts in Contra Costa, San Francisco, San Mateo, and Santa Clara Counties, have adopted ethical standards applicable to these providers.

To provide ethical guidelines for mediators and other providers in court-related civil ADR programs:

Recommendation 13

The subcommittee recommends that the Judicial Council, in the short term, adopt rules 1580.1 and 1619 of the California Rules of Court, as set forth in Appendix 5, requiring:

- **Courts that maintain a panel of mediators or make a list of mediators available to litigants to adopt ethical standards applicable to the mediators on the courts’ panel or list.**
- **Courts that maintain a panel of ADR providers or make a list of ADR providers available to litigants to require that, to be included on the list, ADR providers sign a certificate agreeing to comply with all applicable ethical requirements.**

Recommendation 14

The subcommittee recommends that the Judicial Council, for the long term, appoint a task force that includes representatives of court-related mediation programs and ADR providers to develop a set of model ethical standards for court-related mediation programs for consideration by the council.

The subcommittee believes that, because these providers are serving in court-related ADR programs, the judicial branch should be responsible for establishing ethical standards applicable to these providers. The subcommittee also believes that, ultimately, a single set of statewide standards should be applicable to mediators and neutral evaluators in court-related civil ADR programs. Those submitting testimony to the subcommittee on this issue appeared to generally support this approach, suggesting that statewide standards for court-connected civil ADR programs would be helpful³¹⁶ and pointing to the courts as the appropriate entity to adopt standards for providers serving in court-related programs.³¹⁷

There was no apparent consensus, however, on what the statewide standards should be. Several sets of existing ethical standards were noted as potential models, including the Standards of Practice for California Mediators of the California Dispute Resolution Council, the Society for Professionals in Dispute Resolution/American Arbitration Association/American Bar Association Standards of Conduct for Mediators, AAA and JAMS/Endispute standards for their panelists and standards adopted by the trial courts in Contra Costa and San Mateo County. Several participants in the public hearings cautioned the subcommittee about applying standards developed for providers in adjudicatory processes, such as arbitration, to mediators or other providers in facilitative processes. Others cautioned the subcommittee about the imposition of unnecessarily burdensome standards that might discourage providers from serving in court-related programs. The subcommittee believes that, to provide a range of perspectives and expertise on these issues, proposed statewide standards for providers in court-related civil ADR programs should be developed by a broad-

³¹⁶ The manager of one court-related ADR program stated, “I see some real value in statewide ethics standards..... I have panelists who operate in four or five different counties. They’re operating sometimes under three, four, five different rules of ethics. While they don’t vary greatly, there have been instances of confusion. It would be helpful to us to have some kind of basic statewide standards that, at the very least, we could build on.”

³¹⁷ One person who testified at the subcommittee’s public hearings noted, “In regulating ADR, it certainly appears, and to me is appropriate, for courts to regulate court-connected ADR, and that’s whether it’s in areas of disclosure, qualification standards, how the neutrals are selected, whether it be in the judicial reference area like 639(e), or in some other kind of court-mandated ADR-like mediation that is happening in certain degrees around the state.”

based group that includes providers who serve on local court civil ADR programs, as well as court civil ADR program managers, judges, and others.

Because reaching consensus on such standards could be a lengthy process,³¹⁸ the subcommittee recommends that, in the short term, local courts be required to adopt ethical standards for providers serving in their civil ADR programs. Courts do not have to start from scratch in this regard; as noted above, there are several sets of existing standards which courts can consider. All of these standards are similar and address the issue of impartiality, including required disclosures by the mediator. The subcommittee understands that, in the short term, this proposal may result in the adoption of different standards in different courts and that such lack of uniformity may create problems for neutrals and litigants involved in cases in more than one county. However, until statewide standards are developed and adopted, the subcommittee believes that it is beneficial for local courts, bar associations, and ADR providers to engage in discussions about the appropriate ethical standards for such providers. These discussions will not only educate participants about potential ethical issues, they will also provide a wealth of information for a future Judicial Council task force in drafting statewide model standards.

C. PRIVATE AND COMMUNITY ADR PROVIDERS

As the table in Appendix 12 indicates, the Legislature has adopted a fairly comprehensive set of disclosure and disqualification requirements applicable to private arbitrators. These statutory requirements can be enforced by the courts, either directly through the disqualification of an arbitrator who fails to comply with disclosure requirements,³¹⁹ or indirectly, through vacatur of the arbitrator's award.³²⁰ In addition, many private providers, including AAA and JAMS/Endispute, and neutral professional associations such as the CDRC, have adopted ethical standards applicable to their panelists/members. However, beyond the arbitrator disclosure and disqualification requirements, no ethical standards have been established by law that are applicable to providers in private practice.

Community or governmental ADR programs that receive funding under the DRPA are required to ensure that their neutrals meet specified ethical requirements,

³¹⁸ The California Dispute Resolution Council's recently adopted set of ethical standards for mediators took several years to complete.

³¹⁹ Code Civ. Proc., § 1281.9(b) and (c) provide that arbitrators are subject to disqualification for failure to comply with the disclosure requirements in § 1281.9(a).

³²⁰ Code Civ. Proc., § 1286.2(c) provides that an arbitration award may be vacated where rights of a party were substantially prejudiced by the misconduct of a neutral arbitrator.

including requirements relating to disclosure and disqualification.³²¹ Beyond this, there are no ethical standards established by law that are applicable to community and governmental ADR providers.

Consistent with its overarching position that it should focus its efforts on issues and measures that fall most squarely within the domain of the judicial branch, the subcommittee is generally not making recommendations relating to ethical standards for private or community ADR providers who are not serving in court-related programs. The subcommittee concluded that, in general, there is an insufficient nexus between the courts and to warrant its developing recommendations applicable to these providers. The subcommittee received quite a bit of testimony cautioning it against trying to develop standards applicable to mediators or other ADR providers beyond those in court-related programs. It was noted that different expectations, goals, and interests are at stake in community ADR programs and the private ADR field than those in court-connected programs.³²² Several participants in the public hearings suggested that any effort to develop standards intended to apply to neutrals across the different fields (private, community, court-related) should be undertaken by a body that either includes representation from or is specifically formed to regulate all these fields.³²³

The subcommittee believes, however, that there is an exception to its general conclusion regarding the nexus between the courts and private or community ADR

³²¹ The regulations applicable to DRPA providers also contain disclosure and disqualification requirements. Cal. Admin Code, title 16, § 3620 provides:

- (a) A Grantee shall ensure that its dispute resolution services are provided by neutral persons.
- (b) An individual shall not function as the neutral person if he or she has any personal bias regarding any particular disputant or the subject matter of the dispute.
- (c) An individual shall not function as the neutral person if he or she has a financial interest in the subject matter of the dispute or a financial relationship with any party to the dispute resolution proceeding. The existence of such interests or relationships shall be deemed a conflict of interest.
- (d) If, before or during the provision of dispute resolution services, a neutral person has or acquires an actual or apparent conflict of interest, the neutral person shall so inform all of the disputants, and shall disqualify himself or herself as the neutral person unless all of the disputants consent in writing to continue. The Grantee shall replace a disqualified neutral person at no additional cost to any disputant.

³²² For example, one public hearing participant stated, “I think that the standards for defining an effective mediator, and the standards that we use to build our ethical framework, are often very different if you compare, say, attorney and judge mediators, who work in a legal court context, and when you look at community mediators, who are working out in the community with different parties.”

³²³ For example, one public hearing participant stated, “I personally believe that if regulations are to be had at the statewide level, that it would be my recommendation that the state should engage in creating some type of separate commission or separate department, similar to how the state of Oregon has an Oregon dispute resolution committee which oversees all of its programs and activities.”

providers, and that is found in the case of former judicial officers providing dispute resolution services. The subcommittee believes that in selecting ADR providers, the public relies in part on these former officers' prior public judicial status as an assurance of their impartiality and ethical behavior in their current role as ADR providers. This is part of the reason retired judges are an attractive choice to many litigants and members of the public seeking ADR services. The public is generally unaware that these former judicial officers, who are often referred to as "judge," are no longer legally bound to comply with the Code of Judicial Ethics. Many former judicial officers, in turn, appear to rely in part on the public's assumptions about former judicial officers in seeking ADR clients, using their former title and status as part of their marketing strategy. Because of this public reliance and provider marketing strategy, when former judicial officers in the private dispute resolution market engage in behavior that is perceived as unethical, it affects not only the public's perception of ADR, but also the public's perception of the judicial system. The subcommittee believes that, taken together, these create a nexus with the court system that warrants its recommending ethical standards governing former judicial officers providing ADR services even when they are serving in non-court related capacities.

Therefore, to encourage ethical behavior by former judicial officers who provide dispute resolution services, and thereby improve public perceptions of the judicial system:

Recommendation 15

The subcommittee recommends that the Judicial Council submit for consideration by the Supreme Court proposed Canon 6G of the California Code of Judicial Ethics, as set forth in Appendix 6, prohibiting former judicial officers who are providing dispute resolution services from accepting gifts from a party, person, or entity whose interests have come before the former judicial officer or, with certain exceptions, from counsel for such party, person, or entity. The subcommittee recommends that this canon apply for the first five years after retirement or resignation and, thereafter, for as long as such former judicial officers indicate their former status in communications concerning their availability for employment as an ADR provider.

The subcommittee believes that the appropriate entity to adopt ethical standards applicable to former judicial officers is the Supreme Court and that the appropriate form for such standards is the California Code of Judicial Ethics. The basis for such regulation is that these providers have a connection with the judicial system and therefore the regulation should come from the judicial branch. Because these standards would apply beyond the auspices of court-related ADR programs, they

do not appear to be matters of court administration, practice, or procedure appropriately addressed in a rule of court. Instead, like the ethical standards for temporary judges, referees, and court-appointed arbitrators, these appear to be matters most appropriately addressed in the canons of judicial ethics.

While the subcommittee believes that all former judicial officers who provide dispute resolution services should voluntarily comply with Canon 6D,³²⁴ the subcommittee's recommendation for the application of mandatory standards is focused on prohibiting the acceptance of gifts from parties or their attorneys. The subcommittee sees this as an appropriate place to start in applying ethical standards to former judicial officers who provide ADR services. This area has clearly been a matter of concern to the public and the judiciary.³²⁵

The subcommittee is recommending that the prohibition on accepting gifts apply for the first five years following retirement or resignation and thereafter for as long as former judges who provide private dispute resolution services indicate their former status in communications concerning their availability for employment as a dispute resolution provider. The subcommittee believes that for the first five years after retirement or resignation, it can be presumed that litigants and the public would know of and rely upon a judicial former officer's prior status, whether or not that status was used in promoting the officer's ADR services. After five years, the subcommittee believes the prohibition on gifts should be limited to circumstances in which former judicial officers use their prior status in promoting their ADR services, thus choosing to link themselves to the public court system in the minds of litigants and the public.

The subcommittee considered, but ultimately rejected, a proposal to recommend the adoption of a corresponding rule in the Rules of Professional Conduct of the State Bar of California, like Rule 1-710 for temporary judges, referees, and court-appointed arbitrators, which would give the attorney discipline system authority to enforce this proposed new canon for former judicial officers. The subcommittee concluded that, rather than enhancing enforcement, such rule might simply result in fewer former judicial officers reinstating their State Bar membership. Although without this enforcement mechanism, this proposed new canon would be largely hortatory in nature, the subcommittee believes it would establish an important standard of conduct for former judicial officers who provide ADR services.

³²⁴ In this regard, the subcommittee notes that some ADR providers are now noting in their advertising that they comply with the Code of Judicial Ethics.

³²⁵ Jean Guccione, "ADR Jurists Debate Ethics, Oversight," *Daily Journal* (March 31, 1998) p. 2; Kenneth Reich, "State Panel to Examine Standards for Private Judges," *Los Angeles Times* (December 26, 1997) p. A3; Philip Carrizosa, "Chief Justice Forms Panel to Study Rent-a-Judging," *Daily Journal* (February 25, 1998) p. 1.

IV. STANDARDS FOR COURT REFERRALS TO RETIRED JUDGES AND ATTORNEYS

This section of the report outlines the subcommittee's recommendations concerning whether the standards for court referrals to retired judges and other ADR providers need to be changed, and if so, how they should be changed.

A. REFEREES APPOINTED PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 638 ET SEQ.

The subcommittee concluded that the principal area of concern with regard to court referrals to retired judges and attorneys is the nonconsensual referral of matters, particularly discovery matters, to referees pursuant to Code of Civil Procedure section 639. As outlined above in Section II.C.3.i., the subcommittee identified three major issues of concern with regard to these references:

- The perception that these references are being made in routine discovery matters;
- The method used by a court to select the referee and the perception of favoritism in this selection process; and
- The fees charged by the referees and the courts' allocation of these fees.

To address these concerns, the subcommittee recommends that the Judicial Council sponsor legislation to amend Code of Civil Procedure section 638 et seq.:

Recommendation 16

The subcommittee recommends that the Judicial Council sponsor legislation to amend the existing statutes relating to references, as set forth in Appendix 7, to:

- **Clarify that discovery references should only be made when exceptional circumstances of the particular case require such a reference.**
- **Require that a court make a specified finding about the parties' ability to pay the referee's fees and prohibit a court from making a nonconsensual reference if the court cannot make such a finding.**
- **Clarify that courts may not consider counsel's ability to pay the referee's fees when determining whether the parties are able to pay these fees.**

- **Require that the court’s reference order include the maximum hourly rate the referee may charge, and if requested by a party, the estimated maximum number of hours for which the referee may charge.**
- **Require that the referee’s report include information about the total hours spent and the total fees charged by the referee.**
- **Require courts to appoint the referee agreed upon by the parties and create a procedure for the selection of a referee when the parties have not agreed.**
- **Require courts to forward copies of all discovery reference orders to the office of the presiding judge.**
- **Require the Judicial Council, by rule, to collect information on the use of discovery references and the fees charged to parties and to report to the Legislature on these issues.**

In developing its proposal, the subcommittee considered the proposed amendments to the reference statutes that were included in Senate Bill 19 from the 1997–98 legislative session; recent court decisions relating to references, including *Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, *Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, and *Hood v. Superior Court* (1999) 85 Cal.Rptr.2d 114; and existing rules of court on references under Code of Civil Procedure section 638 et seq.

Initially, the subcommittee considered whether these issues were more appropriately left to developing case law in this area, addressed through changes in the rules of court relating to references, or dealt with through statutory changes. The subcommittee concluded that statutory changes were needed at this time. A number of these issues, such as party input into the selection of the referee, are currently addressed by either rules of court or by case law. However, considering both the testimony received by the subcommittee and recent opinions issued by the courts, there continue to be problems in these areas. The subcommittee believes that it is important to address these problems now, rather than wait for the continued development of case law, and that statutory changes are more likely to precipitate the desired changes in practices.

Consistent with the decisions in *Taggares* and *Hood, supra*, the first of the amendments proposed by the subcommittee is intended to clarify that courts are permitted to make discovery references pursuant to Code of Civil Procedure section 639 only when the exceptional circumstances of the particular case require such a reference.

Also consistent with the decision in *Taggares, supra*, the second amendment proposed by the subcommittee is intended to clarify that courts are prohibited from making nonconsensual references pursuant to Code of Civil Procedure section 639 where a party that is financially unable to do so would be forced to pay the referee's fees. The court reasoned that requiring one party to bear the full cost of a reference may give rise to an appearance of unfairness if the rulings favor that party; and if only one party pays, there is a chilling effect on the exercise of that party's discovery rights and a corresponding disincentive on the opposing party to cooperate. The subcommittee agrees with this reasoning.

The third amendment is intended to clarify that in determining whether a party is able to bear the costs of a private referee, the court should consider only the actual party's financial circumstances, not those of the party's counsel. The subcommittee's recommendation is consistent with the interpretation of existing statutes in *Taggares, supra*, in which the court concluded that the authorization in Code of Civil Procedure sections 645.1 and 1023 for the court to order "parties" to pay the referee's fees meant these fees could be imposed on the parties themselves and not on parties' counsel. The court specifically held that the fact that plaintiff's attorneys assumed the risk of advancing the costs of litigation as part of a contingency fee contract did not require plaintiff's attorneys to advance the costs of a nonconsensual reference. The court concluded that imposing the cost of reference on an impoverished client's attorney raises equal protection, due process, and fundamental fairness concerns, in that it punishes poor litigants — those unable to afford retainers and hourly fees — by barring meaningful access to the courts through discouraging the availability of contingent fee counsel. Again, the subcommittee agrees with this reasoning.

The fourth and fifth proposed amendments are intended to establish mechanisms to assist in court oversight of the referee's fees. The first of these proposed amendments would require the court, in its reference order, to set the maximum hourly rate which the referee could charge and, if requested by any party, the maximum number of hours for which the referee could charge. As discussed in section II.C.3.i., the subcommittee received public testimony expressing concern over both the hourly rates and overall cost of discovery references. The subcommittee saw the importance therefore of addressing both these issues. The subcommittee discussed at length whether an estimate of the maximum number of hours for which the referee may charge should be required in all reference orders, as was proposed in SB 19. While the subcommittee believes that requiring an estimate in all cases could be effective in addressing concerns about "churning," the subcommittee is also concerned that such a requirement would impose a substantial administrative burden on the courts. The subcommittee believes that these concerns are best balanced by requiring such an estimate only if requested

by a party. When the referee completes his or her work, the second of these proposals would require that the total fee charged be included in the referee's report. This will facilitate any needed review of the referee's fees.

The sixth amendment on the list would clarify that the court must appoint the referee selected by the parties and only if they are unable to select a referee would the court become involved in the selection process. As discussed above, the public testimony received by the subcommittee included complaints that courts did not always take party preferences into account in selecting a referee and that courts practiced favoritism in selecting referees — choosing as referees judges' friends and former colleagues. The subcommittee believes it is important to minimize the opportunities for favoritism and to ensure party input into the referee selection process. This is consistent with the decision in *Taggares, supra*, which suggests that parties should always be given the opportunity to select an acceptable referee in order to avoid potential criticism arising from concerns that a court may routinely select a particular private provider and in order to permit the parties to agree on a referee whose fees, availability, and expertise are perceived to be mutually favorable. The subcommittee discussed a requirement, modeled after the requirements in the judicial arbitration and civil action mediation programs, that each court maintain a list of persons eligible for appointment as referees and that referees in nonconsensual references be selected from that list. However, the subcommittee ultimately rejected that approach as creating too great an administrative burden on the courts.

The final two proposed amendments, requiring that copies of reference orders be sent to the office of the presiding judge and requiring the Judicial Council to study and report to the Legislature on references, are intended to provide the information needed to assess the impact of these proposed statutory changes and whether any additional measures need to be taken. Both of these measures were included in SB 19.

B. JUDICIAL ARBITRATION

As discussed above in Section II.C.3.ii., the subcommittee received varied testimony concerning the judicial arbitration program — some suggesting that it could have positive effects on litigants, but more suggesting that it was having negative effects. In particular, the testimony expressed concerns about courts referring cases valued at over \$50,000 to judicial arbitration without the parties' consent. The subcommittee had very little current empirical information about the program to help assess the testimony or the overall effects of judicial arbitration on courts, litigants, or the public.

The subcommittee believes that this program should be assessed to determine if the standards for referring cases to the program need to be modified. For instance, certain classes of cases may be more amenable to resolution through judicial arbitration. If so, then it would be appropriate to consider narrowing the referral criteria to focus on those cases.

Recommendation 17

The subcommittee recommends that the Judicial Council direct staff to conduct a study of the judicial arbitration program to assess, among other things, resolution rates for the program and whether certain classes of cases appear to be more amenable to resolution through this program.

GLOSSARY

“Alternative dispute resolution process” or “ADR process” means a process, other than formal litigation, in which a neutral person or persons resolves or assists disputants in resolving their dispute

“Adjudicatory process” means a process in which the neutral person renders a decision

“Arbitration” means a process in which a neutral person or panel reviews evidence, hears arguments, and renders a decision regarding a dispute.

“Binding” means the neutral’s decision in an adjudicatory process is final and subject to only limited appellate review

“Community ADR program” means ADR services provided by community-based organizations and governmental entities

“Court-related ADR program” means court-sponsored or sanctioned efforts to offer or encourage the use of ADR processes.

“Evaluative process” means a process in which the neutral person provides the disputants with an evaluation of their dispute

“Facilitative process” means a process in which the neutral person does not render a decision, but facilitates communication and negotiation between the disputants

“Mediation” means a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement.

“Mini-trial” means a process in which a neutral moderates presentations to agents of the disputants with settlement authority and may facilitate negotiations between the disputants and/or offer an evaluation of the dispute.

“Neutral” means an individual who serves as an impartial third party to provide dispute resolution services, including but not limited to an arbitrator, mediator or case evaluator.

“Neutral evaluation” means a process in which a neutral (or a panel of neutrals) hears brief written and oral presentations and then assesses the strengths and weaknesses of the disputants' contentions and evidence and offers a confidential evaluation of the dispute.

“Neutral fact-finding” means a process in which a neutral person reviews information submitted by the disputants and/or conducts independent research regarding the facts, and submits findings to the disputants or the court on specified factual issues.

“Provider” means a program which provides dispute resolution services or a neutral who provides dispute resolution services.

“Private ADR” means dispute resolution services provided for a fee by a third party neutral outside of the court system or community/governmental dispute resolution program

“Private judging” means proceedings in which parties agree to have their case adjudicated by a neutral person compensated by the parties and appointed by the court as either as a temporary judge pursuant to Article VI, Section 21 of the California Constitution, or as a referee pursuant to Code of Civil Procedure section 638

“Settlement conferences” means a process in which a neutral meets with the disputants to explore settlement options; the procedures used vary and may include techniques similar to those used in mediation and neutral evaluation.

“Summary jury trial” means a process in which a mock jury listens to presentations and renders an advisory verdict.

