Bench Handbook

JUDGES GUIDE TO ADR

[REVISED 2008]

ADMINISTRATIVE OFFICE OF THE COURTS

EDUCATION DIVISION/CENTER FOR JUDICIAL EDUCATION AND RESEARCH

ABOUT CJER

The California Center for Judicial Education and Research (CJER), as the Education Division of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

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SCOPE OF THIS BENCH HANDBOOK

The primary objective of this Bench Handbook is to provide you (the trial judge) with a procedural overview of alternative dispute resolution (ADR) processes. As defined in Cal Rules of Ct 3.800(1), these are any processes, other than formal litigation, in which neutral persons resolve disputes or help the parties to resolve them.

In the past, when someone sought an attorney's help in resolving a dispute, the only options typically considered were either direct negotiations or litigation. Now many parties, attorneys, and judges routinely consider other processes, such as mediation, neutral evaluation, and arbitration.

Alternative dispute resolution processes offer not only potential assistance to litigants, giving them greater choices in designing an appropriate response to their dispute, but also potential relief to your court's docket. You play a critical role in encouraging litigants to consider the various ADR possibilities, as reflected in an increasing number of statutes, rules, standards, and guidelines.

Coverage includes a description of the various ADR processes and the factors that may make their use appropriate (chapters 1 and 2); the laws that encourage use of ADR and the general duties that these laws and their related rules impose on the participants (chapter 3); the roles you may play in educating the public, litigants, attorneys, and other judges about ADR (chapter 4); when litigants may be referred to ADR on a mandatory basis (chapter 5); quality assurance (chapter 6); confidentiality and immunity (chapter 7); enforcing agreements or awards reached in ADR (chapter 8); and limitations on a judge's actions (chapter 9). An Appendix lists organizations, Web sites, and publications concerned with ADR.

This Handbook focuses on general civil matters and does not cover family law matters in-depth. It also does not discuss less common ADR processes such as partnering, ombudsperson facilitation, conciliation, and confidential listening. These processes are among the subjects discussed in chapter 3 of CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, SECOND EDITION (Cal CJER 2008).

Chapter 1
OVERVIEW OF ADR PROCESSES

I. [§1.1] INTRODUCTION

This chapter provides an overview of the most commonly used alternative ADR processes.

The term "ADR" is generally used to refer to "alternative dispute resolution" processes, *i.e.*, processes for resolving disputes other than by litigation. Rule 3.800 of the California Rules of Court defines "alternative dispute resolution process" or "ADR process" as a process, other than formal litigation, in which a neutral person or persons resolve a dispute or assist parties in resolving their dispute. Some authorities have suggested that "ADR" should stand for "appropriate dispute resolution," because this better conveys the idea that court adjudication is part of a spectrum of options from which the process best suited for resolving a particular dispute can be selected.

Whether ADR stands for "alternative" or "appropriate" dispute resolution, this term encompasses a broad array of different processes, including negotiation, mediation, mini-trials, summary jury trials, arbitration, and private judging. The processes within this array can be distinguished from each other and organized into categories based on the different roles played by the neutral(s), the formality of the dispute resolution process, and the effect of any decision reached in the process.

II. [§1.2] FACILITATIVE VERSUS ADJUDICATORY

Dispute resolution processes can be divided into two main categories: facilitative or adjudicatory, according to the role played by the neutral.

Facilitative. Rather than rendering a decision, the neutral facilitates the parties' negotiations and helps them to try to reach a decision on their own. The majority of dispute resolution processes, including negotiation, mediation, neutral evaluation, mini-trials, summary jury trials, and settlement conferences, are in this category. Parties who want to make the ultimate determination of whether and how to resolve their dispute should use a facilitative process.

Adjudicatory. The neutral renders a decision on the dispute or on particular issues. Adjudicatory processes include fact-finding, arbitration, private judging, and court adjudication.

Parties who want a third party to decide the outcome of their dispute should use an adjudicatory process.

III. [§1.3] BINDING VERSUS NONBINDING

Adjudicatory dispute resolution processes can be further divided into two categories: binding or nonbinding. The parties generally specify whether a neutral's decision will be binding or nonbinding in their agreement to submit a dispute to ADR.

In binding processes, the neutral's decision is final and subject to only very limited appellate review. Parties looking for a quick, final resolution should consider choosing a binding process.

In nonbinding processes, the neutral's decision is merely advisory; the parties are free to either accept the decision or reject it and continue with negotiations, litigation, or some other ADR process. Parties who want to retain the power to accept or reject a proposed resolution of their dispute should opt for a nonbinding process.

Identifying a process as binding or nonbinding is not the same as determining whether a resolution reached through that process can be enforced. For example, a settlement agreement reached through a nonbinding facilitative process such as mediation is enforceable. See §8.1.

IV. THE ADR CONTINUUM

A. [§1.4] NEUTRAL'S INVOLVEMENT DEPICTED AS A CONTINUUM

The array of dispute resolution processes may be depicted as a continuum, from the least formal, in which a neutral third party plays the least active role in determining the outcome, to the most formal, in which a neutral assumes the greatest role. At one end of this continuum lies negotiation, an informal process that involves no neutral; at the other is court adjudication, a formal process in which the dispute is decided by the judge.

The chart in §1.5 and the discussion in chapter 2 describe the dozen most commonly used ADR process in the order in which they fall on the continuum. Each of these processes is described in detail in chapter 2. Six other ADR processes are summarized in §1.6.

For additional details, see chapter 3 of CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, SECOND EDITION (Cal CJER 2008). The broad range of possible ADR options and the reasons for using or not using specific processes, is also discussed in Knight, Chernick, Haldeman & Bettinelli, California Practice Guide: Alternative Dispute Resolution, chap 1 (The Rutter Group 2007). The Continuing Education of the Bar's guide analyzes the "tensions" among competing dispute resolution models. A Litigator's Guide to Effective Use of ADR in California, chap 1 (Cal CEB 2005).

B. [§1.5] CHART: CONTINUUM OF MOST COMMON PROCESSES FOR RESOLVING DISPUTES

Process	Description	Most Common Usage	Must Court Case Be Filed To Use Process?	Voluntary?	Who Pays for Neutral's Services?
Negotiation	Parties and/or their attorneys communicate directly with each other to try to resolve the dispute; no neutral is involved.	Appropriate for almost every dispute; the most commonly used ADR process.	No.	Yes.	N/A; no neutral involved.
Mediation	Neutral facilitates communication between the parties and helps them to work out mutually agreeable solutions.	Appropriate for almost every dispute; especially appropriate if: parties want to preserve a business or personal relationship; there are communication problems or emotional barriers; it is a multi-party dispute; or parties want a multifaceted solution.	1. No.	Yes.	Parties generally pay, unless mediator is from county service.
			2. Mandatory child custody/visitation (Fam C §§3170–3173); or other court-ordered mediation, *e.g.*, under CCP §§1775–1775.15: Yes.	No.	Court may pay or provide pro bono neutral; judicial arbitration money available for civil action mediation.
Neutral Evaluation	Neutral(s) hears brief presentations, offers a confidential evaluation of the dispute, and may assist in negotiations.	In civil disputes when an estimate of damages is needed, when parties have unrealistic expectations, or when there are technical issues.	No.	Yes.	Parties generally pay. Court may pay or provide pro bono neutral.
Mini-Trial	Brief presentations of each party's case are made to parties themselves or to those with settlement authority (*e.g.,* CEOs). Neutral typically moderates presentations and may facilitate negotiations.	Resolve complex business disputes.	No.	Yes.	Parties pay.
Summary Jury Trial	Mock jury listens to presentations and renders advisory verdict(s). Neutral typically moderates presentations and may facilitate negotiations.	Parties hold divergent views of how jury would react to various aspects of case, and a full jury trial would be lengthy.	No.	Yes.	Parties pay.
Settlement Conference	Parties meet with neutral to explore settlement options.	Unfacilitated negotiation has not been successful at resolving dispute.	1. No.	Yes.	Parties generally pay.
			2. Court-ordered (Cal Rules of Ct 3.1380 or local rules): Yes.	No.	Court may pay or provide pro bono neutral.
Neutral Fact-Finding or Special Reference	Neutral reviews information submitted by parties and/or conducts independent investigation and makes findings of fact.	Resolution of dispute hinges on critical issues of fact, or resolution of factual issues requires technical expertise.	1. No.	Yes.	Parties pay.
			2. Court-ordered special reference (CCP §§638, 639): Yes.	Involuntary reference under CCP §639: No.	Parties generally pay; some neutrals serve pro bono
Arbitration: Contractual or Judicial	Neutral(s) reviews evidence, hears arguments, and renders a decision.	Parties want a quick, final decision or a neutral with specific expertise.	1. Contractual (CCP §§1280–1294.2): No.	Yes.	Parties pay. .
			2. Judicial (CCP §§1141.10–1141.31): Yes.	No.	Court generally pays; some arbitrators serve pro bono.
Private Judging or General Reference	A nonjudicial officer, selected and compensated by the parties, is appointed by the court to hear and decide the case.	Parties want a trial, but would like to avoid delay or would like a particular person or persons to decide the case.	Yes. Court must order appointment, whether as temporary judge (Cal Const art VI, §21) or as consensual referee (CCP §638).	Yes.	Parties generally pay; sometimes neutral serves pro bono.
Court Adjudication	Judge hears and decides case.	Decides lawsuits.	Yes.	No.	State pays judge's salary.

Process	Is Judicial Approval of Neutral's Appointment Required?	Do Rules of Evidence Apply?	Is Judicial Confirmation of Neutral's Decision Required?	Is Neutral's Decision Enforceable in Court	Is Neutral's Decision Appealable in Court?
Negotiation	N/A (no neutral involved).	No.	N/A.	N/A. However, settlement agreement entered into by parties generally enforceable.	N/A.
Mediation	Voluntary: No. Mandatory Child custody/visitation (Fam C §§3170–3173): Mediators generally appointed by family court services. Civil action mediation (CCP §§1775–1775.15): No, but if parties do not select mediator, court assigns mediator from court list. Other court-ordered (local rule): Local rules may provide for appointment by court.	No.	N/A; neutral does not render decision, However, under mandatory child custody/visitation (Fam C §§3170–3173), in some counties the mediator makes recommendation to the court which the court may adopt.	N/A; neutral does not render decision, However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Neutral Evaluation	Voluntary: No. Court-ordered (local rule): Local rules may provide for appointment by court.	No.	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Mini-Trial	No.	No.	No.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Summary Jury Trial	No.	Generally no; depends on the parties' agreement.	No; verdict(s) purely advisory.	No; verdict(s) purely advisory. However, settlement agreement entered into by parties generally enforceable.	No; verdict(s) purely advisory.
Settlement Conference	Voluntary: No. Court-ordered (Cal Rules of Ct 3.1380 or local rules): Court generally appoints neutral.	No.	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Neutral Fact-Finding or Special Reference	Voluntary: No.	Depends on the parties' agreement.	No; but parties may stipulate to the neutral's findings and this stipulation may be enforceable.	No; but parties may stipulate to the neutral's findings and this stipulation may be enforceable.	No.
	Court-ordered special reference (CCP §§638, 639): Yes.	Yes.	Yes.	Referee does not render judgment; referee's decision has effect of special verdict.	Court's judgment may be appealed.
Arbitration: Contractual or Judicial	Contractual (CCP §§1280–1294.2): No, but if parties do not select an arbitrator, court may appoint one.	Rules of evidence generally relaxed; depends on the parties' agreement.	Yes, in order to enforce.	Yes.	Very limited review.
	Judicial (CCP §§1141.10–1141.31): No, but if parties do not select an arbitrator, court assigns one from court list.	Rules of evidence relaxed.	If no trial de novo requested, award entered as judgment of court.	Yes.	Very limited review.
Private Judging or General Reference	Yes.	Generally apply; depends on the parties' agreement.	Temporary judge (Cal Const art VI, §21): Renders judgment on behalf of court. Referee (CCP §638): Renders statement of decision on which judgment is entered by the court.	Temporary judge (Cal Const art VI, §21): Renders judgment on behalf of court. Referee (CCP §638): Renders statement of decision on which judgment is entered by the court.	Subject to appeal like any other court.
Court Adjudication	No.	Yes.	No.	Judge renders court's judgment.	Yes.

C. [§1.6] OTHER ADR PROCESSES

Process	Description	Most Common Usage
Conciliation	Neutral seeks to reconcile the disputing parties by meeting with them, reducing tensions, and encouraging communication. Is not necessarily settlement-oriented.	To help the parties resolve a marital or labor dispute. Especially appropriate for overcoming personal or emotional barriers to resolution.
Confidential Listening	Parties tell their settlement positions to a neutral, who then informs them whether their positions are within a previously defined negotiable range. If so, neutral may mediate settlement discussions.	To achieve settlement when parties are reluctant to disclose their settlement positions.
Facilitation	Neutral meets with parties having different viewpoints who need to work together to reach a solution, and encourages them to discuss how to do so without conflict.	To promote staff cohesion in a business or other association.
Ombudsperson, or Action Line	Neutral receives a grievance, investigates the facts, and proposes a solution that avoids a dispute.	To respond to a grievance by an employee, student, constituent, client, patient, or customer.
Partnering	Neutral meets with parties and assists them in identifying and addressing potential conflicts before they interfere with the completion of their common task.	To manage a major enterprise, such as a construction project or a land use plan, involving many parties.
Umpiring	Like binding arbitration, but with early deadlines, streamlined procedure.	Labor grievances requiring rapid resolution.

Chapter 2
INDIVIDUAL ADR PROCESSES AND THEIR USES

I. [§2.1] INTRODUCTION

This chapter discusses in detail the most commonly used processes for resolving disputes, in the same order as they appear in §1.5, the chart depicting them as a continuum. Coverage includes the roles played by the neutral and by the parties, when each process might be most appropriately used, and the applicable statutes and rules of court.

II. [§2.2] NATURE OF ADR PROCESSES MAY VARY

Several points should be kept in mind in reading the following descriptions of the various ADR processes. First, definitions of many ADR processes are fluid. What one person considers mediation, another may characterize as case evaluation or a traditional settlement conference. Individual neutrals, particularly mediators, have very different styles and the roles that the participants choose to play in mediation vary. Many variations may be included within the label "mediation." The labels used for other ADR processes, such as "settlement conference," may reflect similar variations.

Second, ADR processes often differ according to the area of law in which they are used. For example, arbitration of a labor dispute proceeds differently from arbitration of a contractual dispute between businesses, and mediation of a child custody dispute differs from mediation of a personal injury claim.

Third, although ADR experts have identified the "appropriateness" factors for each process, there is currently little empirical data to support the matching of a particular dispute to a particular ADR process. Factors pointing to more than one process may be present in the same dispute, leaving room for intuition and personal judgment based on the experiences of the judge or the litigants.

III. NEGOTIATION

A. [§2.3] DESCRIPTION

In negotiation, the parties themselves and/or their attorneys communicate directly with each other to try to resolve their dispute. Unlike the other ADR processes discussed here, there is no neutral third party to facilitate the discussions between the parties.

B. [§2.4] FACTORS TO CONSIDER

Appropriate for almost every dispute, negotiation is, in fact, the most commonly used ADR process.

Because no neutral is involved, however, negotiation has inherent limitations. If the parties reach an impasse after attempting to negotiate, they should consider other ADR processes.

C. [§2.5] Rules Requiring Settlement Discussions

California Rules of Ct 3.724(6) requires the parties to discuss settlement before the case management conference. In addition, many local rules require the parties to engage in good-faith settlement discussions before participating in a settlement conference. See, *e.g.*, San Francisco rule 5.0(G).

IV. MEDIATION

A. Description

1. [§2.6] Role of Mediator

In mediation, which is sometimes characterized as assisted negotiation, a neutral third party facilitates communication between the disputants and helps them in trying to reach a mutually acceptable resolution of their dispute See *Marriage of Kieturakis* (2006) 138 CA4th 56, 86, 41 CR3d 119 (citing §4.5 of the 2004 version of this CJER Bench Handbook and quoting its characterization of mediation as "assisted negotiation").

The process is informal and the neutral's role generally consists of helping the parties to communicate with each other, clarifying the issues in contention, identifying options for resolving the dispute, and, if possible, helping the parties to agree on a resolution. 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 use a variety of techniques. These include asking the parties to describe what is important to them; validating the legitimacy of each party's interests and concerns while remaining neutral about the various possible solutions; and helping each side understand and express its understanding of the other side's position. Mediators may also help the parties explore their underlying interests, issues, or feelings, such as anger or hurt, which may be fueling the dispute. Many disputants find it easier to reach a resolution once these factors have been clarified, acknowledged, and addressed. Depending on the mediation program and the mediator's individual style, the process may involve meeting with the parties jointly and/or meeting with each party separately on a rotating basis (caucusing).

Although mediation techniques are frequently used in settlement conferences, typically there is a significant difference between the role of the neutral in meditation and the role of the neutral in settlement conferences. In mediation, the neutral's role is generally limited to helping the parties communicate with each other, clarifying the issues in contention, identifying options for resolving the dispute, and helping the parties reach an agreement. In settlement conferences, the neutral generally takes a more active role in trying to guide the parties to a resolution, often making an independent evaluation of the case based on knowledge of the law and prior experience and then seeking to persuade the parties to change positions and move toward a compromise settlement.

For a summary of statutory provisions protecting the confidentiality of mediation, see §§7.1–7.8.

2. [§2.7] Roles of Parties and Attorneys

In mediation, the parties often participate directly in the discussions with the mediator and with each other. The attorneys' role in mediation discussions is likely to vary depending on the nature of the dispute and the relationship between the parties. For example, attorneys are more likely to take the lead in discussions in personal injury disputes when the parties have no

relationship beyond the accident alleged to have caused the injuries. In contrast, the parties may be particularly active participants in mediation discussions when they have an ongoing or past business or personal relationship, such as in a business dissolution. The attorneys take the lead in discussing the legal issues, while the parties focus more on the facts of the dispute. If the parties reach an agreement that they would like to be enforceable, the attorneys generally prepare a written agreement or stipulated settlement.

B. [§2.8] When Mediation May Be Appropriate

The following factors may indicate that mediation is particularly appropriate:

- The parties want to preserve or establish an ongoing business or personal relationship.
- There are communication problems among the parties, *e.g.*, because of significant cultural differences.
- There are personal or emotional barriers to resolution, *e.g.*, hostility or distrust.
- The parties do not want to relinquish their decision-making authority to a jury, judge, or arbitrator.
- The number of parties or the complexity of the issues makes it difficult to conduct negotiations and to fashion solutions.
- Resolving the dispute is more important to the parties than advocating general principles or establishing legal precedents.
- The parties want to tailor a solution to meet specific needs or interests, e.g., a structured settlement, or one that calls for more than payment of money.
- Disputed questions of fact may hinge on the parties' states of mind or intent, or their subjective interpretations of objective facts.
- An evaluative dispute resolution process, *e.g.*, neutral evaluation, has failed to resolve the dispute.

The following factors may indicate that mediation is inappropriate:

- A party wants a neutral to render a decision that resolves the dispute. This would point instead to arbitration or court adjudication.
- A party wants an independent evaluation of the relative strengths and weaknesses of the parties' evidence and legal arguments. This would point instead to neutral evaluation.
- The parties have very unequal bargaining powers, *e.g.*, because of an inequality of knowledge or sophistication, which cannot be equalized in the mediation process.
- One or both parties are adamantly unwilling to compromise or discuss alternatives.

C. [§2.9] Spoken Form: Encouraging the Parties To Use Mediation

To encourage the parties to consider using mediation, you might address them along the following lines:

Counsel, I have read your papers and declarations. This case seems tailor-made for mediation, for a number of reasons. First, [*if applicable*] **your clients have a long-term relationship that they would benefit from preserving. Second, every court is mandated to exercise restraint in using its equitable powers, and litigation of this case would not be wise**

use of those powers. Third, it often turns out that, with the help of a skilled mediator, the parties find a mutually acceptable resolution even if at the outset they did not think it possible.

I do not wish to inquire into confidential communications, but I wonder whether you have fully explained the cost of litigation to your respective clients and how much time and effort they will have to invest.

I encourage you to consider stipulating to mediation.

Although it may sometimes be appropriate for you to "cajole" the parties to stipulate to private mediation, "the essence of mediation is its voluntariness." It is therefore generally error to order the parties to attend and pay for mediation. *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 543, 53 CR3d 115. As discussed below, some statutes authorize you to make a mediation program mandatory. On the compensation of court-connected mediators, see §2.23.

If all of the parties decide to participate in mediation, they must complete and file a stipulation to that effect. Cal Rules of Ct 3.726. For a sample stipulation form, see §3.14.

D. [§2.10] Applicable Statutes and Rules

An increasing number of statutes and court rules include provisions for mediation. Some establish specific programs connected with the courts, while others authorize or require the mediation of certain types of disputes. Still others address specific issues related to mediation, such as confidentiality of mediation proceedings and the conduct and immunity of mediators.

1. [§2.11] Confidentiality

Various statutory provisions protect the confidentiality of mediation in general civil cases. These are discussed in §§7.1–7.4. The confidentiality of mediation in family law proceedings is protected by Fam C §3177. See §2.28.

2. Mediation in General Civil Cases

a. General Provisions

(1) [§2.12] Implementing Court-Connected Mediation Programs

All courts are encouraged to "implement mediation programs for civil cases as part of their core operations." Cal Rules of Ct, Standards of J Admin 10.70(a).

(2) [§2.13] Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases

Purpose of rules. The Judicial Council rules of court set forth minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. See Cal Rules of Ct 3.850–3.868. Advisory Committee Comments accompany some of these new rules.

Applicability of rules. The rules apply to mediations in which a mediator has agreed (1) to be included on a superior court's list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within the court's mediation program, and (2) to mediate a general civil case pending in the superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by the court or will be compensated by the court to mediate a case in the court's mediation program. Cal Rules of Ct 3.851(a).

All mediators affiliated with a firm that provides mediation services must comply with the Judicial Council rules when serving in a court's mediation program. Cal Rules of Ct 3.851(b).

With certain exceptions, the rules apply from the time the mediator agrees to mediate a case until the end of the mediation. Cal Rules of Ct 3.851(c).

The rules do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics. Cal Rules of Ct 3.851(d). However, judicial officers who serve as mediators in their court's mediation programs are encouraged to be familiar with and observe the rules when mediating, particularly the rules concerning subjects, such as voluntary participation and self-determination (see Cal Rules of Ct 3.853), that are not covered in the Code of Judicial Ethics. Comment to Cal Rules of Ct 3.851(d).

The rules also do not apply to settlement conferences conducted under Cal Rules of Ct 3.1380. Cal Rules of Ct 3.851(e).

Voluntary participation and self-determination. Mediators must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. Cal Rules of Ct 3.853. The mediator must

- Inform the parties at or before the outset of the first mediation session that resolution of the dispute requires the parties' voluntary agreement. Cal Rules of Ct 3.853(1).
- Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time. Cal Rules of Ct 3.853(2).
- Refrain from coercing the parties to make a decision or to continue to participate in the mediation. Cal Rules of Ct 3.853(3).

Voluntary participation and self-determination are fundamental principles of mediation that apply not only when the parties voluntarily elect to mediate their dispute, but also when the parties are ordered to participate in a court mediation program. Comment to Cal Rules of Ct 3.853. Although the court may order parties to attend mediation, the mediator may not mandate the extent of their participation in the mediation or coerce any party to settle the case. Comment to Cal Rules of Ct 3.853.

