

A Primer on Voluntary Alternative Dispute Resolution

by Donna S. Hershkowitz, Counsel, and Drew Liebert, Chief Counsel,
for the Assembly Judiciary Committee*

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"Just when you think you've graduated from the school of experience,
someone thinks up a new course." -- Mary H. Waldrip

Creative methods have been used for at least 500 years by disputants seeking to avoid the formality and cost of a hearing before the King's bench to resolve their disputes. Disputants historically sought out non-court alternatives, known as "alternative dispute resolution," or ADR, because this approach was consistent with several of their goals: to be allowed to participate in the selection of the forum that will resolve the dispute, to have the matter handled fairly and lead to just results, and perhaps most of all, to be quick and inexpensive. However not all forms of ADR have been uniformly embraced and avoided public controversy. In recent years there have been continued political battles over efforts to reign in the increasing prevalence of involuntary forms of arbitration known as "mandatory pre-dispute binding arbitration." Powerful political disputants on both sides of this issue have thus far been at a virtual political impasse, and the possibilities for quick resolution of this particular public policy debate do not presently appear clear.

With the hope of "graduating" from this singular focus on involuntary ADR, the new Chair of the Assembly Judiciary Committee directed Committee counsel to assist the Committee in embarking on, in Mary Waldrip's words above, "a new course" for looking at the possible promise of voluntary ADR in California. Specifically, the Chair seeks to direct the Committee's attention to the question whether there may be recent success stories in the area of voluntary ADR which might assist the Legislature in resolving at least a few apparently intransigent public policy

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problems, such as, for example, those surrounding employment disputes and construction defects law.

With this objective as a guide, this paper briefly provides a refresher about the major forms of voluntary ADR currently in use, where and how they tend to be employed, and what appear to be their potential advantages and disadvantages. The paper focuses particular attention on the possible "starring" role voluntary mediation may play in resolving difficult disputes quickly with critical "buy in" by the disputants. One thing about ADR that is patently obvious (and all interested parties agree) is the surprising lack of empirical evidence surrounding the performance and promise of all forms of ADR.

GENERAL ADR REFRESHER

The term "ADR" includes a range of tools for resolving disputes and helping parties deal constructively with their differences. Mediation and arbitration are, of course, the two most commonly known, but the term "ADR" also includes: neutral evaluation, private judging, mini-trials, facilitation, policy dialogues, summary jury trials, neutral fact-finding, and ombuds practice.¹

Key to understanding ADR are the following factors: ADR is intended to be less formal than court proceedings, may have a variety of objectives or expected outcomes, is intended to be applied flexibly, and, according to the American Bar Association, should be voluntary. These qualities permit ADR to be adapted to the needs of particular settings, cases, and parties in order, purportedly, to save both time and cost and to produce results that may not be able to be realized in the more formal court setting. Courts and ADR providers have been adding to the range of ADR "hybrid" techniques extensively during the past two decades. For example, the federal court in San Francisco long ago began experimenting with "early neutral evaluation" (ENE), which has proven to be a useful addition to the range of ADR processes. ENE, under which a neutral helps the parties and attorneys focus at an early point on the issues in the case, how they will be proved, strengths and weaknesses, and how and whether settlement might be possible at an early phase, is now widely available in both federal and state courts.²

ADR techniques have been used in a wide range of settings, including family disputes, community conflicts, business disputes of all kinds, construction matters, environmental cases, public policy issues, and even criminal cases. Adaptations have also been made extensively in business settings to prevent unnecessary conflict, including the development of more effective approaches to negotiation.³

Particularly in light of recent debates by policymakers, it is important to emphasize that ADR is designed to be voluntary.⁴ Well-informed participants in ADR have a number of choices not available to those in litigation. Such participants can negotiate about, or consider options regarding, the kind of resolution techniques for their case, the person or persons who will provide ADR services, significant aspects of how ADR will operate for them, or in fact may reject ADR as an alternative to court.⁵

WHAT ARE MEDIATION AND ARBITRATION, AND HOW DO THEY WORK?

MEDIATION

At its essence, "mediation" is a process in which a neutral person facilitates communication and negotiations between the disputants to assist them in reaching a mutually acceptable agreement, or a better understanding of each participant's interests, needs, values, and options. Mediation is similar to voluntary forms of arbitration in that a neutral third party is involved and also in that an agreement between the parties may specify the circumstances under which mediation will occur.⁶

However, mediation is distinguishable from arbitration in several significant respects. Most important, in mediation the neutral third party has no authority to decide the dispute. The mediator's task, instead, is to assist the parties in reaching agreement on a negotiated resolution.