APPENDIX 1

APPENDIX 1

PROPOSALS TO ENCOURAGE ADR USE IN CIVIL CASES

Introductory Comment

The Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System has been charged with studying the effects of alternative dispute resolution processes (ADR) on courts, litigants, and the public and developing recommendations for expanding the positive and ameliorating the negative effects that are identified. The subcommittee has concluded, among other things, that the early, voluntary use of ADR processes can have positive effects on courts, litigants, and the public, including potentially reducing the time, cost, and stress of resolving disputes. The three parts of this proposal for new and amended statutes and rules of court are intended to expand these positive effects by encouraging the increased early use of ADR processes in a larger segment of litigants.

- *Part 1, proposed Chapter 1 of the statutes and Chapters 1 and 2 of the proposed rules, focuses on providing litigants with information about ADR and encouraging them to agree to ADR on a voluntary basis. The statutes and accompanying rules would require parties to exchange information about ADR and about their willingness to participate in an ADR process at the time of service of the initial pleadings and as part of a mandatory meet and confer. The rules would also require courts to designate a staff member who is knowledgeable about ADR to serve as the court's ADR resource person and program administrator. The subcommittee believes that appropriate staff support is an essential element of a successful court-related ADR program.*

To reduce duplication in both the statutes and rules, Part 1 contains provisions, such as confidentiality provisions, that would be generally applicable to court-connected mediation programs, including both the existing Civil Action Mediation Program and the two new programs proposed in Parts 2 and 3.

- *Part 2, proposed Chapter 2 of the statute and Chapters 4 and 5 of the proposed rules,*
- *would authorize courts to refer general civil cases to mediation. The basic presumption underlying this proposal is that it is appropriate for the parties in virtually every civil dispute to try some form of ADR as early as possible. But this presumption is tempered with the knowledge that a truly unwilling participant can impede even an appropriate dispute resolution process. For this reason, the proposal is structured to make all general civil cases eligible for referral to mediation, but also*

to permit any party to opt out of participating in ADR. On a theoretical level, this structure embodies the policy that all civil cases are amenable to ADR while still ensuring that participation is voluntary. On a practical level, the subcommittee believes that this “opt-out” structure will result in the use of mediation in a greater proportion of civil cases than if litigants were required to “opt-in” to a mediation referral. The ultimate goal is to increase both the initial mediation participation rate and also, by educating litigants and attorneys through the mediation experience, to increase the proportion of disputants who will voluntarily choose to use ADR in the future, preferably even before filing a civil claim in the courts.

Both Parts 1 and 2 of the subcommittee’s proposal would apply to all trial courts. The subcommittee views these as modest steps toward encouraging the voluntary use of ADR in all trial courts. The subcommittee also considers these proposals to be a “floor,” not a “ceiling,” for court-related ADR programs. That is, these proposals are not intended to diminish the courts’ existing authority to implement ADR programs, and indeed, it is hoped that courts will be encouraged to go beyond the basic measures outlined here. For example, although the proposals would apply only in general civil cases, the subcommittee believes that the use of appropriate ADR processes should also be encouraged in other types of cases.

- *To encourage courts to experiment with ADR measures beyond those called for in Parts 1 and 2, Part 3, Chapter 4 of the statute, establishes a mandatory early mediation pilot project in Los Angeles Superior Court for civil cases valued at over \$50,000. Parties would be required to pay the mediator’s fees, but the referral order would cap their financial obligation by specifying a maximum number of hours for mediation. This is the same Judicial Council–sponsored statutory proposal that became part of Senate Bill 19 in the 1997-1998 legislative session. The subcommittee is aware that the Legislature recently enacted a bill establishing ADR pilot projects in four courts, including in two of the courts mandatory mediation projects in which the court can pay the mediator’s fees. However, the subcommittee believes that the Los Angeles project is well worth pursuing as it would permit the comparison of party-paid versus court-paid mandatory mediation.*

In order to make these ADR-related provisions easier to find, the proposed statutes and rules would be located in a single title of the Code of Civil Procedure and the California Rules of Court. All of the statutory provisions in these proposals would be codified in the portion of the Code of Civil Procedure where the current Civil Action Mediation statutes are now located. The rules would be incorporated into the same portion of the rules of court that now contains the Judicial Arbitration and Civil Action Mediation rules. An outline of these provisions is attached. The subcommittee also considered a proposal to recodify the judicial arbitration statutes, which are currently found at Code of Civil Procedure section 1141.10 et seq., into the same title as these proposals but ultimately decided that changing the long-standing citations of provisions might add confusion.

PROPOSED LEGISLATION

CODE OF CIVIL PROCEDURE

PART THREE. SPECIAL PROCEEDINGS

**TITLE 11.6. ~~CIVIL ACTION MEDIATION~~ COURT-RELATED
ALTERNATIVE DISPUTE RESOLUTION PROCESSES**

**CHAPTER 1 GENERAL PROVISIONS (Proposed New
Section 1750 et seq.)**

**CHAPTER 2 COURT REFERRALS TO VOLUNTARY
MEDIATION (Proposed New Section 1760 et seq.)**

**CHAPTER 3 CIVIL ACTION MEDIATION (Current Section
1775 et seq.)**

**CHAPTER 4 EARLY MEDIATION PILOT PROGRAM
(Proposed New Section 1780 et seq.)**

PROPOSED RULES OF COURT

CALIFORNIA RULES OF COURT

TITLE FIVE. SPECIAL RULES FOR TRIAL COURTS

**DIVISION III. ~~JUDICIAL ARBITRATION~~ ALTERNATIVE
DISPUTE RESOLUTION RULES FOR CIVIL CASES**

**CHAPTER 1. GENERAL PROVISIONS (Proposed New Rule
1580 et seq.)**

**CHAPTER 2. ADR INFORMATION AND STIPULATIONS
(Proposed New Rule 1590 et seq.)**

**CHAPTER 3 JUDICIAL ARBITRATION RULES (Current
Rules 1600-1618)**

**CHAPTER 4 GENERAL RULES RELATING TO
MEDIATION OF CIVIL CASES** (Proposed New Rule 1619 et
seq.)

**CHAPTER 5 COURT REFERRALS TO VOLUNTARY
MEDIATION** (Proposed New Rule 1620 et seq.)

**CHAPTER 6 CIVIL ACTION MEDIATION PROGRAM
RULES** (Current Rules 1630 – 1639)

**CHAPTER 7 EARLY MEDIATION PILOT PROGRAM
RULES** (Rule 1640 et seq. – To be drafted)

PROPOSAL TO ENCOURAGE ADR USE IN CIVIL CASES

PART 1 – ADR INFORMATION SHARING AND STAFFING

**CODE OF CIVIL PROCEDURE
PART THREE. SPECIAL PROCEEDINGS
TITLE 11.6. ~~CIVIL ACTION MEDIATION~~
COURT-RELATED ALTERNATIVE DISPUTE RESOLUTION PROCESSES**

CHAPTER 1 GENERAL PROVISIONS

§ 1750. Legislative Findings and Intent (Proposed New Code Section)

The Legislature finds and declares that:

- (a) The peaceful resolution of disputes in a timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government under Article VI of the California Constitution.
- (b) In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. Many disputes can be resolved in a mutually acceptable and equitable manner through less formal processes.
- (c) Alternative processes for reducing the cost, time, and stress of dispute resolution, particularly mediation, have been effectively used in California and elsewhere. It is in the public interest for alternative dispute resolution processes to be encouraged where appropriate by the courts.
- (d) Alternative dispute resolution processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize alternatives to trial for resolving their differences in the early stages of a civil action.
- (e) The purpose of this title is to encourage parties in civil cases to use appropriate processes to aid in the resolution of their disputes prior to trial.
- (f) Nothing in this title should be construed to preempt other current or future alternative dispute resolution programs operating in the trial courts.

Comments: This section sets forth the Legislature’s findings and intent in enacting these provisions. The language of this section is taken primarily from the introductory section of the Civil Action Mediation Act (Code Civ. Proc., § 1775; subsection (f) is from § 1775.13).

§ 1750.1. Definitions (Proposed New Code Section)

As used in this division:

- (a) “Alternative dispute resolution process” or “ADR process” means a process, other than formal litigation, in which a neutral person or persons resolves disputes or assists parties in resolving their dispute.
- (b) “Court” means a superior or municipal court.
- (c) “General civil case” means all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption proceedings), juvenile court proceedings, small claims appeals, and “other civil petitions” as defined in the Regulations on Superior Court Reports to the Judicial Council, including petitions for a writ of mandate or prohibition, temporary restraining order, harassment restraining order, domestic violence restraining order, writ of possession, appointment of a receiver, release of property from lien, and change of name.
- (d) “Mediation” means a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement. As used in this division, mediation does not include a settlement conference pursuant to Rule 222 of the California Rules of Court.

Comments: The language of subdivision (a) is modeled in part on the definition of “alternative dispute resolution process” included in the Federal Alternative Dispute Resolution Act of 1998 (28 U.S.C.A., § 651). It is also similar to the definition of “ADR” included in the California Dispute Resolution Council’s Principles.

The language of subdivision (c) is taken from rule 2103(b) of the California Rules of Court, which establishes the applicability of the statewide differential case management rules.

The language of subdivision (d) mirrors that in both the Civil Action Mediation Act (Code Civ. Proc., § 1775.1) and Evidence Code section 1115, which relates to mediation

confidentiality. The exclusion of settlement conferences from the definition of “mediation” under this division is also consistent with the treatment of settlement conferences under the Evidence Code’s mediation confidentiality provisions (see § 1117).

§ 1750.2. Judicial Council Rule (Proposed New Code Section)

The Judicial Council shall adopt rules to implement this title.

Comments: This is a general authorization for the Judicial Council to adopt implementing rules. The language is modeled after that in the Trial Court Funding Act (Gov. Code, § 77999(h))

§ 750.3. Statements Made During Mediation; Evidence (Proposed New Code Section)

(a) All statements made during a mediation under this title shall be subject to Section 703.5, Section 1152, and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code.

(b) Any reference to a mediation or to a statement of agreement or nonagreement filed pursuant to either Section 1775.9 or Section 1780.6 during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of Section 657.

Comments: This section would apply existing mediation confidentiality provisions to mediations conducted pursuant to this title, including mediations under the current Civil Action Mediation Program and those under the new mediation referral and early mediation provisions proposed by the subcommittee. The language is taken from Code of Civil Procedure sections 1775.10 and 1775.12, relating to the Civil Action Mediation Program; the new provision would replace those code sections.

§ 1750.4. Running of Time Limitations (Proposed New Code Section)

Except as otherwise provided in this title, submission of an action to mediation pursuant to this title shall not suspend the running of the time periods specified in Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2.

Comments: This section is modeled after, and would replace, Code of Civil Procedure section 1775.7(a), relating to the Civil Action Mediation Act. Courts currently have adopted a variety of approaches to coordinating their ADR programs with the Delay

Reduction Act. Some, such as San Mateo and Ventura, do not provide for any extension of the Delay Reduction time periods for ADR, while others, such as Fresno and Sonoma do (see Fresno Superior Court local rule 7.8 and Sonoma Superior Court local rule 16.4. D).

§ 1750.5. Discovery (Proposed New Code Section)

Any party who participates in mediation pursuant to this title shall retain the right to obtain discovery to the extent available under the Civil Discovery Act of 1986, Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4.

Comments: This section is modeled after language in the Civil Action Mediation Act (Code Civ. Proc., § 1775.11) and is intended to protect the rights of the parties to full discovery.

CHAPTER 3 CIVIL ACTION MEDIATION

§ 1775. Findings and Declarations (Deletion of Existing Code Section)

The Legislature finds and declares that:

(a) ~~The peaceful resolution of disputes in a fair, timely, appropriate, and cost effective manner is an essential function of the judicial branch of state government under Article VI of the California Constitution.~~

(b) ~~In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.~~

(c) ~~Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.~~

(d) ~~Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.~~

(e) ~~As a pilot project in Los Angeles County and in other counties which elect to apply this title, courts should be able to refer cases to appropriate dispute resolution processes such as judicial arbitration and mediation as an alternative to trial, consistent with the parties' right to obtain a trial if a dispute is not resolved through an alternative process.~~

(f) ~~The purpose of this title is to encourage the use of court annexed alternative dispute resolution methods in general, and mediation in particular. It is estimated that the average cost to the court for processing a civil case of the kind described in Section 1775.3 through judgment is three thousand nine hundred forty three dollars (\$3,943) for each judge day, and that a substantial portion of this cost can be saved if these cases are resolved before trial.~~

~~The Judicial Council, through the Administrative Office of the Courts, shall conduct a survey to determine the number of cases resolved by alternative dispute resolution authorized by this title, and shall estimate the resulting savings realized by the courts and the parties. The results of the survey shall be included in the report submitted pursuant to Section 1775.14. The programs authorized by this title shall be deemed successful if they result in estimated savings of at least two hundred fifty thousand dollars (\$250,000) to the courts and corresponding savings to the parties.~~

Comments: This subject is now covered in chapter 1, section 1750, of the proposed statute.

§ 1775.1. Definitions (Deletion of Existing Code Section)

(a) ~~As used in this title:~~

(1) ~~“Court” means a superior court or municipal court.~~

(2) ~~“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) ~~Unless otherwise specified in this title or ordered by the court, any act to be performed by a party may also be performed by his or her counsel of record.~~

Comments: This subject is now covered in chapter 1, section 1750.1, of the proposed statute.

§ 1775.7. Running of Time Limitations (Amendment to Existing Code Section)

(a) ~~Submission of an action to mediation pursuant to this title shall not suspend the running of the time periods specified in Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2, except as provided in this section.~~

(b) ~~If an action is or remains submitted to mediation pursuant to this title more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a statement of nonagreement is filed pursuant to Section 1775.9 shall not be included in computing the five-year period specified in Section 583.310.~~

Comments: This subject is now covered in chapter 1, section 1750.6, of the proposed statute.

§ 1775.10. Statements Made During Mediation; Evidence (Deletion of Existing Code Section)

~~All statements made by the parties during the mediation shall be subject to Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115) of Division 9, of the Evidence Code.~~

Comments: This subject is now covered in chapter 1, section 1750.5, of the proposed statute.

§ 1775.11. Discovery (Deletion of Existing Code Section)

~~Any party who participates in mediation pursuant to Section 1775.3 shall retain the right to obtain discovery to the extent available under the Civil Discovery Act of 1986, Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4.~~

Comments: This subject is now covered in chapter 1, section 1750.7, of the proposed statute.

§ 1775.12. Reference to Mediation or Statement of Nonagreement at Subsequent Trial (Deletion of Existing Code Section)

~~Any reference to the mediation or the statement of nonagreement filed pursuant to Section 1775.9 during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of Section 657.~~

Comments: This subject is now covered in chapter 1, section 1750.5, of the proposed statute.

§ 1775.13. Legislative Intent (Deletion of Existing Code Section)

~~It is the intent of the Legislature that nothing in this title be construed to preempt other current or future alternative dispute resolution programs operating in the trial courts.~~

Comments: This subject is now covered in chapter 1, section 1750(f), of the proposed statute.

§ 1775.14. Report to Legislature (Deletion of Existing Code Section)

~~On or before January 1, 1998, the Judicial Council shall submit a report to the Legislature concerning court alternative dispute resolution programs. This report shall include, but not be limited to, a review of programs operated in Los Angeles County and other courts that have elected to apply this title, and shall examine, among other things, the effect of this title on the judicial arbitration programs of courts that have participated in that program.~~

~~(b) The Judicial Council shall, by rule, require that each court applying this title file with the Judicial Council such data as will enable the Judicial Council to submit the report required by subdivision (a).~~

Comments: The provision relating to the report to the Legislature is now obsolete. The required data collection subject data collection by the Judicial Council is now covered in chapter 1, section 1750.3, of the proposed statute.

Rules 1580, 1580.1, 1580.2, 1580.3, 1590, 1590.1, 1590.2, and 1590.3 of the California Rules of Court would be added effective _____, to read:

CALIFORNIA RULES OF COURT
TITLE V. SPECIAL RULES FOR TRIAL COURTS
DIVISION III. ~~JUDICIAL ARBITRATION~~ ALTERNATIVE DISPUTE
RESOLUTION RULES FOR CIVIL CASES
CHAPTER 1. GENERAL PROVISIONS

Rule 1580. Definitions

As used in this division:

- (a) “Alternative dispute resolution” or “ADR process” means a process, other than formal litigation, in which a neutral person or persons resolves disputes or assists parties in resolving their dispute;
- (b) “Court” means a superior or municipal court;
- (c) “General civil case” means all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption proceedings), juvenile court proceedings, small claims appeals, and “other civil petitions” as defined in the Regulations on Superior Court Reports to the Judicial Council, including petitions for a writ of mandate or prohibition, temporary restraining order, harassment restraining order, domestic violence restraining order, writ of possession, appointment of a receiver, release of property from lien, and change of name; and
- (d) “Mediation” means a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement. As used in this division, mediation does not include a settlement conference pursuant to rule 222 of the California Rules of Court.

Comments: This rule simply mirrors the statutory language.

Rule 1580.1. Lists of ADR providers

- (a) If a court makes a list of ADR providers available to litigants, the list shall contain, at a minimum, the following information concerning each provider listed:
- (1) The types of ADR services available from the provider;
 - (2) The provider's résumé, including ADR training and experience; and
 - (3) The fees charged by the provider for each type of service.
- (b) In order to be included on a court list of ADR providers, an ADR provider must:
- (1) Sign a certificate agreeing to comply with all applicable ethical requirements; and
 - (2) Agree to serve as an ADR neutral on a pro bono or modest-means basis in at least one case per year, if requested by the court.

Comments: Subsection (a) of this rule would require that, if a court makes available a list of ADR providers, that list must include specified information. This rule is modeled in part on local court rules from Santa Clara and Sonoma. Several courts, including Marin, San Mateo, Santa Clara, and Sonoma make such lists available. The rule does not specify how this list is to be maintained; some courts are currently maintaining such lists themselves while others are relying on local county bar associations to maintain them. Subsection (b) would require that, in order to be included on the list, providers must comply with applicable ethical requirements and accept at least one pro bono or modest-means case from the court each year.

The subcommittee discussed proposals regarding the qualifications of providers, including a requirement that local lists of mediators not be limited to attorneys. The subcommittee supported the concept that individual courts should establish qualification criteria for providers on court lists and that lists of mediators should not be limited to attorneys. However, the subcommittee noted that section 33 of the Standards of Judicial Administration already provides recommended criteria for screening potential ADR providers.

Rule 1580.2. ADR program information

- (a) Each court shall submit to the Judicial Council, in a form approved by the Judicial Council, information on its ADR programs.
- (b) Subject to applicable limitations, including the confidentiality requirements in Evidence Code section 1115 et seq., courts shall require parties and ADR providers, as appropriate, to supply pertinent information for these reports.

Comments: This rule is modeled after rule 1638, relating to the Civil Action Mediation Act. It is intended to provide a general authorization for the collection of information concerning court-related ADR programs and to facilitate more unified, consistent data collection efforts by the Judicial Council concerning these programs.

Rule 1580.3. ADR program administration

The presiding judge in each trial court shall designate the clerk, executive officer, or other court employee who is knowledgeable about ADR processes to serve as ADR program administrator. The duties of the ADR program administrator shall include:

- (a) Developing informational material concerning the court's ADR programs;
- (b) Educating attorneys and litigants about the court's ADR programs;
- (c) Supervising the development and maintenance of any panels of ADR providers maintained by the court; and
- (d) Gathering statistical and other evaluative information concerning the court's ADR programs.

Comments: This rule would require courts to designate a staff member who is knowledgeable about ADR processes to serve as the court's ADR program administrator and resource person. This proposed rule parallels rule 1603, which requires the presiding judge to designate staff to administer the judicial arbitration program, and some of the proposed language is modeled after that rule. This requirement is also similar to a requirement in the Federal Alternative Dispute Resolution Act of 1998 (28 U.S.C.A., § 651 (d)) and rule 3(d) of the Uniform Rules on Dispute Resolution adopted by the Supreme Judicial Court of Massachusetts.

As indicated in the introductory comment, the subcommittee believes that appropriate staff support is an essential element of a successful court-related ADR program. A number of superior courts, including those in Contra Costa, Los Angeles, San Mateo, Santa Clara, and Ventura, have some ADR program administration staff. The funding for these positions has been created in a variety of ways. Some courts, such as Ventura, have shifted existing court positions in order to provide ADR program staff. The Multi-Option Appropriate Dispute Resolution Program (MAP) in San Mateo is supported through contributions from the court, the local county bar association, and the local community dispute resolution center. Some courts, such as Contra Costa and Los Angeles, have received at least initial funding for staff support through a Dispute Resolution Programs Act (DRPA) grant. While the subcommittee supports and admires the creative efforts undertaken in order to provide staff support for these court-related

ADR programs, not all courts have been able to provide it. The subcommittee agrees with the first General Principle concerning court-related ADR approved by the Judicial Council in May 1992: “ADR programs are an appropriate use of public funds” and therefore accompanies this proposed new rule with a recommendation that funding for ADR staff be given a high priority in the allocation of funding by and to the trial courts.

CHAPTER 2 ADR INFORMATION AND STIPULATIONS

Rule 1590. Applicability

Except as otherwise provided in these rules, the provisions in this chapter shall apply to all general civil cases filed in the trial courts after June 30, 2001.

Rule 1590.1. Information about ADR

- (a) Each court shall provide the plaintiff at the time of filing with an ADR Information Package that includes, at a minimum, the following:
- (1) General information about the potential advantages and disadvantages of ADR and descriptions of the principal ADR processes. The Administrative Office of the Courts shall prepare model language that the courts may use to provide this information;
 - (2) Information about the ADR programs available in that court, including citations to any applicable local court rules and directions for contacting any court staff responsible for providing parties with assistance regarding ADR;
 - (3) In counties that are participating in the Dispute Resolution Programs Act (DRPA), information about the availability of local dispute resolution programs funded pursuant to the DRPA. This information may take the form of a list of the applicable programs or directions for contacting the county’s DRPA coordinator;
 - (4) An ADR preference form on which parties may indicate their willingness to participate in an ADR process on a voluntary basis; and
 - (5) An ADR stipulation form that parties may use to stipulate to the use of an ADR process.