After informing the parties of their choices and the consequences of those choices, a mediator may invoke a broad range of approaches to assist them in reaching an agreement without violating the principles of voluntary participation and self-determination, including encouraging the parties to continue participating in mediation if it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted and suggesting that a party consider obtaining professional advice, *e.g.*, legal advice for an unrepresented party. Comment to Cal Rules of Ct 3.853. Examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in mediation after the party has told the mediator that he or she wishes to terminate mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the parties' objection, using abusive language, or threatening to report a party's conduct in the mediation to the court. Comment to Cal Rules of Ct 3.853.

Maintaining confidentiality. Mediators must, at all times, comply with applicable law concerning confidentiality. Cal Rules of Ct 3.854(a). See Evid C §§703.5, 1115–1128; see also §§7.1–7.4. At or before the outset of the first mediation session, the mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings. Cal Rules of Ct 3.854(b). The mediator may not use information acquired in confidence in the course of mediation outside the mediation or for personal gain. Cal Rules of Ct 3.854(d).

Before a mediator may speak separately with a participant in the mediation out of the presence of the other participants, the mediator must discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Cal Rules of Ct 3.854(c). Except as required by law, the mediator may not disclose information a participant reveals in confidence during such a separate communication, unless authorized to do so by the participant. Cal Rules of Ct 3.854(c).

Maintaining impartiality. Mediators must remain impartial toward all participants in the mediation process at all times. Cal Rules of Ct 3.855(a).

Disclosure requirements. A mediator must make reasonable efforts to keep informed of matters that could raise a question about the mediator's ability to conduct the proceedings impartially, and must disclose these matters to the parties, including the following:

- Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature. Cal Rules of Ct 3.855(b)(1)(A). These include service as a mediator in another mediation involving any of the participants, business relationships or transactions between the mediator and any participant, or ownership of stock or other significant financial interest involving any participant. Comment to Cal Rules of Ct 3.855(b)(1)(A).
- The existence of any grounds for disqualification of a judge specified in CCP §170.1. Cal Rules of Ct 3.855(b)(1)(B). If the mediator is an attorney and a member of his or her firm is serving or has served as an attorney for a party in the mediation, the mediator should disclose this fact if, in the eyes of a reasonable person, the representation could raise a question about the mediator's ability to conduct the mediation impartially. Comment to Cal Rules of Ct 3.855(b)(1)(A).

A mediator's disclosure duty is a continuing obligation from the inception of the mediation process through its completion. Cal Rules of Ct 3.855(b)(2). The mediator must make disclosure as soon as practicable after he or she becomes aware of a matter that must be disclosed. Cal Rules of Ct 3.855(b)(2). The mediator should make disclosure before the first mediation session, if at all possible, but in any event within the time required by applicable court rules or statutes. Cal Rules of Ct 3.855(b)(2).

If no party objects to the mediator or raises any question or concern about the mediator's ability to conduct the mediation impartially after the mediator makes his or her disclosures, the mediator may proceed. Cal Rules of Ct 3.855(c)). But see Cal Rules of Ct 3.855(f) (required recusal despite parties' consent).

If a participant raises a question or concern about the mediator's ability to conduct the mediation impartially following the disclosures or at any other point, the mediator must address the question or concern with the participants. Cal Rules of Ct 3.855(d). If no party objects to the mediator, the mediator may proceed. Cal Rules of Ct 3.855(d). But see Cal Rules of Ct 3.855(f) (required recusal despite parties' consent).

If either party in a two-party mediation objects to the mediator, the mediator must withdraw; in a multiparty mediation, the mediator may continue the mediation with the parties that do not object as long as doing so does not violate any rules, law, local court rules, or program guidelines. Cal Rules of Ct 3.855(e).

Required recusal. Regardless of the parties' consent, the mediator must either decline to serve as mediator or, if already serving, withdraw from the mediation if the mediator cannot

- Maintain impartiality toward all participants in the mediation process (Cal Rules of Ct 3.855(f)(1)); or
- Proceed without jeopardizing the integrity of the mediation process or of the court (Cal Rules of Ct 3.855(f)(2)).

Mediator's qualifications. Mediators must comply with experience, training, educational, and other requirements the court establishes for appointment and retention. Cal Rules of Ct 3.856(a). They have a continuing obligation to truthfully represent their background to the court and mediation participants. Cal Rules of Ct 3.856(b). A mediator must inform the court if (1) the mediator has been disciplined by any public disciplinary agency or professional licensing agency, (2) the mediator has resigned membership in the State Bar or other professional licensing agency while disciplinary or criminal charges were pending, (3) a felony charge is pending against the mediator, (4) the mediator has been convicted of a felony or a misdemeanor involving moral turpitude, or (5) a judgment has been entered against the mediator in a civil action for actual fraud or punitive damages. Cal Rules of Ct 3.856(c).

A mediator must have the skills, knowledge, and ability to conduct the mediation effectively, and must decline to serve or withdraw from the mediation if he or she feels inadequate to perform the required duties. Cal Rules of Ct 3.856(d).

Conducting proceedings. The mediator must keep any scheduled proceedings and make reasonable efforts to advance the mediation in a timely manner. Cal Rules of Ct 3.857(a).

The mediator must conduct the proceedings in a procedurally fair manner, *i.e.*, by giving each party an opportunity to participate and make uncoerced decisions. Cal Rules of Ct 3.857(b). The mediator is not obligated, however, to ensure the substantive fairness of any agreement the parties reach. Cal Rules of Ct 3.857(b).

The mediator must give the participants a general explanation of the nature of mediation, the procedures to be used, the confidentiality of the proceedings, and the roles of the mediator, the parties, and the other participants. Cal Rules of Ct 3.857(c). At or before the outset of the first mediation session, the mediator must inform the participants that he or she will not be representing any participant as a lawyer or performing professional services in any capacity other than as an impartial mediator. Cal Rules of Ct 3.857(d), 3.854(b). However, the mediator may provide information or opinions that is within the purview of his or her training or experience, subject to the principles of impartiality and self-determination. Cal Rules of Ct 3.857(d). For example, if the mediator has the training or experience to do so, the mediator may (Advisory Committee Comment to Cal Rules of Ct 3.857(d))

- Discuss a party's options (including a range of possible outcomes in an adjudicative process).
- Offer a personal evaluation or opinion of a set of facts as presented that is clearly identified as a personal evaluation or opinion.
- Communicate his or her opinion of what the law is or how it applies to the subject of the mediation as long as he or she does not also advise the participant about how to adhere to the law or the position the participant should take.

The mediator may also do the following:

- Present possible settlement options and terms for discussion, and may assist the parties in preparing a written settlement agreement as long as the mediator confines the assistance to stating the terms of settlement the parties have determined. Cal Rules of Ct 3.857(h).

- Recommend the use of other services in connection with the mediation and particular providers of other services but must disclose any personal or financial interests the mediator has with such services, individuals, or organizations. Cal Rules of Ct 3.857(e).
- Bring to the parties' attention the interests of others who are not participating in the mediation, but who may be affected by agreements reached as a result of the mediation. Cal Rules of Ct 3.857(f).

Combining mediation with other ADR processes. Under Cal Rules of Ct 3.857(g), a mediator must

- Exercise caution when combining mediation with other alternative dispute resolution processes, and may do so only with the parties' informed consent and in a manner consistent with law or court order.
- Inform the parties of the general nature of other ADR processes and the consequences of revealing information during one process that may be used for decision making in another process.
- Give the parties the opportunity to select another neutral for any subsequent ADR process.
- Clearly inform the parties when the transition from one process to another is occurring if they consent to a combination of processes.

Termination of mediation and withdrawal as mediator. A mediator may suspend or terminate the mediation or withdraw as mediator if he or she reasonably believes the circumstances so require, including when the mediator suspects that the mediation is being used to further illegal conduct, a participant is unable to participate meaningfully in negotiations, or continuation of the process would cause significant harm to a participant or third party. Cal Rules of Ct 3.857(i). In such event, the mediator must discontinue the mediation or withdraw without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants. Cal Rules of Ct 3.857(j).

Mediator's compensation. Mediators must comply with any applicable requirements concerning compensation established by statute or the court. Cal Rules of Ct 3.859(a). Before commencing mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. Cal Rules of Ct 3.859(b). The amount or nature of the fee must not be made contingent on the outcome of the mediation. Cal Rules of Ct 3.859(c). The mediator must abide by any agreement reached concerning his or her compensation. Cal Rules of Ct 3.859(b).

Gift, bequest, or favor prohibited. A mediator may never solicit, accept from, or give to any participant or affiliate of any participant a gift, bequest, or favor that might reasonably raise a question about the mediator's impartiality. Cal Rules of Ct 3.859(d).

Limitations on marketing of services. A mediator must be truthful and accurate in marketing his or her services (Cal Rules of Ct 3.858(a)), and must not promise or guarantee results, or make any statement that directly or indirectly implies favoritism (Cal Rules of Ct 3.858(c)). Unless specifically permitted by the court, a mediator may not indicate that he or she is approved, endorsed, certified, or licensed by the court, but may indicate that he or she is a member of the court's panel or list. Cal Rules of Ct 3.858(b). A mediator may not solicit business from a participant in a mediation while the proceeding is pending. Cal Rules of Ct 3.858(d).

A mediator must ensure that any marketing activities carried out on his or her behalf by others comply with these requirements. Cal Rules of Ct 3.858(a).

Complaint procedure. A court that makes a list of mediators available to litigants in general civil cases, or recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in that court must establish procedures for receiving, investigating, and resolving complaints against mediators serving in the court's mediation program. Cal Rules of Ct 3.865(a). These procedures must be kept confidential (Cal Rules of Ct 3.867), and before any disclosure is ordered concerning these procedures, notice must be given to any person whose mediation communications may be revealed (Cal Rules of Ct 3.867(e)).

Remedies. If a mediator fails to comply with the rules of conduct for mediators in court-connected mediation programs, the court may reprimand the mediator, require the mediator to receive additional mediation training, remove the mediator from the court's panel, and prohibit the mediator from receiving future court referrals. Cal Rules of Ct 3.865(b).

The Los Angeles Superior Court's ADR Committee has a Quality Assurance Subcommittee that evaluates complaints received regarding the performance of mediators whose names appear on the list that the ADR Department makes available to litigants in general civil cases. The subcommittee reviews inquiries made by the department's staff about these complaints and, when warranted, conducts further investigations and takes appropriate action.

(3) [§2.14] Processing Complaints

Courts should establish procedures for receiving, investigating, and resolving complaints alleging that mediators in court-connected programs failed to comply with the applicable rules of conduct. Cal Rules of Ct 3.865. For details about these rules of conduct, about the confidentiality of the complaint procedures, and about the possible effects of a mediator's noncompliance with the rules, see §2.13.

b. Mediation Under CCP §§1775–1775.15

(1) [§2.15] Application of Provisions

In Los Angeles County, the presiding judge or another designated judge may order mediation for any action in which judicial arbitration is otherwise required and the amount in controversy does not exceed $50,000 for each plaintiff. CCP §1775.2(a). Any other court, at the option of its presiding judge, may also elect to invoke this procedure. CCP §1775.2(b). See, *e.g.*, Sonoma rule 16.7 (stating that the county has opted to do so).

In courts electing to institute CCP §§1775–1775.15 programs, the parties may stipulate to mediation regardless of the amount in controversy. CCP §§1775–1775.15; Cal Rules of Ct 3.870–3.878. Once an action has been ordered to mediation, it may not be ordered to arbitration and vice versa. CCP §1775.4. On judicial arbitration generally, see §§2.67–2.78.

(2) [§2.16] Suitability of Mediation

Before sending a case to mediation, you must consider any views that the parties have expressed on the suitability of mediation. Suitability for mediation must be determined on a case-by-case basis, rather than categorically. Cal Rules of Ct 3.871(a)(1), 3.871(b).

(3) [§2.17] Qualifications and Selection of Neutral

A mediator must be selected within 30 days of the submission of an action to mediation under this program. CCP §1775.6. 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. CCP §1775.6; Cal Rules of Ct 3.872–3.873. In compiling the panel, the court must comply with the general requirements relating to the selection of neutrals and the maintenance of panels. These are discussed in §3.4.

For the rules of conduct applicable to mediators in court-connected programs, see §2.13.

(4) [§2.18] Participant Lists

At least five court days before the first mediation session, each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all persons who will attend the mediation for that party. Cal Rules of Ct 3.874(b).

(5) [§2.19] Mediation Statements

The mediator may request that each party submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues and other information or documents that may appear helpful to resolve the dispute. Cal Rules of Ct 3.874(b).

(6) [§2.20] Attendance at Mediation Sessions

The mediator may excuse participants from attending mediation sessions, or permit attendance by telephone; otherwise, all individual parties and for each entity that is a party, a representative with authority to settle or recommend settlement of the dispute, must attend all sessions, as must each party's attorney of record. Cal Rules of Ct 3.874(a)(1), (3).

(7) [§2.21] Guidelines for Parties

The following summary has been used in Los Angeles County to prepare the parties for mediation under CCP §§1775–1775.15.

Who Must Attend The Mediation?
Local Rules require that all parties and decision makers must be present (LASC Rule 12.15, CRC 3.874(a)(1)).

The parties and decision makers must be prepared to remain present to participate in the mediation until agreement is reached, or the mediation is terminated.

If an insurance carrier is involved, a claims representative should be present with appropriate authority and with telephonic access to any other decision maker who can grant additional authority.

What Is The Role Of The Mediator?
The Mediator is an impartial, neutral intermediary, whose role is to help the participants reach a settlement. The mediator will not impose a settlement, but will assist the parties in exploring settlement options. The Mediator does not communicate with the Court except to file a Statement of Agreement or Non-Agreement or seek sanctions for failure to comply pursuant to Local Rules 12.5, 12.10 & 12.15.

How To Prepare For The Mediation
Counsel and clients should be prepared to discuss all relevant issues. Before the meeting, clients and counsel should discuss the mediation process and understand it is confidential and non-binding. As part of preparation, counsel are encouraged to discuss with their clients a complete and reasonable litigation budget, without downplaying the costs of proceeding to trial.

Counsel and clients should be prepared both to state their own position and to listen carefully to that of the other side. Persuasive and forceful communication is encouraged, but civility and mutual respect is vital. Hostile or argumentative tactics are likely to cause positions to become entrenched and thus discourage progress.

Submission Of Briefs
Some mediators may require a brief. Usually the brief will include a concise description of the facts, the parties and their representatives, and any unusual rules of law. The brief may or many not be exchanged with the other side. Exchange of briefs is helpful where the goal is to present a persuasive case to the other side. No exchange may be preferred where the parties wish to disclose information to the mediator only, such as the range of settlement that is desired. In either event, parties should be prepared to discuss frankly all aspects of the case during private discussions with the mediator.

What To Expect At The Mediation Conference
The mediator's opening statement will usually discuss the mediation process and stages, the mediator's role and the confidentiality requirements. All present will be required to sign a confidentiality agreement specifically agreeing to hold confidential all discussions in mediation (CCP 1775.10, 1775.12; Evidence Code 1122).

Each party will present its uninterrupted opening statement setting forth its position as to the facts and the law.

After the opening statement, the mediator and parties may ask each other questions or respond to the opening statements. Most mediators will allow this process to continue as long as it appears to be useful.

Thereafter, the mediator will usually call for a private discussion with each side, sometimes called a caucus. During this time, statements previously made in the joint sessions are explored more fully.

In private discussion, clients and counsel should assist the mediator in understanding the issues and interests at stake. The parties may wish to disclose confidential information to the mediator during these discussions. The mediator will help the parties and counsel to see the strengths, weaknesses, positions, arguments, risks and possibilities of their case.

Either in private discussion or joint session, the mediator may assist the parties in generating and exchanging proposals for settling the case. When the parties reach a settlement agreement, all essential terms will be reduced to writing which will be an enforceable contract if the parties so agree (Evidence Code 1123.

Discovery During Mediation
Although the parties are urged to exercise restraint with respect to conducting discovery while mediation is pending (LASC Local Rule 12.17, CCP 1775.11), any party who participates in mediation retains the right to obtain discovery).

(8) [§2.22] Statement of Agreement or Nonagreement (Judicial Council Form ADR-100)

Within ten days of the conclusion of the mediation, or if any party wishes to terminate the mediation, the mediator must file the following 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. CCP §1775.9; Cal Rules of Ct 3.875.

ADR-100

MEDIATOR *(Name and Address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
STATEMENT OF AGREEMENT OR NONAGREEMENT ☐ **First** ☐ **Supplemental**	CASE NUMBER:

NOTE: This form must be used by mediators in the Civil Action Mediation Program (Code Civ. Proc., § 1775 et seq.) and in the Early Mediation Pilot Program (Code Civ. Proc., § 1730 et seq.).

1. This case was filed on *(date if known):*

2. I was selected as the mediator in this matter on *(date):*

3. Mediation *(check one):*
   a. ☐ did not take place.
      (1) ☐ A party who was ordered to appear at the mediation did not appear.
      (2) ☐ Other reason *(please specify without disclosing any confidential information):*

   b. ☐ took place on *(date or dates):*
      and lasted a total of _____ hours.

4. ☐ The mediation has not ended. I submit this form to comply with the court's requirement to do so by a specified date.

5. The mediation ended *(check one):*
   a. ☐ in full agreement by all parties on *(date):*
   b. ☐ in partial agreement
      (1) ☐ in full agreement as to the following parties:
      on *(date):*
      (2) ☐ in full agreement as to limited issues on *(date):*
   c. ☐ in nonagreement.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF MEDIATOR)

NOTE: Within 10 days of the conclusion of the mediation or, when applicable, by the deadline set by the court, the mediator must serve a copy of this statement on all parties and file the original, with proof of service, with the court clerk. The proof of service on the back of this form may be used.

Form Adopted for Mandatory Use
Judicial Council of California
ADR-100 [Rev. January 1, 2003]

STATEMENT OF AGREEMENT OR NONAGREEMENT

Code of Civil Procedure, §§ 1739, 1775.9

American LegalNet, Inc.
www.USCourtForms.com

CASE NAME:	CASE NUMBER:

PROOF OF SERVICE
☐ **Mail** ☐ **Personal Service**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My residence or business address is *(specify):*

3. I mailed or personally delivered a copy of the *Statement of Agreement or Nonagreement* as follows *(complete either a or b):*
   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
      (1) I enclosed a copy in an envelope **and**
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service, with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed as follows:
         (a) Name of person served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state):*
   b. ☐ **Personal delivery.** I personally delivered a copy as follows:
      (1) Name of person served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

(9) [§2.23] Compensation of Mediator

The compensation of court-connected 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. CCP §1775.8.

c. [§2.24] ADR Information Form (Judicial Council Form ADR-101)

The following ADR Information Form is used to collect statistical information that each court participating in the Civil Action Mediation Program must submit quarterly to the Judicial Council. See Cal Rules of Ct 3.877. The required information may instead be submitted as an electronic database. Cal Rules of Ct 3.877(b).

NAME OF COURT:

ADR Information Form

This form should be filled out and returned, within 10 days of the resolution of the dispute, to:

1. Case name: _____ No. _____
2. Type of civil case: ☐ PI/PD-Auto ☐ PI/PD-Other ☐ Contract ☐ Other *(specify)*: _____
3. Date complaint filed _____ Date case resolved _____
4. Date of ADR conference _____ 5. Number of parties _____
6. Amount in controversy ☐ $0–$25,000 ☐ $25,000–$50,000 ☐ $50,000–$100,000 ☐ over $100,000 *(specify)*: _____
7. ☐ Plaintiff's Attorney ☐ Cross Complainant's Attorney 8. ☐ Defendant's Attorney ☐ Cross Defendant's Attorney

NAME	NAME
ADDRESS	ADDRESS
( ) TELEPHONE NUMBER	( ) TELEPHONE NUMBER

9. Please indicate your relationship to the case:

☐ Plaintiff ☐ Plaintiff's attorney ☐ Defendant ☐ Defendant's attorney
☐ 3rd party defendant ☐ 3rd party defendant's attorney ☐ Other *(specify)*: _____

10. Dispute resolution process:

☐ Mediation ☐ Arbitration ☐ Neutral case evaluation ☐ Other *(specify)*: _____

11. How was case resolved?

a. ☐ As a direct result of the ADR process.
b. ☐ As an indirect result of the ADR process. c. ☐ Resolution was unrelated to ADR process.

12. Check the closest dollar amount that you estimate you saved (attorneys fees, expert witness fees, and other costs) by using this dispute resolution process compared to resolving this case through litigation, whether by settlement or trial.

☐ $0 ☐ $250 ☐ $500 ☐ $750 ☐ $1,000 ☐ more than $1,000 *(specify)*: $ _____

13. If the dispute resolution process caused a net increase in your costs in this case, check the closest dollar amount of the *additional* cost:

☐ $0 ☐ $250 ☐ $500 ☐ $750 ☐ $1,000 ☐ more than $1,000 *(specify)*: $ _____

14. Check the closest number of court days that you estimate the court saved (motions, hearings, conferences, trial, etc.) as a result of this case being referred to this dispute resolution process:

☐ 0 ☐ 1 day ☐ more than 1 day *(specify)*: _____

15. If the dispute resolution process caused a net increase in court time for this case, check the closest number of *additional* court days:

☐ 0 ☐ 1 day ☐ more than 1 day *(specify)*: _____

16. Would you be willing to consider using this dispute resolution process again? ☐ Yes ☐ No

Form Adopted by the Judicial Council of California ADR-101 [New March 1, 1994]

ADR INFORMATION FORM

3. [§2.25] Mediation Programs Established by Local Court Rule

The Ventura County Superior Court has adopted a *mandatory* mediation program through a local rule. Ventura rule 3.24. To help classify cases, every plaintiff must file a case information sheet with the complaint. The following types of disputes, listed on the information sheet, are considered appropriate for mediation in this program: those involving neighbors, homeowners associations, businesses or partnerships, sexual harassment, employment discrimination, and code enforcement. Several counties have local rules related to *voluntary* ADR programs. See *e.g.*, San Francisco rule 4.2.

4. Family Law Proceedings

a. Child Custody and Visitation Mediation

(1) [§2.26] Application of Provisions

All contested child custody or visitation matters and all matters involving petitions for stepparent or grandparent visitation must be sent to mediation. Fam C §§3170–3173. Each superior court must provide a mediator for these mediation services. Fam C §3160.

Superior courts may increase the fee for filing divorce petitions and the fees for marriage licenses or certificates to support these mediation services. Govt C §26840.3.

(2) [§2.27] Qualifications and Selection of Mediator

The mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency or may be any other person designated by the court. Fam C §3164. However, the mediator must meet the minimum qualifications required of a counselor of conciliation, as provided in Fam C §1815. These qualifications include

- A master's degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships;
- At least two years of experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served;
- Knowledge of the court system of California and the procedures used in family law cases;
- Knowledge of other resources in the community to which clients can be referred for assistance;
- Knowledge of adult psychopathology and the psychology of families; and
- Knowledge of child development, child abuse, clinical issues relating to children, the effects of divorce on children, the effects of domestic violence on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.

The court may substitute additional experience for a portion of the required education, or additional education for a portion of the required experience. Fam C §1815.