Second, participation in mediation is almost always voluntary. Mediation agreements are generally not specifically enforceable; even when made a part of a larger contract, agreements to mediate typically

provide that mediation is a pre-condition to arbitration or litigation, as the case may be. Parties are generally not compelled by statute or a court to participate in mediation.⁷

Third, while parties to arbitration are committed to the process until its conclusion in a decision, parties to mediation are not obligated to reach any agreement; any party generally may withdraw from the process at any time.

Finally, parties in mediation have full statutory protection for confidentiality, while parties in arbitration, though conducted in private, are not generally bound by confidentiality.⁸ Nothing said in mediation and no document prepared for mediation can be used for or against a party in subsequent arbitration or litigation, and what goes on in mediation is not discoverable by third parties. The purpose of confidentiality is to promote candor, which, in turn, is intended to increase the prospects for successful resolution of all matters involved in the mediation.

It is sometimes said that there are three styles of mediation: transformative, facilitative, and evaluative (also sometimes referred to as "directive"). These terms do not have precise definitions, nor have they been consistently applied. And, many mediators would contend that they use all three approaches as might be appropriate in particular cases.⁹

With these caveats, the styles might be explained as follows: "**Transformative mediation**" is a term used to describe a process in which the primary goals are empowerment of the parties and their recognition of the needs and perspectives of others. The theory is that through improvement in communication, the parties will improve their mutual understanding and their relationship, and the conflict will be resolved as a consequence of the "transformation" that occurs.¹⁰

"Facilitative" and "evaluative" are terms used to describe mediation techniques that, in effect, describe opposite ends of a spectrum of mediator activity. Facilitative mediation emphasizes party self-determination, allowing the parties to control what issues will be resolved and in what ways. Facilitative mediators focus on communication and a fair process, but avoid substituting their judgment on the merits of the dispute for the judgment of the parties.

Evaluative mediators, on the other hand, make frequent use of their own judgments about the merits of disputed issues to guide the parties toward a negotiated agreement. Such mediators place emphasis on their role as "agents of reality" who can challenge positions that the parties take, apply pressure to both sides to develop movement toward a resolution, and relate what other decision-makers (such as a jury or a judge) might do if faced with similar circumstances.¹¹

As mediation has developed as a more recognized and accepted way of resolving disputes, the field has become more diverse in the types of disputes addressed. Mediation is now commonly used for business and civil cases of all sorts, construction, employment, environmental, commercial, education, community, health care, family (including dependency, divorce, and custody disputes), as well as some criminal matters (in the form of victim-offender mediation).

ARBITRATION

Reduced to its most basic elements, "arbitration" refers to the use of a *private third party to conduct a hearing on a dispute and make a decision on it*. As noted above, arbitration has been an alternative to litigation for hundreds of years. It was used, for example, in the thirteenth century by English merchants who preferred to have their disputes resolved according to their own customs (the law merchant) rather than in court. In modern times, it is extensively used to resolve disputes arising under collective bargaining agreements and under a wide variety of commercial agreements and contracts.¹²

By "private" the definition means that the decision-maker is not someone whose government/ public job is to decide disputes. In addition, the process itself is private in that the public (including the media) is not normally permitted to attend the hearing, and any records kept do not become public records. By the term "third party" the definition implies that the decision-maker is not one of the parties in the dispute, but rather is someone expected to be neutral or non-biased. The third party may be one or more persons. The phrase "conduct a hearing" means that the arbitrator must go through an information-gathering process, which typically is governed by the arbitration agreement, but generally includes at least the following: notice to all parties as to when and where the hearing will be held, an opportunity for each side to present evidence, and an opportunity for each side to be present when evidence is presented and to counter it through cross-examination and argument. Under California law, each party is entitled to be represented by legal counsel.

The definition's reference to "make a decision" contains three important elements. Unless the parties agree otherwise¹³: (i) the decision is binding on the parties in the sense that it can be enforced against them; (ii) the right of appeal to court are strictly limited¹⁴; and (iii) the award, to be legally appropriate, must decide the dispute which the parties have submitted to arbitration and not decide anything else.

Because the arbitrator's power in traditional binding arbitration is immense and increasingly controversial,¹⁵ many variations on traditional arbitration have emerged which limit the arbitrator's power, constrain the arbitrator's possible awards, or address special needs of particular industries and types of disputes. Among the best known is "baseball" arbitration, which originated in disputes between owners and baseball players disputing over salaries. In "baseball" arbitration each party submits a proposed amount for the arbitrator to award – in effect its best settlement offer – and the arbitrator *must* award one amount or the other. From the parties' standpoint this type of arbitration helps both to prevent compromise awards and also to prevent "clearly unreasonable" awards by placing upper and lower limits on award amounts. This has the effect of motivating the parties to make their proposed amounts reasonable, based on the evidence submitted, because if they do not, the arbitrator may pick the other party's amount.¹⁶