(b) The plaintiff shall complete the ADR preference form and shall serve this completed form and a copy of the ADR Information Package on each defendant along with the complaint. Cross-complainants shall serve a completed ADR preference form and a copy of the ADR Information Package on any new parties to the action.

(c) All defendants shall complete the ADR preference form and shall serve this completed form on all other parties with their first responsive pleading.

Comments: This rule would require the court to provide the plaintiff with ADR information at the time of the filing of the complaint and would require the plaintiff to serve this information on the defendants along with the complaint. The rule would also require both plaintiffs and defendants to exchange forms indicating their willingness to participate in ADR processes. The intent is to educate and promote discussions between attorneys and their clients about ADR early in the litigation process and to encourage them to voluntarily agree to ADR use. These early requirements, including the sharing of the ADR preference form, would be in addition to requirements for discussing ADR at a meet-and-confer and considering ADR at the case management conference, which are required by rules 212 and 512 as amended effective July 1, 1999, thereby providing layered opportunities for the parties to consider and agree to the use of ADR. This rule is modeled in part after local court rules in Fresno, Santa Clara, Sonoma, and other counties that require plaintiffs to serve ADR information on defendants along with the complaint. Local court rules in Fresno and Sonoma and local forms require parties to share information about their willingness to participate in ADR.

The idea of having courts provide parties with information about ADR is by no means new. A number of existing statutes, rules of court, and standards of judicial administration require or urge courts, under various circumstances, to provide parties with information about ADR:

- *Statute 1996, chapter 942 requires that in counties electing to participate in the Dispute Resolution Programs Act (DRPA)¹ parties be notified of the availability of the programs funded pursuant to the DRPA “in a manner that is determined by the Judicial Council.”*
- *Rule 1639 of the Rules of Court requires courts participating in the Civil Action Mediation Program to “make available educational material, adopted by the Judicial Council, or from other sources, describing available ADR processes in the community.”*

¹ The Dispute Resolution Programs Act (Bus. & Prof. Code, § 465 et seq.) permits counties to add between \$1 and \$8 to their civil filing fee and use the funds for grants to local community dispute resolution programs.

- *Section 32.5 of the Standards of Judicial Administration (adopted effective January 1, 1999) urges courts to take “appropriate measures to ensure that the parties are aware of and consider ADR processes early” in all cases where the court determines ADR may be appropriate; at a minimum, courts are urged to provide the parties with “information about the ADR methods available, the advantages and disadvantages of each method for the case, the procedures for selecting neutrals, and the identity of court staff who can assist the parties with the selection of an ADR method.”*
- *Section 32 of the Standards of Judicial Administration urges courts to “jointly develop ADR information and provide education programs for parties who are not represented by counsel.”*
- *The General Principles concerning court-related ADR approved by the Judicial Council in May 1992 state that “[e]ducation about ADR is needed for parties, their attorneys, and judges” and that “[e]ducational materials, such as brochures and videotapes, explaining ADR should be available at the court.”*

This proposal would bring this patchwork of provisions together and establish a more global requirement that courts provide parties with ADR information in all general civil cases. Subsections (a)(1) and (2) of this rule would require the courts to provide the same type of information that section 32.5 of the Standards of Judicial Administration currently urges they provide to litigants. The Administrative Office of the Courts, in conjunction with the State Bar, has already prepared a brochure that contains the type of information required under subsection (a)(1). Subsection (a)(3) would implement the requirement in Statutes of 1996, chapter 942 that in counties that elect to participate in the DRPA, parties be notified of the availability of the programs funded pursuant to the DRPA “in a manner that is determined by the Judicial Council.”

Rule 1590.2. Meet and confer

- (a) In courts that do not hold case management conferences, no later than 90 days following the filing of the complaint counsel for the parties shall meet and confer, in person or by telephone, and shall discuss ADR, including mediation, arbitration, and neutral case evaluation, as available, and possible settlement.
- (b) Within 30 days after having met and conferred as required by subdivision (a) of this rule, the parties shall file a joint statement with the court indicating that they have complied with this provision and whether they have agreed to use an ADR process.

Comments: This proposed rule would establish a requirement that, in courts that do not hold case management conferences, parties meet and confer about ADR and possible settlement no later than 90 days following the filing of the complaint. This requirement would parallel the new requirement established by rules 212 and 512, as amended effective July 1, 1999, that in courts holding case management conferences, parties meet and confer no later than 30 days prior to the case management conference. Much of the proposed language is modeled after rules 212 and 512.

Rule 1590.3. Stipulation to ADR

If all parties agree to use an ADR process, they shall complete the ADR stipulation form and file it with the court. If the completed stipulation form is filed at least 10 days before a scheduled case management conference, the court may cancel or continue the conference.

Comments: This provision is designed to encourage the parties to enter into an early stipulation to use an ADR process by authorizing courts to relieve the parties of the requirement that they appear at a case management conference when they file such a stipulation. Local rules of several courts, including Santa Clara, have similar provisions.

APPENDIX 2

APPENDIX 2

PROPOSALS TO ENCOURAGE ADR USE IN CIVIL CASES PART 2 – REFERRALS TO VOLUNTARY MEDIATION

Part 2, proposed Chapter 2 of the statute and Chapters 4 and 5 of the proposed rules, would authorize courts to refer general civil cases to mediation. The basic presumption underlying this proposal is that it is appropriate for the parties in virtually every civil dispute to try some form of ADR as early as possible. But this presumption is tempered with the knowledge that a truly unwilling participant can impede even an appropriate dispute resolution process. For this reason, the proposal is structured to make all general civil cases eligible for referral to mediation, but also to permit any party to opt out of participating in ADR. On a theoretical level, this structure embodies the policy that all civil cases are amenable to ADR while still ensuring that participation is voluntary. On a practical level, the subcommittee believes that this “opt-out” structure will result in the use of mediation in a greater proportion of civil cases than if litigants were required to “opt-in” to a mediation referral. The ultimate goal is to increase both the initial mediation participation rate and also, by educating litigants and attorneys through the mediation experience, to increase the proportion of disputants who will voluntarily choose to use ADR in the future, preferably even before filing a civil claim in the courts.

CODE OF CIVIL PROCEDURE PART THREE. SPECIAL PROCEEDINGS TITLE 11.6. ~~CIVIL ACTION MEDIATION~~ COURT-RELATED ALTERNATIVE DISPUTE RESOLUTION PROCESSES

CHAPTER 2 COURT REFERRALS TO VOLUNTARY MEDIATION

§ 1760. Applicability (Proposed New Code Section)

- (a) Except as provided by rule pursuant to subdivision (b), this chapter shall apply to all general civil cases filed in the trial courts after June 30, 2001.
- (b) The Judicial Council may, by rule, exempt specified categories of general civil cases from the provisions of this chapter.

Comments: This section defines the cases to which this act would apply. The language of subdivision (a) of this section is modeled in part after rule 2103(a) of the California Rules of Court, which establishes the applicability of the statewide differential case

management (delay reduction) rules, and Code of Civil Procedure section 1775.2, which establishes the applicability of the Civil Action Mediation Program (see proposed section 1740.1, above, for a definition of “general civil case”). As noted above, using the same applicability provision as the differential case management provisions may make it easier for courts to incorporate ADR measures into their overall system of civil case management.

Subdivision (b) authorizes the Judicial Council to exempt any classes of cases that may not be appropriate for referral. This is similar to the authority given to the Judicial Council to exempt cases from judicial arbitration under Code of Civil Procedure 1141.15.

§ 1760.1. Referral Authority (Proposed New Code Section)

At the first case management conference or similar event, or, if the court does not hold a case management conference or similar event, no earlier than 120 days following the filing of the complaint, a court may refer to mediation any general civil case not otherwise exempted from referral by the provisions of this title or the rules adopted by the Judicial Council.

Comments: This section would authorize courts to make referrals to mediation. Courts would be authorized to make these referrals at case management conferences (or similar events). Section 32.5 of the Standards of Judicial Administration currently urges courts to “confer with all parties, at or before the initial case management conference or similar event, about ADR processes.” Under the Trial Court Delay Reduction Act (Gov. Code, § 68616), these case management conferences may take place no earlier than 120 days following the filing of the complaint. The actual timing of such conferences is set by local rule and varies from 120 days to 210 or more days following the filing of the complaint.

§ 1760.2. Exemption From Referral (Proposed New Code Section)

- (a) A case shall be exempt from referral to mediation under this chapter if:
- (1) The parties file a joint statement certifying that they have already participated in or have agreed to participate in an ADR process; or
 - (2) Any party files with the court a statement declining referral to mediation.
- (b) The Judicial Council shall adopt rules to implement these exemptions and forms for the statements required under subdivisions a (1) and (2).

Comments: Subdivision (a)(1) provides an exemption from referral to mediation under these provisions if the parties have already used or agreed to use an ADR process. The section is intended to encourage parties to agree to ADR early in the life of a case without the necessity for court involvement. It is similar in concept to provisions in some local rules that exempt from their case management conference requirement cases in which the parties have stipulated to ADR (see, e.g., San Mateo Superior Court Rules, rule 2.3(g) and Santa Clara Superior Court Rules, rule 1.1.5C).

Subdivision (a)(2) permits any party to voluntarily opt out of a referral to mediation under this act by filing a statement declining referral with the court. The exemption is designed to ensure that participation in the mediation is voluntary.

Both subdivisions (a)(1) and (2) provide for mandatory exemptions. The court is required to exempt cases that meet these criteria.

Subdivision (b) specifically requires the council to adopt rules and forms to implement these exemptions (see proposed rule 1620.3, below).

§ 1760.3. Selection of Neutral (Proposed New Code Section)

The parties shall select the neutral person or persons to conduct the mediation ordered by the court or the ADR process stipulated to by the parties. If the parties do not select a neutral within the time period specified in the rules adopted by the Judicial Council, the court shall select a neutral. The Judicial Council shall provide by rule for the procedures to be followed by a court in selecting a neutral.

Comments: Consistent with the subcommittee's recommendations in the area of references, this section establishes the basic rule that the parties select the neutral. Selection of the neutral by the court is a backup only when the parties fail to select one. The procedures for court selection of the neutral are to be set by Judicial Council rule. This is similar to the process established under the Civil Action Mediation Act, except in that act the time for party selection of the mediator is set by statute (15 days; see Code Civ. Proc., § 1775.6).

§ 1760.4. Cost of ADR Process (Proposed New Code Section)

Except as otherwise provided either by rules adopted by the Judicial Council or local rules of court, including rules relating to the provision of no- or low-cost ADR services to low-income parties, the cost of participating in an ADR process pursuant to this chapter, including the neutral's fees, shall be borne by the parties.

Comments: This section makes clear that the parties will bear the cost of the ADR process, but it leaves open the option, either on a statewide basis by Judicial Council rule or on a local basis through local court rule, for other payment options. For example, the Judicial Council–implementing rules may address the provision of services on a no-cost basis to litigants proceeding in forma pauperis.

Because participation in an ADR process under these provisions is voluntary, the policy of requiring parties to pay ADR costs does not conflict either with the General Principles relating to ADR adopted by the Judicial Council in May 1992 or with the National Standards for Court-Connected Mediation Programs developed in 1992 by the Center for Dispute Settlement and the Institute of Judicial Administration under grant from the State Justice Institute.

Uncodified Provision –

Report on Program (Proposed New Provision)

- (a) On or before _____, the Judicial Council shall submit a report to the Legislature concerning court referrals to mediation made pursuant to this title.
- (b) The Judicial Council shall, by rule, require that each court file with the Judicial Council such data as will enable the council to submit the report required by subdivision (a).

Comments: This section is modeled after the reporting requirement in the Civil Action Mediation Act (Code Civ. Proc., §1775.14). This provision is not intended to duplicate, but to be coordinated with, the general data collection efforts authorized under proposed rule 1580.2.

Rules 1620, 1620.1, 1620.2, 1620.3, and 1620.4 of the California Rules of Court would be added, effective _____, to read:

**CALIFORNIA RULES OF COURT
TITLE V. SPECIAL RULES FOR TRIAL COURTS
DIVISION III ~~JUDICIAL ARBITRATION~~ ALTERNATIVE DISPUTE
RESOLUTION RULES FOR CIVIL CASES**

CHAPTER 5. COURT REFERRALS TO VOLUNTARY MEDIATION

Rule 1620. Purpose

The rules in this chapter implement Code of Civil Procedure section 1760 et seq., relating to court referrals of civil cases to voluntary mediation.

Comments: The language of this rule is taken primarily from rule 1630, relating to the Civil Action Mediation Act.

Rule 1620.1. Referral authority

At the first case management conference or similar event, or, if the court does not hold a case management conference or similar event, no earlier than 120 days following the filing of the complaint, a court may refer to mediation any general civil case not otherwise exempted from referral by Code of Civil Procedure section 1760 et seq. or by these rules.

Comments: This rule simply replicates the language from the proposed statute.

Rule 1620.2. Exemptions from referral

(a) The following types of actions are exempt from referral to mediation under Code of Civil Procedure section 1760 et seq.:

- (1) Class actions; and
- (2) Small claims actions.

(b) Courts that hold case management conferences or similar events shall not refer a case to mediation pursuant to Code of Civil Procedure section 1760 et seq. if:

- (1) Prior to the case management conference, the parties file either a joint statement certifying that they have already participated in an ADR process or a completed ADR stipulation form; or
 - (2) At the case management conference, the parties stipulate to an ADR process or any party files a statement declining referral to mediation.
- (c) Courts that do not hold case management conferences or similar events shall not refer a case to mediation pursuant to Code of Civil Procedure section 1760 et seq. if:
- (1) Within 120 days following the filing of the complaint, the parties file either a joint statement certifying that they have already participated in an ADR process or a completed ADR stipulation form; or
 - (2) Within 30 days after service of the first responsive pleadings, any party files a statement declining referral to mediation.

Comments: Subdivision (a) of this rule implements the authority given to the council in the proposed statute to designate classes of cases that are exempt from referral to ADR pursuant to the statute. The types of cases listed are some of those that are otherwise included in the definition of “general civil cases” but are exempt from referral to judicial arbitration pursuant to Judicial Council rules (rule 1600.5).

Subdivisions (b) and (c) of this rule establish the time frames and procedures for exemption of individual cases from referral under the proposed statute. A case would be exempt from referral if, at any time prior to the case management conference or, if the court does not hold a case management conference or similar event, within 120 days following the filing of the complaint, the parties file either a stipulation to ADR or a joint statement indicating that they have already participated in ADR. A case would also be exempt from referral if the parties stipulate to ADR at the conference. This rule also provides for an exemption if any party files a request for exemption at the case management conference or, if the court does not hold a case management conference or similar event, within 30 days after service of the first responsive pleadings. These exemptions are designed to encourage the parties and their counsel to discuss ADR options and to agree to an ADR process on their own, before the court can make a referral.

Rule 1620.3. Lists of mediators

Each court that makes referrals to mediation pursuant to Code of Civil Procedure section 1760 et seq. shall make a list of mediators available to litigants.

Comments: This rule would require courts that make referrals to mediation pursuant to the act to make available a list of mediators. The language is modeled in part on local court rules from Santa Clara and Sonoma. As noted in the comments to proposed rule

1619 above, several courts, including Marin, San Mateo, Santa Clara, and Sonoma, make such lists available. The rule does not specify how this list is to be maintained; some courts are currently maintaining such lists themselves, while others are relying on local county bar associations to maintain them.

Rule 1620.4. Selection of neutral

- (a) Within 21 days of filing an ADR stipulation form or of being referred to mediation by the court, the parties shall select the neutral person or persons to conduct the ADR process and shall notify the court, in writing, of their selection.. The person or persons selected by the parties need not be from the list of mediators maintained by the court pursuant to rule 1620.3. The notice shall include the name, address, and telephone number of each person selected.
- (b) If the parties do not select a neutral within the time period specified in subdivision (a) above, then no later than 21 days after filing an ADR stipulation form or of being referred to mediation by the court each party shall submit to the court up to three nominees to serve as the ADR neutral. The nominees selected by the parties must be from the list of mediators maintained by the court pursuant to rule 1620.3. The court shall select a neutral from among these nominees. If no nominations are received from any of the parties, the court shall select a mediator from the list of mediators provided for in rule 1620.3.

Comments: This rule implements the statutory neutral selection process, giving parties 21 days to select a neutral before the court may step in. The rule also provides that, where the parties do not select the neutral within the time period, the court will select the neutral from its provider list. This rule is modeled after the rule relating to selection of a mediator in the Civil Action Mediation Program.

APPENDIX 3

APPENDIX 3

PROPOSALS TO ENCOURAGE ADR USE IN CIVIL CASES PART 3 – EARLY MEDIATION PILOT PROJECT

Introductory Comment

This part of the subcommittee's proposal to encourage ADR use would establish a mandatory early mediation pilot project in Los Angeles Superior Court for civil cases valued at over \$50,000. Parties would be required to pay the mediators fees, but the parties financial obligation would be capped by setting a maximum number of hours for mediation in the referral order. This is the same statutory proposal sponsored by the Judicial Council in the 1997-98 legislative session.

CODE OF CIVIL PROCEDURE PART THREE. SPECIAL PROCEEDINGS TITLE 11.6. CIVIL ACTION MEDIATION COURT-RELATED ALTERNATIVE DISPUTE RESOLUTION PROCESSES CHAPTER 4 EARLY MEDIATION PILOT PROJECT

§ 1780. Applicability (Proposed New Code Section)

- (a) Except as otherwise provided in this section or by rule pursuant to subdivision (c), this chapter shall apply to all general civil cases filed in the participating court after June 30, 2001, in which the amount in controversy exceeds fifty thousand dollars (\$50,000).
- (b) This chapter does not apply to any of the following:
 - (1) Any proceeding subject to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 or mediation pursuant to Chapter 4 (commencing with Section 1775) of this title.
 - (2) Any case assigned to a particular judge or judges based on subject matter.
 - (3) Any proceeding in which a government entity is a party unless that entity agrees to participate.
- (a) The Judicial Council may, by rule, exempt other specified categories of general civil cases from the provisions of this title.

(b) The determination of the amount in controversy shall be made in the same manner as provided in Section 1141.16, except that the time of the required conference may be as specified in Section 1780.1, and in making this determination the court shall not consider the merits of questions of liability, defenses, or comparative negligence.

(c) The participating court shall be the superior court in Los Angeles County.

Comments: This section establishes the general application of the proposed pilot project. As with the subcommittee's other proposals, this pilot project would apply only to general civil cases, however this program would be further limited to cases valued at over \$50,000 and would apply only in the superior court of Los Angeles County. Subdivision (b) establishes some general exemptions from the program; these were part of the proposal sponsored by the council during the 1997–1998 legislative session.

§ 1780.1. Early Status Conference (Proposed New Code Section)

- (a) In cases subject to this chapter, the participating court may hold a status conference not earlier than 90 days and not later than 150 days after the filing of the complaint. This conference may serve as the court's initial status conference.
- (b) At or before the conference, any party may request that the status conference be continued on the grounds that the party has been unable to serve an essential party to the proceeding.
- (c) At the status conference, the court may refer the parties to mediation in accordance with this chapter.

Comments: Subdivision (a) of this section authorizes the court to hold a status conference between 90 and 150 days after the filing of the complaint; currently, under the trial court delay reduction provisions of the Government Code, a court may hold an initial status conference no earlier than 120 days after the filing of the complaint.

Subdivision (c) authorizes the court to refer parties to mediation at this early status conference.

§ 1780.2. Selection of the Mediator (Proposed New Code Section)

- (a) At least seven court days before the status conference, each side shall serve a list of potential mediators on all other sides to the proceeding. This list shall contain

the names, addresses, and billing rates of no more than three individuals whom that side represents in writing to the court would be available to conduct the mediation within the next 60 days. As used in this section, “side” has the same meaning as in Section 2331(1), and the trial judge may divide the parties into two or more sides according to their respective interests in the case.

- (b) If the court refers the parties to mediation at the early status conference, it shall designate a mediator who has been agreed upon by the parties. If the parties are unable to agree upon a mediator, each side shall be entitled to strike two names from the list of potential mediators served by each of the other sides pursuant to subsection (a). The court shall designate a mediator from among those individuals who have not been stricken from the lists.

Comments: This section establishes the process for the selection of mediator. As with the subcommittee’s other proposals, this process provides for the selection of the mediator by the parties. The court’s authority to select the mediator is limited to those cases where the parties are unable to agree upon a mediator.

§ 1780.3. Timing of Mediation (Proposed New Code Section)

The mediation shall take place within 60 days following the early status conference unless one of the following occurs:

- (a) Any party requests a later date that is within 150 days following the early status conference.
- (b) Counsel, a party, or the mediator is unavailable during that time period.
- (c) The court finds that discovery reasonably necessary for a meaningful mediation cannot be conducted prior to the end of that period.
- (d) The court finds, for good cause, that a later date is necessary.

Comments: This section establishes the time frame within which the mediation must occur.

§ 1780.4. Mediator’s Fees (Proposed New Code Section)

- (a) The parties are responsible for paying the mediator’s fees. Except as provided in subsection (b) or when the parties agree otherwise, each party to the proceeding shall pay an equal share of the mediator’s fees.

- (b) Any party who has been granted permission to proceed in forma pauperis shall not be required to share in the payment of the mediator's fee.
- (c) The court's order referring the parties to mediation shall limit the parties' obligation for the mediator's fees by setting a maximum number of hours for the mediation. If the parties agree on a maximum number of hours for the mediation, the court shall specify that maximum in its order. If the parties do not agree on the maximum number of hours, the court shall set the maximum at no more than three hours. Unless the parties agree otherwise:
- (1) The mediation shall not exceed the maximum number of hours specified in the order; and
 - (2) The parties obligation to pay the mediator's fees is limited to the mediator's fee for the maximum number of hours specified in the order and does not include preparation time, travel time, and postmediation time.

Comments: This section provides that the parties are obligated to pay the mediator's fees, but in order to prevent problems similar to those that have arisen in the context of nonconsensual discovery references, the obligation is limited to the fee for a maximum number of hours as set forth in the court's order. The maximum hours set in the order must be the number of hours agreed upon by the parties or, if they are unable to agree, no more than three hours.