(3) [§2.28] Confidentiality

Mediation proceedings under these provisions must be held in private and are confidential. Fam C §3177. All communications, verbal or written, from the parties to the mediator in the proceedings are official information within the meaning of Evid C §1040. However, the mediator

may, consistent with local court rules, make a recommendation to the court as to the custody of or visitation with the child. Fam C §3183. See §7.4.

b. [§2.29] Dependency Mediation

Under Welf & I C §350(a)(2), juvenile courts offer dependency mediation in appropriate cases. Each program is designed to provide a problem-solving forum for developing a plan in the best interests of the child, emphasizing the preservation and strengthening of the family.

The confidentiality provisions of Evid C §§1115–1128 apply to program participants, except that any mediator who is required by the Child Abuse and Neglect Reporting Act (Pen C §§11164–11174.3) to report child abuse must report new allegations of child abuse or neglect that are discussed in mediation. See Welf & I C §350(a)(2).

5. [§2.30] Statutory Mediation Programs Not Connected With the Courts

A number of statutes either establish specific mediation programs not connected with the courts or simply authorize parties involved in specific types of disputes to submit those disputes to mediation:

- Attorneys and clients can voluntarily agree to mediate disputes regarding attorney's fees or services. Bus & P C §§6086.14, 6200(h).
- The parties to an eminent domain proceeding may agree to refer it to mediation or arbitration. For the applicable rules, see CCP §§1250.420–1250.430.
- Mediation conferences are required, unless waived by either party, in disputes between schools and parents regarding special education of handicapped children. Ed C §§56500.3, 56501(b)(2), 56503. Parties may also request mediation after a formal hearing begins.
- Parties to various types of labor disputes, including disputes between local public agencies and their employee organizations, the state and its employee organizations, and public schools and institutes of higher education and their employee organizations, are allowed to submit these disputes to mediation. Govt C §§3505.2, 3507.1, 3507.3, 3518, 3589–3590, 3548; Pub Util C §125524.
- The California Department of Labor, through its State Mediation and Conciliation Service, may investigate and mediate labor disputes when asked to intervene by a party to the dispute. Lab C §§65–66.

V. NEUTRAL EVALUATION

A. DESCRIPTION

1. [§2.31] Role of Neutral

Neutral evaluation is a facilitative dispute resolution process. In a typical neutral evaluation, a neutral (or a panel of neutrals) hears brief written and oral presentations. The neutral, who need not be an attorney but often has expertise in the substantive area of the dispute, then assesses the strengths and weaknesses of the parties' contentions and evidence and offers a confidential evaluation of the dispute. In addition, after providing an evaluation, the neutral sometimes (depending on the particular program) facilitates negotiations between the parties. If the dispute is not settled at this point, the neutral may help the parties identify areas of agreement and discuss

stipulations, *e.g.*, those regarding discovery. In a less typical variation of this technique, the neutral facilitates negotiations following the initial presentations and provides an evaluation only if hearing the presentations alone does not result in the parties reaching a resolution of the dispute.

Ideally, neutral evaluation takes place at an early stage in a dispute, before the parties have become firmly fixed in their positions or spent much time or money on litigation preparation.

2. [§2.32] Roles of Parties and Attorneys

Although the roles vary depending on the nature of the dispute, the attorneys are typically responsible for making brief presentations of their clients' positions, as well as for preparing any written summaries that are submitted to the neutral. Neutral evaluation often leads to settlement discussions. The parties themselves generally enter into these discussions.

B. [§2.33] When Neutral Evaluation May Be Appropriate

The following factors may indicate that neutral evaluation is appropriate:

- Liability has been established, and the only significant issue remaining is the amount of damages.
- A party has not confronted the weaknesses in its case or has unrealistic expectations regarding damages.
- There are technical or scientific issues that require special expertise to resolve.

The following factors may indicate that neutral evaluation is inappropriate:

- The parties want the neutral to render a decision that resolves the dispute.
- A party is seeking equitable relief.
- There are significant personal or emotional barriers to resolving the dispute.

VI. MINI-TRIAL

A. Description

1. [§2.34] Role of Neutral

A mini-trial is a facilitative dispute resolution process. Each party's best case is presented in summary form to the parties themselves or to party representatives with authority to settle the dispute (typically senior executive officers of disputing companies). A neutral generally moderates the presentations, and renders nonbinding opinions about the probable resolution of specific legal, factual, and evidentiary issues. The neutral may also comment on the outcome likely to be obtained in a court proceeding. Following the presentations, the parties enter into negotiations, typically with the neutral acting as a facilitator. The procedures are flexible. The ultimate goal of a mini-trial is to facilitate a voluntary out-of-court settlement by bringing key decision makers on both sides together, giving them an opportunity to hear each side's case, and encouraging them to communicate directly with each other.

2. [§2.35] Roles of Parties and Attorneys

Parties listen to the presentations of each side's case. As in neutral evaluation, attorneys in mini-trials are typically responsible for presenting their clients' positions. Although attorneys may also participate in subsequent settlement discussions, these are usually conducted by the parties themselves with the attorneys playing an advisory role.

B. [§2.36] When Mini-Trial May Be Appropriate

Mini-trials can be used in any civil dispute; however, they are most appropriate in situations when the following factors are present:

- The parties have, or expect to develop, a continuing business relationship. Mini-trials were developed for, and continue to be used primarily in, disputes between businesses.
- Significant issues or substantial sums are at stake and a court trial is likely to be lengthy and very expensive.
- The parties are having difficulty communicating constructively with each other.
- One or more parties are not realistically assessing their position.

The following factors indicate that a mini-trial may be inappropriate:

- The parties want to the neutral to render a decision that resolves the dispute.
- The amount at stake does not warrant the time and resources necessary to commit to the mini-trial process.
- The resolution of a dispute hinges primarily on questions of law or on an assessment of the relative credibility of key witnesses.
- The bargaining power of the parties is unequal.
- One or more of the persons participating in the negotiations, e.g., executive officers of the disputing companies, were personally involved in the events out of which the dispute arose.

C. [§2.37] Procedures for Mini-Trial

In a typical mini-trial, the parties execute a written agreement that describes the procedures that will govern. For example, this agreement may

- Identify the neutral who will act as advisor and facilitator.
- Require an exchange of exhibits, a disclosure of witnesses, and other pretrial discovery, specifying limitations in scope, and deadlines.
- Require each party to have present at the trial a person with authority to resolve the dispute.
- Specify the sequence in which the parties will make their presentations.
- Specify the efforts that the neutral will make, following the presentations, to facilitate a settlement.
- Require the neutral to render a written evaluation, in the absence of a settlement, including the likely outcome if should there be a court trial.

VII. SUMMARY JURY TRIAL

A. Description

1. [§2.38] Role of Neutral

A summary jury trial is a facilitative dispute resolution process. An abbreviated trial is held before a mock jury of an agreed number of persons (typically six or eight) presided over by a

neutral. The parties (or the initiating party) usually retain an agent who chooses persons generally representative of the probable jury pool. The format of the presentation to the jury may vary from dispute to dispute, and evidentiary and procedural rules are flexible. After the presentation of the parties' positions, the jury usually returns a consensus verdict or individual verdicts. These verdicts are nonbinding and meant only to aid the parties in reaching a settlement by indicating how a real jury would view the dispute. Following submission of the verdict(s), counsel may question the mock jurors about their perception of liability and damages and the neutral may facilitate settlement negotiations between the parties.

Summary jury trials and mini-trials are very different processes. Summary jury trials, like neutral evaluation, are designed to facilitate resolution by providing the parties with a neutral third party's nonbinding evaluation of the case, except here the evaluation comes from an advisory jury. Because the jury plays an evaluative role, the focus of the parties' persuasive efforts, at least during their presentations, is on the jury. In contrast, in a mini-trial, there is no advisory jury and the neutral's role is generally limited to moderating the parties' presentations and facilitating their communication.

2. [§2.39] Roles of Parties and Attorneys

Parties may be present during the presentations to the jury and may be called as witnesses during these presentations. Attorneys in summary jury trials typically present their clients' positions. Sometimes the attorneys summarize the expected testimony of their witnesses, or only the key witnesses testify. The attorneys may also participate in subsequent settlement discussions, or these discussions may be conducted by the parties with the attorneys playing an advisory role.

B. [§2.40] When a Summary Jury Trial May Be Appropriate

The following factors indicate that a summary jury trial may be appropriate:

- Significant issues or sums are at stake and a trial is likely to be very lengthy and expensive. (Summary jury trials, however, can also be expensive.)
- One or more parties (or their counsel) appear to have unrealistic expectations regarding the merits of the dispute or damages.
- The parties hold widely divergent views of how a jury would interpret disputed facts, apply concepts such as "reasonableness" or "ordinary care" to the facts, regard the credibility of witnesses, or set damages.
- A defendant insurer or governmental entity concedes liability, but wants an advisory verdict on the issue of damages before the insurer's decision makers can approve or disapprove a large settlement.

The following factors may indicate that a summary jury trial is inappropriate:

- The parties want the neutral to render a decision that resolves the dispute.
- The amount at stake does not warrant the time and resources that would be necessary for a summary jury trial.
- Less time-consuming and costly resolution processes have not yet been explored.
- A full jury trial is not likely to take more than a few days.

VIII. SETTLEMENT CONFERENCE

A. DESCRIPTION

1. [§2.41] Role of Neutral

A settlement conference is a facilitative dispute resolution process. The parties meet with a neutral third party to explore settlement options. Settlement conferences are generally informal, and procedures vary from neutral to neutral and from dispute to dispute. Neutrals commonly use techniques similar to those used in mediation and neutral evaluation. However, in a settlement conference, the neutral generally takes a considerably more active role in trying to guide the parties to a resolution. Typically, the neutral makes an independent evaluation of the case based on knowledge of the law and prior experience and then seeks to persuade the parties to change positions and move toward a compromise settlement. The neutral does not render a decision; the ultimate decision regarding whether and how to resolve the dispute is left to the parties.

2. [§2.42] Roles of Parties and Attorneys

In settlement conferences, both parties and their attorneys typically appear, and the attorneys often participate directly in the settlement discussions with their clients. Attorneys may also be required to prepare a summary of the case for the neutral.

B. [§2.43] WHEN A SETTLEMENT CONFERENCE MAY BE APPROPRIATE

Settlement conferences may be used in any civil dispute, but may be most useful when the following factors are present:

- The parties have not fully explored settlement options and are unlikely to do so without the assistance of a neutral.
- The parties have strongly held positions about the probable outcome of the dispute, but may be receptive to having a competent neutral help guide them toward a resolution.

C. [§2.44] APPLICABLE LAW

On the court's own motion or at any party's request, the court may set one or more mandatory settlement conferences. Cal Rules of Ct 3.1380(a). Unless excused by the court, trial counsel, parties, and persons with settlement authority must all attend the conference. Cal Rules of Ct 3.1380(b).

For a comprehensive discussion of mandatory settlement conferences, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, SECOND EDITION, chap 5 (Cal CJER 2008).

Most counties have local rules that establish mandatory settlement conference procedures, including the duties of attorneys, parties, and insurers. See, *e.g.*, Los Angeles rule 7.9(d).

Ventura County has a mandatory *early* settlement conference program. In cases chosen for this program, the court schedules an early conference (in practice, approximately 165 days after the filing of the complaint) that all parties and their attorneys must attend. Each party must be represented by someone having full settlement authority. Ventura rule 3.24(A). Neutral volunteer attorneys preside. This rule is invoked if the parties' joint status report indicates that they may be inclined toward settlement or if the case is of a type that is usually amenable to settlement, *e.g.*, an action in which no equitable relief is sought and the only issue in dispute is the amount of damages.

IX. NEUTRAL FACT-FINDING

A. DESCRIPTION

1. [§2.45] Role of Neutral

Neutral fact-finding is an adjudicatory dispute resolution process. A neutral third party reviews information submitted by the parties and/or conducts independent research regarding the facts, and submits findings to the parties or the court on specified factual issues. When the fact finder is appointed under the reference procedure set forth in CCP §638 or §639, this process is sometimes called a special reference, and the fact finder is called a special referee or special master. Neutral fact-finding can be used to resolve a single factual issue or all the outstanding factual issues in a dispute. The neutral is often an expert who draws on relevant special expertise. The factual findings of the neutral are only advisory, unless the parties have agreed that they will be binding.

2. [§2.46] Roles of Parties and Attorneys

Parties and attorneys are generally responsible for identifying the factual issues that are submitted to the neutral. Attorneys typically play the same role in presenting evidence to a fact finder as in other processes in which facts are adjudicated.

B. [§2.47] WHEN NEUTRAL FACT-FINDING MAY BE APPROPRIATE

Neutral fact-finding may be used in almost any type of situation in which factual issues are unresolved. However, it may be most appropriate in civil disputes when

- Resolution of a dispute is being frustrated because the parties cannot agree on a few important issues of fact.
- One or more questions of fact require scientific, technical, or other special expertise for their resolution, such as questions regarding the partition of real property.
- One or more questions of fact are unusually complex or require the examination of voluminous evidence.

C. [§2.48] WITHOUT COURT INTERVENTION

Parties to a dispute may enter into an agreement to use neutral fact-finding completely outside the auspices of the court. No statutory provisions specifically relate to such agreements, other than those applicable generally to contracts. There are provisions, however, under which the court may refer a case for neutral fact-finding. These are discussed in §§2.49–2.63.

D. [§2.49] SPECIAL REFERENCES ORDERED BY COURT; WHEN APPROPRIATE

A matter may be referred by a court for neutral fact-finding. If the referee is only empowered to determine specified facts (see CCP §638(b)), it is called a special reference. This can be either consensual, *i.e.*, based on the agreement of all parties (see §2.50), or nonconsensual (see §2.51). If the referee is empowered to hear and determine any or all issues (see CCP §638(a)), it is a general reference, which must be consensual. See §§2.99–2.107.

A special reference is *appropriate* when:

- One or more questions of fact require scientific, technical, or other special expertise for their resolution.

- One or more questions of fact are unusually complex or require the examination of voluminous evidence. See CCP §639(a)(1), (2) (reference may be directed for "the examination of a long account," or "the taking of an account"). A special referee is often brought in to carry out an accounting.

A *nonconsensual* special reference is *inappropriate* if payment of the referee's fee would impose an unfair or unreasonable economic burden on any of the litigants. In this situation, however, you may order an unequal apportionment of the fee.

For the relevant Judicial Council forms, see §2.59 (Stipulation for Order Appointing Referee, Form ADR-109) and §2.60 (Order Appointing Referee, Form ADR-110).

1. Grounds for Ordering Special References

a. [§2.50] Consensual Special References

A consensual special references may be ordered by the court on either of the following grounds:

- On the motion of a party seeking to enforce a written contract or lease that provides that any controversy arising from it must be heard by a referee (CCP §638; see Cal Rules of Ct 3.901); or
- On an agreement of the parties filed with the clerk or judge or entered in the minutes or in the docket of the court. CCP §638. Although dictum in two cases suggests otherwise, this statute has been held to authorize oral stipulations in open court for appointment of a referee (see *Garland v Smith* (1933) 131 CA 517, 524, 21 P2d 688; *Estate of Hart* (1938) 11 C2d 89, 91, 77 P2d 1082; Knight, Chernick, Haldeman & Bettinelli, California Practice Guide: Alternative Dispute Resolution §§6:123–6:125 (The Rutter Group 2007)).

The agreement to submit the matter to a referee must be presented to the court together with a proposed order of reference that states whether the scope of the reference covers all issues or is limited to specific issues. It must also state the name, business address, and telephone number of each proposed referee and, if he or she is a member of the State Bar, his or her Bar number. It must bear each proposed referee's signature indicating consent to serve and certification that the referee will comply with the applicable canons and rules. Cal Rules of Ct 3.901–3.902.

b. [§2.51] Nonconsensual Special References

Nonconsensual special references may be ordered, either on the motion of any party or on the court's own motion, on any of the following grounds:

- *Examination of a long account.* A referee may be directed to hear and decide the whole issue, or to report on a specific question of fact. CCP §639(a)(1).
- *Taking of an account.* This is used when necessary for the information of the court before judgment, or for carrying out a judgment or order. CCP §639(a)(2).
- *Question of fact.* This may be used to address a question that arises on motion or otherwise, at any stage of the action other than on the pleadings. CCP §639(a)(3).
- *Special proceeding.* This is used when necessary for the information of the court in a special proceeding. CCP §639(a)(4). See generally Cal Rules of Ct 3.920 et seq.

- *Discovery dispute.* A referee may be appointed to hear and determine discovery motions and disputes, but only if the exceptional circumstances of the case require the appointment. CCP §§639(a)(5), 639(d)(2); Cal Rules of Ct 3.927. See §2.53. On discovery referees generally, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—DISCOVERY, chap 5 (Cal CJER 1994).

These are the only grounds for which you may make a nonconsensual reference; courts cannot assign matters to a referee for decision without explicit statutory authorization or the parties' consent. See *Marriage of Olson* (1993) 14 CA4th 1, 8, 17 CR2d 480; Knight, Chernick, Haldeman & Bettinelli California Practice Guide: Alternative Dispute Resolution §§6:134–6:147 (The Rutter Group 2007).

On weighing the potential economic hardship to the litigants against the need for the reference, see §§2.54–2.55 and item 2c of the Order Appointing Referee (Judicial Council Form ADR-110) that appears in §2.60.

For statutes that authorize courts to refer certain issues to fact-finding bodies, see §2.63.

2. Required Findings

a. [§2.52] For Purposes Other Than Discovery

If you appoint a special referee under CCP §639 when one or more parties have not consented to the reference you must do so by written order. CCP §639(d). For Judicial Council Form ADR-110, which may be used for this purpose, see §2.60. As indicated in this form, required items include the following (CCP §639(d)):

- A statement of the purpose of the appointment. Possible purposes include: the examination of an account; the taking of an account; for a question of fact raised in connection with a motion; and for the information of the judge in a special proceeding. CCP §639(a)(1)–(4), (d)(1).
- The subject matter or matters included in the reference. CCP §639(d)(3).
- The name, business address, and telephone number of the referee. CCP §639(d)(4).
- The maximum hourly rate that the referee may charge. CCP §639(d)(5).
- At the request of any party, the maximum number of hours for which the referee may charge. On the written application of any party or of the referee, you may modify this maximum number of hours, subject to any findings under CCP §639(d)(6) regarding a party's economic inability to pay the referee's fees. CCP §639(d)(5). On determining inability to pay, see §2.54.
- Either a finding that no party has established an economic inability to pay a prorata share of the referee's fees or a finding that another party has agreed voluntarily to pay the additional share of these fees. No referee may be appointed at a cost to the parties unless you make one of these findings. CCP §639(d)(6)(A). On determining inability to pay, see §2.54, and item 2c of the Order Appointing Referee (Judicial Council Form ADR-110) that appears in §2.60.

For additional requirements when the referee is appointed for discovery purposes, see §2.53.

b. [§2.53] Additional Requirements If for Discovery Purposes

As indicated in Judicial Council Form ADR-110, when the purpose of the special reference relates to discovery, the order appointing the referee must also include the following in addition to the items discussed in §2.52:

- Whether the referee is appointed for limited or for all discovery purposes. CCP §639(c).
- The exceptional circumstances requiring the reference. These must relate specifically to the circumstances of the particular case. CCP §639(d)(2); Cal Rules of Ct 3.927.

3. [§2.54] Determining Party's Inability To Pay

When determining, for the purposes of CCP §639(d)(6)(A) (see §2.52), whether a party has established an economic inability to pay a prorata share of the proposed referee's fees, you may consider only the ability of the party, not the party's counsel, to pay these fees. You may, however, consider, without limitation, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation. CCP §639(d)(6)(B).

Any party who is proceeding in forma pauperis is considered unable to pay a prorata share of the fees. CCP §639(d)(6)(B). You do not need a formal application or formal proof of indigence. The representations of the party's attorney are sufficient, unless there is reason to suspect their accuracy. *DeBlase v Superior Court* (1996) 41 CA4th 1279, 1283–1284, 49 CR2d 229. You may not require a party to produce tax returns to substantiate his or her indigence. *Hood v Superior Court* (1999) 72 CA4th 446, 449–450, 85 CR2d 114.

But if you do reject a party's representations of indigence or financial hardship you must state your reasons for rejecting them.

4. [§2.55] Apportionment of Referee's Fees

At any time after determining ability to pay, you may order the parties to pay the referee's fees in any manner that you determine to be fair and reasonable, including apportionment of the fees among the parties. See items 5c(3) of Judicial Council Form ADR-110. "Parties," however, does not include the parties' counsel. CCP §645.1(b).

But you may not order one party to pay the full cost of a nonconsensual reference because the other party is indigent. Such an apportionment is not "fair and reasonable" as required by CCP §645.1. The reference, if ordered, must be conducted at no cost to the parties. *Taggares v Superior Court* (1998) 62 CA4th 94, 104–106, 72 CR2d 387. Possible options suggested by the appellate court in *Taggares* include

- Permitting the parties, if they agree, to choose from a panel of attorneys who have agreed to serve pro bono in matters of this nature, or from a court-approved list of mediators or arbitrators willing to serve without charge.
- Requiring the parties to choose from a court-approved list of retired judges willing to volunteer services in indigent cases.
- Referring the matter to the presiding judge for assignment to another department or an assigned judge.

Another alternative may be to refer the matter to one of the court's commissioners or referees.

5. [§2.56] Use of Court Facilities

In involuntary references, the parties are entitled to use court facilities and personnel to the extent provided in the order of reference. Cal Rules of Ct 3.926. In voluntary references, the parties may not use court facilities or personnel except on a finding by the presiding judge that doing so will further the interests of justice. Cal Rules of Ct 3.909(a).

6. [§2.57] Public Access to Proceedings

If a referee conducts proceedings at a private facility instead of at the courthouse, the public may attend any proceeding on the request of any person. Cal Rules of Ct 3.909(a), 3.926.

For all matters pending before privately compensated referees, the court clerk must post a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. Cal Rules of Ct 3.909(b). Judicial Council Form ADR-110 has space in item 7 for the inclusion of this information.

7. [§2.58] Selection of Referee; Required Disclosures; Disqualification

If the parties by agreement select up to three persons to serve as the referees, you must appoint these persons. CCP §640(a). If the parties do not agree on the selection of referees, each party must submit to you up to three nominations. You must then appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received, you must appoint one or more referees against whom there is no legal objection, or appoint a court commissioner of the county where the action is pending to serve as the referee. CCP §640(b).

An order appointing a referee under CCP §639 (see §2.60) must include the name, business address, and telephone number of the person being appointed and, if the person is a member of the State Bar of California, his or her Bar number. CCP §639(d)(4); Cal Rules of Ct 3.922(b).

Referees must comply with Cal Rules of Ct, Code of Judicial Ethics, Canon 6D, which requires disclosure of a wide variety of matters that might be grounds for disqualification. On the grounds for disqualification and the procedure for objecting to the appointment of a referee, see CCP §§641–642; Cal Rules of Ct 3.905, 3.925.

All persons, including referees, appointed by a court must be selected on the basis of merit and without discrimination on the basis of gender, race, ethnicity, disability, sexual orientation, or age. Cal Rules of Ct 10.611. This policy is reinforced by Cal Rules of Ct, Standards of J Admin 10.21(b), which states that each trial court should conduct a recruitment procedure that publicizes its appointment programs and maximizes the opportunity for a diverse applicant pool.