Another variation, used extensively in the courts, is called "judicial arbitration" or "court annexed arbitration." This ADR technique may be imposed by the court in certain cases, and proceeds like traditional arbitration, but the parties have the option as to whether the award becomes binding. The neutral decision-maker renders an award, which provides a benchmark for both sides to consider as they review possible settlement options, if it does not dispose of the case.¹⁷ Either of the parties may subsequently request the court to hold a hearing to decide the matter on both the facts of the case and the governing rule of law.¹⁸

Except for the court-annexed variety, arbitration is based in contract. Usually, the contract which contains a mandatory binding arbitration clause has something other than arbitration as its main subject matter. Of course, parties may agree upon arbitration after a dispute has arisen, and frequently do so. This (referred to as post-dispute voluntary arbitration) is the way arbitration was traditionally envisioned, where both parties agree, after knowing the extent of their conflicts, to use arbitration as their dispute resolution mechanism. Historically, the parties had relatively equal bargaining power and desired to provide for an expedited process for resolving commercial disputes which arose out of or related to the implementation of their contractual agreement.

However, in the past decade, businesses, employers, and parties of superior bargaining power have increasingly *imposed* pre-dispute, binding arbitration provisions on consumers as a price tag for receiving goods or services or obtaining employment. Such pre-dispute clauses are called "adhesion contracts" because the bargaining power of the contracting parties is very unequal, and the party with lesser bargaining power is required to accept the entire contract on a take it or leave it basis (i.e. he or she is not able or permitted to accept the majority of the contract but reject the required arbitration provision). Much more litigation about such contracts results, and courts scrutinize such contracts more sharply. Involuntary arbitration in such contexts is generally referred to as "*mandatory arbitration*" or "*imposed arbitration*" in order to convey that one party did not have the degree of choice normally present.

Recent discussions about imposed arbitration have focused on mandatory arbitration provisions. In such circumstances, a party is required to accept arbitration as the method for resolving the dispute. The degree to which such an arbitration is "voluntarily selected," and the processes and procedures which will govern the arbitration is "agreed to" by the parties in these cases is the subject of much debate. A recent decision by the California Supreme Court suggests that in certain instances, arbitration has become increasingly less advantageous for consumers who are required, pre-dispute, to "agree" to submit all future claims and controversies to arbitration.¹⁹ However, this form of involuntary ADR is not the focus of this paper or of the Judiciary Committee's hearing on January 30, 2001.

WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF MEDIATION AND ARBITRATION?

Fuller discussions of many of the advantages and disadvantages of mediation and voluntary arbitration listed below are contained elsewhere in this report. This section simply seeks to pull together many of the asserted advantages and disadvantages for quicker reference.

ADVANTAGES OF MEDIATION

- Control over the outcome remains with the parties. Parties may be able to achieve closure regarding events that brought them together, in emotional or other terms, something that is typically not possible, or is very difficult to achieve, in the formal court setting. The parties may also be able to agree upon settlements that include items not available in court, such as promises to do things that can preserve or rebuild past relationships. In effect the parties are full participants, not passive spectators.

- The proceedings are informal and flexible. This may lead to a less stressful process that is more consistent with the personalities and needs of the case than litigation would be.
- Confidentiality. Privacy can be maintained and publicity kept to a minimum, which some argue helps to preserve dignity for the participants and promote candor, thus enhancing the chances that the dispute will be fully resolved after consideration of all possible options.
- Low cost. Typically mediation involves discussing what information is necessary to resolution, minimizing long discovery procedures and other costly activities, and helping to keep "transaction costs" to a minimum.
- Speed. Mediation typically is able to focus on what issues are essential to a resolution, getting to the point quickly and efficiently.
- May restore or preserve relationships. By addressing communication and relationship issues, mediation helps parties to restore or preserve their relationships, rather than seeing them deteriorate in escalating adversarial proceedings.
- Facilitates communication. Even when cases do not settle, mediation facilitates the exchange of information and helps parties focus on key issues.

DISADVANTAGES OF MEDIATION

- May not result in resolution. Mediation relies on the parties to participate in the search for a resolution that all may be able to live with. Sometimes the parties are not able to do so or parties may be able to manipulate the process so that it becomes little more than a costly hurdle or a secondary discovery device.
- May involve disclosing facts or strategies, thus giving up the element of surprise. If mediation is not successful, the parties will have been exposed to each other's stories and the facts each plans to rely upon in later proceedings, so the element of surprise is lost.
- Time and resources may be spent without a corresponding benefit. If mediation does not result in a resolution, some cost will have been involved and may not be recoverable.
- Success in mediation requires that the parties invest great care in the selection of the mediator and in preparation of the case for mediation.
- Success in mediation requires all the parties with a vested interest to participate. If not all parties are part of the mediation process or have the authority to settle, mediation will never be successful.