§ 1780.5. Participation in the Mediation (Proposed New Code Section)

Trial counsel, parties, and persons with full authority to settle the case shall personally attend the mediation unless excused by the court for good cause. If any consent to settle is required for any reason, the party with the consent authority shall be personally present at the mediation. If no trial counsel, party, or person with full authority to settle a case is personally present at the mediation, unless excused by the court for good cause, the party who is in compliance with this section may immediately terminate the mediation.

Comments: This section requires that all persons necessary to approve a settlement attend the mediation.

§ 1780.6. Statement of Nonagreement (Proposed New Code Section)

- (a) In the event that the parties to the mediation are unable to reach a mutually acceptable agreement and any party to the mediation wishes to terminate the

mediation at any time, the mediator shall file a statement of nonagreement. This statement shall be on a form developed by the Judicial Council.

(b) Upon the filing of a statement of nonagreement, the matter shall be calendared for trial, by court or by jury, both as to law and fact, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to mediation, or the matter shall receive civil priority on the next setting calendar.

Comments: This section, modeled after the Civil Action Mediation Act, requires parties to file a statement of nonagreement with the court if the mediation does not result in resolution of the case.

§ 1780.7. Effect of Appearance (Proposed New Code Section)

An appearance at an early status conference or mediation ordered under this chapter shall not be deemed a general appearance and does not constitute a waiver of the right to make a motion under Section 418.10.

Comments: This section provides that an appearance at the status conference or mediation will not be treated as a general appearance.

§ 1780.8. Voluntary Mediation (Proposed New Code Section)

Nothing in this chapter precludes all or some of the parties to a proceeding from voluntarily agreeing to mediate their dispute at any time.

Comments: This section is intended to encourage parties to voluntarily agree to mediation outside of this pilot program.

§ 1780.9. Judicial Council Implementing Rules (Proposed New Code Section)

The Judicial Council shall adopt any rules necessary or appropriate to implement this chapter.

Comments: This section requires the council to adopt rules to implement this pilot project.

§ 1780.10. Legislative Report (Proposed New Code Section)

On or before January 1, 2004, the Judicial Council shall submit a report to the Legislature on mediation conducted pursuant to this chapter. The report shall examine, among other things, the effect of this chapter on the other judicial mediation programs of courts, the costs of the mediation to the parties, and an estimate of the costs avoided, if any, both to the parties and to the courts because the parties used mediation instead of litigation to resolve the dispute. The Judicial Council shall, by rule, require that each participating court file with the Judicial Council data that will enable the council to submit the report required by this section.

Comments: This section calls for a report to the Legislature on the pilot project. As with the data collection requirements in other portions of the proposal, this specific data collection requirement is intended to be coordinated with the general data collection on court-related ADR programs.

§ 1780.11. Automatic Repeal (Proposed New Code Section)

This chapter shall remain in effect until January 1, 2005, and as of that date is repealed, unless a later enacted statute deletes or extends that date.

Comments: This section calls for the sunset of the pilot project unless the Legislative extends the program. The sunset provision is timed so that the Legislature will be able to take into account the report on the pilot program in determining whether to repeal the sunset.

§ 1780.12. Effective Date (Proposed New Code Section)

This chapter shall become effective on July 1, 2001.

Comments: This provision sets the effective date of the pilot project at six months after the legislation would ordinarily become effective. This is intended to give the council time to adopt implementing rules and the court time to implement the pilot project.

APPENDIX 4

APPENDIX 4

PROPOSALS RE ETHICAL STANDARDS FOR ADR NEUTRALS

Introductory Comment

The Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System was charged with identifying the entity that has or should have the authority to adopt ethical standards for retired judges, attorneys, and/or nonattorneys acting as arbitrators or mediators and recommending what standards (if any) should be adopted by that entity. In response to this charge, the subcommittee is recommending a three-part set of proposals regarding ethical standards for ADR neutrals.

- *Part 1 would amend the existing rules of court relating to temporary judges, referees, and arbitrators in the judicial arbitration program to require that they disclose any prior public State Bar discipline or court finding of violation of the Code of Judicial Ethics and certify, on a form adopted by the Judicial Council, that they are aware of and will comply with Canon 6 of the Code of Judicial Ethics and other applicable ethical requirements. In addition, the proposed amendments would add service as an expert witness or attorney for any party to the list of specific prior relationships that must be disclosed by temporary judges and referees and, in order to correspond to the time period covered by Canon 6D's ban on acceptance of gifts, would lengthen the period covered by this disclosure requirements from the prior 18 months to the prior 2 years.*

These rules amendments would also require that any former California judicial officer must be either an active or inactive member of the State Bar in order to serve as a referee or arbitrator in the judicial arbitration program. The latter requirement is intended to bring these former judicial officers within the reach of State Bar disciplinary enforcement pursuant to the amendment of rule 1-710 of the Rules of Professional Conduct for Attorneys recently adopted by the California Supreme Court. The subcommittee notes that a former judge who is an inactive member of the State Bar is still eligible to participate in the Assigned Judges Program.

- *Part 2 includes a proposed rule of court requiring that if a court maintains a panel of ADR providers or makes a list of ADR providers available to litigants, in order to be included on the list, ADR providers must sign a certificate agreeing to comply with all applicable ethical requirements. It also includes a rule requiring each court that maintains a panel of mediators or makes a list of mediators available to litigants to adopt ethical standards applicable to the mediators on the court's panel or list.*

These rules are intended to ensure that mediators in court-related mediation programs are covered by appropriate ethical standards. Enforcement of these requirements would be through removal from a court list.

- *Part 3 would establish a new canon in the Code of Judicial Ethics relating to former judicial officers who provide dispute resolution services. This new canon would apply for the first five years following retirement or resignation and thereafter if the individual indicates that he or she is a former judicial officer in communications regarding his or her availability for employment. The canon would prohibit the former judicial officer from accepting a gift from a person or entity whose interests have come before him or her. This prohibition on gifts would be in place throughout the period in which he or she is engaged in resolving a dispute and continuing for two years thereafter.*

**PART 1 – CERTIFICATION REQUIREMENTS FOR
TEMPORARY JUDGES, REFEREES AND JUDICIAL ARBITRATORS**

Rules 244, 244.1, 244.2, 532, 532.1, and 532.2, 1604, and 1606 of the California Rules of Court would be amended, effective _____ to read:

Rules 244 and 532. Temporary judge — stipulation, order, oath, assignment, compensation, and other matters

(a) – (b) ***

(c) **[Disqualification]** A request for disqualification of a privately compensated temporary judge shall be determined as provided in Code of Civil Procedure sections 170.1, 170.2, 170.3, 170.4, and 170.5. A privately compensated temporary judge, as soon as practicable, shall disclose to the parties any potential ground for disqualification under the provisions of Code of Civil Procedure section 170.1 and any facts that might reasonably cause a party to entertain a doubt that the temporary judge would be able to be impartial. A temporary judge who has been privately compensated in any other proceeding in the past ~~18~~ 24 months as a judge, a referee, an arbitrator, a mediator, a settlement facilitator, an expert witness or attorney by a party, attorney, or law firm in the instant case shall disclose the number and nature of other proceedings before the first hearing. A temporary judge shall also disclose any prior public State Bar discipline or court finding of violation of the Code of Judicial Ethics or the former Code of Judicial Conduct. The temporary judge shall certify, on a form adopted by the Judicial Council, that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and other ethical requirements.

(d) – (g) ***

Rules 244.1 and 532.1. Reference by agreement

(a) [Reference pursuant to Code of Civil Procedure section 638] A written agreement for an order directing a reference pursuant to section 638 of the Code of Civil Procedure shall be presented with a proposed order to the judge to which the case is assigned, or to the presiding judge or supervising judge if the case has not been assigned. The proposed order shall state the name and business address of the proposed referee and bear the proposed referee’s signature, indicating consent to serve. If the proposed referee is a former California judicial officer, the referee shall be a member of the State Bar. The written agreement and order shall clearly state whether the scope of the reference covers all issues or is limited to specified issues.

~~**[Objections to the appointment]** An agreement for an order directing a reference does not constitute a waiver of grounds for objection to the appointment under section 641 of the Code of Civil Procedure, but any objection shall be made with reasonable diligence.~~

[Disclosure by referee] The referee shall disclose as soon as practicable any facts that might be grounds for disqualification. A referee who has been privately compensated in any other proceeding in the past ~~18~~ 24 months as a judge, a referee, an arbitrator, a mediator, ~~or a~~ settlement facilitator, expert witness, or an attorney by a party, an attorney, or a law firm in the instant case shall disclose the number and nature of other proceedings before the first hearing. ~~Any objection to the appointment of a person as a referee shall be in writing and shall be filed and served upon all parties and the referee.~~ A referee shall also disclose any prior public State Bar discipline or court finding of violation of the Code of Judicial Ethics or the former Code of Judicial Conduct. The referee shall certify, on a form adopted by the Judicial Council, that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and other ethical requirements. A former California judicial officer serving as a referee shall also certify that he or she is a member of the State Bar.

(c) [Objections to the appointment] An agreement for an order directing a reference does not constitute a waiver of grounds for objection to the appointment under section 641 of the Code of Civil Procedure, but any objection shall be made with reasonable diligence. Any objection to the appointment of a person as a referee shall be in writing and shall be filed and served upon all parties and the referee.

~~(e)~~ (d) ***

~~(d)~~ (e) ***

~~(e)~~ (f) ***

(b) Rules 244.2 and 532.2. Reference by order

(a) ***

(b) **[Selecting the referee]** In selecting the referee, the court shall accept nominations from the parties and provide a sufficient number of names so that the parties may choose the referee by agreement or elimination. The parties may waive this procedure by a waiver noted in the minutes. If the referee is a former California judicial officer, he or she shall be a member of the State Bar. The name of the referee shall be stated in the order of reference.

~~(c) **[Objection to reference]** Participation in the selection procedure under subdivision (b) does not constitute a waiver of grounds for objection to the appointment under section 641 of the Code of Civil Procedure, or objection to the rate or apportionment of compensation of the referee, but any objection shall be made with reasonable diligence.~~ **[Disclosure by referee]** It is the duty of a referee to disclose as soon as practicable any facts that are known by the referee that might be grounds for disqualification. A referee who has been privately compensated in any other proceeding in the past ~~18~~ 24 months as a judge, a referee, an arbitrator, a mediator, or a settlement facilitator, an expert witness or an attorney by a party, attorney, or law firm in the instant case shall disclose the number and nature of such other proceedings, including the names of any party, attorney, and law firm that appeared in the previous case and are appearing in the instant case. ~~Any objection to the appointment of a person as a referee shall be in writing and shall be filed and served upon all parties and the referee.~~ A referee shall also disclose any prior public State Bar discipline or court finding of violation of the Code of Judicial Ethics or the former Code of Judicial Conduct. The referee shall certify, on a form adopted by the Judicial Council, that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and other ethical requirements. A former California judicial officer serving as a referee shall also certify that he or she is a member of the State Bar.

(c) [Objection to reference] Participation in the selection procedure under subdivision (b) does not constitute a waiver of grounds for objection to the appointment under section 641 of the Code of Civil Procedure or for objection to the rate or apportionment of compensation of the referee, but any objection shall be made with reasonable diligence. Any objection to the appointment of a person as a referee shall be in writing and shall be filed and served upon all parties and the referee.

~~(d)~~ (e) ***

~~(e)~~ (f) ***

CHAPTER 3 JUDICIAL ARBITRATION RULES

Rule 1604. Composition of the panels

(a) ***

(b) The panels of arbitrators shall be composed of active members of the State Bar, retired court commissioners who were licensed to practice law prior to their appointment as a commissioner, and retired judges. A former California judicial officer shall be a member of the State Bar in order to be on the panel of arbitrators. Each person appointed shall serve as a member of a panel of arbitrators at the pleasure of the administrative committee. A person may be on the arbitration panels in more than one county.

(c) ***

(d) An appointment to a panel is effective when the person appointed agrees to serve; certifies, on a form adopted by the Judicial Council, that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and other ethical requirements; and files an oath or affirmation to justly try all matters submitted to him or her. A former California judicial officer serving as an arbitrator must also certify that he or she is a member of the State Bar.

(e)-(f) ***

Rule 1606. Disqualification for conflict of interest

(a) It shall be the duty of the arbitrator to determine whether any cause exists for disqualification upon any of the grounds set forth in section 170.1 of the Code of Civil Procedure governing the disqualification of judges. If any member of the arbitrator's law firm would be disqualified under subdivision 4 of section 170.1, the arbitrator is disqualified. Unless the ground for disqualification is disclosed to the parties in writing and is expressly waived by all parties in writing, the arbitrator shall promptly notify the administrator of any known ground for disqualification and another arbitrator shall be selected as provided in rule 1605. An arbitrator shall also disclose any prior public State Bar discipline or court finding of violation of the Code of Judicial Ethics or the former Code of Judicial Conduct.

(b) – (c) ***

APPENDIX 5

APPENDIX 5

PROPOSALS RE ETHICAL STANDARDS FOR ADR NEUTRALS PART 2 –STANDARDS FOR MEDIATORS IN COURT-RELATED CIVIL MEDIATION PROGRAMS

Introductory Comment

This part of the subcommittees proposal regarding ethical standards for ADR neutrals includes a proposed rule of court requiring that if a court maintains a panel of ADR providers or makes a list of ADR providers available to litigants, in order to be included on the list, ADR providers must sign a certificate agreeing to comply with all applicable ethical requirements. It also includes a rule requiring each court that maintains a panel of mediators or makes a list of mediators available to litigants to adopt ethical standards applicable to the mediators on the court's panel or list. These proposed rules are intended to ensure that mediators in court-related mediation programs are covered by appropriate ethical standards. Enforcement of these requirements would be through removal from a court list.

Rules 1580.1 and 1619 of the California Rules of Court would be added, effective _____, to read:

Rule 1580.1. Lists of ADR providers

- (a) If a court makes a list of ADR providers available to litigants, the list shall contain, at a minimum, the following information concerning each provider listed:
- (1) The types of ADR services available from the provider;
 - (2) The provider's résumé, including ADR training and experience; and
 - (3) The fees charged by the provider for each type of service.
- (b) In order to be included on a court list of ADR providers, an ADR provider must:
- (1) Sign a certificate agreeing to comply with all applicable ethical requirements;
and
 - (2) Agree to serve as an ADR neutral on a pro bono or modest-means basis in at least one case per year if requested by the court.

Comments: This rule is also discussed in Part 1 of the subcommittee's proposal to encourage ADR use. (See Appendix 1.)

Subsection (b) of this rule would require that, in order to be included on a list of ADR providers made available to litigants by the court, providers must sign a certificate indicating that they will comply with applicable ethical requirements. This is intended to apply a certification requirement similar to that for temporary judges, referees, and judicial arbitrators under Part 1 of the subcommittee's ethics proposal to mediators or other neutrals in court-related ADR programs.

Rule 1619. Ethical standards for mediators in court-related mediation programs

Each court that maintains a panel of mediators or makes a list of mediators available to litigants shall adopt ethical standards applicable to the mediators on the court's panel or list. These ethical standards shall include, but not be limited to, provisions addressing mediator disclosure, impartiality, and avoidance of bias or the appearance of bias, both during and after the mediation.

Comments: This rule is also discussed in Part 2 of the subcommittee's proposals on encouraging the use of ADR processes.

This rule would require courts that maintain a panel of mediators or make a list of mediators available to litigants to adopt ethical standards applicable to those mediators. The rule does not specify a particular set of ethical standards that must be adopted. There are several sets of standards that courts may wish to consider, including the California Dispute Resolution Council's Standards of Practice for California Mediators, the Society for Professionals in Dispute Resolution/American Arbitration Association/American Bar Association Standards of Conduct for Mediators, and standards adopted by the trial courts in Contra Costa and San Mateo. All of these rules address the issue of impartiality, including disclosures required to be submitted by the mediator.

The subcommittee understands that this proposal may result in the adoption of different standards in different courts and that such lack of uniformity may create problems for neutrals and litigants who are involved in cases in more than one county. For this reason, the subcommittee is also recommending that the Judicial Council consider appointing a task force to draft a set of model ethical standards for mediators in court-connected mediation programs. In the meantime, the subcommittee believes that it is beneficial for local courts, bar associations, and ADR providers to engage in discussions about appropriate ethical standards for mediators. These discussions will not only educate participants about potential ethical issues, but will also provide a wealth of information for a future Judicial Council task force to use in drafting model standards.

APPENDIX 6

APPENDIX 6

PROPOSALS RE ETHICAL STANDARDS FOR AND NEUTRALS PART 3 – NEW CANON OF JUDICIAL ETHICS RE FORMER JUDICIAL OFFICERS PROVIDING ADR SERVICES

Introductory Comment

Part 3 would establish a new canon in the Code of Judicial Ethics relating to former judicial officers who provide dispute resolution services. For the first five years following retirement or resignation and thereafter at anytime when the individual indicates that he or she is a former judicial officer in communications regarding availability for employment, this new canon would prohibit the former judicial officer from accepting a gift from a person or an entity whose interests have come before him or her. This prohibition on gifts would be in place throughout the period in which he or she is engaged in resolving a dispute and continuing for two years thereafter. The language of this section is modeled in part on Canons 4F, 6C, and 6D. Canon 6D, as amended earlier this year, similarly prohibits temporary judges, referees, and court-appointed arbitrators from accepting such gifts.

This proposal is intended to address concerns about the potential effect of former judicial officers' activities on the public's perception of the judicial system. It is also intended to address perceived concerns about the use of the former judicial position for competitive advantage in the dispute resolution marketplace. When a former judicial officer engages in private dispute resolution activities, that person will be perceived by those who utilize his or her services as a person of integrity in part by virtue of his or her former judicial position. When a former judicial officer fails to meet that expectation, the subcommittee believes, the public's perception of the judicial system's integrity is also damaged. This proposal would therefore place special obligations on private dispute resolution providers who are former judicial officers. These obligations would be in place for the first five years after retirement or resignation because the committee believes the person's status as a former judicial officer would be apparent during that period, whether or not that status was specifically noted in the former judicial officer's communications. After the first five years, these special obligations would apply only if the former judicial officer indicated his or her former status in communications concerning availability for employment.

Unlike the Canon 6D requirements for temporary judges, referees, and court-appointed arbitrators, there is no corresponding rule of professional conduct for attorneys giving the State Bar disciplinary authority over retired judges' performing private dispute resolution services. The subcommittee considered such a proposal but ultimately rejected it as too problematic. For that reason, this new canon 6G is largely hortatory in

nature. In addition to this specific requirement, which is focused only on prohibiting the acceptance of gifts, the subcommittee recommends that all former judicial officers voluntarily comply with the provisions of Canon 6D.

CANON 6

G. Former Judicial Officers

(1) Notwithstanding the provisions of Canon 6D(4), a former judicial officer who serves as a temporary judge, referee, court-appointed arbitrator, private arbitrator, mediator, or in any other private judicial capacity, shall not accept a gift, bequest, or favor from a party, person, or entity whose interests have come before the former judicial officer, or, except as hereinafter provided, from counsel for such party, person, or entity:

- (a) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other member of the former judicial officer's family residing in the former judicial officer's household (as defined in these Canons as "member of the judges' family residing in the judge's household"*), including gifts, awards, and benefits for the use of both the spouse or other family member and the former judicial officer, provided the gift, award, or benefit could not reasonably be perceived as intended to influence the former judicial officer in his or her private judicial activities;
- (b) ordinary social hospitality from counsel for such party, person or entity;
- (c) a gift, bequest, or favor, or loan from a close personal friend whose appearance or interest in the future would not come before the former judicial officer because of the relationship, provided the gift, award, or benefit could not reasonably be perceived as intended to influence the former judicial officer in his or her private judicial activities;
- (d) a loan in the regular course of business on the same terms generally available to persons who are not judges or former judicial officers;
- (e) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

(2) This Canon shall apply for the first 5 years after retirement or resignation, and, thereafter, for so long as the former judicial officer serves as a temporary judge, referee, court-appointed arbitrator, private arbitrator, mediator, or in any other private judicial capacity and describes himself or herself as a former judicial officer or uses the word "honorable" or any other judicial title in communications concerning his or her availability for professional employment, and continuing for two years after he or she ceases to serve in a such a capacity or ceases to describe himself or herself in such a manner in communications concerning his or her availability for professional employment.

APPENDIX 7

APPENDIX 7

PROPOSAL TO AMEND THE STATUTES AND RULES RELATING TO REFERENCES

Introductory Comment

The Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System has been charged with studying and making recommendations concerning whether the standards for court referrals to private judges and other ADR providers need to be changed and, if so, how they should be changed. Based on the public testimony received by the subcommittee, as well as recent articles, court decisions, and other materials, the subcommittee has concluded that one of the principal areas of concern in this regard is the nonconsensual referral of matters to referees pursuant to Code of Civil Procedure section 639. The subcommittee identified three major issues of concern with regard to these references:

- *The perception that these references are being made in routine discovery matters that could be handled by the court;*
- *The method used by a court to select the referee and the perception of favoritism in this selection process; and*
- *The fees charged by the referees and the method used by the courts to allocate these fees among the parties.*

The proposed amendments to the reference statutes outlined below are intended to address these three issues, as well as to clarify and promote consistency in the statutory language. In developing them the subcommittee considered the proposed amendments to the reference statutes included in Senate Bill 19 during the 1997–1998 Legislative session, recent court decisions relating to references, including Solorzano v. Superior Court (1993) 18 Cal.App.4th 603; Taggares v. Superior Court (1998) 62 Cal.App.4th 94; and Hood v. Superior Court (1999), 85 Cal.Rptr.2d 114, and the existing rules of court relating to references under Code of Civil Procedure section 638 et. seq.

§ 638. Reference by agreement; purposes

A ~~reference may be ordered~~ referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in 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 hear and determine ~~try~~ any or all of the issues in any 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.

Comments: Different sections of the reference statutes currently refer to the courts “ordering” or “making” a reference and “appointing a referee.” The subcommittee recommends that the language of these sections be made more consistent. The change in the first paragraph is intended to promote this goal.

The change to subparagraph 1 is intended to more accurately reflect the current role of referees.