8. [§2.59] Stipulation or Motion for Order Appointing Referee (Judicial Council Form ADR-109)

ADR-109

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:	
☐ **STIPULATION** ☐ **MOTION** **FOR ORDER APPOINTING REFEREE**	CASE NUMBER:

1. **Applicant.** The following parties apply for appointment of a referee *(name each applicant)*:

2. **Statutory ground for appointment.**
   a. ☐ **Section 638.** Appointment of the referee is requested under Code of Civil Procedure section 638 because *(check one)*:
      (1) ☐ all parties to the action have agreed to the appointment of a referee under section 638.
      (2) ☐ the parties entered into a written contract or lease that provides that any controversy arising from it shall be heard by a referee, as follows *(identify agreement and state provision for appointment of referee below or in Attachment 2a)*:

   b. ☐ **Section 639.** Appointment of the referee is requested under Code of Civil Procedure section 639 because *(check and complete (1) or (2))*:
      (1) ☐ **Discovery reference.** 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. *(Code Civ. Proc., § 639(a)(5). State the exceptional circumstances specific to the particular case that require the discovery reference, below or in Attachment 2b(1).)*

      (2) ☐ **Other reference.** *(Check one or more of the following statutory grounds and state the reason the appointment is requested, below or in Attachment 2b(2).)*
         (a) ☐ The trial of an issue of fact requires the examination of a long account. *(Code Civ. Proc., § 639(a)(1).)*
         (b) ☐ The taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect. *(Code Civ. Proc., § 639(a)(2).)*
         (c) ☐ A question of fact, other than upon the pleadings, has arisen by motion or otherwise. *(Code Civ. Proc., § 639(a)(3).)*
         (d) ☐ It is necessary for the information of the court in a special proceeding. *(Code Civ. Proc., § 639(a)(4).)*

3. **Referee.** Applicant requests appointment of the following person as referee:
   a. Name:
   b. Business address:
   c. Telephone number:
   d. ☐ The proposed referee is an active or inactive member of the State Bar. *(A proposed referee who is a former California judicial officer must also be an active or inactive member of the State Bar.)* The proposed referee's State Bar number is:

Form Approved for Optional Use
Judicial Council of California
ADR-109 [Rev. January 1, 2007]

STIPULATION OR MOTION FOR ORDER APPOINTING REFEREE
(Alternative Dispute Resolution)

Code of Civil Procedure, § 638 et seq.;
Cal. Rules of Court, rules 3.900–3.910, 3.920–3.927
www.courtinfo.ca.gov

American LegalNet, Inc.
www.FormsWorkflow.com

ADR-109

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	

4. **Subject matter of reference.**
   a. ☐ **Section 638.** Applicant requests that the reference include *(check and complete one)*:
      (1) ☐ all issues in dispute.
      (2) ☐ the following issues *(describe issues to be covered by reference below or in Attachment 4a)*:

   b. ☐ **Section 639.** Applicant requests that the reference include the following issues *(describe issues below or in Attachment 4b)*:

5. **Referee's compensation.** *(Check and complete one.)*
   a. ☐ The referee will not be privately compensated by the parties.
   b. ☐ The referee will be privately compensated by the parties as follows:
      (1) ☐ The parties have agreed that the referee's fees shall be paid as follows *(state agreement below or in Attachment 5b)*:

      (2) ☐ The parties have not agreed on payment of the referee's fees and request the matter to be resolved by the court under Code of Civil Procedure section 645.1.

6. **Use of court facilities and personnel.** *(Check and complete one.)*
   a. ☐ Applicant does not request the use of court facilities or court personnel.
   b. ☐ Applicant requests the use of court facilities or court personnel. *(Describe the requested use below or in attachment 6b. If the reference is to be conducted by a privately compensated referee appointed under Code Civ. Proc., § 638, also state why the use of court facilities or court personnel will further the interest of justice. Court facilities and personnel may be used in proceedings before a privately compensated section 638 referee only upon a finding of the presiding judge that the use would further the interest of justice.)*

7. **Hearing location information.** The following person may be contacted to arrange attendance at any proceeding that is open to the public and that is conducted in a private facility *(complete all of the following)*:
   a. Name:
   b. Address:
   c. Telephone:

Date:

(TYPE OR PRINT NAME)	▶ (SIGNATURE OF APPLICANT OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF APPLICANT OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF APPLICANT OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF APPLICANT OR ATTORNEY)
(TYPE OR PRINT NAME)	▶ (SIGNATURE OF APPLICANT OR ATTORNEY)

9. [§2.60] Order Appointing Referee (Judicial Council Form ADR-110)

ADR-110

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:	
ORDER APPOINTING REFEREE	CASE NUMBER:

THE COURT FINDS:

1. ☐ **Section 638 appointment.** A referee is properly appointed under Code of Civil Procedure section 638 because *(check one)*:
   a. ☐ all parties to the action have agreed to the appointment of a referee under section 638.
   b. ☐ the parties entered into a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee.
2. ☐ **Section 639 appointment.** A referee is properly appointed under Code of Civil Procedure section 639 because *(check and complete a or b)*:
   a. ☐ **Discovery reference.** 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. *(Code Civ. Proc., § 639(a)(5). State the exceptional circumstances specific to the particular case that require the discovery reference, below or in Attachment 2a.)*

   b. ☐ **Other reference.** *(Check one or more of the following statutory grounds and state the reason for the appointment below or in Attachment 2b.)*
      (1) ☐ The trial of an issue of fact requires the examination of a long account. *(Code Civ. Proc., § 639(a)(1).)*
      (2) ☐ The taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect. *(Code Civ. Proc,. § 639(a)(2).)*
      (3) ☐ A question of fact, other than on the pleadings, has arisen by motion or otherwise. *(Code Civ. Proc., § 639(a)(3).)*
      (4) ☐ It is necessary for the information of the court in a special proceeding. *(Code Civ. Proc., § 639(a)(4).)*

   c. **Economic inability to pay**. *(Check one.)*
      (1) ☐ No party has established an economic inability to pay a pro rata share of the referee's fees.
      (2) ☐ One or more parties has established an economic inability to pay a pro rata share of the referee's fees and another party has agreed voluntarily to pay that additional share of the referee's fees. *(Complete item 5c(3)(b).)*
         (a) The following party has established an economic inability to pay a pro rata share of the referee's fee *(name each)*:
         (b) The following party has agreed voluntarily to pay an additional share of the referee's fee *(name each)*:
      (3) ☐ The referee is being appointed at no cost to the parties.

Form Approved for Optional Use
Judicial Council of California
ADR-110 [Rev. January 1, 2007]

ORDER APPOINTING REFEREE
(Alternative Dispute Resolution)

Code of Civil Procedure, § 638 et seq.;
Cal. Rules of Court, rules 3.900–3.910, 3.920–3.927
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ADR-110

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	

THE COURT ORDERS:

3. **Referee.** The following person is appointed as referee. *(The referee's signature indicating consent to serve and certification that he or she is aware of and will comply with the applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court must be included in the proposed order appointing a referee under Code of Civil Procedure section 638 or attached to the order appointing a referee under section 639. See item 9.)*
   a. Name:
   b. Business address:
   c. Telephone number:
   d. ☐ The referee is an active or inactive member of the State Bar. *(A proposed referee who is a former California judicial officer must also be an active or inactive member of the State Bar.)* The referee's State Bar number is:

4. **Scope and subject matter of reference.** The referee is appointed as follows *(check and complete a or b)*:
   a. ☐ **Section 638 appointment.** The referee is appointed under Code of Civil Procedure section 638 *(check and complete one)*:
      (1) ☐ to hear and determine any or all of the issues in the action or proceeding, whether of fact or of law, and to report a statement of decision.
      (2) ☐ to ascertain the following facts necessary to enable the court to determine the action or proceeding *(state facts to be ascertained by referee below or in Attachment 4a)*:

   b. ☐ **Section 639 appointment.**
      (1) ☐ The following subject matter or matters are included in the reference (*describe the matter or matters the referee is ordered to consider below or in Attachment 4b)*:

      (2) ☐ **Section 639 discovery reference.**
         (a) ☐ The discovery referee is appointed for *(check one)*:
            (i) ☐ The discovery matters identified in (1) above.
            (ii) ☐ All discovery purposes in the action.
         (b) The referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions, and other requests made during the course of the hearing.

5. **Referee's compensation.** *(Check and complete one of the following.)*
   a. ☐ **Uncompensated referee.** The referee will not be privately compensated by the parties.
   b. ☐ **Compensation of section 638 referee.**
      (1) ☐ The referee's fees will be paid as agreed by the parties.
      (2) ☐ The parties have not agreed on the payment of the referee's fees and have requested that the matter be resolved by the court. The court orders that the referee's fees be paid as follows *(state the manner of payment determined by the court to be fair and reasonable below or in Attachment 5b)*:

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RESPONDENT/DEFENDANT:	

5. c. ☐ **Compensation of section 639 referee.**
   (1) The maximum hourly rate that the referee may charge is *(specify):*
   (2) ☐ The maximum number of hours for which the referee may charge is *(at the request of any party, state the maximum number of hours for which referee may charge):*
   (3) ☐ The court orders that the referee's fees be paid or apportioned as follows and reserves jurisdiction to modify this order *(state fair and reasonable apportionment of reference costs below or in Attachment 5c):*
      (a) ☐ All parties shall pay equal shares of the referee's fees.
      (b) ☐ The parties shall pay equal shares of the referee's fees except that, based on the finding of economic inability set forth in item 2c(2):
         (i) The following party is not required to pay any portion of the referee's fees *(name of each party excused from paying referee's fees):*
         (ii) The following party shall pay the pro rata share of the referee's of the party identified in (i), in addition to his or her own share of the referee's fees *(name of each party who has agreed to pay an additional share of the referee's fees):*
      (c) ☐ The referee's fees shall be paid as set forth in Attachment 5c.
   (4) ☐ The court will subsequently determine how the referee's fees will be paid, under Code of Civil Procedure section 645.1(b). *(If the issue of economic hardship is raised before the services of a referee appointed under section 639 begin, the court must make a fair and reasonable apportionment of reference costs.)*
6. **Use of court facilities and court personnel.** Court facilities and court personnel *(check and complete one):*
   a. ☐ may not be used without an order of the presiding judge. *(Court facilities and personnel may be used in proceedings before a privately compensated section 638 referee only upon a finding of the presiding judge that the use would further the interest of justice.)*
   b. ☐ may be used as follows *(describe any authorized use of court facilities or court personnel if referee will not be privately compensated or is appointed under section 639):*
7. ☐ **The reference will be conducted in a private facility.** The clerk must post notice that the following person may be contacted to arrange attendance at any proceeding that is open to the public *(complete all of the following):*
   a. Name:
   b. Address:
   c. Telephone:
8. **Referee's report.**
   a. **Time of report.** The referee must report *(check and complete one):*
      (1) ☐ in writing to the court within 20 days after the hearing, if any, has been concluded and the matter submitted.
      (2) ☐ as follows *(specify other time and manner of reporting directed by the court):*
   b. **Manner and contents of report.**
      (1) ☐ **Section 638 referees.** The referee must report in the following manner agreed to by the parties and approved by the court *(describe):*
      (2) ☐ **Section 639 referees.** The referee must file with the court a report that includes a recommendation on the merits of any disputed issue, a statement of the hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. The referee must serve the report on all parties.
9. **Certification of referee.** The undersigned consents to serve as referee as provided above and certifies that he or she is aware of and will comply with the applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court.

(TYPE OR PRINT NAME OF PROPOSED REFEREE)

(SIGNATURE OF PROPOSED REFEREE)

Date:

JUDICIAL OFFICER

10. [§2.61] Referee's Report; Objections

The referee must serve and file a written report (see Judicial Council Form ADR-111) that includes a statement of decision within 20 days after the hearing, if any, has been concluded, and the matter has been submitted. CCP §643(a). When the referee was appointed under CCP §639 (nonconsensual special reference), the report must also include a statement of the total hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. CCP §643(b).

Any party may object to the referee's report within ten days after service; the other parties may respond within ten days after service of the objections. You must then review these objections and any responses and enter an appropriate order. CCP §643(c).

11. [§2.62] Advisory Nature of Referee's Decision; Discretionary Hearing

Under a special reference, the referee's decision is only advisory. CCP §644(b). You may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections to the findings and responses to those objections. CCP §644(b). Procedural due process requires you to consider the referee's report independently before acting on the referee's recommendations. *Aetna Life Ins. Co. v Superior Court* (1986) 182 CA3d 431, 436, 227 CR 460 (no indication in record that judge made independent determination, despite objections; order vacated). *Rockwell Int'l Corp. v Superior Court* (1994) 26 CA4th 1255, 1270, 32 CR2d 153 (judge's failure to consider the referee's report independently was evidenced by judge's stated deference to referee's greater experience and "gray hair," and by absence of any indication that judge read opposition to referee's report).

You are not required to hold a hearing. Code of Civil Procedure §644(b) only states that the judge must consider "any objections and responses thereto *filed* with the court" (emphasis added); see *Lewis v Superior Court* (1999) 19 C4th 1232, 1247–1250, 7 CR2d 85.

Many judges nevertheless hold a hearing whenever crucial points raised in the objections or the responses to them need clarification, especially when a party has requested a hearing. By holding a hearing, you underscore that you will be making an independent determination. Some judges put the hearing on the objections on the calendar and issue a tentative ruling. Unless you require personal appearances, the parties are permitted to participate in this hearing via a conference telephone call. CCP §367.5; Cal Rules of Ct 3.670.

In your notice of the meeting, make it clear to the parties that you have examined the referee's report and are familiar with their respective arguments. Delineate precisely the points that prompted you to hold a hearing and emphasize to the parties that their presentations must be succinct and will be strictly limited to those points.

E. [§2.63] Other Statutorily Authorized Fact-Finding Programs

In addition to CCP §§638 and 639, other statutes authorize courts to refer certain factual issues for determination in specific types of cases:

- In any suit brought for determination of water rights, the court may refer any or all issues to the Water Resources Control Board as a referee. Wat C §2000. The board must make a report to the court, based solely on its own investigation or on hearings it held, setting forth the findings and conclusions as required by the court's order of reference. Wat C §§2010, 2012. The report of the board is subject to review by the court if the parties file exceptions. Wat C §2017.

- The Governor is authorized to appoint a fact-finding commission to inquire into and investigate issues involved in disputes between transit systems and employer organizations. Pub Util C §120503.
- When a mediator is unable to effect a settlement of a labor dispute between either a public school or an institute of higher education and its employer organization, either party may request that the differences be submitted to a fact-finding panel. Govt C §§3591–3593, 3548.1–3548.3.

X. ARBITRATION

A. DESCRIPTION

1. [§2.64] Role of Arbitrator

Arbitration is an adjudicatory dispute resolution process. A neutral third party or panel reviews evidence, hears arguments, and renders a decision regarding a dispute. Although arbitration is an adjudicatory process, it is typically less formal than court adjudication. Depending on the parties' agreement, arbitration may be either nonbinding or binding. For a description of judicial arbitration, see §§2.67–2.78; on contractual arbitration, see §§2.79–2.84.

Common variations of standard arbitration include

- "High-low" arbitration, also known as "mini-maxi" or "controlled" arbitration. In this variation, the parties agree to a minimum and a maximum award amount, but keep this information from the arbitrator. If the arbitrator's award falls between these high and low figures, the exact amount of the award is paid. If the award is higher than the agreed maximum, only the maximum is paid, and if it is lower than the agreed minimum, the minimum is paid. Another variation of high-low arbitration is for the award to be binding only if it falls within the high-low range; otherwise, it is simply advisory. Because this approach reduces the risk of an unfavorable award, it can be attractive to both parties, especially in low probability, high potential pay-out cases.
- "Baseball" arbitration. In this variation, used for many years in resolving contract disputes between baseball players and owners, each side submits a figure to the arbitrator. The arbitrator then conducts the usual arbitration hearing, but is limited to choosing one of the figures that was submitted. A variation of this process is to allow the parties to submit revised figures after the conclusion of their presentations, before the arbitrator decides which figure to adopt. Another variation of baseball arbitration is "night baseball," in which the arbitrator is kept in the dark as to the two figures the parties have submitted. Whichever figure is closer to the arbitrator's award is the amount that must be paid.
- Arbitration to determine degree of fault. In cases involving multiple defendants, when there is agreement on the amount of the claimant's damages but disagreement among the defendants as to their relative fault and liability, the defendants may agree to a binding arbitration to determine their respective degrees of fault, and thus their contributions to the settlement sum. The claimant, assured of getting the agreed sum, refrains from taking any further action for a reasonable period (typically 90 or 120 days) to let the arbitration proceed.

2. [§2.65] Roles of Parties and Attorneys

The roles of parties and attorneys in arbitration are similar to those in litigation. Attorneys are typically responsible for preparing and presenting the evidence and argument to the arbitrator. Parties are often witnesses.

B. [§2.66] When Arbitration May Be Appropriate

Arbitration may be used in any civil dispute; however, certain factors indicate when arbitration may be most appropriate. Some of these factors, such as the parties having no ongoing relationship with one another, point equally to either binding or nonbinding arbitration. Others, particularly those relating to the parties' desire for a quick decision, may point more toward binding arbitration because it results in a final determination of the dispute rather than merely an advisory decision.

Factors suggesting that arbitration may be appropriate include the following:

- The parties want a quick, confidential, independent decision resolving the dispute.
- The parties want the dispute heard on a certain date, to enable the parties and their attorneys to plan their schedules and to facilitate appearances by expert witnesses.
- The parties want the dispute decided by a specific individual, or a panel of individuals, having special expertise regarding the subject matter of the dispute.
- The parties want the opinion of a qualified neutral about a specific issue, such as the extent of damages or the credibility of witnesses.
- The parties have no relationship beyond a single incident, and only the amount of damages is in dispute.
- The amount in dispute is relatively small and a quick decision is of primary importance.
- The parties have been unable to resolve the dispute through negotiation or facilitative dispute resolution processes such as mediation or settlement conferences.

Factors suggesting that arbitration may be inappropriate include the following:

- The parties want help in improving communications, finding common ground, or working toward a creative solution to the dispute. These factors tend to point instead to mediation.
- In the case of binding arbitration, one or more disputants would like to retain the option of rejecting or appealing the neutral's decision.

C. [§2.67] Judicial Arbitration

Judicial arbitration is a court-connected, nonbinding arbitration program established by statute (CCP §§1141.10–1141.31) with implementing court rules (Cal Rules of Ct 3.810–3.830). For a comprehensive discussion of this subject, see California Judges Benchbook: Civil Proceedings—Before Trial , Second Edition, chap 4 (Cal CJER 2008).

1. [§2.68] Application of Provisions

Courts with 18 or more judges must submit all nonexempt unlimited civil cases in which the amount in controversy for each plaintiff is $50,000 or less to judicial arbitration. CCP §1141.11(a). Courts with fewer than 18 judges may provide for judicial arbitration of all unlimited civil cases by local rule. CCP §1141.11(b); Cal Rules of Ct 3.811(a)(2). All courts may by local rule provide for judicial arbitration of all limited civil cases. CCP §1141.11(c); Cal Rules of Ct 3.811(a)(3).

The amount in controversy is determined not by the prayer for damages, but by the court. CCP §§1141.11(a)–(b), 1141.16(a).

Actions exempt from mandatory judicial arbitration include those in which equitable relief is sought that is not frivolous or insubstantial; class actions; small claims actions, or trials de novo on appeals from small claims actions; unlawful detainer proceedings; family law proceedings; and actions involving multiple causes of action or a cross-complaint if the court determines that the amount in controversy as to any given cause of action or cross-complaint exceeds $50,000. CCP §§1141.13, 1141.15; Cal Rules of Ct 3.811(b).

Family law proceedings are exempt, except that courts may submit to judicial arbitration cases involving the division of community property if the value of the property does not exceed $50,000 and the parties have not agreed to a voluntary division. Cal Rules of Ct 3.811(b)(5); Fam C §2554.

A court may by local rule also exempt any category of actions if, under the circumstances prevailing in that court, arbitration would not reduce the probable time and expense necessary to resolve the litigation. A judge may exempt a particular action for the same reason. Cal Rules of Ct 3.811(b)(6)–(7).

Parties may stipulate to submit any civil case, regardless of the amount in controversy, to this program. Cases in which each plaintiff elects arbitration and agrees that the arbitration award will not exceed $50,000 are also subject to arbitration. CCP §1141.12; Cal Rules of Ct 3.811(a)(4)–(5).

2. [§2.69] Mediation as an Alternative to Judicial Arbitration

In Los Angeles County the presiding judge or another designated judge may order any action to mediation instead of judicial arbitration. CCP §1775.2(a). See CCP §§1775–1775.15 and Cal Rules of Ct 3.870–3.878, discussed in §§2.15–2.23. Any other court, at the option of its presiding judge, may also elect to invoke this procedure. CCP §1775.2(b). See, *e.g.*, Sonoma rule 16.7 (stating that the county has opted to do so).

3. [§2.70] Guidelines for Parties

The following summary is used in Los Angeles County to prepare the parties for the judicial arbitration process.

Who Must Attend The Arbitration Hearing
Local rules require counsel, or party if not represented by counsel, to attend the arbitration session. Failure to appear is subject to monetary sanctions (LASC Rule 12.10).

The arbitration may proceed, and an award issued, in the absence of any party who, after due notice, fails to be present or to obtain a continuance (CRC 3.821(b)).

Role Of The Arbitrator
Arbitrators listen to the evidence presented by each side and render a decision in writing called an award. The arbitrator shall disclose to parties any conflict of interest or potential conflict that might affect his or her impartiality on the case.

How To Prepare For The Arbitration
Although less formal than a trial, counsel and clients should be fully prepared to argue their position on the case and to present documentary evidence and witnesses. Before the arbitration: organize your

arguments; identify and organize documentary evidence and testimony that support your arguments; and make sure you have complied with CRC 3.823.

Persuasive and forceful presentation is encouraged but civility and mutual respect are vital.

Submission Of Briefs
Briefs are expected and necessary. The brief should include identification of the parties, a concise description of the facts, and applicable case law and statutes. The briefs should be submitted to the arbitrator at least 2 days prior to the arbitration hearing.

What To Expect At The Arbitration Hearing
The rules of evidence apply in arbitration, but with exceptions (See CRC 3.823(b)). The arbitrator will explain the process. Each side may present an uninterrupted opening statement setting forth its position as to the facts and law.

After opening statements, the parties present their evidence and witnesses. The arbitrator swears in the witnesses and makes rulings on the admissibility of evidence. After all evidence is presented and all witnesses have been heard, the parties make closing arguments.

Discovery After Assignment of Arbitrator
All discovery must be completed not later than 15 days prior to the date set for the arbitration hearing (CRC 3.822(b)).

Award of Arbitrator
Within 10 days after the conclusion of the arbitration hearing, the arbitrator submits an award and files it with the ADR Office with copies to all parties. The court may allow up to an additional 20 days to submit an award in complicated cases (CRC 3.825(b)).

The award must be in writing, signed by the Arbitrator and filed with the ADR Office (CCP 1141.23).

Judgment/Trial De Novo
An arbitrator's award is final and entered as the judgment unless a Request for Trial (Trial de Novo) is filed within 30 days from the date the arbitrator files the award with the ADR Office (CRC 3.826(a)). The 30 day period may not be extended (CRC 3.826(a)).