ADVANTAGES OF VOLUNTARY ARBITRATION

- Expertise of the decision-maker. The arbitrator is selected by the parties, not imposed on them by the court. They can, therefore, choose someone with expertise in the subject matter, making the outcome of arbitration more likely to reflect practices in the industry or specialized knowledge that

only experts would have.

- Finality of the decision. The courts nearly always respect the provision that the arbitrator's decision is final and binding. This discourages appeals to the courts and costly, protracted proceedings.
- Privacy of the proceedings. Arbitration is a private forum and can be used to shield a proceeding from public scrutiny if the parties wish to do so.
- Procedural informality. Since the parties jointly determine the procedural rules, they can opt for simplicity and informality. This helps to preserve their relationships and to reduce stress.
- Low cost. Simplified procedures tend to reduce the costs of dispute resolution, as does the fact that, unless the parties agree otherwise, discovery is usually limited. Costs are also contained by the limited opportunities for appeal.
- Speed. The same factors that lead to low costs also lead to speedier resolutions. In addition, the parties need not wait for a trial date to be assigned them, but can proceed to arbitration as soon as they and the arbitrator are ready.
- More predictable results. Using the features of arbitration described above to keep awards within boundaries set by the parties, parties can preclude outcomes that are "irrational" or completely out of the scope of what the parties believe is a reasonable range.
- Party autonomy. By their agreements, parties may structure arbitration processes to suit their own circumstances, using single arbitrators in small disputes and panels of three or more in large disputes requiring more expertise. Discovery may be extensive or limited; the contents of awards, the range of remedies, and degree of finality, and other pertinent factors may be specified in the arbitration agreement.
- Saving public funds. By reducing court caseloads, arbitration eases the pressure felt by judges and courts to handle more cases.

DISADVANTAGES OF VOLUNTARY ARBITRATION

- Theoretical advantages of arbitration may not be realized in particular cases. Parties may lack knowledge, or make mistakes, about the neutrality or expertise of the arbitrator, and consumers often have significantly less access to information about arbitrators and their decision records than the employer, health plan, or business they may be facing in arbitration.
- There is no appeal and the award is final, so if the losing party believes it is erroneous or contrary to law, there is virtually no recourse. In fact, the California Supreme Court has held that "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties."²⁰
- There is often only very limited discovery, which tends to work to the disadvantage of the consumer. According to the American Arbitration Association, this is an inevitable byproduct of arbitration: "It

is understood that alternative dispute resolution processes such as arbitration sometimes represent a trade-off between the concept of full discovery associated with court procedures and the efficiencies association with minimal pretrial process.²¹

- Arbitrators are not bound by the law, and thus there may be less predictability and certainty about the results of arbitration. Courts have held that "arbitrators, unless specifically required [by the arbitration contract] to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." Courts have expressly recognized that due to this fact, "there is a risk that the arbitrator will make a mistake." Courts have found that risk, however, that a mistake of law will be made, to be an "acceptable" risk.²²
- Arbitrators may prefer compromise solutions that avoid antagonizing either party. Some consumer representative contend that arbitrators can be inclined by their own self-interest to side with the repeat players who are more likely to seek out their services again in the future, or otherwise temper awards that are in favor of plaintiffs. And studies reportedly show that arbitrators who repeatedly represent one side in employment arbitration do follow a pattern of favoring employers.²³
- Decision-making control passes to the arbitrator, once selected, rather than remaining with the parties.
- Initial costs, such as filing fees, room rental, and arbitrator compensation, can be substantially greater than court filing fees, and are generally not recoverable.
- Awards are not self-enforcing. Awards against a reluctant or recalcitrant party must be reduced to a judgment to become enforceable.
- Representation in arbitration may require legal counsel, which may put smaller parties at a disadvantage. And because the awards from arbitration are typically far lower, it is reportedly more difficult for plaintiffs to find legal representation.
- Ability to have the matter heard may be substantially compromised. In its review of arbitration in managed care, the California Research Bureau found that one health plan reported 12 –27% of its cases were disposed of by summary judgment, prior the parties being able to develop and present their case fully to the arbitrator. This compares with a rate of less than 1% of all civil complaints being disposed of by summary judgment.²⁴ It is unclear to what extent summary judgment is equally prevalent in other arbitration contexts.²⁵
- Lack of required arbitrator qualifications. "California, like most states, does not have established professional standards or licensing requirements for arbitrators."²⁶

DO MEDIATION AND ARBITRATION OFFER THE SAME PROTECTIONS OFFERED IN JUDICIAL FORUMS?