§ 639. Direction of Reference; Application; Court’s Own Motion; Nonconsensual Reference; Application; Order (Amendment to Existing Code Section)

When the parties do not consent, the court may, upon the ~~application~~ written motion of any party, or of its own motion, ~~direct a reference~~ appoint a referee in the following cases:

Comments: The change from “application” to “written motion” is intended to more accurately reflect current practice (see rules 244.2 and 532.2, relating to motions by a party for appointment of a referee). As discussed in the comments on section 638, the change from “direct a reference” to “appoint a referee” is intended to promote consistency in the statutory language.

(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. Appointments of referees pursuant to this subdivision shall not be made routinely but only when exceptional circumstances of the particular case require it. When a referee is appointed to preside over a deposition, the referee shall control the proceedings and rule upon objections.

Comments: The first new sentence added to subparagraph (e) is intended to clarify that a discovery reference should be made only when exceptional circumstances of the particular case require it. This is similar to the language in SB 19 that provided: “[A] reference ordered under subdivision (e) shall not be made routinely but only if required by exceptional circumstances related to the action.” The subcommittee received public testimony suggesting that discovery references are being made on a routine basis in

*cases that do not involve particularly complex or difficult discovery disputes. The subcommittee believes, consistent with the concept embodied in SB 19 and with recent Court of Appeal decisions, that discovery references should not be made routinely (see, e.g., Taggares v. Superior Court of San Diego County, *supra*, 62 Cal.App.4th 94. (Unless both parties in litigation have agreed to a reference, the court should not make blanket orders directing all discovery motions to a discovery referee except in the unusual case where a majority of factors favoring reference are present. These include: (1) there are multiple issues to be resolved; (2) there are multiple motions to be heard simultaneously; (3) the present motion is only one in a continuum of many; and (4) the number of documents to be reviewed (especially in issues based on assertions of privilege) make the inquiry inordinately time consuming. In making its decision, the trial courts need to consider that the statutory scheme is designed only to permit reference over the parties' objections where that procedure is necessary, not merely convenient (Code Civ. Proc., § 639 (e)). Where one or more of the above factors unduly affect the court's time or limited resources, the court is within its discretion to make an appropriate reference); DeBlase v. Superior Court (1996), 41 Cal.App.4th 1279 [Plaintiff's discovery motion did not raise complex or time-consuming issues of a degree sufficient to warrant appointment of a referee to resolve them. Neither the document request nor the response was voluminous or complicated.]; and Hood v. Superior Court (1999), 85 Cal.Rptr.2d 114 Trial court order appointing referee to resolve discovery disputes was improper and could not stand where no finding was made that case presented circumstances out of the ordinary that made reference "necessary.")*

The second new sentence is intended to provide statutory clarification of the authority of referees presiding over depositions to control the proceedings and rule on objections. California Rules of Court, rules 244.2(e)(1) and 532.2(e)(1) currently require that orders appointing discovery referees “[g]rant the referee the authority to set the date, time, and place for all hearings determined by the referee to be necessary, to direct the issuance of subpoenas, to preside over hearings, to take evidence, and to rule on objections, motions, and other requests made during the course of the hearing.” This provision is not intended to diminish the court’s authority to review any rulings made by a referee during a deposition; the court’s general authority to review the referee’s report is covered in section 643, below.

(f) All appointments of referees pursuant to this section shall be by written order, which shall include the following:

Comments: *This new subdivision would clarify that all nonconsensual references must be made by written order. This requirement is different from what was proposed in SB 19; that bill set forth requirements for reference orders in the case of discovery (639(e)) only and did not specify whether a written order was required.*

(1) When the referee is appointed pursuant to subdivisions (a), (b), (c), or (d), a statement of the reason that the referee is being appointed.

(2) When the referee is appointed pursuant to subdivision (e), the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.

Comments: California Rules of Court, rules 244.2(a) and 532.2(a) currently require that orders appointing referees under section 639 (nonconsensual references) specify the reasons for the reference. These proposed new subdivisions would create a statutory requirement that such reference orders include a justification for making a nonconsensual reference. Proposed subdivision (1) contains language similar to these requirement in SB 19, that orders appointing discovery referees “state the reasons the court finds it necessary to refer the matter to a referee.” By separating out and reiterating the more stringent standard for making discovery references, these proposed new subdivisions would reemphasize that discovery references should not be made on a routine basis.

(3) The subject matter or matters included in the reference.

Comments: California Rules of Court, rules 244.2(a) and 532.2(a) currently require that orders appointing referees under section 639 specify “the scope of the requested reference.” This subdivision would create a statutory requirement that such orders include a description of the subject matter(s) the referee is being asked to consider. This is similar to the language used in California Rules of Court, rules 244.1(a) and 532.1 (applicable to consensual references under section 638), which currently require that the reference agreement and the reference order “clearly state whether the scope of the reference covers all issues or is limited to specified issues.” SB 19 would similarly have required that orders appointing discovery referees “specify the scope of the reference and the specific matter that the court intends to refer to the referee.”

(4) The name, business address, and telephone number of the referee.

Comments: California Rules of Court, rules 244.2(b) and 532.2(b) currently require that the name of the referee be stated in orders appointing referees under section 639. This proposed new subdivision would create a statutory requirement that such reference orders include the name, address, and telephone number of the referee being appointed. This is similar to the language used in California Rules of Court, rules 244.1 and 532.1 (applicable to consensual references under section 638), which currently require that the reference order proposed by the parties “state the name and business address of the proposed referee.” SB 19 would similarly have required that orders appointing discovery referees “identify the referee.”

(5) The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. Upon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours subject to any findings in (6) below.

Comments: California Rules of Court, rules 244.2(a) and 532.2(a) currently require that orders appointing referees under section 639 include “any conditions on the reference, including any limitation on the referee’s total fees or hourly fee.” The first sentence of this proposed new subdivision would create a statutory requirement that such reference orders include the maximum hourly rate the referee may charge and, if requested by a party, the estimated maximum number of hours for which the referee may charge. This requirement is different from what was proposed in SB 19, which would have required that all orders appointing discovery referees specify “the estimated maximum time the matter should take.”

The subcommittee received public testimony expressing concern over both the hourly rates and the overall cost of discovery references. In this context it was suggested that some referees engage in “churning”—taking more time than is necessary to make determinations in order to increase their overall fees. The subcommittee believed that it was therefore important to address both the maximum hourly and total fees. The subcommittee discussed at length whether an estimate of the maximum number of hours for which the referee may charge should be required in all reference orders, as was proposed in SB 19. While the subcommittee believed that requiring an estimate in all cases would be effective in addressing concerns about “churning,” it was also concerned that it would impose a substantial administrative burden on the courts. The subcommittee believed that these concerns were best balanced by requiring such an estimate only if requested by a party.

The subcommittee discussed whether this proposed language prohibited a referee from requiring advance payment or a retainer and determined that it did not. The subcommittee further discussed whether the statute should prohibit a referee from requiring a nonrefundable retainer in nonconsensual references but determined that the statute should not address this issue.

The second sentence of this proposed new subdivision would provide that the court could modify its estimate of the maximum number of hours upon application of either a party or the referee. Neither the current rules nor SB 19 specifically address this issue; both, however, provide that the court can modify its order as to the apportionment of the reference costs and may consider the referee’s recommendation in determining any modification.

(6) Either a finding that no party has established an economic inability to pay a pro rata share of the referee’s fee or a finding that one or more parties has

established an economic inability to pay a pro rata share of the referee's fee but that another party has agreed voluntarily to pay that additional share of the referee's fee. A court shall not appoint a referee at a cost to the parties if neither of these findings can be made. In determining whether a party has established an inability to pay the referee's fees, the court shall consider only the ability of the party, not of party's counsel, to pay these fees.

Comments: California Rules of Court, rules 244.2(a) and 532.2(a) currently provide that “[w]hen the issue of economic hardship is raised before the commencement of the referee’s services, the court shall determine a fair and reasonable apportionment of reference costs.” The first sentence of this proposed new subdivision would create a statutory requirement that a court make a specified finding about the parties’ ability to pay the referee’s fees and would prohibit a court from making a nonconsensual reference if it cannot make such a finding. This requirement is different from what was proposed in SB 19, which would have required that all orders appointing discovery referees specify “whether or not any party has claimed an economic hardship; and if so, the court shall determine a fair and reasonable apportionment of reference costs.” As drafted, this subdivision prohibits courts from making nonconsensual references in which there will be a cost to the parties unless the court finds the parties are able to pay. This is consistent with the recent decision in Taggares v. Superior Court of San Diego County, supra, 62 Cal.App.4th 94, in which the court held that where one party is indigent, a court may not order a non-indigent party to pay the entire cost of the reference and thus may not order a nonconsensual reference unless it makes a cost-free option available to the parties. The court in that case reasoned that requiring one party to bear the full cost of a private reference may give rise to an appearance of unfairness if the rulings favor that party; and if only one party pays, there is a chilling effect on the exercise of that party's discovery rights and a corresponding disincentive for the opposing party to cooperate. The subcommittee agrees with this reasoning.

The second sentence in this subdivision would clarify that courts may not consider counsel’s ability to pay the referee’s fees when determining whether the parties are able to pay their fees. This issue was not addressed in SB 19, but the subcommittee’s recommendation is consistent with the interpretation of existing statutes in Taggares. In this case, the court concluded that the authorization in Code of Civil Procedure sections 645.1 and 1023 for the court to order “parties” to pay the referee’s fees meant these fees could be imposed on the parties themselves, not on parties’ counsel. The court specifically held that the fact that plaintiff’s attorneys assumed the risk of advancing the costs of litigation as part of a contingency fee contract did not require plaintiff’s attorneys to advance the costs of a nonconsensual reference. The court concluded that imposing the cost of reference on an impoverished client's attorney raises equal protection, due process, and fundamental fairness concerns, in that it bars meaningful access to their courts by discouraging the availability of contingent-fee counsel, thereby punishing poor litigants those unable to afford retainers and hourly fees.

(g) In any matter in which a referee is appointed pursuant to subdivision (e), a copy of the order appointing the referee shall be forwarded to the office of the presiding judge of the court. The Judicial Council shall, by rule, collect information on the use of references in such proceedings and the reference fees charged to litigants, and shall report thereon to the Legislature within [A sunset provision is to be inserted, using the appropriate language to provide that subdivision (g) will be repealed effective three years after enactment.]

Comments: This subdivision would require courts to forward copies of all discovery reference orders to the office of the presiding judge. It would also require the Judicial Council, by rule, to collect information on the use of discovery references and the fees charged to parties and to report to the Legislature on these issues. SB 19 contained similar requirements. The subcommittee discussed at length whether copies of orders appointing discovery referees should be sent to the presiding judge, the clerk's office, or some other central location. The subcommittee ultimately concluded that, while the presiding judge did not exercise supervisory authority over other judges' determinations concerning the appointment of discovery referees, the office of the presiding judge was the most appropriate location to collect these copies because the office could easily be located by litigants who wished to access the information.

§ 640. Order of Reference; Selection or Appointment of Referees or Court Commissioner; Qualifications; Selection of Referee; Qualifications (Amendment to Existing Code Section)

(a) ~~A reference may be ordered to~~ The court shall appoint as referee or referees the person or persons, not exceeding three, agreed upon by the parties.

Comments – As discussed in the Comments to section 638, the change from “a reference may be ordered” to “appoint as referee” is intended to promote consistency in the statutory language.

(b) If the parties do not agree, on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee and the court or judge must shall appoint one or more referees, not exceeding three, from among the nominees. If no nominations are received from any of the parties, the court shall appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to court may appoint as referee, court commissioner of the county where the cause is pending.

Comments: California Rules of Court, rules 244.2(b) and 532.2(b), which apply to all nonconsensual references, currently provide that “[i]n selecting the referee, the court shall accept nominations from the parties and provide a sufficient number of names so that the parties may choose the referee by agreement or elimination. The parties may waive this procedure by a waiver noted in the minutes.” These proposed new subdivisions would create a statutory procedure for the selection of a referee when the parties have not agreed on a particular referee or referees. SB 19 did not address the procedures for selecting the referee.

The public testimony received by the subcommittee included complaints about the procedures used by courts to select referees, including that courts did not take the parties’ preferences into account in selecting a referee and that courts practiced favoritism in selecting referees – choosing as referees judges’ friends and former colleagues. The subcommittee believes that minimizing the opportunities for favoritism and ensuring party input into the referee selection process are important. This belief is consistent with the decision in Taggares, supra, which suggests that parties should always be given the opportunity to select an acceptable referee so the court can avoid criticism that it routinely selects a particular private provider and so the parties can choose a referee whose fees, availability, and expertise are perceived to be mutually favorable. The subcommittee discussed a requirement, modeled after the requirements in

the judicial arbitration and civil action mediation program, that each court maintain a list of persons eligible for appointment as referees and that referees in nonconsensual references be selected from that list. However, the subcommittee ultimately recommended the proposal procedure above because it provides greater party choice while minimizing the administrative burden on the courts.

(c) Participation in the referee selection procedure pursuant to this section does not constitute a waiver of grounds for objection to the appointment of a referee under Section 641 or 641.2 of the Code of Civil Procedure

Comments: *California Rules of Court, rules 244.2(c) and 532.2(c) (applicable to nonconsensual references under Code Civ. Proc. 639) currently provide that “[p]articipation in the [referee] selection procedure . . . does not constitute a waiver of grounds for objection to the appointment under section 641 of the Code of Civil Procedure,” and rules 244.1(b) and 532.1(b) (applicable to consensual references under 638) currently provide that “[a]n agreement for an order directing a reference does not constitute a waiver of grounds for objection to the appointment under section 641 of the Code of Civil Procedure.” This proposed new subdivision would provide statutory clarification that participation in the referee selection process does not constitute waiver of a party’s right to object to the reference. SB 19 would similarly have provided that “[w]here the parties stipulate to a particular referee, it shall not be deemed a waiver of any party’s objection to the reference being made.”*

§ 641. Objections to Referee; Timing; Grounds (Amendment to Existing Code Section)

A party may object to the appointment of any person as referee, on one or more of the following grounds:

(a) – (c) ***

(d) Having served as a juror or been a witness on any trial between the same parties ~~for the same cause of action.~~

(e) – (g) ***

Comments: The subcommittee believed that serving as a juror or witness in any trial between the same parties, whether or not it was for the same cause of action, should be grounds for objection to a referee.

§ 641.2. Environmental Actions; Objection to Referee on Grounds of Referee's Technical Qualifications (Amendment to Existing Code Section)

In any action brought under Article 8 (commencing with Section 12600) of Chapter 6, Part 2, Division 3, Title 3 of the Government Code, a party may object to the appointment of any person as referee on the ground that ~~he~~ the person is not technically qualified with respect to the particular subject matter of the proceedings.

**§ 642. Objections to Reference or to Referee; Hearing and Disposal;
Affidavit; Witnesses (Amendment to Existing Code Section)**

~~The objections taken to the appointment of any person as referee must be heard and disposed of by the Court. Affidavits may be read and witnesses examined as to such objections.~~ Objections, if any, to a reference or to the referee or referees appointed by the court shall be made in writing, and must be heard and disposed of by the court, not by the referee.

Comments – These amendments are intended simply to clarify the statutory language, not to make any substantive changes.

§ 643. Written Referee’s Report of Statement of Decision; Time (Amendment to Existing Code Section)

(a) Unless otherwise directed by the court, the referee or commissioner must report ~~their statement of decision~~ in writing to the court within 20 days after the testimony is closed hearing, if any, has been concluded and the matter has been submitted.

Comments: California Rules of Court, rules 244.2(e)(2) and 532.2(e)(2) currently require that orders appointing discovery referees under section 639(e) “[r]equire the referee to submit a written report to the parties and to the court within 20 days after the completion of the hearing, with a proposed order and any recommendation for the imposition of sanctions.” The first proposed addition to this section is intended to clarify that the court has discretion to shorten or extend the time within which a referee must submit a report to the court. The other amendments are intended to more accurately reflect the referee’s role and existing practice and terminology as well as to clarify that referees are not required to submit separate reports on preliminary subissues within a particular matter, the referee’s report is required only after the matter has been completed.

(b) A referee appointed pursuant to Section 638 shall report as agreed by the parties and approved by the court.

Comments: This proposed new subdivision is intended to help clarify that the expanded reporting requirements established under proposed subdivision (c) below do not apply in the case of consensual references.

(c) A referee appointed pursuant to Section 639 shall submit a report that includes a recommendation on the merits of any disputed issue, a statement of the total hours spent and the total fees charged by the referee, and the referee’s recommended allocation of payment. Within 10 days after the referee serves and files the report, or within such other time as the court may direct, any party may serve and file objections to the report or recommendations. The court shall review any objections to the report and any response submitted to those objections and shall thereafter enter the appropriate orders. Nothing in this title is intended to deprive the court of its power to change the terms of the referee’s appointment or to modify or disregard the referee’s recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court’s own motion.

Comments: The first sentence in this proposed new subdivision would establish a statutory requirement that discovery referees include specified information in their

reports to the court. The requirement for a recommendation on the merits “of any disputed issue” is intended to encompass cases where the referee’s role is limited to supervising a deposition; in such cases a recommendation that the court follow any evidentiary rulings made by the referee during the deposition would be sufficient. The requirement that the report include the total hours spent and the total fees charged by the referee is intended to further address concerns about the total fees charged by ensuring that parties have the information necessary to formulate objections to them and that courts can effectively oversee them.

The second and third sentences in this proposed new subdivision would establish a statutory procedure and time frame for the filing of objections to a discovery referee’s report and clarify that objections to the referee’s fees may also be filed. California Rules of Court, rules 244.2(e)(3) and 532.2(e)(3) currently specify that orders appointing discovery referees under section 639(e) “[r]equire that objections to the report shall be served and filed no later than 15 calendar days after the report is mailed to counsel, that any party who objects to the report shall serve and file notice of a request for a hearing, and that copies of the objections and any responses shall be served upon the referee.” This subdivision would provide 10, rather than 15, days to file objections to the report or the referee’s fees.

The final sentence in this proposed new subdivision is intended to clarify that these objection procedures do not change the court’s existing authority with regard to the terms of referees’ appointments or their recommendations.

§ 644. Decision as decision of Court; Entering Judgment (Amendment to Existing Code Section)

(a) In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court.

(b) In the case of all other references, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings.

Comments: These amendments are intended to embody existing case law in the statute; they are meant to clarify current practice, not to make any substantive changes.

§ 645.1. Order for Payment of Referee’s Fees (Amendment to Existing Code Section)

(a) When a referee is appointed pursuant to Section 638, the referee’s fees shall be paid as agreed by the parties. If the parties do not agree, the court may order the parties to pay the referee’s fees as set forth in subsection (b) below.

Comments: This new subdivision is intended to clarify that in consensual references, the parties may determine how the referee’s fees will be paid and the court will set the terms of payment only where the parties fail to agree on those terms.

(b) When a referee is appointed pursuant to Section 639, at any time after a determination of ability to pay is made as specified in subdivision (g) (f)(6) of Section 639, the court may order the parties to pay the fees of the referees, who are not employees or officers of the court at the time of appointment, as fixed pursuant to Section 1023, in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties. For purposes of this section, the term “parties” does not include parties’ counsel.

Comments: California Rules of Court, rules 244.2(a) and 532.2(a) currently provide that “[w]hen the issue of economic hardship is raised before the commencement of the referee’s services, the court shall determine a fair and reasonable apportionment of reference costs.” The proposed introductory clause that would be added to this section would require the court, before ordering the payment of the referee’s fees, to first make a determination, pursuant to proposed new subdivision (f)(6) of section 639, that the parties are able to pay the fees. Once this determination was made, this section would give the trial court discretion to order progress payments or defer the referee’s payment until the work has been completed.

The subcommittee believed that the phrase “referees who are not employees or officers of the court at the time of appointment” was unnecessary.

*The final sentence would be added to this section in order to further clarify that courts may not order parties’ counsel to pay the referee’s fees. As was discussed above in the Comments to proposed new subdivision (f)(6) of section 639, this recommendation is consistent with the interpretation of existing statutes in Taggares, *supra*, 62 Cal.App.4th . In this case, the court concluded that the authorization in Code of Civil Procedure sections 645.1 and 1023 for the court to order “parties” to pay the referee’s fees meant these fees could be imposed on the parties themselves and not on parties’ counsel.*

APPENDIX 8

Release
Date: February 24, 1998
Release #: 16

CHIEF JUSTICE NAMES NEW TASK FORCE ON QUALITY OF JUSTICE IN CALIFORNIA

Panel to Study Impact of Private Judging, ADR on State Courts, Litigants, and Public

San Francisco—Chief Justice Ronald M. George today announced the appointment of the Judicial Council Task Force on the Quality of Justice, a new statewide panel that will study the impact of private judging and court-affiliated alternative dispute resolution (ADR) services on state courts, litigants, and the public. The task force also will study ways the California judicial system can attract and retain highly qualified judges to serve full careers on the bench.

“The way we address these important issues will have a tremendous impact on the quality of justice, the public’s access to justice, and the public’s confidence in our judicial system for many years to come,” said Chief Justice George in appointing the panel.

The task force will consist of two subcommittees—the Subcommittee on the Quality of Judicial Service and the Subcommittee on ADR and the Judicial System.

Subcommittee on the Quality of Judicial Service

Judge Robert M. Mallano, former Presiding Judge of the Los Angeles County Superior Court, and Justice James D. Ward of the Court of Appeal for the Fourth Appellate District (San Bernardino) will serve as chair and co-chair,

(over)

respectively, of the Subcommittee on the Quality of Judicial Service. Created at the recommendation of the Judicial Council, this panel is charged with making recommendations, including proposed rules, standards, and legislation, to ensure that:

- judges remain on the bench for full careers;
- older judges who are healthy and fit have the option to remain on the bench;
- judges who are no longer fully able to serve retire at an appropriate time; and
- compensation and benefits (e.g., sabbaticals and increased vacation time) are adequate to attract and retain highly qualified attorneys from all areas of legal practice.