4. [§2.71] Role of Arbitration Administrator

The presiding judge of every court must designate an ADR program administrator (Cal Rules of Ct 10.783(a)), who also serves as arbitration administrator with duties that include the supervision of the selection of arbitrators for the cases on the arbitration hearing list and the operation of the judicial arbitration program generally. See Cal Rules of Ct 3.813(a). For further details about the administrative duties, see §3.5.

5. [§2.72] Role of Administrative Committee

Every court having 18 or more authorized judges must have an ADR committee, the duties of which include the appointment of panels of arbitrators and the review of the county's judicial arbitration program. See Cal Rules of Ct 10.783(b)(1), 3.813(b).

6. [§2.73] Qualifications and Selection of Arbitrator

The court must appoint a panel of arbitrators for personal injury cases and other panels as determined by the presiding judge. Cal Rules of Ct 3.814(a).

Each arbitrator on the court's panel must be a member of the State Bar of California, a retired court commissioner who was licensed to practice law before appointment as a commissioner, or a retired California judicial officer who is an active or inactive member of the State Bar.

Nonattorneys may serve as arbitrators on the stipulation of all parties. CCP §1141.18(a); Cal Rules of Ct 3.814(b).

The parties may by stipulation select any person to serve as the arbitrator. Cal Rules of Ct 3.815(a).

If the parties do not designate an arbitrator within 15 days of the case being placed on the arbitration hearing list, the administrator of the arbitration program must choose an arbitrator according to the procedures set forth in California Rules of Court or in the court's local rules. Cal Rules of Ct 3.815(b).

7. [§2.74] Disclosure Requirements; Ethics Standards

In addition to any other disclosures required by law, each arbitrator must disclose to the parties the following (Cal Rules of Ct 3.816(b)):

- Any matter subject to disclosure under Cal Rules of Ct, Code of Judicial Ethics, Canon 6D(2)(f)–(g), *i.e.*, information the arbitrator believes the parties might consider relevant to the question of disqualification (even if the arbitrator believes there is no actual basis for disqualification), and the arbitrator's membership in any organization that practices discrimination. The arbitrator must use an objective standard in deciding whether a person aware of the facts might doubt the arbitrator's impartiality. See *Roitz v Coldwell Banker Residential Brokerage Co.* (1998) 62 CA4th 716, 723, 73 CR2d 85.
- Any significant personal or professional relationship the arbitrator (or a member of the arbitrator's firm, see above) has or has had with a party, attorney, or law firm in the case. This includes the number and nature of any other proceedings in the past 24 months in which the arbitrator has been compensated privately by a party, attorney, law firm, or insurance company in the case for any services, including, but not limited to, service as an attorney, expert witness, or consultant, or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral. See *Ceriale v AMCO Ins. Co.* (1996) 48 CA4th 500, 505–506, 55 CR2d 685 (arbitrator must disclose fact that he has case assigned for arbitration before one of the attorneys in the case).

If any member of the proposed arbitrator's firm would be disqualified under CCP §170.1(a)(2), the arbitrator is disqualified. Cal Rules of Ct 3.816(a).

The arbitrator must make these disclosures no later than five days before the deadline for the parties to file a motion for disqualification of the arbitrator under CCP §170.6 or, if the arbitrator is unaware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter. Cal Rules of Ct 3.816(b).

On the motion of any party, made as promptly as possible under CCP §§170.1 and 1141.18(d) before the conclusion of arbitration proceedings, you must vacate the appointment of the arbitrator if you find that the moving party demanded the arbitrator's disqualification, the arbitrator failed to disqualify himself or herself, and one or more of the grounds for disqualification specified in CCP §170.1 exist. Cal Rules of Ct 3.816(d). If the appointment is vacated, the arbitration administrator must return the case to the top of the arbitration hearing list and appoint a new arbitrator. Cal Rules of Ct 3.816(d).

8. [§2.75] Assignment to Arbitration; Case Management Conference

When all parties stipulate to arbitration, the case must be set for arbitration forthwith. Cal Rules of Ct 3.812(a). When all plaintiffs file an election to submit the case to arbitration, the case

must be set for arbitration forthwith, subject to a defendant's motion to delay the arbitration hearing for good cause. Cal Rules of Ct 3.812(b).

Absent such a stipulation or election, the case must be set for judicial arbitration if you determine that the case is not exempt and the amount in controversy does not exceed $50,000. This determination must be made at the first case management conference (see Cal Rules of Ct 3.722; discussion in §3.7) that takes place after all named parties have appeared or defaulted. Cal Rules of Ct 3.812(d).

At the case management conference, you should inquire whether the parties are willing to explore possible ADR processes. See §3.8. Absent such an alternative, you should undertake your own practical assessment of the maximum damages recoverable. You need not accept the plaintiff's demand for damages as the measure for purposes of judicial arbitration. *Sharples v Chole* (1994) 29 CA4th 1213, 1218, 35 CR2d 208. You must, however, have some factual basis for determining that the damages are significantly inflated and can be discounted below the $50,000 level. If the plaintiff disputes your determination of the amount in controversy, you should give the plaintiff an opportunity to offer representations in the nature of an offer of proof, *e.g.*, regarding what evidence will be revealed in discovery about the potential damages. 29 CA4th at 1218–1220.

In making your determination, you may not consider questions of liability or comparative negligence or any other defense. CCP §1141.16(a).

If you decide to refer the case to judicial arbitration, you should exercise control over the management of the case. In the absence of a stipulation by the parties, the arbitration hearing may not be held until 210 days after the complaint was filed, or 240 days after it was filed if the parties have stipulated to a continuance under Govt C §68616(d). Govt C §68616(g). Keeping this limitation in mind, you should

- Set a date for completion of arbitration (*e.g.*, 60/90/120 days from date of conference depending on the nature of the case).
- Specify the date by which the arbitrator's award must be filed with the court. Unless the arbitrator requests more time, the award must be filed within ten days after the conclusion of the arbitration hearing. See Cal Rules of Ct 3.825(b)(1).
- Invite the parties to stipulate to a shorter period for requesting a trial de novo instead of the 30 days provided by statute.
- Encourage the parties' to consider stipulating that the judicial arbitration will be binding, i.e., that they waive the right to a trial de novo after the filing of the arbitrator's award. This stipulation must be consented to by each party, not merely by their attorneys. *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 402–408, 212 CR 151.

9. [§2.76] Compensation of Arbitrator

Compensation for arbitrators in judicial arbitration, unless waived in whole or in part by the arbitrator, is $150 per case or per day, whichever is greater, except that a superior court may set a higher level of compensation. CCP §1141.18(b). The arbitrators are generally compensated for their services by the court. CCP §1141.28(a). However, in cases that would not have been subject to judicial arbitration but for the stipulation of the parties, the parties must compensate the arbitrators. The parties are generally required to split the cost evenly, but if the arbitrator determines that payment would create a substantial economic hardship for any party, that party's share will be paid by the court. CCP §1141.28(b).

10. [§2.77] Judicial Review; Enforcement of Awards

The awards made by the arbitrators under these provisions are final unless a trial de novo is requested. CCP §1141.20(a).

Any party may elect to have a trial de novo by filing a request within 30 days after the arbitrator files the award. CCP §1141.20. If the person 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. CCP §1141.21.

The court clerk is required to enter the award as a judgment if no party files a request for a trial de novo within 30 days after the arbitrator files the award with the clerk. Cal Rules of Ct 3.827(a). The judgment then has the same force and effect in all respects as a judgment in a civil matter or proceeding, except that it is not subject to appeal. Cal Rules of Ct 3.827(c).

A party may challenge a judgment based on a judicial arbitration award only by moving to vacate the judgment. See §8.2.

11. [§2.78] Confidentiality

If a party refers to the judicial arbitration proceeding or award during a subsequent trial, it may require vacating the verdict. See CCP §§657, 1141.25. See §7.9.

D. [§2.79] Contractual Arbitration

Unlike judicial arbitration, contractual arbitration is a private process conducted outside the courts. Court involvement in this process is generally limited to proceedings

- To compel arbitration when a party to an arbitration agreement refuses to arbitrate voluntarily. See §5.5.
- To stay court proceedings of issues that are subject to an arbitration agreement. See §5.6.
- For provisional remedies in connection with arbitrable controversies. See §5.7.
- To appoint an arbitrator when the parties cannot agree on a method of appointment. See §§5.13, 8.3.
- To confirm, correct, or vacate an arbitrator's award. See §8.9.

Contractual arbitration is a broad subject, detailed coverage of which is beyond the scope of this handbook. Sections 2.80–2.84 provide an overview of California and federal law. For further details, see Knight, Chernick, Haldeman & Bettinelli, California Practice Guide: Alternative Dispute Resolution, chap 5 (The Rutter Group 2007).

On the enforcement of agreements to arbitrate generally, see §§5.4–5.15.

1. [§2.80] Qualifications and Selection of Arbitrator

Both the California Arbitration Act (CAA) (CCP §§1280–1294.2) and the Federal Arbitration Act (FAA) (9 USC §§1–16) require that the method of appointing an arbitrator specified in an arbitration agreement be followed. CCP §1281.6; 9 USC §5. If the arbitration agreement does not specify an appointment method, the CAA provides that the parties may agree on a method that then must be followed. CCP §1281.6. If the parties do not agree on a method or the method cannot be followed for any reason, both the CAA and the FAA provide that the court, on petition of a party to the arbitration agreement, must appoint an arbitrator using procedures set forth in the respective acts. CCP §1281.6; 9 USC §5.

2. [§2.81] Ethics Standards for Neutral Arbitrators in Contractual Arbitration

As required by CCP §1281.85, the Judicial Council has adopted a set of Ethics Standards for Neutral Arbitration in Contractual Arbitration. See Cal Rules of Ct, Ethics Standards for Neutral Arbitrators 1–17. Unless otherwise indicated, references to "Standard(s)" in the discussion that follows are to these standards. Advisory Committee Comments (referred to below as "Comment(s)") accompany some of these rules.

Purpose of California's ethics standards. The ethics standards are minimum standards of conduct for neutral arbitrators and are intended to guide the conduct of arbitrators, to inform and protect participants in the arbitration, and to promote public confidence in the fairness and integrity of the arbitration process. Standard 1(a)–(b). See Standard 2(a) ("arbitrator" and "neutral arbitrator" defined). They are consistent with the ethics standards for arbitrators in the judicial arbitration program. See CCP §1141.18(d); Cal Rules of Ct 3.816(b); discussion in §6.7.

Applicability of standards. A neutral arbitrator serving under an arbitration agreement must comply with the ethics standards adopted by the Judicial Council. CCP §1281.85. The standards apply to all persons who are appointed to serve as neutral arbitrators in any arbitration under an arbitration agreement if the agreement is subject to CCP §§1280–1294.2 or the arbitration hearing is conducted in California. Standard 3(a). They do not apply to arbitrators acting in an international arbitration proceeding, a judicial arbitration proceeding, an attorney-client fee arbitration proceeding, a certified automobile warranty dispute resolution process, an arbitration of a workers' compensation dispute under Lab C §§5270–5277, an arbitration conducted by the Workers' Compensation Appeals Board under Lab C §5308, an arbitration of a complaint filed against a contractor with the Contractors State License Board under Bus & P C §§7085–7085.7, or an arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements. Standard 3(b)(2). The standards also do not apply to a party-arbitrator, *i.e.*, an arbitrator unilaterally selected by a party, who is not expected to serve in an impartial manner. Standards 2(q), 3(b)(1).

Federal SEA standards preempt California standards. The ethics standards discussed below do not apply to arbitrations conducted in California by the National Association of Securities Dealers (NASD), to the extent that they conflict with the NASD's ethics standards. Because they have been approved by the Securities and Exchange Commission under the Securities Exchange Act of 1934 (SEA) (15 USC §§78a–78nn), the NASD's rules for arbitrators preempt conflicting California rules, *e.g.*, those relating to the standards for arbitrators' disclosures and disqualifications. *Credit Suisse First Boston Corp. v Grunwald* (9th Cir 2005) 400 F3d 1119, 1128–1132. In *Jevne v Superior Court* (2005) 35 C4th 935, 944, 949–960, 28 CR3d 685, the California Supreme Court, agreeing with *Credit Suisse, supra*, held that the California standards as a whole are preempted in NASD-administered securities arbitration.

Although arbitration provider organizations (see Standard 2(g)) are not themselves subject to the standards, they should not only be aware of them but should also facilitate compliance with them when performing administrative functions that involve arbitrators who are subject to the standards. Comment to Standard 3.

An arbitrator must comply with the standards from the acceptance of appointment until the conclusion of the arbitration except as otherwise provided in the standards. Standard 4(a). If the case is referred back to the arbitrator for reconsideration or rehearing after the conclusion of the arbitration, the arbitrator must comply with the standards from the date of the referral until the arbitration is again concluded. Standard 4(b). The "conclusion of the arbitration" is (1) the date

on which the arbitrator's appointment is terminated if the arbitrator is disqualified or withdraws before making an award or on which the case is settled or dismissed, (2) the final date for making an application to the arbitrator for correction if the arbitrator makes an award and no party makes a timely application for correction, or (3) the date on which the arbitrator serves a corrected award or a denial on each party or the date on which denial occurs by operation of law if a party has made a timely application for correction. Standard 2(c).

General duties. An arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process and must maintain impartiality toward all participants at all times. Standard 5.

In conducting the arbitration, the arbitrator must (Comment to Standard 5):

- Guard against statements or conduct that would create an appearance of partiality toward any party.
- Avoid entering into a relationship or acquiring an interest that might create the appearance of partiality or bias. This includes partiality or bias in a party's favor that may arise from a party's offer to select the arbitrator to serve in additional cases.

Declining appointment. Notwithstanding the parties' contrary request, consent, or waiver, a proposed arbitrator must decline appointment if he or she is unable to be impartial. Standards 6, 10(c).

General duty to be informed. A person who is nominated or appointed as an arbitrator must make a reasonable effort to inform himself or herself of matters that must be disclosed under Standard 7 or Standard 8. Standard 9(a). The arbitrator should ask each participant to make an effort to disclose any matters that may affect the arbitrator's ability to be impartial. Comment to Standard 7.

Required disclosures. A person who is nominated or appointed as an arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial, including all of the matters listed below. See Standard 7(d). For additional details, see the cited subparagraphs of Standards 7 and 8.

- Family relationships or significant personal relationships with a party or a party's lawyer. Standard 7(d)(1)–(3).
- Service as arbitrator for a party or a party's lawyer. Standard 7(d)(4).
- Compensated services as another type of ADR neutral involving a party or a party's lawyer. Standard 7(d)(5). See *Guseinov v Burns* (2006) 145 CA4th 944, 955–958, 51 CR3d 903 (arbitrator's failure to disclose his prior service as a mediator in a matter involving plaintiff's attorney did not violate Standard 7(d)(5) because he served as volunteer mediator and received no compensation for this service).
- Current arrangements with a party for prospective services as a neutral. Standard 7(d)(6).
- Attorney-client relationships or other professional relationships with a party or a party's lawyer. Standards 7(d)(7)–(8).
- Financial interests in a party or in the subject matter of the arbitration, including interests that could be substantially affected by the arbitration. Standards 7(d)(9)–(11).
- Knowledge of the disputed facts. Standard 7(d)(12).

- Membership in organizations practicing discrimination. Standard 7(d)(13).

Inability to conduct or timely complete proceedings. An arbitrator must also disclose (Standard 7(e)):

- If the arbitrator is not able to properly perceive the evidence or properly conduct the proceedings because of a permanent or temporary physical impairment; and
- Any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner.

Continuing duty. An arbitrator's duty to disclose the matters described above is a continuing duty, applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding. Standard 7(f).

Consumer arbitrations. Additional disclosures are required in connection with consumer arbitrations administered by provider organizations. For details, see Standard 8.

Disqualification. An arbitrator is disqualified if (Standard 10):

- The arbitrator fails to comply with the obligation to make disclosures and a party serves a notice of disqualification in the manner and within the time specified in CCP §1281.91;
- The arbitrator complies with the obligation to make disclosures within ten calendar days of service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in CCP §1281.91;
- The arbitrator makes a required disclosure more than ten calendar days after service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in CCP §1281.91;
- A party becomes aware that an arbitrator has made a material omission or material misrepresentation in the disclosure and, within 15 days after becoming aware of the omission or misrepresentation and within the time specified in CCP §1281.91(c), the party serves a notice of disqualification that clearly describes the material omission or material misrepresentation and how and when the party became aware of this omission or misrepresentation; or
- If any ground specified in CCP §170.1 exists and the party makes a demand to disqualify the arbitrator in the manner and within the time specified in CCP §1281.91(d).

For purposes of disqualification, "obligation to make disclosure" means an arbitrator's obligation to make disclosures under Standard 7, Standard 8, or CCP §1281.9. Standard 10(b).

Notwithstanding any contrary request, consent, or waiver by the parties, an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially. Standard 10(c).

Duty to refuse gift, bequest, or favor. For details, see Standard 11.

Duties and limitations regarding future professional relationships or employment. For details, see Standard 12.

Conduct of proceeding. An arbitrator must conduct the arbitration fairly, promptly, and diligently and in accordance with the applicable law relating to the conduct of arbitration proceedings, and in making the decision, an arbitrator must not be swayed by partisan interests, public clamor, or fear of criticism. Standard 13.

Ex parte communications. Standard 14 requires the following:

- An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the arbitrator outside the presence of all of the parties concerning a pending or impending arbitration, except as permitted by Standard 14 (see below), by agreement of the parties, or by applicable law.
- An arbitrator may communicate with a party in the absence of other parties about administrative matters, such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings, as long as the arbitrator reasonably believes that the communication will not result in a procedural or tactical advantage for any party. When such a discussion occurs, the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity to respond before making any final determination concerning the matter discussed.
- An arbitrator may obtain the advice of a disinterested expert on the subject matter of the arbitration if the arbitrator notifies the parties of the person consulted and the substance of the advice and affords the parties a reasonable opportunity to respond.

Confidentiality. Standard 15 requires the following:

- An arbitrator must not use or disclose information that he or she received in confidence by reason of serving as an arbitrator in a case to gain personal advantage. This duty applies from acceptance of appointment and continues after the conclusion of the arbitration.
- An arbitrator must not inform anyone of the award in advance of the time that the award is given to all parties. This standard does not prohibit an arbitrator from providing all parties with a tentative or draft decision for review or from providing an award to an assistant or to the provider organization that is coordinating, administering, or providing the arbitration services in the case for purposes of copying and distributing the award to all parties.

Compensation. Standard 16 requires the following:

- An arbitrator must not charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration.
- Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees and any special fees for cancellation, research and preparation time, or other purposes.

Marketing. Standard 17 requires the following:

- An arbitrator must be truthful and accurate in marketing his or her services and must not make any representation that directly or indirectly implies favoritism or a specific outcome. An arbitrator must ensure that his or her personal marketing activities and any activities carried out on his or her behalf, including any activities of a provider organization with which the arbitrator is affiliated, comply with this requirement.
- An arbitrator must not solicit business from a participant in the arbitration while the arbitration is pending.

An arbitrator may accept another arbitration from a party or a party's lawyer while the first matter is pending, as long as the arbitrator complies with Standard 12 regarding future professional relationships and employment, and there was no express solicitation of this business by the arbitrator. Comment to Standard 17.

Effect of violation of standards. A violation of the standards may, under some circumstances, be grounds for vacating the arbitrator's award. For example, the award may be vacated if the arbitrator failed to comply with the disclosure requirements (see CCP §1286.2(a)(6)(A); Standard 7), or if "the rights of the party were substantially prejudiced" by the violation of other obligations under the standards (see CCP §1286.2(a)(3)). Comment to Standard 1.

3. [§2.82] Procedures

The parties' arbitration agreement generally establishes the procedures to be followed in the arbitration. The CAA establishes certain procedures that apply when the parties' contract is silent on a particular topic, such as the appearance of witnesses. CCP §1282.2. The CAA also specifically requires that the arbitrator's award be in writing and include a determination of all the questions submitted to the arbitrator. CCP §1283.4. Unless required to do so by the parties' agreement, an arbitrator need not make any findings of fact or give any reasons for making the award. *Cothron v Interinsurance Exch.* (1980) 103 CA3d 853, 860, 163 CR 240.

4. [§2.83] Judicial Review; Enforcement of Awards

Contractual arbitration awards are final and binding unless the arbitration agreement specifically provides otherwise. The very limited grounds for judicial review of these awards are the same as those for correcting or vacating an award. See §8.4 for further discussion of judicial review of contractual arbitration awards.

5. [§2.84] Arbitration Required by Contract

In addition to the CAA, several statutes authorize arbitration agreements in specific types of contracts. Some of these statutes also outline special requirements for those agreements:

- Franchisers and franchisees may agree to binding arbitration of disputes if the arbitration meets the applicable standards in the Business and Professions Code, including selection of the arbitrator from a list of arbitrators supplied by the American Arbitration Association. Bus & P C §§20040–20043.
- If a real estate contract contains a provision for binding arbitration, the contract must include a prominent notice that the parties are giving up their right to a jury trial. See CCP §1298.
- Employers and employees at public schools and institutes of higher education are specifically authorized to include agreements for final and binding arbitration of disputes in their collective bargaining agreements. Govt C §§3548.5, 3589.
- Arbitration provisions in contracts for medical services are specifically authorized, but the contract must contain a prominent notice that the parties are giving up their right to a jury trial. See CCP §1295; Health & S C §1599.81.
- Auto insurance policies are required to provide for binding arbitration of disputes between the insurer and the insured over whether the insured is entitled to recover damages, and, if so, in what amount under the policy's uninsured motorist coverage and

Ins C §11580.2(f). See §5.18 for discussion of statutes requiring the use of binding ADR processes.

- Arbitration provisions in contracts between athlete agents and athletes, or talent agents and artists, are valid only if they meet specific criteria, including providing the state Labor Commissioner with notice of all arbitration hearings and an opportunity to attend them. Lab C §§1544, 1700.45.
- Public works contracts may include provisions for the arbitration of specified disputes unless prohibited by law. Pub Cont C §22201.

E. [§2.85] Arbitration Required by Statute

Certain disputes are required by statute to be submitted to arbitration. The following are examples:

- Fee disputes between an insurer and counsel hired by that insurer to represent its insured because of a conflict of interest between the insurer and the insured (*Cumis* counsel) must be submitted to binding arbitration if they are not settled by other dispute resolution processes provided for in the insurance policy. CC §2860(c).
- All disputes between public school districts concerning funds, property, or obligations when territory withdrawn from one district is added to another must be submitted to binding arbitration. Ed C §§35565, 81501.
- All disputes between the governing board of a community college and an employee regarding discipline must be submitted to an arbitration proceeding conducted in accordance with the Administrative Procedure Act. Ed C §§87674–87677.
- Disputes between the Department of Fish and Game and persons planning to substantially divert streams or change streambeds, regarding proposed project modifications to protect fish an wildlife resources, must be submitted to a panel of arbitrators whose decisions are binding. Fish & G C §§1601–1603.
- When a decision of the Director of the Department of Fish and Game to close a commercial fishing ground is appealed, that appeal must be considered by an arbitration panel convened by the director. Fish & G C §7710.1.
- Disputes between appraisers appointed to determine the replacement value of aquatic plants or animals destroyed by the Department of Fish and Game must be submitted to arbitration under the Commercial Arbitration Rules of the American Arbitration Association. Fish & G C §15512.
- Certain issues in worker's compensation proceedings, including the existence of coverage, are required to be submitted to arbitration in cases in which the claimant is represented by an attorney. Lab C §5275.
- All disputes arising under contracts made under the State Contract Act must be submitted to the Public Works Contract Arbitration Program established by that Act, unless the parties to the contract waive this requirement in writing after a claim has arisen. Pub Cont C §§10240–10240.13. This program differs from most other arbitration programs in that, unless the parties to the contract otherwise agree, the arbitrator is required to follow the substantive law (Pub Cont C §10240.8); the award must be in writing and contain the basis for the decision, finding of fact, and conclusions of law (Pub Cont C §10240.8); and

a reviewing court must vacate an award that does not conform to the statutory requirements or is not supported by substantial evidence (Pub Cont C §10240.12).