The chief protection in both voluntary arbitration and mediation is that the process is theoretically under the control of the parties and their attorneys and other advisors. Protections against bias and conflicts of

interest are in some respects stronger than those afforded litigants in court because in mediation and arbitration the parties can make an informed choice about who the provider will be. According to CDRI, prospective arbitrators in California are required by statute to disclose to the parties a much broader range of relationships than those a judge would be required to disclose or consider. This level of protection is even stronger in mediation, because parties can withdraw at any time. Of course, judges are not reliant upon repeat players to hire them in future litigation in the same manner that arbitrators and mediators may be.

Furthermore, the major professional associations have joined in establishing codes of ethics and standards that arbitrators and mediators should follow, providing another layer of protection for parties. Several are listed below:

1. The American Arbitration Association and the American Bar Association have joined in adopting a Code of Ethics for Arbitrators.²⁷
2. The Society of Professionals in Dispute Resolution (formerly SPIDR, but recently merged into a new entity, the Conflict Resolution Association, also including the Academy of Family Mediators and the Conflict Resolution in Education Network) developed in 1986 the first and still one of the most comprehensive ethical codes applying to mediators and arbitrators.²⁸
3. The American Arbitration Association, American Bar Association, and SPIDR have joined in publishing a set of Standards of Conduct for Mediators²⁹; and
4. The California Dispute Resolution Council adopted a model set of Standards of Practice for California Mediators as the result of a long and careful consultation process with other organizations in California; these standards have been adopted or used as a model by courts and counties throughout the state in developing their own local standards.³⁰

However, concerns have been raised by various constituencies about the due process and other "trade-offs" associated with imposed arbitration. Concerns include the severely limited right to appeal, even as to legally and factually erroneous decisions which cause substantial injustice to the parties; restricted discovery; arbitrators clear allowance to not follow the law; forced waiver of the constitutional right to a jury trial; and difficulty in obtaining needed legal representation attributable in large part to the clear understanding that arbitrators awards are often substantially lower than those typically awarded by juries.

COST AND EXPEDIENCY: DO WE KNOW WHETHER MEDIATION AND ARBITRATION ARE CHEAPER AND/OR FASTER?

Numerous studies have been undertaken comparing mediation, voluntary arbitration, and litigation with regard to a number of criteria. The results are mixed, depending on the dispute resolution context studied and the methods used.

Results for arbitration and other ADR processes are also mixed; in general research has indicated that people respond favorably to court ADR programs, although savings in time and money for the parties and courts do not always occur.³¹ The specific costs of any arbitration, of course, are dependent upon

the arbitration association used, and the specific provisions of the arbitration contract. According to a recent report published by the California Research Bureau (CRB), "[t]here are two major private arbitration organizations in California, American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS), that charge users a variety of fees for their services. JAMS services include professional fees (hearing, reading/research, and award preparation, \$250-\$600 per hour) and case management fees (scheduling, document handling, and facility rental per day from \$125-\$250 per party). In addition to case management and professional fees, AAA charges a filing fee of from \$500 to \$7,000, depending on the amount of the claim, an administrative fee of \$150 a day, and rental fees for arbitration rooms."³² In the CRB's study of arbitration in the health care arena, it was estimated that it would cost roughly \$4,800 to arbitrate a 1-2 day case.³³ Filing fees in court, on the other hand, are less than \$200.

The CRB Report also finds that "[c]onsumer groups contend that requiring consumers to pay arbitration fees as a condition of filing claims puts them at a significant disadvantage. The cost may discourage consumers from filing claims and may lead to summary judgments. . . ."³⁴

WHY WOULD SOMEONE VOLUNTARILY SELECT MEDIATION OR ARBITRATION AS A MEANS OF DISPUTE RESOLUTION INSTEAD OF PROCEEDING THROUGH THE COURTS?

Disputants select arbitration or mediation to gain the advantages listed above. Among other things, repeat players (e.g. health plans, employers, etc.) tend to require arbitration, instead of permitting aggrieved persons to choose the court system, because the awards are typically lower³⁵, the parties' costs are not recoverable, and they may have a greater comfort level with arbitrators they will select over judges assigned by the court. Research has generally supported a favorable view of voluntary ADR. As one well-known researcher has summarized:

"Empirical research about mediation in a variety of contexts indicates that:

- Disputants engaged in mediation tend to be satisfied with the process;
- Similar comparisons favorable to mediation hold for disputant evaluations of the fairness both of the process and of the outcome;
- Where compliance with mediated outcomes has been studied, it appears to be at least as high or higher than compliance with adjudicated outcomes;
- In the mediation process some parties may experience considerable pressure to settle or to follow the mediator's values in shaping the terms of a settlement;
- There is no evidence that mediation has been used extensively enough to reduce backlog in a court's docket;
- There is no evidence to show that mediation saves courts money although it may in some instances contribute to avoidance of possible future costs (i.e., of hiring new judges and opening new courtrooms);
- The very limited evidence we have indicates that when litigants settle through mediation, they often save money. When mediation is another step in the litigation process, it does not increase costs substantially;
- Outcomes of mediated agreements are likely to be somewhat different than outcomes achieved through negotiation or adjudication."³⁶

The principal reasons why court proceedings are preferred over ADR in some cases, in addition to the disadvantages of mediation and arbitration described above, are that the parties distrust arbitration or need a definitive result from the public institution charged with resolving disputes either because they cannot reach agreement or want to establish a legal precedent.