Subcommittee on ADR and the Judicial System

Dean Jay Folberg, of the University of San Francisco Law School, and Judge Darrel Lewis, of the Sacramento Superior and Municipal Courts, will serve as chair and vice-chair, respectively, of the second panel. This subcommittee will study and make recommendations on the following issues:

- ***Effect of ADR on courts:*** How has the increasing use of private alternative dispute procedures affected the justice system and the courts? Should any measures be adopted to ameliorate any negative effects or reinforce and expand any positive effects of private ADR?
- ***Effect of ADR on litigants and the public:*** What effect has the increasing use of private ADR had on litigants and the public? For example, how has private ADR affected the time and cost required to resolve disputes in the courts or the public's understanding of, and confidence in, the justice system? What measures might be adopted to ameliorate any negative effects or reinforce and expand any benefits of private ADR?
- ***Ethical issues:*** Which state entity or official has the authority to adopt ethical standards, including educational guidelines, governing active and

retired judges, attorneys, and nonattorneys acting as arbitrators or mediators? If an entity has the authority, should it adopt standards, and what should they be? If no entity has such authority with respect to one or more of the groups identified, can and should such authority be granted, to whom, and what standards should the entity adopt?

- ***Court referral of disputes:*** Should the standards governing the referral of disputes by courts to private judges or attorneys be changed? If yes, what changes should be made?

Both subcommittees have been asked to complete interim reports with tentative recommendations by November 1, 1998, with final reports from each subcommittee to be submitted to the council by March 1, 1999.

Membership rosters for both subcommittees are attached.

#

APPENDIX 9

Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System
Survey of Alternative Dispute Resolution Providers

In September 1998, the Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System conducted a survey of dispute resolution providers in California. Surveys were mailed out to approximately 90 ADR providers, including private ADR firms, community-based ADR programs, and individual providers. ADR providers were identified from a variety of sources. Private ADR firms and individual providers were found in the Los Angeles Daily Journal's 1998 Directory of California Attorneys, the 1998 Bar Association of San Francisco's Directory of San Francisco Attorneys & Alternative Dispute Resolution Providers, the 1998 edition of California Arbitrator Reviews and were identified by members of the subcommittee. Community-based programs were identified in the State Bar of California's Dispute Resolution Directory. The providers surveyed were not selected on a random basis; surveys were sent to all of the private firms and community-based programs identified, all of the individual providers identified by subcommittee members, and to a selection of other individual providers.

In all, 45 surveys were returned; 22 surveys from individual private providers of ADR services, 5 from private ADR firms, 11 community-based or governmental ADR programs, 1 from a court-related program and 6 surveys which did not identify the type of ADR provider. During the 1997 calendar year, these 45 providers of ADR services handled 28,760 total cases.¹

Type of Provider	Number Of Survey Respondents	Percent of Survey Respondents
Individual private provider	22	49%
Private ADR firm	5	11%
Community or government programs	11	24%
Court-related program	1	2%
Unknown	6	13%
TOTAL	45	100%

ADR services

Respondents were asked to indicate the types of ADR services that they provide and the number of cases they had during the 1997 calendar year. The following table compares the types of ADR services provided by individual private providers, private firms, and community providers.

¹ There may be some overlap between the cases handled by private firms and those handled by individual private providers, as many individual providers serve on the panels of ADR firms.

This table shows that:

- More than half the caseload of the individual providers responding was mediations; with the remainder split among other processes.
- The bulk of private ADR firms' caseload was split primarily between arbitrations and mediations, with slightly more arbitrations than mediations.
- Community providers caseload consisted primarily of mediations and conciliations (listed in the "other" category).
- Over three quarters of the total arbitrations were handled by private ADR firms.

Arbitrations Resulting from Predispute Contractual Agreements

Respondents were asked to indicate how many of the arbitrations they conducted in 1997 were the result of predispute contractual agreements to arbitrate. Results are presented in the following table:

PREDISPUTE CONTRACTUAL AGREEMENT	Number of providers	Percentage of providers	Number of arbitrations	Percent of all arbitrations conducted
Individual providers	15	68%	143	35%
Private firms	4	80%	3,435	63%
Community	2	18%	106	10%
OVERALL	24		3,684	53%

Ethical Standards

Respondents were asked to indicate whether they, as individual providers, or the providers in their organization follow any specific ethical or practice guidelines related to, for example, conflicts of interest, limitations on repeat business, disclosure, gifts, employment, fees, fairness of proceedings, *ex parte* communications. Results are summarized in the following table:

Type of Provider	Yes	Percent of those Responding	No	Percent of those Responding
Individual provider	20	95%	1	5%
Community ADR organization	9	100%	0	0%
Private ADR firm	5	100%	0	0%
Unknown	4	100%	0	0%
TOTAL	38	97%	1	3%

ADR SERVICES	INDIVIDUAL PROVIDERS			PRIVATE FIRMS			COMMUNITY PROVIDERS			TOTAL		
	# of Providers	# of Cases	% of Cases	# of Providers	# of Cases	% of Cases	# of Providers	# of Cases	% of Cases	# of Providers	# of Cases	% of Cases
<i>Arbitrations</i>	20	408	14%	5	5,461	52%	5	1,108	10%	30	6,977	28%
<i>Mediations</i>	22	1,520	52%	5	4,576	43%	11	7,708	69%	38	13,804	56%
<i>References pursuant to CCP §638</i>	11	193	7%	3	133	1%	1	4	0%	15	330	1%
<i>References pursuant to CCP §639</i>	8	140	5%	4	160	2%	0	0	0%	12	300	1%
<i>Mini-trials</i>	1	15	1%	1	2	0%	1	0	0%	3	17	0%
<i>Summary jury trials</i>	0	0	0%	0	0	0%	2	1	0%	2	1	0%
<i>Voluntary settlement conferences</i>	8	231	8%	2	250	2%	2	5	0%	12	486	2%
<i>Other</i>	5	424	15%	1	3	0%	5	2,350	21%	11	2,777	11%
Grand total	22	2,919	100%	7	10,585	100%	11	11,176	100%	38	24,680	100%

FirstName»LastName»
JobTitle»
Company»
Address1»
City»

Dear Title2»LastName»

I am writing as the Chair of the Judicial Council Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System (the Subcommittee). In February, Chief Justice Ronald M. George appointed the Task Force on the Quality of Justice to study the impact of private judging and court-affiliated alternative dispute resolution (ADR) services on state courts, litigants, and the public. The Subcommittee specifically is charged with studying and making recommendations on the following issues:

1. The effect of the increasing use of private alternative dispute resolution procedures on the justice system, litigants, and the public and whether any measures should be adopted to ameliorate any negative effects or reinforce and expand any benefits of private ADR;
2. Whether ethical standards should be adopted governing active and retired judges, attorneys, and nonattorneys acting as arbitrators and mediators; and
3. Whether the standards governing court referrals to private judges and attorneys should be changed.

The subcommittee currently is seeking information from ADR providers that will assist it in responding to its charge. Accordingly, the subcommittee has prepared the enclosed questionnaire, which is being sent to selected ADR provider organizations and individual providers.

On behalf of the subcommittee, I would appreciate it if you would take the time to complete the questionnaire. Unless you choose otherwise, your responses to this questionnaire will be completely anonymous.

The subcommittee also will be holding public hearings in San Francisco and Los Angeles. We will provide you with notice of these public hearings and other opportunities for comment as they occur.

Please return the completed questionnaire by Friday, September 25, either by facsimile to Ms. Romunda Price at 415-396-9358, or by mail in the enclosed, postage-paid envelope. If you have any questions or comments, please call the subcommittee's counsel, Heather Anderson, at 415-356-6616, or Deborah Brown, at 415-396-9129.

Thank you in advance for your participation.

Sincerely,

Jay Folberg, Dean
University of San Francisco School of Law
and
Chair, Judicial Council Task Force
on the Quality of Justice, Subcommittee on
Alternative Dispute Resolution and the
Judicial System

Enclosures

ALTERNATIVE DISPUTE RESOLUTION PROVIDER QUESTIONNAIRE

Thank you for helping the Judicial Council Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Justice System by participating in this survey. If you need additional space to answer any of the questions, please feel free to attach separate sheets.

1. Please indicate whether you are answering this questionnaire on behalf of an organization or as an individual provider of alternative dispute resolution (ADR) services.

___ I am answering on behalf of an organization.

___ I am answering as an individual provider.

2. Indicate the types of ADR services you provide and the number of cases you had in calendar year 1997 in each of the modes of ADR services listed below. If you do not maintain this information, please provide your best estimate of the number of cases within each category.

ADR Services	Total number of cases	These figures are from records I/we maintain.	These figures are my/our best estimate.
Arbitrations			
Mediations			
References pursuant to CCP §638			
References pursuant to CCP §639			
Mini-trials			
Summary jury trials			
Voluntary settlement conferences			
Other (please specify): _____			
Grand total			

3. Of the total arbitrations that you provided in calendar year 1997 (identified in your response to question number 2 concerning arbitrations), how many were the result of a predispute contractual agreement to arbitrate? If you do not maintain this information, please provide your best estimate.

Number of arbitration services that resulted from predispute contractual agreements: _____

This figure is: ___ from records I/we maintain.

___ my/our best estimate.

4. Of the total number of the arbitrations that resulted from predispute contractual agreements to arbitrate in calendar year 1997 (identified in your response to question number 3), how many were the result of the following types of predispute contractual agreements? If you do not maintain this information, please provide your best estimate.

Predispute Contractual Agreements	Number of arbitrations	These figures are from records I/we maintain.	These figures are my/our best estimate.
Individual employment contracts			
Disputes arising under collective bargaining agreements			
Health care contracts			
Banking contracts			
Real estate and homeowner contracts			
Consumer contracts not listed above (please specify other types): _____			
Business transaction contracts			
Other (please specify): _____ _____			
Total			

5. Do you (as an individual arbitrator) or your organization's arbitrators award attorney fees?

Yes ___ No ___

If yes, please describe the circumstances under which you (as an individual arbitrator) or your organization's arbitrators award attorney fees.

6. How many of the arbitrations that you conducted in calendar year 1997 resolved the case without additional court action (other than any court action necessary to dismiss the case or enter an award)? If you do not maintain this information, please provide your best estimate.

Number of arbitrations that resolved the case without additional court action: _____

This figure is: ___ from records I/we maintain.

___ my/our best estimate.

7. Of the total mediations that you provided in calendar year 1997 (identified in your response to question number 2 concerning mediations), how many were the result of a predispute contractual agreement to mediate? If you do not maintain this information, please provide your best estimate.

Number of mediation services that resulted from predispute contractual agreements: _____

This figure is: _____ from records I/we maintain.

_____ my/our best estimate.

8. Of the total mediations that resulted from predispute contractual agreements to mediate in calendar year 1997 (identified in your response to question number 7), how many were the result of the following types of predispute contractual agreements? If you do not maintain this information, please provide your best estimate.

Predispute Contractual Agreements	Number of mediations	These figures are from records I/we maintain.	These figures are my/our best estimate.
Individual employment contracts			
Disputes arising under collective bargaining agreements			
Health care contracts			
Banking contracts			
Real estate and homeowner contracts			
Other consumer contracts not listed above (please specify other types): _____			
Business transaction contracts			
Other (please specify): _____ _____			
Total			

9. How many of the mediations that you conducted in calendar year 1997 resolved the case without additional court action (other than any court action necessary to dismiss the case or enter an award)? If you do not maintain this information, please provide your best estimate.

Number of mediations that resolved the case without additional court action: _____

This figure is: _____ from records I/we maintain.

_____ my/our best estimate.

10. Do you (as an individual provider) or the ADR providers in your organization know who pays for the neutral's fees for the arbitrations and/or mediations in which you are involved?

Yes _____ No _____

If yes, please complete the following chart by inserting the number of cases in calendar year 1997 that fall within each category. If you do not maintain this information, please provide your best estimate.

Payment of Neutral's Fees	Number of arbitrations	Number of mediations	These figures are from records I/we maintain.	These figures are my/our best estimate.
Plaintiff and defendant pay equal portion of neutral's fees.				
Defendant pays all of neutral's fees.				
Plaintiff pays all of neutral's fees.				
Defendant pays more than half of neutral's fees.				
Plaintiff pays more than half of neutral's fees.				
Other (please specify): _____				
Comments on payment of neutral's fees:				

11. Do you (as an individual provider) or the ADR providers in your organization follow any specific ethical or practice guidelines related to, for example, conflicts of interest, limitations on repeat business, disclosure, gifts, employment, fees, fairness of proceedings, *ex parte* communications?

Yes _____ No _____

If yes, please describe the guidelines and provide a copy of any related written materials.

IF YOU ARE COMPLETING THIS SURVEY ON BEHALF OF AN ORGANIZATION, PLEASE SKIP TO QUESTION NUMBER 13.

12. As an individual provider, please describe your background and State Bar status by checking the appropriate box:

	Active member of California State Bar	Inactive member of California State Bar	Not member of California State Bar
Retired judge			
Attorney			
Other			

IF YOU ARE AN INDIVIDUAL PROVIDER, PLEASE SKIP TO QUESTION NUMBER 20.

13. As an ADR organization, how many ADR providers do you have? (Please include all ADR providers employed by or affiliated with your organization.) _____

14. Please complete the following chart by inserting the number of ADR providers you have in your organization within each category. Please include ADR providers employed by or affiliated with your organization.

ADR Providers	Active members of California State Bar	Inactive members of California State Bar	Not members of California State Bar	Total
Retired judges				
Attorney				
Other				

15. Do you have any minimum requirements for your ADR providers (e.g., experience, licenses, certifications)? Yes _____ No _____

If yes, please describe the minimum requirements and provide a copy of them.

16. Do you provide any training programs for your ADR providers? Yes _____ No _____

If yes, please describe your training programs and provide a copy of any training materials.

17. Do you have any continuing education requirements for your ADR providers?

Yes _____ No _____

If yes, please describe your continuing education requirements and provide a copy of any materials on the requirements.

18. Do you evaluate your ADR providers? Yes _____ No _____

If yes, please describe how you evaluate your providers (e.g., how often, who evaluates, and whether there are any rewards or discipline for good or bad performance) and provide a copy of any evaluation materials. _

19. Do you have a procedure for handling complaints about your ADR providers?

Yes _____ No _____

If yes, please describe your complaint procedure and provide copies of any related materials.

TO BE ANSWERED BY ALL RESPONDENTS

20. Please provide any additional information that you believe would assist this task force in its charge to:

- (1) evaluate the effect of alternative dispute resolution on the courts, the public, and litigants;**
- (2) consider whether ethical standards should be adopted governing alternative dispute resolution providers; and**
- (3) consider whether the standards governing the referral of disputes by courts to private judges or attorneys should be changed.**

Please complete this portion of the questionnaire only if you wish to share the following identifying information with the Judicial Council Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Justice System. If you would prefer that your responses remain anonymous, you need not complete this section. If you do complete the section below, this identifying information will be held in confidence and no one outside the subcommittee and its staff will be able to link your name to the responses.

Name: _____

Organization: _____

Job Title: _____

If you would be willing to discuss your responses in more detail with the subcommittee or its staff, please provide your telephone number.

Telephone Number: _____

This completes the questionnaire. Thank you very much for your participation.

Please return the completed questionnaire **by Friday, September 25, 1998.**

Responses may be returned either by facsimile **to Ms. Romunda Price at (415) 396-9358** or by mail in the enclosed, postage-paid envelope.

APPENDIX 10

**PARTICIPANTS IN PUBLIC HEARINGS OF
TASK FORCE ON THE QUALITY OF JUSTICE, SUBCOMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION AND THE JUDICIAL SYSTEM**

Los Angeles Hearing – October 2, 1998

SARA ADLER
Los Angeles, California

ROBERT M. BARRETT
Chair, State Bar of California
Committee on Professional Responsibility
and Competence
Woodland Hills, California

LEE JAY BERMAN
California Dispute Resolution
Council
Los Angeles, California

DARIAN BOJEAUX
Beverly Hills, California

BRUCE BRUSAVICH
Consumer Attorneys of California
Torrance, California

LAUREN BURTON
Los Angeles County Bar, Dispute
Resolution Services
Los Angeles, California

STEVEN DAVIS
President
Alternative Resolution Centers
Los Angeles, California

VAR FOX
Judicate West
Los Angeles, California

JOE GENTILE
Los Angeles, California

NED GOOD
Law Offices of Ned Good
Los Angeles, California

MR. ROBERT HINERFELD
Manatt, Phelps & Phillips, LLP
Los Angeles, California

HON. WILLIAM HUSS, (Retired)
President
IVAMS
Los Angeles, California

ROSEANE JANTZI
Los Angeles, California

CHIRAY KOO
Asian-Pacific American Dispute
Resolution Center
Los Angeles, California

MARSHA McLEAN
Los Angeles, California

JOHN MORIARITY
Moriarity & Associates
Van Nuys, California

HON. RICHARD NEAL
Associate Justice
Second Appellate District, Div. Seven
Los Angeles, California

SHERMAN RATTNER
Media Development Association
Venice, California

RICHARD REUBEN
Stanford Center on Conflict
And Negotiations
Culver City, California

DENNIS SHARP
American Arbitration Association
Los Angeles, California

ESTER SORIANO
Coordinator
County of Los Angeles,
Community Services Division
Los Angeles, California

HON. ALICE SULLIVAN, (Retired)
San Diego, California

HON. ROBERT WEIL, (Retired)
Los Angeles, California

STEVEN YOUNG
Chair
Beverly Hills Bar, Litigation
Section
Los Angeles, California

San Francisco Hearing – October 5, 1998

MR. NORMAN BRAND
President
California Dispute Resolution
Council
San Francisco, California

MR. ALAN CARLSON
Executive Officer
San Francisco Trial Courts
San Francisco, California

MR. RICHARD COLLIER
Mediation Advisory Committee
San Francisco Trial Courts
San Francisco, California

MR. PHIL CRAWFORD
Law Offices of Phil Crawford
Los Gatos, California

HON. RALPH FLAGEOLLET
Commissioner
San Francisco Trial Courts
San Francisco, California

MS. CANDICE GOLDMAN
ADR Coordinator
Alameda County Bar Association
Oakland, California

MS. BARBARA KOB
Mediation Services, County of Marin
San Rafael, California

MR. EARL LUI
Consumers Union
San Francisco, California

MR. TIMOTHY McCULLOM
McCullom, Bayer & Bunch
San Francisco, California

MR. GEORGE MOORE
Pasadena, California

MR. BILL NAGLE
Special Master
Burlingame, California

MR. SCOTT O'BRIEN
Sonoma County Bar Association
Sebastopol, California

MR. GORDON OWNBY
Cooperative of American Physicians Inc. /
Mutual Protection Trust
Los Angeles, California

MR. CLIFF PALEFSKY
McGuinn, Hillsman & Palefsky
San Francisco, California

MS. SHEILA PURCELL
Multi-Option Appropriate Dispute Resolution
Program
San Mateo Superior Court
Redwood City, California

HON. A.JAMES ROBERTSON II
San Francisco Trial Courts
San Francisco, California

MS. ROBIN SIEFKIN
Director, ADR Programs
Superior Courts of California,
Contra Costa County
Martinez, California

MS. ELEANOR SPATERBLOCH
Mediation Services, County of Marin
San Rafael, California

MR. JERRY SPOLTER
Spolter, McDonald & Mannion
San Francisco, California

MR. JIM STURDEVANT
Consumer Attorneys of California
San Francisco, California

MR. JOHN TOKER
ADR Administrator
Superior Court of California
County of Santa Clara
San Jose, California

MR. JOHN TRUE, III
Rudy, Exelrod, Zieff and True
San Francisco, California

MR. STEPHEN VAN LIERE
Regional Vice-President
American Arbitration Association
San Francisco, California

INDIVIDUALS AND ORGANIZATIONS THAT SUBMITTED WRITTEN TESTIMONY TO THE SUBCOMMITTEE

NICHOLAS ALLIS, Esq.
Beverly Hills Bar Association

ROBERT M. BARRETT
Chair, State Bar of California
Committee on Professional Responsibility
and Competence

DARIAN BOJEUX
Beverly Hills, California

BRUCE M. BRUSAVICH, Esq.
Agnew & Brusavich
Terrance, California

ALAN CARLSON
Chief Executive Officer
San Francisco Trial Courts
San Francisco, California

CENTER FOR CONFLICT RESOLUTION
Pasadena, California

HON. DAVID N. EAGLESON (Retired)
Associate Justice
Supreme Court of California
Long Beach, California

IVA G. FALCONE
ADR Programs Associate,
Trial Courts of Santa Barbara County

NANCY M. FOWLER, Director
County of Santa Clara, Office of
The County Executive Criminal
Justice Information Control
San Jose, California

HARVEY S. FREY, M.D., Ph.D.
Director
Health Administration Responsibility Project
Santa Monica, California

HON. HALEY J. FROMHOLZ
Chair, ADR Committee
Los Angeles Superior Court

DOUGLAS GASTELUM
Los Angeles, California

ROBERT J. GLYNN, LLP
San Francisco, California

NED GOOD, Esq.
Law Offices of Ned Good
Pasadena, California

RONALD F. HOFFMAN, Esq.
San Diego, California

EBER E. JAQUES
Sausalito, California

STEPHEN KELLER
El Dorado County Superior Court
Case Management/ADR Department
Placerville, California

EARL LIU, Esq.
Senior Staff Attorney
Consumers Union
San Francisco, California

TIMOTHY D. McCOLLUM, Esq.
McCollum, Bayer and Bunch
Fresno, California

JOHN MORIARTY
Moriarty & Associates
Van Nuys, California

GEORGE E. MOORE, Esq.
Pasadena, California

HON. RICHARD C. NEAL,
Associate Justice
California Court of Appeal
Los Angeles, California

GAIL NUGENT
Executive Director
The Community Board Program
San Francisco, California

SCOTT O'BRIEN
Sonoma County Bar Association
ADR Section/Recourse Mediation
And Referral Service (MARS)

GORDON T. OWNBY
General Counsel
Cooperative of American Physicians,
Inc./Mutual Protection Trust
Los Angeles, California

CLIFF PALEFSKY, Esq.
McGuinn, Hillsman & Palefsky
San Francisco, California

NANCY PEVERINI, Esq.
Legislative Counsel
Consumer Attorneys of California
Sacramento, California

GERALD F. PHILLIPS, Esq.
Phillips, Salman & Stein
Los Angeles, California

SHERMAN RATTNER, Esq.
Venice, California

ROSEMARY SHAHAN
President, Consumers for Auto Reliability
and Safety Foundation
Sacramento, California

ESTER G. SORIANO
Dispute Resolution Program (DRP)
Coordinator, Community and Senior
Services of Los Angeles County

JERRY SPOLTER, Esq.
San Francisco, California

JAMES C. STURDEVANT, Esq.
The Sturdevant Law Firm
San Francisco, California

JOHN H. SULLIVAN, President
Association for California Tort
Reform
Sacramento, California

RONALD L. TAYLOR
Judge of the Superior Court of
California, County of Riverside
Riverside, California

JOHN TOKER
ADR Administrator
Santa Clara County Superior Court

JOHN M. TRUE, III, Esq.
Law Offices of Rudy, Exelrod, Zieff,
& True LLP
San Francisco, California

HON. ROBERT WEIL, Retired
Judge of the Superior Court
Los Angeles, California

WARREN I. WOLFE
President, ADR Solutions
Encino, California

ALLAN ZAREMBERT
President, California Chamber of
Commerce
Sacramento, California

«Title» «FirstName» «LastName», «JobTitle»
«Address1»
«Address2»
«City»

Dear «Title2» «LastName»:

You are cordially invited to attend a public hearing on alternative dispute resolution in California, which is sponsored by the Judicial Council Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System (the Subcommittee).