Local agencies may choose to have their claims arising from a public works contract arbitrated under the program, or in court according to procedures set forth in Pub Cont C §§20104.2 and 20104.4. These court procedures generally provide for a meet-and-confer session, early mediation after a complaint is filed (unless waived by both parties), and mandatory judicial arbitration if the claim is not settled after mediation.

F. [§2.86] Arbitration Required by Statute If Requested by a Party

Certain disputes are required by statute to be submitted to arbitration at the request of one party. The following are examples:

- In attorney-client fee disputes, arbitration is mandatory if requested by the client or if the client has agreed to it in writing. Bus & P C §6200(c).
- The owner of an easement or the owner of the property to which the easement is attached may apply to court for appointment of an arbitrator to apportion liability between the parties for maintenance of the easement. CC §845.
- A Hazardous Substance Cleanup Arbitration Panel apportions liability for the costs of removal and remedial actions to clean up hazardous substances. Health & S C §25356.2. A party may convene an arbitration proceeding by agreeing to submit to binding arbitration by the panel. Health & S C §25356.3.
- On the request of any manufacturer or contractor in the garment industry, the Conciliation Service of the Department of Industrial Relations must appoint an arbitration panel to hear a dispute between the parties regarding pricing and product quality. Lab C §§2685–2692.
- On the submission of a dispute by one or both parties, the Workers Compensation Appeals Board is authorized to act as an arbitrator in controversies arising from insurance policies issued to self-employed persons. Lab C §5308.
- If a disagreement arises between the seller and purchaser of an interest in an oil tract regarding the fair market value of the tract, either party may request that an arbitration committee be created to determine the value. Pub Res C §3647.
- Taxpayers may request arbitration of an apportionment or allocation of tax liability between states participating in the Multistate Tax Compact. Rev & T C §38006, art IX.

G. [§2.87] Arbitration by Agreement of All Parties

Certain disputes are required by statute to be submitted to arbitration when all parties concur. The following are examples:

- Certain types of alleged contractor violations of the Business and Professions Code when the damages are greater than $5000 and less than $25,000, and any related disputes between the licensee and the complainant, may be referred to arbitration according to the rules specified in Bus & P C §§7085–7085.8. If the damages are $5000 or less, arbitration is mandatory. The complainant may enforce the award from this arbitration under the statutes governing enforcement of contractual arbitration awards. CCP §§1285–1288.8; Bus & P C §7085.

- The parties to an eminent domain proceeding may agree to refer the proceeding to arbitration or mediation. For the applicable rules, see CCP §§1250.420–1250.430.
- Persons authorized to acquire property for public use are authorized to enter into agreements to arbitrate disputes for the compensation to be paid for the property. CCP §§1273.010–1273.050.
- A public school employer and an employee representative may agree to submit to binding arbitration disputes regarding the interpretation, application, or violation of their collective bargaining agreement. Govt C §3548.6.
- The state and a hospital may jointly elect to submit to binding arbitration disputes regarding alleged violations by the hospital of requirements relating to records of transfers. Health & S C §1317.4(h)(6).
- A county mutual fire reinsurance company and a member of that company may agree to submit to binding arbitration a dispute regarding the amount of a loss. Ins C §8073.
- With approval of the court, the personal representative, guardian, or conservator of an estate and a third person may agree to submit to arbitration a dispute relating to the estate. Prob C §§2406, 9621.
- Transit boards and employee representatives may agree to submit disputes regarding the terms to be included in a collective bargaining agreement to binding arbitration by a panel of arbitrators chosen by the parties. Pub Util C §120502.
- A transit development board and employee representatives may agree to submit disputes regarding development of a new contract or the interpretation of an old contract to binding arbitration by a board of arbitrators chosen by the parties. Pub Util C §125525.
- When there is a dispute between taxing authorities of California and any other state regarding the domicile of a decedent, the taxing authorities may agree to submit the dispute to arbitration under the rules established by California statute. Rev & T C §§13820–13820.13, 13830–13830.13.
- Cities and persons causing damage by entering watersheds are authorized to enter into agreement for the arbitration of these damage claims. Wat C §1246.

XI. PRIVATE JUDGING

A. [§2.88] DESCRIPTION

In private judging, a person chosen and compensated by the parties is appointed by the court to hear and decide the case. The hearing procedures are flexible, but generally follow court hearing procedures. The private judge's decision is binding on the parties and is treated as the decision of the court. Because the parties' stipulation to use the private judge must be submitted for approval to the court (see §2.93), this resolution process is not entirely private.

The parties and attorneys generally assume the same roles that they would in a court adjudication.

B. [§2.89] WHEN PRIVATE JUDGING MAY BE APPROPRIATE

Private judging can be used in any civil dispute, but may be particularly appropriate when the case would otherwise go to trial and the litigants want

- A particular individual to decide the case,
- The dispute to be decided quickly,
- A certain trial date so the parties and their attorneys can plan schedules and such things as the appearance of expert witnesses,
- Assurance of an uninterrupted trial, and
- The right to appeal from an adverse decision.
- Private judging may not be appropriate when:
- The parties want help in improving their lines of communication, finding common ground, or working toward a creative solution to the dispute.
- The parties have not yet explored less costly resolution processes. Because the costs of private judging are comparable to those of litigation, private judging may be inappropriate when less expensive dispute resolution techniques have not been explored.

C. [§2.90] APPLICABLE LAW

A person chosen by the parties to hear and decide a case as a private judge may be appointed by the court in one of two ways:

- As a temporary judge (Cal Const art VI, §21); or
- As a referee under the general reference procedure (CCP §§638–645.1). This procedure also serves as the basis for court-supervised fact-finding. See §§2.99–2.107.

1. [§2.91] Chart: Comparison Between Consensual General Referee and Temporary Judge

The following are the principal differences between a general referee appointed with the parties' consent under CCP §§638, 640 and a temporary judge appointed under Cal Const art VI, §21.

	Consensual General Referee	Temporary Judge
Number and qualifications	Up to three persons may be appointed as referees. There is no requirement that they be members of the state bar.	Only one person can be appointed as temporary judge. That person must be a member of the state bar.
Basis for appointment	Based on agreement entered into either before or after filing of lawsuit.	Based on stipulation of "the parties litigant," *i.e.*, entered into after lawsuit has been filed.
Powers	Has only powers specifically stated in order of reference	Has same powers as trial judge.
Decision	Renders statement of decision; trial judge renders judgment.	Renders judgment.

	Consensual General Referee	Temporary Judge
Proceedings after trial	May hear proceedings after trial only if specifically authorized to do so in order of reference.	May hear proceedings after trial. See §2.95.

2. [§2.92] Temporary Judge

Article VI, §21 of the California Constitution provides:

On stipulation of the parties, you may order an action to be tried by a temporary judge (also known as a private judge) who is a member of the state bar, sworn and empowered to act until final determination of the action.

a. [§2.93] Parties' Stipulation

The constitutional requirement of a stipulation "of the parties litigant" has been interpreted to mean that all the parties who have appeared must stipulate to the appointment of the temporary judge. *Sarracino v Superior Court* (1974) 13 C3d 1, 6, 118 CR 21. For them to be "parties litigant," there must be pending litigation. Thus, stipulations to the appointment of a temporary judge may be entered into only after an action has been filed. See Knight, Chernick, Haldeman & Bettinelli, California Practice Guide: Alternative Dispute Resolution §§6:25–6:34 (The Rutter Group 2007).

The California Rules of Court require the stipulation of the parties to be in writing. Cal Rules of Ct 2.831(a). However, appointments based on both oral stipulation and actions "tantamount to a stipulation" (*i.e.*, participating without objection in a proceeding before a temporary judge) have been upheld. See *In re Richard S.* (1991) 54 C3d 857, 864–866, 2 CR2d 2; *In re Horton* (1991) 54 C3d 82, 91, 284 CR 305. The parties must submit their stipulation for approval to the presiding judge or to the presiding judge's designee, *e.g.*, the supervising judge of a branch court. Cal Rules of Ct 2.831(a). The order that the judge signs must refer to the stipulation. After the signed order is filed, the temporary judge must take and subscribe the oath of office and certify that he or she will comply with Cal Rules of Ct, Code of Judicial Ethics, Canon 6, and with the Cal Rules of Ct. Cal Rules of Ct 2.831(b).

b. [§2.94] Selection of Temporary Judge

Article VI, §21 calls for the appointment of *a* temporary judge. Thus, only one person may be appointed as a temporary judge in a given case. You may issue a blanket order approving a particular person as a temporary judge in all cases in which the parties stipulate to that person. See *Marriage of Crook* (1991) 235 CA3d 30, 32, 286 CR 537. Appointment of a temporary judge to a case must be made strictly in accordance with the parties' stipulation. Therefore, when the parties stipulate to the appointment of a certain person and that person recuses himself or herself, the court may not appoint a different person over a party's objection. *Kim v Superior Court* (1998) 64 CA4th 256, 261, 75 CR2d 468.

Temporary judges are subject to disqualification under CCP §§170.1–170.5. They must comply with Cal Rules of Ct, Code of Judicial Ethics, Canon 6D, *i.e.*, they must disclose to the parties any potential grounds for disqualification and any facts that might reasonably cause a party to doubt that the temporary judge can be impartial. Cal Rules of Ct 2.831(d).

c. [§2.95] Temporary Judge's Powers

Article VI, §21 requires that a temporary judge be empowered to act until final determination of the cause. A temporary judge thus has the same powers as a sitting judge in the proceeding that he or she has been appointed to try, including the authority to render a judgment in the case. See *Sarracino v Superior Court* (1974) 13 C3d 1, 10, 118 CR 21.

The powers under art VI, §21 extend until final determination of the cause, a period that includes posttrial proceedings. See *McCartney v Superior Court* (University of Southern California) (1990) 223 CA3d 1334, 1339, 273 CR 250 (motion to reconsider); *Anderson v Bledsoe* (1934) 139 CA 650, 651, 34 P2d 760 (motion for new trial); *Reisman v Shahverdian* (1984) 153 CA3d 1074, 1095–1096, 201 CR 194 (motion to vacate judgment).

d. [§2.96] Compensation

Temporary judges are compensated by the parties as agreed by them in writing. Cal Rules of Ct 2.832.

e. [§2.97] Use of Court Facilities

Parties who have elected to use the services of a privately compensated temporary judge are deemed to have elected to proceed outside the courthouse, and therefore court facilities and personnel may not be used, except on a finding by the presiding judge that it would further the interest of justice. Cal Rules of Ct 2.833(b).

f. [§2.98] Public Access to Proceedings

For all matters pending before a privately compensated temporary judge, the court clerk must post a notice indicating the case name and number and the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. Cal Rules of Ct 2.833(a). On any person's request, or on a judge's own motion, an order may be issued requiring the trial to be held at a site easily accessible to the public, with appropriate seating for those who have made known their plan to attend. Cal Rules of Ct 2.833(c).

3. General Reference

a. [§2.99] Voluntary and Binding Nature; When Appropriate

A reference for private judging is called a general reference or judicial reference. The referee is empowered to hear the case and make a binding decision (see CCP §638(a)), rather than simply to make nonbinding, advisory recommendations to the court, as in a special reference (see CCP §638(b), discussed in §§2.49–2.62). All general references must be voluntary. *In re Edgar M.* (1975) 14 C3d 727, 734, 122 CR 574. Absent the consent of all parties, a general reference constitutes an unconstitutional abdication of judicial authority. *Aetna Life Ins. Co. v Superior Court* (1986) 182 CA3d 431, 435, 227 CR 460.

The following factors may indicate that a general reference is *appropriate*:

- The parties want the dispute decided
  - — Quickly. The trial may usually be scheduled at a mutually convenient time, sooner than the case can be scheduled on the court's trial calendar, and the referee's statement of decision must be rendered within 20 days after the close of testimony. See CCP §643(a).

— On a certain date, to enable the parties and their attorneys to plan their schedules and to facilitate appearances by expert witnesses.

— By a specific individual who has special expertise regarding the subject matter of the dispute. Unlike a temporary judge (see §2.88), a referee need not be a member of the State Bar.

— By a panel of individuals. There may be up to three referees. CCP §640(a), (b). Only one individual may be appointed for private judging. See Cal Const art VI, §21.

- The parties want simplified procedural and evidentiary rules to apply.
- The parties want to limit the decision maker's powers, *e.g.*, to preclude the power to punish contempt.
- The parties want the right to appeal from an adverse decision.

The following factors may indicate that a general reference is *inappropriate*:

- The parties have not yet explored less costly resolution processes such as neutral evaluation (see §§2.45–2.46) or mediation (see §§2.6–2.7).
- The parties want the decision maker to have broad powers equivalent to those of a judge, *e.g.*, the power to hear posttrial motions, which a referee has only if specifically granted under the parties' agreement and the order of appointment (see *Clark v Rancho Santa Fe Ass'n* (1989) 216 CA3d 606, 623, 265 CR 41).
- A party wants to tell its story fully, needs an outlet for frustration or anger, or seeks personal satisfaction, *e.g.*, an apology. Mediation may be more appropriate.
- The parties want the proceedings to remain private. Ordinarily the proceedings may be held at whatever location the parties select. This usually ensures privacy. The court clerk, however, is required to post a notice giving information about all matters pending before privately compensated referees, including the case name and number, and the telephone number of a person whom interested members of the public may call to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. On any person's request or on a judge's own motion, an order may be issued requiring the proceedings to be held at a site easily accessible to the public, with appropriate seating for those who have made known their plan to attend. See Cal Rules of Ct 3.910. The records in the case are public, unless the judge grants a motion that they be sealed. See Cal Rules of Ct 2.550(c).

b. [§2.100] Grounds for Order

An order of general reference must be based on one of two grounds:

- The agreement of the parties filed with the clerk or judge or entered in the minutes or in the docket. CCP §638. Judicial Council form ADR-109 may be used for this purpose. Although dictum in one case suggests otherwise, this statutory provision has been held to authorize oral stipulations in open court for appointment of a referee (see *Garland v Smith* (1933) 131 CA 517, 524, 21 P2d 688; *Estate of Hart* (1938) 11 C2d 89, 91, 77 P2d 1082; Knight, Chernick, Haldeman & Bettinelli, California Practice Guide: Alternative Dispute Resolution §§6:123–6:125 (The Rutter Group 2007)); or

- The motion of a party seeking to enforce a written contract or lease that provides that any controversy arising from it must be heard by a reference. CCP §638.

c. [§2.101] Parties' Stipulation or Motion

The stipulation or motion for the appointment of a referee under section 638 must state:

- Whether the scope of the requested reference includes all issues or is limited to specified issues;
- Whether the referee will be privately compensated;
- If authorization to use court facilities or court personnel is requested, the use requested and why this would further the interests of justice; and
- If a particular referee's appointment is requested, the proposed referee's certification that he or she consents to the appointment and will comply with Cal Rules of Ct, Code of Judicial Ethics, Canon 6, and with the Cal Rules of Ct.

It must also be accompanied by a proposed order that includes the matters specified in rule 3.902 (see §2.104).

d. [§2.102] Selection of Referee

You must appoint the person or persons (up to three) agreed on by the parties as the referee(s). CCP §640(a). The agreement to submit the matter to a referee must be presented to you together with a proposed order of reference that states the name, business address, and telephone number of each proposed referee and includes each proposed referee's signature indicating consent to serve. Cal Rules of Ct 3.901(a), 3.902(1). If the parties do not agree on the selection of the referee or referees, each party must submit to you up to three nominations. You must then appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. CCP §640(b).

If no nominations are received, you must appoint one or more referees against whom there is no legal objection, or appoint a court commissioner of the county where the action is pending to serve as the referee. CCP §640(b). All persons, including referees, appointed by a court must be selected on the basis of merit and without discrimination on the basis of gender, race, ethnicity, disability, sexual orientation, or age. Cal Rules of Ct 10.611. This policy is reinforced by Cal Rules of Ct, Standards of J Admin 10.21(b), which states that each trial court should conduct a recruitment procedure that publicizes its appointment programs and maximizes the opportunity for a diverse applicant pool.

e. [§2.103] Required Disclosures; Disqualification

Referees must comply with Cal Rules of Ct, Code of Judicial Ethics, Canon 6D, which requires disclosure of a wide variety of matters that might be grounds for disqualification. On the grounds for disqualification and the procedure for objecting to the appointment of a referee, see CCP §§641–642; Cal Rules of Ct 3.904, 3.905.

f. [§2.104] Order of Appointment

If you appoint a general referee under CCP §638, you must issue a written order that states the following (Cal Rules of Ct 3.902):

- The name, business address, and telephone number of the proposed referee, and if he or she is a member of the State Bar, the proposed referee's State Bar number;
- A statement specifying whether the scope of the reference covers all issues or is limited to specified issues;

- Whether the referee will be privately compensated;
- Whether the use of court facilities and court personnel is authorized; and
- The name and telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse.

Judicial Council form ADR-110 (see §2.60) may be used for this purpose.

g. [§2.105] Use of Court Facilities

A party who has elected to use a privately compensated referee under CCP §638 is deemed to have elected to proceed outside the courthouse, and therefore court facilities and personnel must not be used, except on a finding by the presiding judge that the use would further the interests of justice. Cal Rules of Ct 3.909(a).

h. [§2.106] Public Access to Proceedings

For all matters pending before privately compensated referees, the court clerk must post a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. Cal Rules of Ct 3.909(b).

On any person's request, or on your motion, an order may be issued requiring the trial to be held at a site easily accessible to the public, with appropriate seating for those who have made known their plan to attend. Cal Rules of Ct 3.910.

i. [§2.107] Enforcement of Agreement or Decision

A general referee renders a statement of decision (CCP §643), on which judgment is entered as if the action had been tried by the court (CCP §644). This judgment is subject to appeal like any other court judgment. CCP §645.

In *Murphy v Padilla* (1996) 42 CA4th 707, 712, 49 CR2d 722, the court stated that an oral stipulation made before a general referee could support an enforceable settlement agreement under CCP §664.6. The court held that an oral stipulation made before a subordinate court officer must meet a two-part test to be considered "before the court" under the provisions of CCP §664.6: the court officer must have adjudicatory powers, and the court officer must, in fact, have acted in that capacity.

XII. COURT ADJUDICATION

A. [§2.108] When Use May Be Appropriate

The following factors may indicate that it is appropriate for the parties to reject possible alternatives and to pursue the lawsuit to trial:

- A party wants a clear-cut decision on the law as a guide for its future activities or as legal precedent.
- The dispute revolves around a clash of principles, and a party wants to prevail without any compromise.
- There is an strong public interest in the outcome of the dispute or in having misconduct sanctioned publicly.
- A party needs immediate provisional or equitable relief.

B. [§2.109] WHEN USE MAY NOT BE APPROPRIATE

A dispute resolution process *other* than pursuing the lawsuit to trial may be more appropriate if one or more of the following factors are present:

- The parties want to keep the dispute private. Other dispute resolution processes may be more private.
- Potential litigation costs are high relative to the amount in controversy. Other dispute resolution processes may be less costly.
- The disputants want to resolve their dispute quickly. Other dispute resolution processes may be faster.
- The remedies available in the context of litigation cannot be tailored to the parties' interests or needs. Mediation, a settlement conference, or another facilitative process may be more appropriate.
- A party wants to tell its story fully, needs an outlet for frustration or anger, or seeks personal satisfaction, *e.g.*, an apology. Mediation may be more appropriate.
- The parties want to preserve or establish an ongoing business or personal relationship. Mediation may be more appropriate.
- The parties want to maintain control over the resolution process. Other dispute resolution processes may afford parties greater control.

Chapter 3
LAWS ENCOURAGING USE OF ADR AND ESTABLISHING GENERAL DUTIES

I. [§3.1] INTRODUCTION

This chapter lists the statutes and Rules of Court that establish specific ADR programs, and discusses the statutes and rules that generally encourage the use of ADR processes or that establish general duties relating to ADR.

II. [§3.2] STATUTES

The following statutes and implementing rules provide for ADR:

- Government Code §68607, part of the Trial Court Delay Reduction Act (Govt C §§68600–68620), requires courts to establish procedures for early identification and timely handling of cases amenable to settlement or other disposition techniques. Govt C §68607(d).
- Code of Civil Procedure §§1141.10–1141.31 and Cal Rules of Ct 3.810–3.830 establish a judicial arbitration program for cases in which the amount in controversy does not exceed $50,000. See §§2.67–2.78.

Code of Civil Procedure §1141.10(a) reads as follows:

> (a) The Legislature finds and declares that litigation involving small civil claims has become so costly and complex as to make more difficult the efficient resolution of such civil claims that courts are unable to efficiently resolve the increased number of cases

> filed each year, and that the resulting delays and expenses deny parties their right to a timely resolution of minor civil disputes. The Legislature further finds and declares that arbitration has proven to be an efficient and equitable method for resolving small claims, and that courts should encourage or require the use of arbitration for such actions whenever possible.

- Code of Civil Procedure §§1775–1775.15 and Cal Rules of Ct 3.870–3.878 establish a Civil Action Mediation Program in Los Angeles and in other counties that elect to invoke this procedure, under which an action in which judicial arbitration might otherwise be required is submitted instead to mediation. See §§2.15–2.23.

  In CCP §1775(a)–(d), the Legislature states its findings regarding the merits of ADR and makes the following declarations:

  > (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.

- Article VI, §21 of the California Constitution and Cal Rules of Ct 3.900–3.927 provide for temporary judges (see §§2.92–2.98).
- Code of Civil Procedure §§638–639 and Cal Rules of Ct 3.900–3.927 provide for special references (see §§2.42–2.62) and general references (see §§2.99–2.107).
- To support, among other objectives, the use of ADR processes and to encourage courts to make referrals to ADR programs, the Dispute Resolution Programs Act (DRPA) (Bus & P C §§465–471.5) authorizes counties to make grants to governmental and nonprofit entities that provide dispute resolution services and to allocate a portion of their civil court filing fees to pay for these grants. These local dispute resolution programs, which primarily deliver mediation services, must meet the standards set forth in the statute and in regulations (see 16 Cal Code Regs, Div 36).

  Section 465 of the DRPA declares that:

  > (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. . .
> (d) Courts . . . should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved. . . .
> (e) Counties should consider increasing the use of alternative dispute resolution in their operations . . .
> (f) The Judicial Council should consider, in redrafting or updating any of the official pleading forms used in the trial courts of this state, the inclusion of information on options for alternative dispute resolution.