HOW OFTEN ARE MEDIATION AND ARBITRATION USED, AND WHO USES THEM?

Use of mediation and arbitration has been increasing rapidly during the past three decades.³⁷ Use appears to be particularly strong in the family, construction, employment, health care, environmental, community, and general civil case categories.³⁸ A 1998 report by the Institute on Conflict Resolution, a partnership between Cornell University and the Foundation for the Prevention and Early Resolution of Conflict (PERC), found that ADR processes were well established in corporate America, widespread in all industries and for nearly all types of disputes, and becoming integral to a systemic, long-term change in the way corporations resolve disputes.³⁹

While ADR programs appear to be growing and becoming more institutionalized, there are currently no statewide sources of information that can paint a comprehensive or detailed picture of this growth. Under the Dispute Resolution Programs Act,⁴⁰ for example, counties operate and fund their own ADR programs, and collect information from within their own counties. Efforts are being made to standardize the definitions, statistical methods, and data collection procedures, so statewide numbers could be made readily available, but no such aggregated data is yet available on the numbers of cases in DRPA-supported programs across the state.

Numbers of cases in the construction, employment, environmental, and general civil areas are not collected statewide because the programs and providers are so numerous and diverse. The Annual Reports of the American Arbitration Association show steady growth in the number of arbitrations and mediations administered by them. Anecdotal evidence abounds of the use of mediation and arbitration in construction disputes. The American Institute of Architects, the Associated General Contractors, and the Associated General Contractors of California all publish forms of contract, which include provisions for mediation and arbitration.

In the employment area, some employers provide in their employment agreements or policies for mediation or arbitration or both. For some the motivation is to offer an employment benefit. For others the motivation is to avoid the risk of large jury verdicts.

In other commercial contexts evidence of increasing ADR use is also evident. Insurers for design professionals use mediation to reduce legal expenses. Lawyers are required to mediate or arbitrate fee disputes with clients at the option of the client.⁴¹ Health care providers, financial service providers, and other businesses often provide for mediation and/or arbitration in their standard form agreements with consumers.⁴²

There is relatively little statistical data about the ADR field, including the numbers of ADR cases, growth in such numbers over time, and numbers of ADR providers. Also, more empirical research about effectiveness and program design, particularly in fields beyond family disputes, needs to be done. CDRI has begun to gather data on the numbers of ADR cases across the board, through a comprehensive

survey of ADR programs statewide, including DRPA programs, private providers, and agency-operated programs. This survey currently includes data from approximately 60 of the larger or better known programs that operate around the state. Based on preliminary results available to date, CDRI estimates that the state's ADR programs annually handle many more than the 103,000 ADR cases counted, which are in addition to those accounted for in the family law category. CDRI believes that the true number will be much higher than this, when reporting is complete and all ADR processes (such as conciliation,⁴³ and group facilitation⁴⁴) are included.

¹Helpful descriptions of these processes may be found in *Dispute Resolution: Negotiation, Mediation, and Other Processes*, by Stephen B. Goldberg, Frank E.A. Sander, and Nancy H. Rogers (3rd ed. 1999).

² See Joshua Rosenberg and H. Jay Folberg "Alternative Dispute Resolution: An Empirical Analysis" 46 Stanford Law Review 1487 (1994).

³ Useful descriptions of ADR processes as applied in business settings can be found in the publications of the CPR Institute for Dispute Resolution in New York and in *Controlling Conflict: Alternative Dispute Resolution for Business*, written by an experienced arbitrator/mediator/discovery referee. See, e.g., "Alternatives," a bi-monthly publication of the CPR Institute for Dispute Resolution, which is a membership organization of some 500 large companies, law firms, academics, and judges interested in controlling the high cost of litigation through expanded use of ADR; *Controlling Conflict: Alternative Dispute Resolution for Business*, by Edward J. Costello, Jr. (CCH Inc. 1996). See also a comprehensive study entitled "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations," by David B. Lipsky and Ronald L. Seeber of the Institute on Conflict Resolution, a partnership between Cornell University's School of Industrial and Labor Relations and the Foundation for the Prevention and Early Resolution of Conflict (PERC), (1998).

⁴ For this reason, among others, increasing attention has been directed to the effect of pre-dispute contract clauses in limiting the voluntary nature of the agreement and undermining the neutrality of the ADR provider.