The Judicial Council Task Force on the Quality of Justice was appointed by the Chief Justice in February 1998 to study the impact of private judging and court-affiliated alternative dispute resolution (ADR) services on state courts, litigants, and the public. The Subcommittee specifically is charged with studying and making recommendations on the following issues:

1. The effect of the increasing use of private ADR procedures on the justice system and courts and whether any measures should be adopted to ameliorate any negative effects or reinforce and expand any benefits of private ADR;
2. The effect of the increasing use of private alternative dispute resolution procedures on litigants and the public and whether any measures should be adopted to ameliorate any negative effects or reinforce and expand any benefits of private ADR;
3. Whether ethical standards should be adopted governing retired judges, attorneys, and nonattorneys acting as arbitrators and mediators; and
4. Whether the standards governing court referrals to private judges and attorneys should be changed.

Enclosed with this letter is a copy of questions posed by the Subcommittee with respect to the subjects in the charge. The Subcommittee would appreciate your input on any or all aspects of the charge.

The subcommittee will hold two full-day public hearings, one in San Francisco and one in Los Angeles, to gather this input. The hearings will be held on October 2 at the Omni Los Angeles Hotel, 930 Wilshire Boulevard, Los Angeles, and on October 5 at the Hyatt Regency Embarcadero, 5 Embarcadero Center, San Francisco. Both hearings are scheduled to begin at 10:00 in the morning and continue until 7:00 in the evening.

To give as many people as possible the opportunity to participate in these hearings and to minimize waiting time for participants, we would like to schedule the majority of participants' presentations in advance. If you are interested in appearing at either of these public hearings, please contact Romunda Price at the Administrative Office of the Courts at (415) 904-5592 as soon as possible to reserve a time. When reserving a time, please indicate whether you are interested in speaking about one particular subject or all of the subjects within the charge.

We will continue to reserve presentation times until September 30. If you are not able to reserve a time in advance, we will have some time during the following periods for open microphone, unscheduled presentations: from noon to 1:00 in the afternoon and from 6:00 to 7:00 in the evening. Additional open microphone periods may be available, depending upon the number of hearing participants.

In addition to oral presentations at the hearings, we would appreciate any written testimony or information that you would like to submit to the Subcommittee. Materials should be sent to Heather Anderson, Committee Co-Counsel at the following address: Judicial Council of California, Administrative Office of the Courts, 303 Second Street, South Tower, San Francisco, California 94107 by September 25.

Thank you in advance for your participation. Please feel free to share the information about these public hearings with your colleagues. If you have any questions about the public hearings, please call the Subcommittee's Counsel, Heather Anderson at 415-356-6616 or Deborah Brown at 415-396-9129.

Sincerely,

Jay Folberg
Dean, University of San Francisco
School of Law and
Chair, Judicial Council Task Force on the
Quality of Justice, Subcommittee on
Alternative Dispute Resolution and the
Judicial System

Enclosure

**TASK FORCE ON THE QUALITY OF JUSTICE,
SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION
AND THE JUDICIAL SYSTEM**

The Subcommittee on Alternative Dispute Resolution and the Judicial System is charged with studying and making recommendations to the Judicial Council on issues relating to private and court-connected alternative dispute resolution (ADR). The subcommittee seeks input on any or all of the subjects and questions listed below.

Effect of ADR on the public, litigants, and the courts:

The use of both private ADR (including ADR required by contracts and ADR used voluntarily after a dispute has arisen) and court-connected ADR (including discovery and other references under California Code of Civil Procedure sections 638 and 639, judicial arbitration, court-sponsored mediation, and court referrals to ADR) has been increasing in recent years.

- What effect, positive or negative, has the increasing use of private and court-connected ADR had on:
 - The public's access to the court system and other processes for resolving disputes?
 - The public's perception of, and confidence in, the justice system?
 - The time required to resolve disputes?
 - The cost of resolving disputes?
 - Disputants' or litigants' satisfaction with the dispute resolution process?
- What measures, if any, should be adopted to reinforce or increase any positive effects of private or court-connected ADR, and who should adopt and implement these measures?
- What measures, if any, should be adopted to ameliorate any negative effects of private or court-connected ADR, and who should adopt and implement these measures?

Ethical issues:

There are currently a variety of ethical standards, including disclosure requirements, applicable to temporary judges, referees, and arbitrators (both in contractual arbitrations and in the judicial arbitration program) pursuant to statute and court rule. There are also sets of voluntary ethical standards to which some arbitrators and mediators may adhere.

- Are there important or recurring ethical issues or problems that are not adequately addressed by current ethical standards with regard to:
 - Temporary judges?
 - Court-appointed referees?
 - Arbitrators conducting judicial arbitrations?
 - Arbitrators conducting private arbitrations?
 - Mediators in court-connected mediation programs?
 - Private mediators?

- Do the ethical problems or issues vary depending upon whether the referee, arbitrator, or mediator is:
 - A retired judge?
 - An attorney?
 - A non-attorney?

- If there are ethical problems or issues that need to be addressed,
 - What entity or entities should be responsible for developing and adopting new ethical standards or other requirements (such as educational requirements) for retired judges, attorneys, and non-attorneys acting as:
 - Temporary judges?
 - Court-appointed referees?
 - Arbitrators conducting judicial arbitrations?
 - Arbitrators conducting private arbitrations?
 - Mediators in court-connected mediation programs?
 - Private mediators?

- What new standards or other requirements should be considered for adoption by this entity or entities?
 - Should these standards be mandatory or voluntary?
 - If mandatory standards are adopted, should there be a mechanism for enforcing these standards, and if so, what should that mechanism be?
 - How would these new standards address the ethical issues or problems identified?
 - What other effects might these standards or enforcement mechanisms have on:
 - The public's perception of ADR process (es)?
 - Individuals' willingness to serve as neutrals?
 - The speed and cost of ADR process (es)?

Court referral of disputes:

Current statutes and court rules establish standards governing court referral of disputes to referees, arbitrators, and some court-connected mediation program mediators.

- Are there important or recurring issues or problems that are not adequately addressed by current standards for court referrals to:
 - Referees?
 - Arbitrators?
 - Mediators?

- If there are issues or problems that need to be addressed, what changes or additions to existing standards for court referrals should be made?
 - How would the proposed changes address the issues or problems identified?
 - What other effects might these changes have?

APPENDIX 11

Alternative Dispute Resolution Survey

This memo is to provide background information for those completing the survey. Please note any problems, including unclear questions, need for different kinds of responses, etc. so we can improve and revise this as we roll it out to a statewide survey.

I. Purpose

To develop baseline descriptive information about the types of programs currently in use in various counties. The purpose of this effort is NOT to evaluate the effectiveness of these programs, but simply to get an accurate picture of what is out there.

The Task Force is collecting this information on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System. The committee will be submitting its report to the Judicial Council in August, to provide information about court-related ADR programs.

II. Scope

The idea is to collect this data in a sample of counties, as a pilot project to demonstrate the need for such data and obtain authorization to collect it on a statewide basis. ADR covers an extensive array of programs. For this effort, the ADR programs we want to include are:

Civil, (excluding Family Law or Dependency Cases)

Mandatory Programs

- Judicial Arbitration
- Civil Action Mediation
- Programs Mandatory by Local Rule
- Settlement Conferences

Voluntary Programs

- Neutral Evaluation
- Mediation

Mandatory or Voluntary

- Small Claims Mediation

Examples of ADR Programs Excluded from this Survey:

- JAMS
- Use of Referees
- Use of Pro-tem Judges

Use of Special Masters

III. Descriptive Information Requested

For each program that is being used, we want to collect the following descriptive data. We will design a survey form that is easy to use, with check boxes or short answers. This will not require new data collection.

Thus, if a court runs 3 of the above listed types of programs, the survey needs to be completed for each program, for a total of 3 surveys.

IV. Administration of the Survey

If there are any clarifications you need, please contact Richard Schauffler (415-865-7650) or Heather Anderson (415-865-7691). The goal is to have the survey completed by Tuesday, July 13, 1999.

Thank you for your assistance.

Surveys may also be faxed to 415-865-4332.

Alternative Dispute Resolution Programs Survey

Please complete one survey for each of the following ADR programs that your court administers. Please check below which program this copy of the survey reports on:

- Judicial Arbitration
- Civil Action Mediation
- Programs Mandatory by Local Rule
- Settlement Conferences
- Neutral Evaluation
- Mediation
- Small Claims Mediation

Profile of ADR program

1. Year program was established: 19__.
2. What is the general process in your court for referral to this ADR program?

Please select only one

- Mandatory referral to specific ADR program by case type
- Mandatory referral to conference to select type of ADR process
 - Parties select process
 - Judge selects process
- Judge may order on case-by-case basis
- Voluntary based on consent of all parties

3. What types of cases are eligible for this ADR program?

All Civil

or:

Only certain types (**check all that apply**)

- Personal Injury
- Business
- Malpractice
- Construction
- Insurance
- Small Claims
- Employment
- Real Estate
- Estate/Trust

___ Other (*please specify*): _____

4. Are there dollar value limits for cases referred to this ADR program?

___ Yes ___ No

4a. If yes, please describe: _____

Timing

1. When (in the life of the case) are cases referred to this ADR program?

Check one:

___ Specific time after complaint is filed

or

___ Specific time before trial date

1a. **Specific time after complaint is filed** (*please select only one*)

- ___ <90 days after the filing of the complaints
- ___ 90 <120 days after the filing of the complaints
- ___ 120 <150 days after the filing of the complaints
- ___ 150 <180 days after the filing of the complaints
- ___ 180 <210 days after the filing of the complaints
- ___ 210 <240 days after the filing of the complaints
- ___ >240 days after the filing of the complaints

or

1b. **Specific time before trial date** (*please select only one*)

- ___ > 30 days before trial
- ___ 14-30 days before trial
- ___ 7-13 days before trial
- ___ 1-6 days before trial
- ___ Day of trial

2. Does the court set deadlines for completion of the ADR process?

___ Yes ___ No

2a. If yes, please describe: _____.

3. What happens if the case is not settled in the ADR process (that is, how does the case get back on the litigation track)?

- case automatically returns to its normal path in the litigation track
 case must be reinstated through formal procedure to the litigation track
 Other (*please describe*): _____

4. What happens if the case is settled in the ADR process:

Outcome	Check all that apply	Estimated % of cases
a) Settlement entered as the judgment of the court		%
b) Case dismissed		%
c) Court is not aware of the outcome of ADR		%

Neutrals

1. How are neutrals provided for this ADR program?:

- The court has neutrals on staff
 The court contracts with an outside provider (such as a community dispute resolution program) to provide neutral services
 The court maintains a panel of neutrals that accept referrals from the court
 The court makes a list of private providers available for litigants to review
 Other (*please describe*): _____

2. Are there required minimum qualifications to serve as a neutral in your program?

- Yes No

2a. If yes, what are these minimum qualifications (check all that apply)

- Must complete a specific training program provided by the court
 Must have completed minimum amount of training as neutral

Select one

- < 10 hours training
 10 to < 20 hours training
 20 to <30 hours training
 30 to <40 hours training
 40 to <50 hours training

- 50 or more hours training
- Must have conducted minimum number of sessions/hours as neutral
- Must have specified degree/professional license (such as bar membership)
- Other (*please describe*): _____

3. Are the neutrals in your program required to comply with a set of ethical requirements?

- Yes No

4. How is the neutral selected for a particular case?

- Neutral is selected by the parties
- Neutral is selected by the court
- Based on rotation system
- Individualized matching of case based on neutral's background
- Other (*please describe*): _____

5. Are the neutrals in your program compensated for their services?

- Yes No

5a. If yes, who compensates the neutrals?

- The court
- The parties
- Other (*please describe*): _____

6. Are the neutral's fees

- Set by the court
- Per case fee; *please specify*: \$ _____
- Hourly rate; *please specify*: \$ _____
- Market rate
- Other (*please describe*): _____

Program Administration/Staffing

1. Does the court have staff responsible for the administration of the program?

- Yes No

1a. If yes, approximate FTE _____

2. Do any other entities play a role in the program administration of the program; if yes, please describe?

___ Local bar association: _____
 ___ Community dispute resolution provider: _____
 ___ Other (*please describe*): _____

Program Funding

1. How is your program funded (*check all that apply*)

Source of funding	Check all that apply	Estimated % of program funding
a) Out of court budget		%
b) Dispute Resolution Programs Act grant		%
c) Local bar association		%
d) Community dispute resolution provider		%
e) Other (<i>please describe</i>):		%

Data Collection

1. Is data regularly collected on cases referred to this ADR program?

___ Yes ___ No

1a. If Yes, what types of data and/or statistics are collected?

(Check all that apply)

___ # of cases referred to this ADR program
 ___ # of cases settled through this ADR program
 ___ # by settlement prior to award
 ___ # by arbitrator award
 ___ # of requests for new trial after ADR program
 ___ -# by plaintiff
 ___ -# by defendant
 ___ Other (*please describe*): _____

Evaluation

1. Has this program been formally evaluated?:

Yes No

1a. If Yes, frequency:

Annually

One-time basis

2. Date last evaluated: ___/___/___

3. Criteria used for evaluation (*check all that apply*):

Disposition time

Disposition rate

Litigant costs

Court costs

Fairness

Participant satisfaction

4. Data used for evaluation (*check all that apply*):

Case disposition time

ADR dispositions

Estimated litigant costs

Estimated court costs

Litigant ratings, via survey

Attorney ratings, via survey

ADR provider performance, litigant ratings

ADR provider performance, attorney ratings

ADR peer ratings

Person Filling Out This Survey:

Name: _____

Title: _____

Court: _____

Telephone: _____

Email: _____

Thank You!

Please return to:

Heather Anderson
Council and Legal Services Division
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102
Voice: 415-865-7691
Email: heather.anderson@jud.ca.gov

APPENDIX 12

DISPUTE RESOLUTION WORKSHEET

CATEGORY OF ADR PROVIDER	WHAT OFFICIAL ENTITY HAS AUTHORITY TO ADOPT ETHICS STANDARDS?	WHAT ETHICAL STANDARDS CURRENTLY EXIST?	WHAT ENFORCEMENT MECHANISMS/ SANCTIONS CURRENTLY EXIST?
<p>A. TEMPORARY JUDGES (Cal. Const., art. VI, § 21; CRC¹ 244, 532).</p> <p><u>Judicial/Bar Status</u> Only members of the bar are eligible to serve as temporary judges (Cal. Const., art. VI, § 21).</p> <p><u>Neutral Selection Process</u> Parties must stipulate to the use of the temporary judge (Cal. Const., art. VI, § 21).</p> <p><u>Limitations on Use of Process</u> Court may order matter to be tried by a temporary judge only upon the stipulation of the parties litigant (Cal. Const., art. VI, § 21).</p>	<p>Legislature</p> <p>Judicial Council Rule</p>	<p>No relevant statutory provisions.</p> <p><u>Disclosure</u> CRC 244(c) — The temporary judge must disclose any potential ground for disqualification per CCP² 170.1. CCP 170.1 lists as potential grounds for disqualification:</p> <ol style="list-style-type: none"> 1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding. A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding. 2) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding. A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years: <ol style="list-style-type: none"> (A) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or (B) A lawyer in the proceeding was associated in the private practice of law with the judge. A judge who served as a lawyer for or officer of a public agency which is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding. 3) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding. A judge shall be deemed to have a financial interest within the meaning of this paragraph if: <ol style="list-style-type: none"> (A) A spouse or minor child living in the household has a financial interest; or (B) The judge or the spouse of the judge is a fiduciary who has a financial interest. A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household. 4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party. 5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding. 	<ol style="list-style-type: none"> 1. Appointing court may remove person as pro tem in future cases. 2. California Rule of Professional Conduct 1-710, gives the State Bar the authority to discipline a "member," active or inactive, for violation of canon 6D. 3. Marketplace

¹ In order to save space, CRC is being used in place of "California Rules of Court, rule" throughout this document.

² In order to save space, CCP is being used in place of "Code of Civil Procedure, section" throughout this document.

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	Judicial Council Rule <i>Continued</i>	<p>6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.</p> <p>7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.</p> <p>Under CRC 244, the temporary judge must also disclose any facts that might reasonably cause a party to entertain a doubt re the temporary judge's impartiality. The temporary judge must disclose the number and nature of other privately compensated proceedings within past 18 months where temporary judge served as an arbitrator, judge referee, mediator, settlement facilitator for a party, attorney, or law firm.</p> <p><u>Disqualification/Recusal</u> CRC 244(c) — requests for disqualification are determined per CCP 170.1, 170.2, 170.3, 170.4, and 170.5.</p> <p><u>Other</u> No other CRC exists relating to ethical requirements for temporary judges.</p>	
	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	<p>Canon 6D of the Code of Judicial Ethics applies certain other canons in the code to temporary judges, referees, and court-appointed arbitrators, including the following:</p> <p><u>Disclosure</u> Canon 6D(2) - requires temporary judges, from the time of notice and acceptance of appointment until termination of the appointment, to disclose in writing or on the record:</p> <ul style="list-style-type: none"> ▪ Information as required by law or information that the temporary judge believes the parties or their lawyers might consider relevant to the question of disqualification, even where it is believed there is no actual basis for disqualification (equivalent of Canon 3E). ▪ Membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation, except for membership in a religious or an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities]. <p><u>Disqualification/Recusal</u> Canon 6D(2)(e) - requires temporary judges, from the time of notice and acceptance of appointment until termination of the appointment, to disqualify themselves in any proceeding in which disqualification is required by law (equivalent of Canon 3E)</p>	

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A. TEMPORARY JUDGES <i>(continued)</i>	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California) <i>(continued)</i>	<p><u>Other</u> Other requirements applied to temporary judges under canon 6D:</p> <p>6D(1) When the temporary judge is actually presiding in a proceeding or communicating with the parties, counsel, or court personnel, shall comply with the following:</p> <ul style="list-style-type: none"> ▪ Canon 1 [integrity and independence of the judiciary], ▪ Canon 2A [promoting public confidence], ▪ Canon 3B(3) [order and decorum] and (4) [patient, dignified, and courteous treatment], ▪ Canon 3B(6) [require lawyers to refrain from manifestations of any form of bias or prejudice], ▪ Canon 3D(1) [action regarding misconduct by another judge] and (2) [action regarding misconduct by a lawyer], <p>6D(2) From the time of notice and acceptance of appointment until termination of the appointment, shall comply with the following:</p> <ul style="list-style-type: none"> ▪ Canon 2B(1) [not allow family or other relationships to influence judicial conduct], ▪ Canon 3B(1) [hear and decide all matters unless disqualified] and (2) [be faithful to and maintain competence in the law], ▪ Canon 3B(5) [perform judicial duties without bias or prejudice], ▪ Canon 3B(7) [accord full right to be heard to those entitled; avoid ex parte communications, except as specified] and (8) [dispose of matters fairly and promptly], ▪ Canon 3C(1)[discharge administrative responsibilities without bias and with competence and cooperatively], (2) [require staff and personnel to observe standards of conduct and refrain from bias and prejudice]and (4) [make only fair, necessary, and appropriate appointments]; ▪ (b) - Not lend the prestige of judicial office to advance his, her, or another person’s pecuniary or personal interests and not use his or her judicial title in any written communication intended to advance his, her, or another person’s pecuniary or personal interests, except to show his, her, or ▪ (c) - Not personally solicit memberships or donations for religious, fraternal, educational, civic, or charitable organizations from the parties and lawyers appearing before the temporary judge; ▪ (d) - Under no circumstance accept a gift, bequest, or favor if the donor is a party, person, or entity whose interests are reasonably likely to come before the temporary judge, referee, or court-appointed arbitrator. A temporary judge, referee, or court-appointed arbitrator shall discourage members of the judge’s family residing in the judge’s household from accepting benefits from parties who are reasonably likely to come before the temporary judge, referee, or court-appointed arbitrator. 	