On the DRPA's criteria for the qualification of neutrals, see §6.3.

Statutes covering mediation in family law proceedings are discussed in §§2.26–2.29.

Although some statutes authorize the general use of ADR, others authorize or require specific ADR procedures. For example:

- Motor vehicle manufacturers are authorized to adopt neutral-assisted dispute resolution processes that buyers must use before they may take advantage of the provisions of California's "Lemon Law" (CC §1793.2; Bus & P C §§472–472.5). Each process must meet the requirements specified by the Federal Trade Commission, as well as standards stated in the Lemon Law.
- The mandatory personal injury coverage in automobile liability insurance contracts must provide for disputes to be resolved by arbitration. Ins C §11580.2(f). The Director of the Department of Food and Agriculture must adopt procedures for the resolution of disputes arising from the regulation of pesticides. The procedures prescribed may include mediation and arbitration. Food & A C §13127(c)(1).
- County transit development boards must establish procedures to resolve disputes between public transit operators and local agencies. Pub Util C §120478.

On confidentiality in connection with ADR, see §§7.1–7.10; on immunity see §7.11.

III. RULES

A. [§3.3] RULES IMPOSING GENERAL ADR DUTIES

Judicial Council rules impose various duties in connection with ADR on courts, court administrators, ADR neutrals, and litigants. Cal Rules of Ct 10.780–10.783. See §§3.4–3.6.

These rules apply to all general civil cases, which (for purposes of the ADR rules) are defined as all limited and unlimited civil cases except the following: probate; guardianship; conservatorship; family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act (which has been superseded by the Uniform Child Custody Jurisdiction and Enforcement Act), freedom from parental custody and control proceedings, and adoption proceedings); juvenile court proceedings; small claims proceedings; unlawful detainer proceedings; and other civil petitions as defined by the Judicial Branch Statistical Information System Data Collection Standards. Cal Rules of Ct 1.6(4).

1. [§3.4] Duties of Courts

Promoting ADR programs. Each court should "promote the development, implementation, maintenance, and expansion of successful mediation and other alternative dispute resolution (ADR) programs," through various activities. These activities include (Cal Rules of Ct, Standards of J Admin 10.70(b)):

- Establishing appropriate criteria for determining which cases should be referred to ADR and what ADR processes are appropriate for those cases. These criteria should include whether the parties are likely to benefit from the use of the ADR process.
- Developing, refining, and using lists of qualified ADR neutrals.
- Adopting appropriate criteria for referring cases to qualified ADR neutrals.
- Developing ADR information and providing educational programs for parties who are not represented by counsel.
- Providing ADR education for judicial officers.

Appointing administrator. The presiding judge of each trial court must designate the clerk or executive officer, or another court employee who is knowledgeable about ADR processes, to serve as ADR program administrator and as arbitration administrator. Cal Rules of Ct 10.783(a), 3.813(a). For the duties of this administrator, see §3.5.

ADR Committees. Each superior court that has 18 or more authorized judges must have an ADR committee; other courts may by rule establish such committees. Cal Rules of Ct 10.783(b)(1), (3). On the judges and nonjudges who comprise the membership and the terms of their appointment, see Cal Rules of Ct 10.783(b)(1). The committee is responsible for overseeing the court's ADR programs for general civil cases, including the responsibilities specified in Cal Rules of Ct 3.813(b) relating to the court's judicial arbitration program. Cal Rules of Ct 10.783(b)(5).

Information packages. At the time of filing the complaint, the trial court must make available to the plaintiff an ADR information package that includes, at a minimum, all the following (Cal Rules of Ct 3.221(a)):

- General information about the potential advantages and disadvantages of ADR and descriptions of the principal ADR processes (discussed in §§2.1–2.109). The Administrative Office of the Courts (AOC) has prepared and distributed a pamphlet entitled Alternative Dispute Resolution: Options for Resolving Your Dispute, which provides the basic information.
- 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.
- In counties that are participating in the Dispute Resolution Programs Act (DRPA) (Bus & P C §§465–471.5), discussed in §§3.2, 4.3, and 6.3, information about whether local dispute resolution programs funded under the DRPA are available. This information may take the form of a list of the applicable programs or directions for contacting the county's DRPA coordinator.
- An ADR stipulation form that parties may use to stipulate to the use of an ADR process. Each court may tailor this form to the services that it offers. For a sample ADR stipulation form, see §3.14.

A court may make its ADR information form available on its Web site, provided that paper copies are made available in the clerk's office. Cal Rules of Ct 3.221(b).

An additional source of detailed information about ADR on the Web is the *California Courts Self-Help Center*, available at http://www.courtinfo.ca.gov/selfhelp/lowcost/adr.htm. Printouts of the first two pages of this Web site appear below.

CALIFORNIA COURTS
Self-Help Center

You Don't Have to Sue (Solve a Problem Without Going to Court)

Suing someone in court isn't the only way to solve a legal problem. More and more people are using other ways to solve their legal problems outside of court. These alternatives are called "alternative dispute resolution," or "ADR" for short.

There are many different kinds of ADR. But all of them use a neutral person to decide your case or help you and the other side to come to an agreement.

- Learn more about different ADR options (includes videos)
- Find an ADR program.
- Find ADR Links.
- Questions & Answers About ADR

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Recruiting and retaining ADR neutrals. Each court should evaluate the ADR training, experience, and skills of potential ADR neutrals. Cal Rules of Ct, Standards of J Admin 10.72(a). If the court makes a list of ADR neutrals available to litigants, the list must contain, at a minimum, the following information concerning each neutral listed (Cal Rules of Ct 10.781(a)): the types of ADR services available from the neutral; the neutral's resume, including ADR training and experience; and the fees charged by the neutral for each type of service. On the duties of ADR neutrals who want to be included on this list, see §3.6.

All persons, including neutrals, appointed by a court must be selected on the basis of merit and without discrimination on the basis of gender, race, ethnicity, disability, sexual orientation, or age. Cal Rules of Ct 10.611. This policy is reinforced by Cal Rules of Ct, Standards of J Admin 10.21(b), which states that each trial court should conduct a recruitment procedure that publicizes its appointment programs and maximizes the opportunity for a diverse applicant pool.

Reports. All trial courts must report information about their ADR programs to the Judicial Council, as requested by the Administrative Office of the Courts (Cal Rules of Ct 10.782(a)). For the ADR Information Form (Judicial Council Form ADR-101) that must be submitted quarterly by courts participating in the CCP §§1775–1775.15 Civil Action Mediation Program, see §2.24.

Coordinating ADR activities. Superior courts should coordinate their ADR promotional activities and explore joint funding and administration of ADR programs with each other and with professional and community-based organizations. Cal Rules of Ct, Standards of J Admin 10.70(c).

2. [§3.5] Duties of ADR Program Administrators

The duties of the ADR program administrator include:

- Generally supervising the operation of the court's arbitration program. Cal Rules of Ct 3.813(a).
- Developing informational material concerning the court's ADR programs. Cal Rules of Ct 10.783(a)(1).
- Educating litigants and attorneys about the court's ADR programs. Cal Rules of Ct 10.783(a)(2). For a discussion of the preconceptions that may have to be overcome, see §§4.4, 4.6.
- Supervising the development and maintenance of any panels of ADR neutrals maintained by the court. Cal Rules of Ct 10.783(a)(3).
- Supervising the selection of arbitrators for cases on the judicial arbitration hearing list. Cal Rules of Ct 3.813(a).
- Gathering statistical and other evaluative information concerning the court's ADR programs. Cal Rules of Ct 10.783(a)(4).

3. [§3.6] Duties of ADR Neutrals

Each ADR neutral who wants to be included on a trial court's list (see §3.4) must (Cal Rules of Ct 10.781(b)):

- Sign a certificate agreeing to comply with all applicable ethical requirements.
- Agree to serve as an ADR neutral on a pro bono or modest-means basis in at least one case per year, not to exceed eight hours, if requested by the court.

All mediators in court-connected mediation programs in general civil cases must comply with the standards of conduct stated in Cal Rules of Ct 3.850–3.868. See §2.13.

Subject to the confidentiality requirements of Evid C §§1115–1128 (see chap 7), all ADR neutrals must supply pertinent information to the court for its reports on ADR to the Judicial Council. Cal Rules of Ct 10.782(b).

4. Duties of Judges

a. [§3.7] Case Management Conference

As part of the courts' general responsibilities for achieving delay reduction in the courts, Cal Rules of Ct 3.713(c) provides that it is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition. To implement this responsibility, courts must evaluate each case to determine how the case should be managed (see Cal Rules of Ct 3.714, 3.715). The courts must consider whether some or all of the issues can be arbitrated or resolved through other alternative dispute resolution processes. Cal Rules of Ct 3.715(a)(10).

The judge must enter a case management order following the case management conference or review. Cal Rules of Ct 3.728. The order may include referral of the case to judicial arbitration or another ADR process and a date for completion of that process. Cal Rules of Ct 3.728(1)–(2).

In every general civil case, unless it falls within an exception, the judge must review the case no later than 180 days after the filing of the initial complaint. Cal Rules of Ct 3.721. The judge must set a case management conference at which the judge must review the case comprehensively and decide various matters including whether to assign the case to an ADR process. Cal Rules of Ct 3.722(a).

Complex cases (see Cal Rules of Ct 3.400(a)) are exceptions to these case management rules. Cal Rules of Ct 3.721. Also listed in Cal Rules of Ct 3.721 as exceptions are uninsured motorist cases, coordinated cases, cases involving exceptional circumstances, cases being expedited under a local case management plan, short causes, and cases under the False Claims Act.

b. Suggested Techniques

(1) [§3.8] Discussing ADR Choices

The earlier you can introduce litigants to the possibility of using ADR, the better. At *every* conference with the parties, you should take the initiative and encourage the parties to weigh their ADR choices. You should examine the case closely enough to detect the presence of factors that may point to the use of specific resolution processes.

At the case management conference, judges typically look for the presence of factors that may point to the use of specific resolution processes. The principal resolution processes, and the factors that may make their use appropriate or inappropriate, are discussed in detail in §§2.1–2.109.

Each party's case management conference statement must indicate whether there is an ADR process in which the party would be willing to participate. See §3.12, discussing Judicial Council Form CM-110. Many judges ask the attorneys directly what ADR processes they think will work best. When attorneys seem reluctant to discuss ADR possibilities in open court, some judges invite them into chambers to explore the possibilities off the record.

To promote the fair and efficient administration of the case, you may order one or more additional case management conferences. Cal Rules of Ct 3.723; Advisory Committee's 2007 Comment to this rule.

(2) [§3.9] Chart: Questions To Consider at Case Management Conference

You or court staff can use the case management conference to question the parties and offer suggestions on ADR. This is somewhat analogous to what a lawyer would explore during the initial interview of a potential client.

You can use skillful questioning, as well as attention to tone and nonverbal communication from litigants and attorneys who may not be comfortable speaking fully and candidly about their case, to help the parties choose a process and a neutral. The following checklist includes suggested questions to consider and information to elicit, the reasons for doing so, and the ADR processes that may be appropriate. See also discussion of the "appropriateness" factors of each ADR process, in §§2.1–2.109.

Questions To Consider	Processes Suggested
Parties	
Are all necessary parties named? How many are there? Are they individuals or institutions?	Multiple parties with differing claims or defenses may be best served by mediation or reference.
Do the parties have a continuing relationship?	Parties with a continuing relationship are often good candidates for mediation.
Are the parties in unequal bargaining positions?	A party in a weaker bargaining position may be better served by a process in which the neutral maintains control, such as arbitration, private judging, or trial.
Is a party seeking mainly to advocate general principles?	Emotional issues may be best addressed in a process such as mediation.
Claims	
What types of claims are involved?	Tort, personal injury, and other money-centered matters often lend themselves to neutral evaluation or arbitration.
Are the claims complex?	Mediation or reference may be appropriate if the issues are unusually complex.
Are there technical or scientific issues?	Neutral evaluation, arbitration, and special references are often well suited to technical and scientific issues.
Are there claims of public interest?	Trial may be appropriate if a public sanctioning is desired.
Does a party want a clear-cut decision that establishes a legal precedent?	Trial may be appropriate.
Relief Sought	
Is equitable relief sought?	Mediation or trial may be suited to equitable issues.

Questions To Consider	Processes Suggested
Is the relief sought monetary? Is a fixed sum sought or will a subjective determination of the amount be required?	Neutral evaluation or arbitration may be best suited to cases involving only money damages.
Is liability admitted?	A settlement conference or binding arbitration is especially appropriate when liability is admitted.
Is a clear-cut decision desired?	Trial or arbitration may be appropriate.
Time and Costs	
Do the parties understand and accept the time it will take to resolve a case in court?	If the parties need the case resolved quickly, binding arbitration may be appropriate. Other ADR processes are generally quicker than trial.
Do they understand the full costs involved and are they prepared to pay them?	Most other ADR processes may be less costly than trial.
Party Control	
Do the parties want to keep control over the resolution?	Processes in which the neutral guides the parties' decision (such as settlement conferences, mediation, neutral evaluation, fact-finding, nonbinding arbitration, mini-trial, or summary jury trial) allow party control.
Do the parties want someone else to decide the case for them?	A conclusive decision can be rendered by a neutral in a binding arbitration, private judging, or trial setting.
Discovery/Case Readiness	
Are there motions whose timely resolution would impact ADR use?	Court action on motions or binding arbitration of certain issues can allow parties to narrow the issues in the case.
Should parties pursue discovery during ADR?	Discovery on key issues may facilitate the ADR proceeding.
Are parties having multiple discovery disputes?	A discovery referee may be needed to assist the parties in this phase.
Might the parties agree to limit discovery or share certain experts?	A referee may be able to help the parties to decide these questions.

(3) [§3.10] Script: Encouraging the Parties To Use ADR

If the attorneys have not yet agreed to use ADR, you might address them as follows:

This court expects the parties in all cases to meet and discuss using some form of ADR.

What do I mean by ADR? It is broad and includes such processes as nonbinding mediation; neutral evaluation; binding and nonbinding arbitration; settlement conferences; mini-trials; and the use of special masters or referees.

I want to see evidence of some structured effort on your part to resolve this case. The court's ADR program administrator, [*name*], is available to discuss with you what processes and ADR providers might be appropriate and available for your use.

(4) [§3.11] Script: Follow-Up Questions

At a later conference, you might address the attorneys as follows:

When are answers due? Has any person who was served not yet answered? Have you conferred with your clients about what ADR process should be used?

What kind of discovery do you think is needed? Because key facts appear to be within the personal knowledge of the parties, you may not need to conduct discovery until after you have tried to pursue an ADR process.

I will continue this case until [*date*] so that you may choose an ADR process. If necessary, I will then give you adequate time to complete that process.

5. [§3.12] Duties of Litigants

The plaintiff must serve on each defendant, together with the complaint, a copy of the ADR information package described in §3.4. Cross-complainants must serve a copy of the ADR information package on any new parties to the action together with the cross-complaint. Cal Rules of Ct 3.221(c). No later than 30 calendar days before the case management conference, the parties must meet and confer to consider various matters, including the possible use of ADR processes and possible settlement. Cal Rules of Ct 3.724(6), 3.727(6)–(7).

The case management statement (Judicial Council Form CM-110) that each party must file at least 15 calendar days before the case management conference (Cal Rules of Ct 3.725(a)) requires a response regarding each of the following items:

10. **Alternative Dispute Resolution (ADR)**
    a. Counsel ☐ has ☐ has not provided the ADR information package identified in rule 3.221 to the client and has reviewed ADR options with the client.
    b. ☐ All parties have agreed to a form of ADR. ADR will be completed by (*date*):
    c. ☐ The case has gone to an ADR process (*indicate status*):
    d. The party or parties are willing to participate in (*check all that apply*):
        (1) ☐ Mediation
        (2) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, rule 3.822)
        (3) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to remain open until 30 days before trial; order required under Cal. Rules of Court, rule 3.822)
        (4) ☐ Binding judicial arbitration
        (5) ☐ Binding private arbitration
        (6) ☐ Neutral case evaluation
        (7) ☐ Other (*specify*):

    e. ☐ This matter is subject to mandatory judicial arbitration because the amount in controversy does not exceed the statutory limit.
    f. ☐ Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.
    g. ☐ This case is exempt from judicial arbitration under rule 3.811 of the California Rules of Court (*specify exemption*):

11. **Settlement Conference**
    ☐ The party or parties are willing to participate in an early settlement conference (*specify when*):

In connection with the case management conference, the parties must address, among other things, whether they have stipulated to, or the case should be referred to, judicial arbitration or to any other form of ADR process and, if so, the date by which that process must be completed. Cal Rules of Ct 3.727(6).

If all parties agree to use an ADR process, they must jointly complete and file an ADR stipulation form. Cal Rules of Ct 3.726. For a sample stipulation form, see §3.14.

All parties must supply pertinent information to the court for its reports on ADR to the Judicial Council. Cal Rules of Ct 10.782(b).

B. STIPULATION

1. [§3.13] Rule Requiring Distribution of Stipulation Form

The information package that the court must make available to the plaintiff when the complaint is filed (see §3.4) must include a form that the parties may use to stipulate to the use of an ADR process. Cal Rules of Ct 3.221(a)(4). For a sample form, see §3.14. The ADR processes listed in this sample form are those discussed in §§2.1–2.107. Each court's form should be tailored to list the alternatives that are actually available to litigants in that court. See, *e.g.*, Los Angeles Superior Court Form ADR-001.

If the parties agree to use an ADR process, they must jointly complete and file the form. Cal Rules of Ct 3.726. The submission of this stipulation gives you an opportunity to impose time limitations (*e.g.*, on the choice of a mediator, arbitrator, referee, or other neutral, and on the completion of the ADR process), to suspend or limit discovery until the completion of the ADR process, and to make other orders (*e.g.*, on the allocation of the costs) in support of the process.

In their order (see §3.14) following the filing of this stipulation, most judges specify the date set for the trial or for a trial setting conference. In some cases they also schedule a conference at which the judge will review the parties' progress.

2. [§3.14] Sample Form: Stipulation To Participate in Alternative Dispute Resolution Process, and Order

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*Title of case*] **No. _____**

STIPULATION TO PARTICIPATE IN ALTERNATIVE DISPUTE RESOLUTION PROCESS, AND ORDER

The undersigned parties and their attorneys stipulate that they will participate in the following alternative dispute resolution process:

[ ]	Court-Connected Mediation	[ ]	Reference to Temporary Judge
[ ]	Private Mediation	[ ]	Settlement Conference With Private Neutral
[ ]	Judicial Arbitration	[ ]	Neutral Fact-Finding
[ ]	Binding Private Arbitration	[ ]	Neutral Evaluation
[ ]	Nonbinding Private Arbitration	[ ]	Mini-Trial
[ ]	Reference to General Referee	[ ]	Summary Jury Trial

[ ] Other (*specify*): _____

It is also stipulated that (e.g., *a specific person shall serve as mediator or other ADR neutral, deadlines for selection of neutral and for completion of ADR process, suspension, or limitation of discovery*)

_____
_____
_____
_____

Date: _____ Date: _____

_____ _____
Name of Plaintiff Name of Defendant

_____ _____
Signature Signature

_____ _____
Name of Plaintiff's Attorney Name of Defendant's Attorney

_____ _____
Signature Signature

IT IS SO ORDERED.

It is also ordered that (e.g., *the ADR process shall be subject to specific deadlines)*

_____
_____

Date: _____

_____
Judge of the Superior Court

Chapter 4
JUDGE AS EDUCATOR

I. [§4.1] DEFINING THE NEEDS; JUDGE'S ROLE

In 1992 the Judicial Council adopted 16 general ADR principles on the recommendation of its Advisory Committee on ADR. The strongest consensus among those who commented on the draft proposal was that education about ADR is needed for the public, litigants, attorneys, and judges.

Many judges consider it their continuing responsibility to work with the ADR program administrators of their courts to foster this education. They point out the many ways in which the judiciary, the State Bar, local bar associations, and many individual ADR neutrals are working together in this common cause.

This chapter discusses some of the common misconceptions about ADR processes that may be held by the public, litigants, attorneys, and judges and provides suggestions about what you can do to try to overcome these misconceptions.

A. EDUCATING THE PUBLIC

1. [§4.2] Addressing Common Misconceptions About ADR

Members of the general public tend to believe that

- Disputes can only be resolved through lawsuits.
- Dispute resolution takes a long time.
- Dispute resolution is expensive.

To counteract these misconceptions, ADR education efforts should publicize and explain the available choices, stressing that processes other than litigation may

- Give the parties a better opportunity to tell their side of the story.
- Give the parties more control over the outcome.
- Be cooperative, rather than adversarial, with everyone working together to resolve the dispute.

- Be more closely tailored to satisfy the parties' specific needs.

When describing ADR, you should be careful to acknowledge that sometimes litigation may be appropriate. This counteracts another possible preconception: that ADR is designed to lighten the workload of sitting judges and provide income for retired judges.

2. [§4.3] Judge's Role

The Dispute Resolution Programs Act (Bus & P C §§465–471.5; see §§3.2, 6.3) supports ADR public education efforts. It authorizes monetary grants for various purposes, including education of communities regarding the availability and benefits of ADR techniques. Bus & P C §465.5(d).

You individually or your court's judges acting together, can further the education of the public about ADR by

- Fully supporting the educational efforts of the court's ADR program administrator.
- Maintaining a list of qualified ADR neutrals and making it available to those who request assistance. On what such a list must contain, see §3.5.
- Encouraging radio and television media to broadcast public service announcements about ADR and about the specific ADR programs that are locally available.
- Participating in radio and television talk shows and interviews that focus on ADR.
- Preparing news releases and holding press conferences on ADR issues for the general media.
- Making pamphlets or other information about ADR available in courthouses, libraries, and other public buildings, in addition to the information package required under Cal Rules of Ct 3.221(a) (see §3.4).
- Joining and participating in the activities of bar associations' committees, sections, or task forces devoted to ADR. At least 16 county or local bar associations have ADR committees or sections.

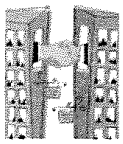
The following is a printout of the Judicial Council's announcement about its sponsorship of an annual Mediation Week.

PROGRAMS

Programs: ADR in Civil Cases

Alternative Dispute Resolution (ADR) for Civil Cases

Most civil disputes are resolved without filing a lawsuit, and most civil lawsuits are resolved without a trial. The courts and others offer a variety of Alternative Dispute Resolution (ADR) processes to help people resolve disputes without a trial. ADR is usually less formal, less expensive, and less time-consuming than a trial. ADR can also give people more opportunity to determine when and how their dispute will be resolved. To learn more about ADR in general and the ADR programs available in the trial courts, click on the links below.



Celebrate Mediation Week
March 18-24, 2007
Raising awareness about the availability and benefits of mediation programs. Learn more about Mediation Week.

Quick Links

Court ADR Programs for Civil Cases
Link to information about ADR programs in California trial courts.

Types of ADR
Learn about the different ADR processes for solving legal disputes.

ADR for Self-Represented Litigants
Link to information about ADR in the California Courts Self-Help Center.

Benefits of ADR
Learn about the benefits of ADR.