⁵ Much has been written about ADR in general and as applied in particular settings. Perhaps the most comprehensive description of the range of ADR techniques and their application in California was prepared by the Judicial Council's ADR Task Force in 1999, which will be an excellent source of information for the Committee.

⁶ For additional background on mediation, see the references cited above in footnote 3 and the following: Nancy H. Rogers, Craig A. McEwen, & Sarah R. Cole, *Mediation: Law, Policy, and Practice* (West Group 2000); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 2nd ed. 1996); Deborah M. Kolb and associates, *When Talk Works: Profiles of Mediators* (Jossey-Bass 1994); and Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey-Bass 1984).

⁷ For an exception, see the Civil Action Mediation Act (California Code of Civil Procedure, §§ 1775 et seq), which established a five-year experiment with mandatory mediation as an optional alternative to judicial arbitration for Los Angeles County and other counties which opt to join the program. California currently has a pilot program operating in five counties, to test different mediation program approaches. See California Code of Civil Procedure § 1730 (Chap 61 of Statutes of 1999, AB 1105, as amended by Chap 127 of Statutes of 2000, AB 2866).

⁸ See California Evidence Code §§ 1115-1128 (1997). Confidentiality applies not only to the parties, but also to the mediator. In California, to ensure the mediator's neutrality, a mediator is considered "incompetent" to testify in a subsequent proceeding about what occurred in a mediation. See California Evidence Code § 703.5. Recent cases have indicated that confidentiality protection is not absolute, though. See *Rinaker v. Superior Court*, 62 Cal App 4th 165, 74 Cal Rptr 2d 464 (1998), *Olam v. Congress Mortgage Co.*, 68 F Supp 2d 1110 (1999), and *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.*, 78 Cal App 4th 653, 92 Cal Rptr 2d 916 (2000), review pending, ___ Cal ___ (No S087319).

⁹ See generally, "Court ADR," by Stephanie E. Smith, in the *California ADR Practice Guide*, cited above, §39.04 at p. 39-7 (1998) and Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed," 1 *Harvard Negotiation Law Review* 7 (Spring 1996).

¹⁰ Transformative mediation is described in detail in *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, by Robert A. Baruch Bush and Joseph P. Folger (Jossey-Bass 1994).

¹¹ For an excellent discussion of these styles, see L. Randolph Lowry, "Training Mediators for the 21st Century: To Evaluate or Not; That is Not the Question!" *Family and Conciliation Courts Review* (January 2000).

¹² For additional background, see chapters specifically relating to arbitration contained in the following references, which are updated annually: *California ADR Practice Guide*, edited by Yaroslav Sochynsky, J. Lani Bader, and Francis O. Spalding

(Lexis Law Publishing 2000); and *Alternative Dispute Resolution Practice Guide*, edited by Bette J. Roth, Randall W. Wulff, and Charles A. Cooper (West Group 2000).

¹³ The degree to which decisions to arbitrate, and the procedures under which the arbitration shall be conducted, are "voluntary," and the subject of "agreement" by parties has been the subject of much controversy. See discussion below regarding pre-dispute binding arbitration which is imposed by parties of superior bargaining power as a condition of receipt of goods, services, or employment.

¹⁴ See discussion of *Moncharsh v. Heily & Blasé*, below, for a discussion of the severe obstacles to appealing an arbitration award to court.

¹⁵ For an example of the controversy surrounding arbitrators awards, the Committee need only look to the current, and very public, disagreement over the award of attorney's fees in the smog impact fee litigation. In that matter, the state is contesting the amount of attorney's fees awarded by the arbitrator as unreasonably high and patently irrational, but finding little recourse because of the immense and practically unreviewable power of arbitrators.

¹⁶ See *Controlling Conflict*, pages 90-91 for additional variations, such as "night baseball arbitration" and "high-low" arbitration.

¹⁷ See California Code of Civil Procedure, §§ 1141.10 et seq.

¹⁸ Code of Civil Procedure § 1141.20.

¹⁹ *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. In *Armendariz*, the Court held that "[a]rbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees [in this context] who are seeking to vindicate statutory rights from gaining access to a judicial forum" and not providing them with the following basic protections: (1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all of the types of relief that would otherwise be available in court, and (5) not requiring employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."

²⁰ *Moncharsh v. Heily & Blasé et al.* (1992) 3 Cal.4th 1.

²¹ California Research Bureau, *Arbitration in California Managed Health Care Systems*, at p.20 (2000), quoting Consumer Due Process Protocol, Reporter's comments, p.28, August 8, 2000, www.adr.org/education/consumer/protocol.html. [Hereafter referred to as "CRB Report."]

²² *Id.* at 14, 17.