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A. TEMPORARY JUDGES <i>(continued)</i>	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California) <i>(continued)</i>	<p><u>Other</u> (continued):</p> <p>6D(3) From the time of notice and acceptance of appointment until the case is no longer pending in any court, shall not make any public comment about a pending or impending proceeding in which the temporary judge has been engaged, and shall not make any nonpublic comment that might substantially interfere with such proceeding. The temporary judge shall require similar abstention on the part of court personnel subject to his or her control. This Canon does not prohibit the following:</p> <ul style="list-style-type: none"> (a) Statements made in the course of the official duties of the temporary judge; and (b) Explanations for public information about the procedures of the court. <p>6D(4) From the time of appointment and continuing for two years after the case is no longer pending in any court, shall under no circumstances accept a gift, bequest, or favor from a party, person, or entity whose interests have come before the temporary judge, referee or court-appointed arbitrator in the matter. The temporary judge shall discourage family members residing in the household of the temporary judge from accepting any benefits from such parties, persons or entities during the time period stated in this subdivision. The demand for or receipt by a temporary judge of a fee for his or her services rendered or to be rendered shall not be a violation of this Canon.</p> <p>6D(5) From time of notice and acceptance of appointment and continuing indefinitely after the termination of the appointment, comply with the following:</p> <ul style="list-style-type: none"> ▪ Canons 3(B)(11) [no disclosure of nonpublic information acquired in a judicial capacity] (except as required by law); ▪ (b) - Not commend or criticize jurors sitting in a proceeding before the temporary judge, referee or court-appointed arbitrator for their verdict other than in a court order or opinion in such proceeding, but may express appreciation to jurors for their service to the judicial system and the community. <p>6D(6) A temporary judge shall comply with Canon 6D(2) until the appointment has been terminated formally or until there is no reasonable probability that the temporary judge will further participate in the matter. A rebuttable presumption that the appointment has been formally terminated shall arise if, within one year from the appointment or from the date of the last hearing scheduled in the matter, which ever is later, neither the appointing court nor counsel for any party in the matter has informed the temporary judge that the appointment remains in effect.</p> <p>6D(7) A lawyer who has been a temporary judge in a matter shall not accept any representation relating to the matter without the informed written consent of all parties.</p> <p>6D(8) When by reason of serving as a temporary judge in a matter, he or she has received confidential information from a party, the person shall not, without the informed written consent of the party, accept employment in another matter in which the confidential information is material.</p>	

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<p>B. COURT-ORDERED REFERENCES (CCP 638–645.1; CRC 244.1, 244.2, 532.1 and 532.2)</p> <p><u>Judicial/Bar Status</u> By active or inactive bar members.</p> <p>Statutes do not require referees to be attorneys.</p> <p><u>Neutral Selection Process</u> Parties may agree on the referee(s). If the parties do not agree, the court must appoint the referee(s) (CCP 640).</p> <p><u>Limitations on Use of Process</u> Reference may be made on agreement of the parties (CCP 638) or on court-order in specified circumstances, including for examination of a long account and for discovery motions and disputes (CCP 639).</p>	<p>Legislature</p>	<p><u>Disclosure</u> No statutory disclosure requirements.</p> <p><u>Disqualification/Recusal</u> CCP 640 allows appointment of referee as to whom there is no “legal objection.”</p> <p>CCP 641 provides that a party may object to the appointment of any person as a referee on enumerated grounds, including: (a) Want of any of the statutory qualifications for juror, except county residency; (b) Having specified personal or business relationships with either party or the judge of the court; (c) Having an interest in the action; (d) Having formed or expressed an unqualified opinion or belief as to the merits of the action; or (e) Evincing enmity or bias toward either party.</p>	<p>1. Appointing court may remove person as referee in future.</p> <p>2. California Rule of Professional Conduct 1-710, gives the State Bar the authority to discipline a “member,” active or inactive, for violation of canon 6D.</p> <p>3. Marketplace</p>
	<p>Judicial Council Rule</p>	<p><u>Disclosure</u> CRC 244.1(b) and 244.2(c) require referees to disclose facts that might be grounds for disqualification and the number and nature of other privately compensated proceedings within past 18 months where the referee served as a judge, referee, arbitrator, mediator, or settlement facilitator, for a party, attorney, or law firm.</p> <p><u>Disqualification/Recusal</u> No CRC provisions.</p>	
	<p>Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)</p>	<p>Canon 6D of the Code of Judicial Ethics applies certain other canons in the code to temporary judges, referees, and court-appointed arbitrators. See requirements under A.</p>	

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<p>C. COURT-ORDERED REFERENCES</p> <p><u>Judicial/Bar Status Referee is not a member of the bar.</u></p> <p>CCP 641(1)(a) clearly infers that nonlawyer may serve (e.g., an accountant in accounting).</p> <p><u>Neutral Selection Process</u></p> <p>Same as when attorneys serve as referees; see B. above.</p> <p><u>Limitations on Use of Process</u></p> <p>Same as when attorneys serve as referees; see B. above.</p>	Legislature	Same statutory requirements as for attorneys serving as referees. See B. above.	<p>1. Appointing court may remove person as referee in future.</p> <p>2. Marketplace</p> <p>Rule of Professional Conduct 1-710, giving the State Bar authority to discipline a person for failure to comply with canon 6D's requirements, does not apply to persons who are not members of the bar.</p>
	Judicial Council Rule	Same CRC requirements as for attorneys serving as referees. See B. above.	
	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	Same Code of Judicial Ethics requirements as for attorneys serving as referees (see B. above). However, the Rules of Professional Conduct do not apply to individuals who are neither active nor inactive members of the State Bar.	

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<p>D. JUDICIAL ARBITRATION (CCP 1141 et seq. and CRC 1600 et seq.)</p> <p><u>Judicial/Bar Status</u> By active or inactive bar members</p> <p><u>Neutral Selection Process</u> Parties may designate arbitrator by stipulation or may strike names from list of arbitrators provided by the court (CRC 1605, 1605.5 and local court rules). Except upon stipulation of all parties, arbitrators must be retired judges or court commissioners or members of the State Bar (CCP 1141.18).</p>	Legislature	<p><u>Disclosure</u> No statutory disclosure requirements.</p> <p><u>Disqualification/Recusal</u> CCP 1141.18(d) — allows a party to request disqualification on grounds of CCP 170.1 or 170.6, and requires arbitrator to recuse for any grounds in CCP 170.1.</p>	<p>1. Appointing court may remove person as arbitrator in future.</p> <p>2. California Rule of Professional Conduct 1-710, gives the State Bar the authority to discipline a “member,” active or inactive, for violation of Canon 6D.</p> <p>3. Market Place</p>
	Judicial Council Rule	<p><u>Disclosure</u> CRC 1606(a) — the arbitrator must determine whether there is cause for disqualification and either disqualify him/herself or disclose the grounds in writing and get a written waiver from all parties.</p> <p><u>Disqualification/ Recusal</u> CRC 1606 – The arbitrator must disqualify him/herself or get written waiver for all grounds for disqualification under CCP 170.1 (see A., above, for a list of these grounds) and if a member of the arbitrator’s law firm would be disqualified per 170.1(4). Court must vacate appointment if arbitrator fails to disqualify him/herself when 170.1 grounds exist and a party has demanded that the arbitrator disqualify him/herself.</p>	
	Supreme Court (Code of Judicial Ethics and Rules Of Professional Conduct of the State Bar of California)	Canon 6D applies certain other Canons in the Code to temporary judges, referees and court-appointed arbitrators.. See A., above.	
	Local Court Rules/Standards	All persons serving in the Contra Costa County Superior Court’s ADR program, including judicial arbitrators, are governed by the Court’s Ethical Standards for Neutrals (Contra Costa, rule 103).	

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<p>D. JUDICIAL ARBITRATION (continued) By active or inactive bar members.</p> <p><u>Limitations on Use of Process</u> In superior courts with 10 or more judges, required in most civil matters under \$50,000. Cases over \$50,000 by stipulation of the parties or if plaintiff elects and agrees to award of \$50,000 or less. Awards are non-binding, but become judgment if no party files a request for trial de novo within 30 days. (CCP 1141.11, 1141.12 and 1141.15)</p>	<p>Examples of Local Court Rules/Standards (continued)</p> <p><u>Example:</u> Contra Costa County Superior Court Rules of Practice and Procedure for ADR Programs³</p>	<p><u>Disclosure</u> Contra Costa rule 603 — neutral should disclose any circumstances that may create or give the appearance of a conflict of interest and any circumstances that may raise a question as to the neutral’s impartiality. If a neutral or his or her law firm has represented either party in any capacity, the neutral should disclose this. The neutral also should disclose any known, significant past personal or professional relationship with any party or attorney in the case. The duty to disclose is a continuing obligation throughout the process.</p> <p><u>Disqualification/Recusal</u> Contra Costa, rule 603 — neutral should refrain from entering or continuing with any dispute if he or she perceives that participation would be a clear conflict of interest. After disclosure of a conflict or potential conflict of interest, the parties may choose to continue with the neutral or may request assignment of a different neutral.</p> <p><u>Other</u> Contra Costa, rule 602 – <i>Impartiality</i> — neutrals should maintain impartiality toward all parties.</p> <p>Contra Costa rule 604–<i>Solicitation by Neutrals</i>—neutrals should not make unwarranted claims about any ADR process or solicit business from a participant while proceeding is pending.</p> <p>Contra Costa, rule 605 — <i>Confidentiality</i> — unless required otherwise, neutrals should treat information revealed in process as confidential.</p> <p>Contra Costa, rule 606 — <i>Neutral’s role in settlement</i> — neutral is responsible for seeing that parties consider the terms of settlement and being sensitive to inappropriate pressures to settle.</p> <p>Contra Costa, rule 607 — <i>Unrepresented interests</i> — neutral is obligated to ensure unrepresented interests are fully considered by the parties.</p> <p>Contra Costa, rule 608 — <i>Informed consent</i> — neutral is obligated to assure that all parties understand nature of the process, procedures, role of the neutral, and parties’ relationship to the neutral.</p> <p>Contra Costa, rule 609 — <i>Promptness</i> — neutral must exert every reasonable effort to expedite the process.</p> <p>Contra Costa, rule 610 — <i>Knowledge of Process</i> — neutral should accept only cases in which neutral has sufficient knowledge regarding the ADR process.</p>	

³ In order to save space, these rules are hereafter cited as “Contra Costa, rule.”

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<p>E. JUDICIAL ARBITRATION (CCP 1141 et seq. and CRC 1600 et seq.)</p> <p><u>Judicial/Bar Status</u> By persons who are not members of the bar.</p> <p>Nonattorneys may serve as arbitrators on the stipulation of all parties (CCP 1141.18).</p> <p><u>Neutral Selection Process</u> Must be by stipulation of parties.</p> <p><u>Limitations on Use of Process</u> Same as when attorneys serve as arbitrators; see D. above.</p>	Legislature	Same statutory requirements as for attorneys serving as judicial arbitrators. See D. above.	<p>1. Appointing court may remove person as arbitrator in future.</p> <p>2. Marketplace</p> <p>3. Proposed Rule of Professional Conduct 1-710 , giving the State Bar authority to discipline a person for failure to comply with canon 6D's requirements, does not apply to persons who are not members of the bar.</p>
	Judicial Council Rule	Same CRC requirements as for attorneys serving as judicial arbitrators. See D. above.	
	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	Same Code of Judicial Ethics requirements as for attorneys serving as arbitrators. See D. above. However, the Rules of Professional Conduct do not apply to individuals who are neither active nor inactive members of the State Bar.	
	Local Court Rules/Standards	Same as for attorneys serving as arbitrators. See D. above.	

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<p>F. CONTRACTUAL ARBITRATION (CCP 1280 et seq.)</p> <p><u>Judicial/Bar Status</u> Statute does not specify.</p> <p><u>Neutral Selection Process</u> Must use the neutral selection process agreed upon by the parties. If cannot agree or process fails, court appoints (CCP 1281.6)</p> <p><u>Limitations on Use of Process</u> By agreement of the parties, either in pre-dispute contract or by submission agreement at time dispute arises (CCP 1281)</p>	Legislature	<p><u>Disclosure</u> CCP 1281.9 — establishes general disclosure requirements for neutral arbitrators. Subd. (a) requires disclosure of information regarding all cases involving any of the same parties or attorneys where the arbitrator is serving or has served as an arbitrator for the last three years, including the date and amount of award. Also requires disclosure of any attorney/client, professional, or other significant personal relationship. Subd. (e) requires disclosure of CCP 170.1 grounds for disqualification, (see A. for a list of these grounds).</p> <p>Other disclosure requirements exist for arbitrators in specified types of disputes — see e.g., CCP 1281.95 — residential construction, and CCP 1297.11 et seq. — international commercial.</p> <p><u>Disqualification/Recusal</u> CCP 1281.9(b) and (c) — arbitrators are subject to disqualification for failure to comply with the disclosure requirements in CCP 1281.9(a) or on the basis of the information disclosed.</p> <p>CCP 1281.9(c)(2) — a party can disqualify one court-appointed arbitrator without cause.</p> <p>CCP 1281.9(e) — an arbitrator must disqualify him or herself on the basis of any ground in CCP 170.1 upon the demand of a party prior to the conclusion of the arbitration.</p>	CCP 1286.2(c) — award may be vacated where rights of a party were substantially prejudiced by the misconduct of a neutral arbitrator.
	Judicial Council Rule	No CRC provisions specifically relating to private contractual arbitration.	
	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	No provisions specifically relating to private contractual arbitration.	
	Local Court Rules/Standards	No provisions specifically relating to private contractual arbitration.	
	Providers/ Professional Organizations	Some providers of ADR services, including JAMS/Endispute and AAA, require their arbitrators to subscribe to certain standards of conduct in order to participate on the organization's panels.	

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<p>G. NEUTRAL EVALUATION (Contra Costa County Superior Court Rules of Practice and Procedure for ADR Programs, Section Two: Extra Assistance to Settle Early (EASE), and San Mateo Superior Court Multi-Option Appropriate Dispute Resolution Program (MAP) Neutral Evaluation Guidelines)</p> <p><u>Judicial/Bar Status</u> Must be attorney (Contra Costa, rule 202 and San Mateo guideline 3).</p> <p><u>Neutral Selection Process</u> Contra Costa — assigned by ADR program director (Contra Costa, rule 202).</p>	Legislature	No statutory provisions specifically relating to neutral evaluation.	
	Judicial Council Rule	No CRC provisions specifically relating to neutral evaluation.	
	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	No provisions specifically relating to neutral evaluation.	
	Local Court Rules/Standards		
	<p><u>Examples:</u></p> <p>Contra Costa Superior Court Rules of Practice and Procedure for ADR Programs, Section Two: Extra Assistance to Settle Early (EASE)</p>	<p>Same requirements in Contra Costa as for judicial arbitrators. See D. above.</p> <p>Contra Costa, rule 207 — The court, evaluator and all counsel and parties, and any other person attending the EASE conference must treat as confidential settlement proceedings all written and oral communications made in connection with or during an EASE conference. EASE conferences constitute mediations governed by California Evidence Code sections 1152.5 and 1152.6.</p>	
	San Mateo Superior Court Multi-Option Appropriate Dispute Resolution Program Neutral Evaluation Guidelines ⁴	<p>San Mateo has adopted ethical standards, based in part on the AAA/ABA/SPIDR Model Standards of Conduct for Mediators, to which all member of its MAP panels are required to adhere.</p> <p><u>Disclosure</u> San Mateo Guideline II.D. - Neutrals must disclose any circumstance that may create or give the appearance of a conflict of interest or reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation.</p> <p><u>Disqualification/Recusal</u> San Mateo Guideline II.D. - Neutrals must refrain from entering or continuing in any dispute if they believe or perceive that participation as a neutral would be a clear conflict of interest or where they feel they could no longer be neutral.</p>	

⁴ In order to save space, hereafter these guidelines are cited as “San Mateo Guidelines”.

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<p>G. NEUTRAL EVALUATION (continued)</p> <p><u>Neutral Selection Process</u> (continued) San Mateo — selected by parties or, if this fails, parties strike names from court-provided list (MAP Referral Procedure).</p> <p><u>Limitations on Use of Process</u> Participation in both the Contra Costa and San Mateo programs is voluntary (Contra Costa, rule 102 and San Mateo guideline 2).</p>	<p>Examples of Local Court Rules/Standards (continued)</p> <p>San Mateo Superior Court Multi-Option Appropriate Dispute Resolution Program Neutral Evaluation Guidelines Continued</p>	<p><u>Other</u> San Mateo Guideline II.A — <i>Impartiality</i> — neutral must maintain impartiality toward all parties.</p> <p>San Mateo Guideline II.B — <i>Informed Consent and Disclosure of Fees</i> — neutral is obligated to assure that all parties understand basis of fees, nature of the process, procedures, role of the neutral, and the parties' relationship to the neutral.</p> <p>San Mateo Guideline II.C — <i>Confidentiality</i> — except where confidentiality is not protected, neutral must resist all attempts to cause him/her to reveal any information outside the process.</p> <p>San Mateo Guideline II.E — <i>Promptness</i> — neutral must exert every reasonable effort to expedite the process.</p> <p>San Mateo Guideline II.F — <i>Settlement and Its Consequences</i> — neutral is responsible for seeing that parties consider the terms of a settlement.</p> <p>San Mateo Guideline II.G — <i>The Law</i> — at no time shall a neutral evaluator offer legal advice to parties.</p> <p>San Mateo Guideline III. — <i>Unrepresented Interests</i> — neutral is obligated to ensure unrepresented interests are fully considered by the parties.</p> <p>San Mateo Guideline IV. — <i>Use of Multiple Procedures</i> — if use of multiple procedures is contemplated, neutral must advise parties of nature of procedures and consequences of revealing information.</p> <p>San Mateo Guideline V. — <i>Background and Qualifications</i> — neutral should accept cases only where has sufficient knowledge regarding the process and subject matter.</p> <p>San Mateo Guideline VI. — <i>Support of the Profession</i> — neutral should participate in the development of new neutrals and public education efforts re ADR and provide pro bono services.</p> <p>San Mateo Guideline VII. — <i>Responsibilities of Neutrals Working on the Same Case</i> — neutral is obligated to inform other neutrals regarding entry into case.</p> <p>San Mateo Guideline IX. — <i>Advertising and Solicitation</i> — all advertising must honestly represent the services and no claims of specific results or promises of favor to one side should be made.</p>	

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<p>H. COURT-ORDERED MEDIATION (CCP 1775 et seq., CRC 1630 et seq., and local court rules.)</p> <p><u>Judicial/Bar Status</u> No requirements specified.</p> <p><u>Neutral Selection Process</u> Parties may stipulate to mediator, but if do not agree within specified time, court appoints mediator from panel maintained by court (CCP 1775.6 and CRC 1633).</p> <p><u>Limitations on Use of Process</u> Cases in which judicial arbitration would otherwise be required (civil cases of \$50,000 or less) in courts in Los Angeles County and other courts that so elect. (CCP 1775.2 and 1775.3.)</p>	Legislature	<p>No statutory disclosure or disqualification requirements relating to court-ordered mediation.</p> <p>Evidence Code 1115 et seq. establishes the general parameters of confidentiality in mediation proceedings, including: 1119(c) — except as otherwise provided, all communications in the course of a mediation shall remain confidential; 1121—Unless the parties agree otherwise in writing, neither the mediator nor anyone else can submit a report to a court regarding a mediation except a required report stating only whether an agreement was reached</p>	<p>1. Appointing court may remove person as mediator in future cases.</p> <p>2. Marketplace</p>
	Judicial Council Rule	No CRC provisions relating to disclosure, disqualification or other ethical requirements in mediation.	
	Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	No provisions specifically relating to disclosure, disqualification or other ethical requirements in court-ordered mediation.	
	Local Court Rules/Standards	<p>Some local courts, including Contra Costa, San Francisco, San Mateo, and Santa Clara Superior Courts, have adopted rules establishing ethical requirements for mediators in their programs. Contra Costa’s rules also apply to judicial arbitrators and neutral evaluators and are described under D. above. San Francisco, San Mateo, and Santa Clara have adopted standards based upon the AAA/ABA/SPIDR Model Standards of Conduct for Mediators. San Mateo’s standards also apply to neutral evaluators and are described under G. above. San Francisco and Santa Clara Superior Court’s standards are described below.</p> <p><u>Disclosure</u> Mediator must disclose all actual and potential conflicts of interest reasonably known to the mediator.</p> <p><u>Disqualification/Recusal</u> After disclosure, mediator must decline to mediate unless all parties choose to retain the mediator.</p> <p><u>Other</u> <i>Self-Determination</i> — mediator must recognize mediation is based on principle of self-determination by the parties.</p>	

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H. COURT-ORDERED MEDIATION <i>(continued)</i>	Local Court Rules/Standards <i>(continued)</i> Standards of Conduct for Mediators adopted by the San Francisco and Santa Clara Superior Courts <i>(continued)</i>	<i>Impartiality</i> — mediator must conduct mediation in impartial manner. <i>Conflicts of Interest</i> — also governs conduct during and after the mediation. <i>Competence</i> — mediator must mediate only when has the necessary qualifications to satisfy the reasonable expectations of the parties. <i>Confidentiality</i> — mediator must maintain the reasonable expectations of the parties with regard to confidentiality. <i>Quality of the Process</i> — mediator must conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. <i>Advertising and Solicitation</i> — mediator must be truthful in advertising and solicitation. <i>Fees</i> — mediator must fully disclose and explain the basis of compensation, fees, and charges to the parties. <i>Obligations to the Mediation Process</i> — mediator has duty to improve the practice of mediation.	
I. PRIVATE MEDIATION <u>Judicial/Bar Status</u> No requirements specified; based on the agreement of the parties. <u>Neutral Selection Process</u> No process specified; based on the agreement of the parties.	Legislature Judicial Council Rule Supreme Court (Code of Judicial Ethics and Rules of Professional Conduct of the State Bar of California)	No statutory disclosure or disqualification requirements relating to private mediation. CCP 1115 et seq. establishes the general parameters of confidentiality in mediation proceedings. See H. above for a description of these provisions. No CRC provisions specifically relating to disclosure, disqualification or other ethical requirements in private mediation. No provisions specifically relating to disclosure, disqualification or other ethical requirements in private mediation.	

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<u>Limitations on Use of Process</u> No limitations specified; based on agreement of the parties.	Local Court Rules/Standards	No provisions specifically relating to private mediation.	
	Providers/ Professional Organizations	Some providers of ADR services require their mediators to subscribe to certain standards of conduct, such as the AAA/ABA/SPIDR Model Standards of Conduct for Mediators described under H. above, in order to participate on the organization's panels.	