²³ *Id.* at 22 (2000). The California Dispute Resolution Council (CDRC) argues, however, that the study upon which this information is based was flawed. However, the 1999 report of the Judicial Council's Alternative Dispute Resolution Task Force also notes that "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. 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." (Alternative Dispute Resolution in Civil Cases: Report of the Taskforce on the Quality of Justice Subcommittee on Alternative Dispute Resolution and the Judicial System (1999) at p.38.) The Judicial Council report also points to one of the findings of a 1994 study by the RAND Corporation of private ADR in the Los Angeles area which is particularly relevant to this issue. That report found that less than 10 percent of the ADR providers "were handling more than half of the total private caseload." (*Id.* at 20.)

²⁴ *Id.* at 18.

²⁵ CDRC believes that summary judgment is not used in arbitration outside of the one health plan noted in the CRB study.

²⁶ CRB Report at p.23.

²⁷ American Arbitration Association, American Bar Association, "The Code of Ethics for Arbitrators in Commercial Disputes" (adopted 1977).

²⁸ Society of Professionals in Dispute Resolution, "Ethical Standards of Professional Conduct for Members of the Society of Professionals in Dispute Resolution" (adopted 1986)

²⁹ Joint Committee on Conduct Standards, American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution, "Standards of Conduct for Mediators" (1994).

³⁰ California Dispute Resolution Council, "CDRC Standards of Practice for California Mediators" (1998). See also "CDRC Principles" (adopted on June 17, 1995, and amended on October 7, 1995).

³¹ Quoting Deborah Hensler and other researchers, "Note: Empirical Research," in Goldberg, Sander, & Rogers, *Dispute Resolution*, cited above, at pp. 384-85 (1999). See also the ICR report cited above, which found that "virtually all who use ADR expect to save time and money and report that they do so, by comparison with litigation and administrative agency processes." Lipsky and Seeber, "The Appropriate Resolution of Corporate Disputes," at p. 8 (1998). The many variations in dispute resolution programs, styles of neutrals, and kinds of cases all make it very difficult to generalize from the empirical research results that are available. The largest body of empirical research assessing multiple aspects of mediation has been

conducted in the divorce mediation and custody mediation fields. Empirical research has demonstrated that divorce mediation significantly reduces the amount of conflict between parents during the separation process, and increases communication between parents about their children. Despite the difficulty, more could be done in California to gather and aggregate data about program results that would be helpful to policy-makers, and according to CDRI, it intends to undertake such inquiries in the future.

³² CRB Report at p.24.

³³ *Id.* According to CDRC, the filing and administrative fees cited in the CRB Report may be out of date. A fee schedule from the American Arbitration Association provided to the Committee by CDRC shows that filing fees range from \$500 to \$13,000 (as opposed to the \$7,000 maximum suggested by CRB). CDRC states that AAA typically performs arbitrations in law offices or other locations that do not require a room rental fee. However, AAA's literature provides that hearing rooms are available on a rental basis. Furthermore, AAA's literature provides that if arbitrator compensation or administrative charges have not been paid in full, "the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings," effectively denying the parties any recourse to resolve their grievances.

³⁴ *Id.* at 25.

³⁵ CDRC asserts that although arbitration awards are typically lower, plaintiffs are more likely to receive some sort of compensation through the arbitration process than they would through the courts.

³⁶ Quoting Professor Craig McEwen, "Note on Mediation Research," contained in Goldberg, Sander, & Rogers, *Dispute Resolution*, cited above, at pp. 182-84 (1999).

³⁷ See generally, Goldberg, Sander, & Rogers, *Dispute Resolution* cited above, at pp. 6-11 (1999).

³⁸ Any increase in the use of mediation in family law cases, however, is more attributable to an increase in the filing of family law matters than it is to an increased desire to use mediation processes. Whenever there is a custody and visitation dispute in a family law proceeding, parties are required to participate in mediation.

³⁹ David B. Lipsky and Ronald L. Seeger, Institute on Conflict Resolution, a partnership between Cornell University's School of Industrial and Labor Relations and the Foundation for the Prevention and Early Resolution of Conflict (PERC), "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations" (1998).

⁴⁰ Dispute Resolution Programs Act, California Business and Professions Code §§ 465-471.5 (1986).

⁴¹ California Business and Professions Code §§ 6200 et seq.

⁴² See, e.g., California Code of Civil Procedure § 1295.

⁴³ Conciliation is often defined for DRPA programs as similar to mediation, but where a neutral person facilitates communication without bringing the parties together at one time, such as through successive telephone calls.

⁴⁴ Group facilitation is the term for problem-solving processes conducted similarly to mediation, but where groups of people are involved; an example would be the mediation of a proposed development, which might involve the developer, citizen groups opposed to the project, and other neighbors and civic officials with a range of other concerns.