Reports and Publications About:

ADR for Civil Cases

ADR for Family and Juvenile Cases

B. EDUCATING LITIGANTS

1. [§4.4] Addressing Common Misconceptions About ADR

Litigants tend to assume that a lawsuit's outcome must be determined by your decision or a jury's verdict. They may resist the suggestion that there may be a more appropriate process of resolving their disputes, fearing that their adversaries will interpret any willingness to compromise as a sign of weakness, and that anything their adversaries may propose will work to their disadvantage. They may also suspect that ADR is a scheme to lighten the workload of sitting judges and provide income for retired judges.

2. [§4.5] Judge's Role

To counteract these misconceptions, you, commissioners, and ADR program administrators should point out that most civil cases are settled before trial. You should explain how skilled neutral persons can facilitate constructive communications, while the parties control the process. You should provide litigants with information about resolution processes other than court adjudication that may be

- *Faster*. Rather than being subject to the court's calendar, the parties may be able to set an earlier timetable for resolving their dispute.
- *Less costly*. Although they may have to pay the neutral's fee, the parties may save on attorney's fees, expert's fees, and court costs. Time often equals money, and quicker resolution of the dispute may mean that the parties lose fewer potentially profitable opportunities.
- *Less stressful.* The parties may experience less stress if they use a process that is more informal and less adversarial than a court trial.
- *More fitting.* The solutions may be more closely tailored to the parties' needs.
- *More private.* The proceedings and the outcome may be protected from public scrutiny.
- *More certain.* The parties may avoid the often unpredictable outcome of a court decision.
- *More satisfying.* The parties may get a better opportunity to tell their side of the story fully, to control the outcome, and to participate in shaping a solution that fits their special needs.

When describing ADR, you and the ADR program administrator **should be careful to acknowledge to litigants that sometimes court adjudication may be appropriate** and should avoid pressuring the litigants, *e.g.*, at the case management conference (see §3.7), to stipulate to an ADR referral, especially one that will cost the parties money. Parties are entitled to their day in court.

Although it may sometimes be appropriate for the judge to "cajole" the parties to stipulate to private mediation, "[t]he essence of mediation is its voluntariness." It is therefore error to order the parties to attend and pay for mediation. *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 543, 53 CR3d 115.

C. EDUCATING ATTORNEYS

1. [§4.6] Addressing Common Misconceptions About ADR

Attorneys who practice civil litigation may be reluctant to support the use of ADR because they believe that

- Exploring ADR makes them seem impotent in the eyes of clients.
- Exploring ADR makes them seem weak in the eyes of opposing lawyers.
- ADR deprives them of much of their control over the proceedings.
- ADR adds inconclusive, time-consuming procedures to their already busy pretrial and trial schedules.
- Neutrals may not be truly neutral and may be prone to splitting the difference.
- They will have greater success with processes that concentrate on legal issues and legal rights and that provide the safety net of an appeal.
- ADR deprives them of possible income because it often makes discovery proceedings and trials unnecessary.

Responses to these objections should stress that ADR can benefit attorneys by producing

- *More satisfied clients*. Clients appreciate attorneys who counsel them about appropriate resolution options that are less stressful and less costly than protracted litigation. Satisfied clients are the key to a successful practice.
- *Greater efficiency*. Attorneys can plan their time more efficiently when representing clients in ADR proceedings because an ADR neutral generally schedules the conference or hearing for a date certain at the convenience of the parties. The parties may be able to choose a neutral who, unlike a randomly selected trial judge, is knowledgeable about the subject matter of the dispute.
- *Competitive advantages*. Sophisticated clients, especially businesspersons, increasingly look for ADR expertise when retaining attorneys. More and more attorneys are finding that ADR counseling is a profitable specialty.
- *Greater professional satisfaction*. ADR enables attorneys to help resolve their clients' disputes in a less stressful setting. It gives them the satisfaction of participating in a process that benefits not only their clients but also the courts and, more broadly, the administration of justice.

2. [§4.7] Judge's Role

You or your court's judges acting together, can educate attorneys about ADR by

- Discussing with them at the case management conference what ADR processes they think will work best (see §§3.7–3.11).
- Sponsoring bench/bar forums and workshops that explain ADR and describe the court's existing or planned ADR services.
- Participating in MCLE programs on ADR sponsored by bar associations or continuing legal education providers.
- Contributing articles about ADR to legal newspapers and bar association publications.
- Contributing to and publicizing ADR education efforts.

D. EDUCATING JUDGES

1. [§4.8] Addressing Common Misconceptions About ADR

Although more judges are becoming familiar with ADR and actively support its growth, educating some about dispute resolution processes other than litigation remains a challenge. The rules adopted by the Judicial Council emphasize the need to educate judges about ADR and the Judicial Council's Standards of Judicial Administration (Cal Rules of Ct, Standards of J Admin 10.70(b)(5)) calls for trial courts to coordinate this education. Cal Rules of Ct, Standards of J Admin 10.70(c).

The hesitancy of some judges to embrace ADR may stem from their preconceptions about it. They may believe that

- ADR shifts the balance of power, moving the judge from the center of the resolution process toward the periphery.
- ADR neutrals are less qualified than judges to produce just results.
- ADR procedures waste time and effort when the parties fail to reach an agreement, putting the case back on the court's calendar.
- ADR procedures, especially private judging, create a separate pseudo-court system. That system, accessible only to those wealthy enough to afford the fees, operates in relative secrecy and without meaningful controls, which undercuts the role of courts as the public forum for dispute resolution.
- ADR procedures, especially arbitration, operate outside the legal system, neither creating precedents nor being bound by them.
- ADR procedures, especially binding arbitration, can yield arbitrary and unfair decisions that may be immune from judicial review.
- ADR fosters cronyism, with sitting judges steering business to favored retired judges and favored ADR firms.
- Private neutrals are inclined to favor parties from whom they or their ADR firms expect to get future business.
- In courts that have no significant civil case backlogs, ADR creates unnecessary complications.

Education for judges about ADR should acknowledge and address these potential problems, while stressing these advantages:

- ADR processes often give disputants a quicker resolution at less cost, with less stress, a better opportunity to have their respective sides of the story heard fully, a greater choice of remedies, and more control over the outcome. For all of these reasons, providing access to your court's ADR services will enhance litigant satisfaction with your court's performance and the public's trust and confidence in the justice system.
- ADR helps courts resolve some cases quicker so that judges can focus on the cases that most need their time and attention. Criminal cases absorb more and more of the available judicial resources, making it increasingly difficult for citizens to gain access to the courts to resolve civil disputes. ADR provides a safety valve for these pressures.

2. [§4.9] Judge's Role; AOC's Role; CJER's Role

You in the role of mentor-judge, or your court's judges acting together, can further educate judges about ADR by encouraging and facilitating educational activities such as the following:

- Studying and sharing educational materials such as this handbook and the publications listed in the appendix.
- Attending CJER's programs about ADR. ADR has been among the subjects regularly covered at the Continuing Judicial Studies Program, the B. E. Witkin Judicial College, the Civil Law and Procedure Institute, and other CJER programs and institutes.
- Attending ADR programs sponsored by other judicial education organizations, bar associations, and ADR providers' organizations.
- Creating programs on ADR by and for local judges (or jointly with neighboring counties' judges), using existing materials, such as this handbook and the publications listed in the appendix.

The Office of the General Counsel of the Administrative Office of the Courts offers support for the expansion of ADR in the courts. Staff attorneys develop educational programs concerning court-related ADR and collect and disseminate information on the subject.

II. [§4.10] JUDGE'S CONTINUING ROLE DURING ADR

You may be called on to play a continuing role while the parties are pursuing an ADR process. The following are some illustrative fact patterns and responses. In each situation, you could meet in chambers with the parties and their attorneys to explore possible solutions. Under some circumstances, you might include the ADR neutral in this meeting, being mindful, however, of the limitations imposed by Evid C §§1119 and 1121, which provide that neither a mediator nor a party may reveal communications made during mediation. See §§7.1–7.8.

Dissatisfied or noncooperating party. After several sessions of voluntary mediation, a party informs you that he or she wants to proceed to trial. The other party and the mediator believe that further mediation will be fruitful. You could urge the dissatisfied or noncooperating party to give the process another chance or suggest that the parties choose another mediator, or another ADR process, such as neutral evaluation.

Protracted mediation. After discovery is substantially complete, the case goes to voluntary mediation. There appears to be some progress, but you are concerned that the case has bogged down. You could set a date by which the mediation must either resolve the dispute or be terminated. An alternative might be to set the case for trial, while letting the mediation continue.

Tolling discovery. While engaging in voluntary mediation, a party seeks an order tolling further discovery pending the outcome of the mediation. If the other party resists, you could explore the acceptable limitations on discovery.

Advisory ruling. During the course of a neutral evaluation, the parties sometimes may ask you to give them an advisory ruling on one aspect of the case. Judges very rarely do so; instead they advise the parties to insist that the neutral's evaluation include this aspect. A possible alternative may be to have the issue resolved by motion.

Chapter 5
WHEN ADR IS MANDATORY

I. [§5.1] OVERVIEW

The parties to a dispute will be required to use ADR if they have entered into an agreement requiring its use or if ADR is mandated by statute or court rule. Case law (see §5.18), however, suggests that a judge lacks authority to require participation in an ADR process absent a specific statute or court rule.

Although it may sometimes be appropriate for you to "cajole" the parties to stipulate to private mediation, "the essence of mediation is its voluntariness." It is therefore generally error to order the parties to pay for medication. *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 543, 53 CR3d 115.

II. [§5.2] AGREEMENT TO USE ADR

An agreement to use an ADR process is generally subject to the same rules of interpretation and enforcement as any other contract. See 1 Witkin, SUMMARY OF CALIFORNIA LAW, *Contracts* §§1–704 (10th ed 2005). However, some specific statutes and policies apply only to certain ADR processes. These are discussed in §§5.3–5.17.

For a sample stipulation form that the parties may use after they have become involved in a lawsuit if they decide to participate in an ADR process, see §3.14.

A. [§5.3] Enforceability of Agreements To Use Mediation

When a contract provides that the parties agree to submit all disputes or claims to mediation, that contract will be enforced, including its provisions regarding the recoverability of attorney's fees, *e.g.*, a provision stating that if a party sues without first attempting to resolve the matter through mediation, that party may not recover attorney's fees. See *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 433, 436, 132 CR2d 362; *Johnson v Siegel* (2000) 84 CA4th 1087, 1100–1101, 101 CR2d 412.

B. Enforceability of Agreements Mandating *Binding* ADR Procedures

1. Binding Arbitration

a. [§5.4] Federal Law Versus State Law

The California Arbitration Act (CAA) (CCP §§1280–1294.2) applies to all agreements to submit to arbitration an existing or future controversy. The Federal Arbitration Act (FAA) (9 USC §§1–16) applies to contracts for maritime transactions and transactions involving interstate or foreign commerce that provide for the settlement of controversies by arbitration. These laws are quite similar. Both specifically provide for the validity and enforcement of arbitration agreements, the stay of court actions on matters subject to an arbitration agreement, the appointment of arbitrators when not addressed in the agreement, and the confirmation and vacation of arbitration awards.

Unless the parties expressly agree that state law will apply, the FAA preempts the state act and governs arbitration under contracts involving interstate or foreign commerce or maritime transactions. *Southland Corp. v Keating* (1984) 465 US 1, 12, 104 S Ct 852, 859, 79 L Ed 2d 1; *Volt Info. Sciences, Inc. v Board of Trustees of the Leland Stanford Junior Univ.* (1989) 489 US 468, 478–479, 109 S Ct 1248, 103 L Ed 2d 488. The phrase "involving commerce," and thus the reach of the Act, is interpreted very broadly. *Allied-Bruce Terminix Cos., Inc. v Dobson* (1995) 513 US 265, 276–278, 115 S Ct 834, 130 L Ed 2d 753. The Act "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v Thomas* (1987) 482 US 483, 490, 107 S Ct 2520, 96 L Ed 2d 426. A general choice-of-law clause incorporates a state's substantive laws, but it does not incorporate the state's procedural laws. To apply, the state's procedural laws must be expressly incorporated into the agreement. *Stone & Webster, Inc. v Baker Process, Inc.* (SD Cal 2002) 210 F Supp 1177, 1187–1189 (holding that FAA governed the issue of arbitrability). The FAA applies to all agreements within its reach, whether proceedings regarding disputes take place in state or federal court. *Southland Corp. v Keating, supra,* 465 US at 15–16. Thus, California courts may be required to apply the FAA in some cases.

For example, in *Shepard v Edward Mackey Enterprises, Inc.* (2007) 148 CA4th 1092, 1100–1101, 56 CR3d 326, the buyer of a home in California sued the builder for damages caused by defective plumbing. A provision in the purchase agreement specified binding arbitration, but the trial court denied the defendant's motion to compel arbitration because CCP §1298.7 overrides such a provision. The appellate court held that the FAA controlled, making arbitration mandatory, because various materials (unrelated to the plumbing) used by the builder were manufactured outside the state.

Although the FAA trumps any state law that conflicts with it, the FAA contains no express preemptive provision, nor any indication that Congress intended to occupy the entire field of

arbitration. Instead, the FAA has a "limited preemptive effect." See *Ovitz v Schulman* (2005) 133 CA4th 830, 851, 35 CR3d 117. In *Ovitz*, the trial court vacated an arbitrator's award because he had failed to make timely disclosure, as required by CCP §1281.9, of his prospective participation in another arbitration involving one of the parties. This is specifically listed in CCP §1286.2(a)(6)(A), as one of the grounds for vacating an award.

The FAA authorizes a court to vacate an award when the arbitrator has engaged in "evident partiality or corruption" (9 USC §10(a)(2)), neither of which was alleged. The appellate court concluded that the language of this section of the FAA strongly suggests that it is intended to apply only in federal court proceedings, and that it does not preempt state court proceedings. Therefore, CCP §1286.2(a)(6)(A) controlled, and the order vacating the award was upheld. 133 CA4th at 850–852.

b. [§5.5] Enforcement of Arbitration Agreements

Both the CAA and the FAA explicitly provide that written agreements to submit an existing or future controversy to arbitration are valid, enforceable, and irrevocable, except for the grounds that exist for the revocation of any contract. CCP §1281; 9 USC §2. Both acts also provide procedures by which a party to an arbitration agreement can petition the court to compel arbitration under the agreement. CCP §1281.2; 9 USC §4. For further discussion of enforcing contractual arbitration agreements, see §§5.13, 8.3.

When a contract provides that the parties agree to submit all disputes or claims to arbitration, that agreement will be enforced so that if a party to that contract files suit without first initiating arbitration, the defendant in that suit is entitled to summary judgment. *Johnson v Siegel* (2000) 84 CA4th 1087, 1095–1100, 101 CR2d 412.

A provision in an agreement that requires disputes to be resolved by a panel of three arbitrators confers an enforceable substantial right, and a judge's order that a dispute under the agreement shall be resolved by one arbitrator is reversible error. *Parker v McCaw* (2005) 125 CA4th 1494, 1506, 24 CR3d 55. A provision that disputes under an agreement be resolved before a particular arbitration forum will likewise be enforced, and if that forum is no longer available, a petition to compel arbitration before a different forum must be denied. *Provencio v WMA Secs., Inc.* (2005) 125 CA4th 1028, 1032, 23 CR3d 524.

In disputes involving multiple parties with related claims, if some claimants agree to arbitrate their differences while others remain outside the agreement and pursue litigation, arbitration is unworkable because of the possibility of conflicting rulings on issues of law or fact. In this situation you may refuse to enforce the arbitration agreement. CCP §1281.2(c); see *Whaley v Sony Computer Entertainment Am., Inc.* (2004) 121 CA4th 479, 488, 17 CR3d 88 (discussing legislative history of CCP §1281.2(c)).

On the enforcement of the arbitrator's award, see §8.9.

c. [§5.6] Stay of Court Proceedings

Both the CAA and the FAA provide for the stay of court proceedings on matters that are subject to arbitration under an arbitration agreement. CCP §1281.4; 9 USC §3. The CAA requires the court to issue a stay either on the ordering of arbitration or on the filing of a petition to compel arbitration. CCP §1281.4. The FAA does not require such an order or filing. Instead, the court must stay any suit or proceeding on any issue that may be referred to arbitration if the person applying for the stay is not in default in proceeding with the arbitration. 9 USC §3.

d. [§5.7] Provisional Remedies

The CAA provides that a party to an arbitration agreement may file an application for a provisional remedy (*e.g.*, an attachment, a writ of possession, a preliminary injunction, a TRO, or a receivership) in connection with an arbitrable controversy, but only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief. CCP §1281.8. The FAA does not provide for provisional remedies.

e. Grounds for Revocation of Agreement To Arbitrate

(1) [§5.8] Agreement Is Illegal or Against Public Policy

A party may revoke an illegal arbitration provision in a contract (see CC §§1667–1670.6, 1689; *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 31–33, 10 CR2d 183), or a provision in a contract that is against public policy, *e.g.*, that requires a party to waive an unwaivable right (see *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071–1074, 130 CR2d 892).

(2) [§5.9] Agreement Is Based on Fraud

A party that was fraudulently induced to enter into a contract that compels arbitration may revoke the arbitration provision. See *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 981, 64 CR2d 843 (health maintenance organization represented that its arbitration system affords fast, inexpensive conflict resolution when in fact the organization often engages in conduct that results in substantial delays).

A party cannot void an arbitration agreement for fraud in the execution by claiming that he or she did not read its terms in reliance on the other party's misrepresentations when the party seeking to avoid arbitration had a reasonable opportunity to learn the agreement's terms. *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 420–423, 58 CR2d 875. See *Jones v Adams Fin. Serv.* (1999) 71 CA4th 831, 837, 84 CR2d 151 (elderly blind woman who suffered from dementia did not have reasonable opportunity to discover real terms of contract before signing it).

When there has been fraud in the inducement, however, a contracting party's negligence does not necessarily preclude it from equitable relief, such as reformation based on mutual mistake. See *Rosenthal, supra,* 14 C4th at 423; *Hess v Ford Motor Co.* (2002) 27 C4th 516, 529, 117 CR2d 220.

(3) [§5.10] Agreement Is Unconscionable

If you find that a provision in a contract mandating binding arbitration is unconscionable, you may refuse to enforce the contract, or enforce the remainder of the contract, or limit the unconscionable provision to avoid an unconscionable result. CC §1670.5(a). See *Graham v Scissor-Tail, Inc.* (1981) 28 C3d 807, 817, 171 CR 604. When this issue is raised, you must give all parties a reasonable opportunity to present evidence on the commercial setting, purpose, and effect of the disputed clause. CC §1670.5(b). See also CC §§1667, 1689.

Employment agreement. The Supreme Court's opinion in *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99 CR2d 745, establishes the factors that you must consider when ruling on a claim that a contract clause in an employment agreement compelling arbitration of disputes should not be enforced because it is unconscionable.

A threshold question usually asked is whether it is a *contract of adhesion, i.e.*, drafted and imposed by a party that has superior bargaining strength under circumstances in which the other party's choices were essentially to adhere to the entire contract by signing, or to reject it. 24 C4th

at 113. But see *Harper v Ultimo* (2003) 113 CA4th 1402, 1408–1409, 7 CR3d 418, rejecting the premise that a finding of adhesion is a prerequisite to a finding of unconscionability.

You should next determine whether both of the following factors are present (24 C4th at 113–114):

- *Procedural unconscionability*. This is evidenced by "oppression," *i.e.*, an absence of negotiations between the parties about the contract's terms, or "surprise," *i.e.*, the disputed provision does not fall within the reasonable expectations of a party adhering to such a contract.
- *Substantive unconscionability*. This is evidenced by provisions in the contract that are "overly harsh" or so "one-sided" that they shock the conscience.

These factors must be weighed. The more substantively harsh or one-sided the contract's terms, the less evidence is required of unreasonableness in the process of the contract's formation. 24 C4th at 114.

Conversely, when there is evidence of highly oppressive conduct, *e.g.*, threats made to induce the signing of the agreement, minimal evidence of substantive unconscionability may suffice to render the mandatory arbitration provision in the agreement unenforceable. See *Mercuro v Superior Court* (2002) 96 CA4th 167, 174, 116 CR2d 671.

In *Armendariz v Foundation Health Psychcare Servs. Inc.* (2000) 24 C4th 83, 120–121, 99 CR2d 745, new employees were required to sign the employer's standard employment agreement without any opportunity to negotiate its terms. The agreement contained a provision that mandated binding arbitration for any claims by employees regarding wrongful termination. It contained no requirement that claims by the employer regarding such termination be resolved through arbitration. The contract also limited the damages that employees could recover to the amount of back wages lost up to the time of arbitration. It contained no comparable limit on any action by the employer against employees. The California Supreme Court therefore struck this agreement down as being unconscionably one-sided.

In the following cases, employment agreement provisions related to mandatory arbitration were unenforceable because they were unconscionably one-sided:

- *Higgins v Superior Court* (2006) 140 CA4th 1238, 1251–1254, 45 CR3d 293 (obligation to arbitrate imposed unilaterally on employees; provision was not conspicuous in document).
- *Nyulassy v Lockheed Martin Corp.* (2004) 120 CA4th 1267, 1287, 16 CR3d 296 (obligation to arbitrate imposed unilaterally on employee).
- *Fitz v NCR Corp.* (2004) 118 CA4th 702, 715–717, 13 CR3d 88 (provision limiting discovery favored employer).
- *Martinez v Master Protection Corp.* (2004) 118 CA4th 107, 115, 12 CR3d 663 (agreement required employees to arbitrate claims they were most likely to assert against employer while permitting employer to litigate claims it was most likely to assert against employees).
- *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071–1074, 130 CR2d 892 (provision permitted either party to "appeal" any arbitration award of more than $50,000 to a second arbitrator, but high dollar threshold inordinately benefited employer).
- *O'Hare v Municipal Resource Consultants* (2003) 107 CA4th 267, 283, 132 CR2d 116 (unconscionability "permeated" the arbitration agreement).

In the following cases, the provisions mandating arbitration were upheld:

- *McManus v CIBC World Markets Corp.* (2003) 109 CA4th 76, 101–102, 134 CR2d 446 (because agreement was not "permeated" with unconscionable provisions, provision requiring employee to pay costs of arbitration was severed, and remaining provisions were enforced). On the severability of unconscionable contractual provisions, see also *Fitz v NCR Corp.* (2004) 118 CA4th 702, 714–715, 726–728, 13 CR3d 88.
- *Jones v Humanscale Corp.* (2005) 130 CA4th 401, 414–416, 29 CR3d 881 (arbitration clause satisfied requirement of mutuality).

For a comprehensive step-by-step analysis of *Armendariz* and its progeny, see *Abramson v Juniper Networks, Inc.* (2004) 115 CA4th 638, 652–668, 9 CR3d 422, an action for wrongful termination. In *Abramson*, the agreement to arbitrate required the employee to pay half the costs of the arbitration; this was illegal as a violation of public policy. The take-it-or-leave-it agreement was procedurally unconscionable because it was oppressive. It was substantively unconscionable because it lacked mutuality and basic fairness. Because illegality and unconscionability permeated the agreement, the objectionable terms could not be severed (see §5.14), and the entire agreement was void and unenforceable.

Opting out. Some employment agreements specify that the prospective employee can "opt out" of the provision that requires disputes to be submitted to arbitration. Two panels of the Ninth Circuit Court of Appeals have held that such a provision saves these agreements from being procedurally unconscionable. *Circuit City Stores, Inc. v Najd* (9th Cir 2002) 294 F3d 1104; *Circuit City Stores, Inc. v Ahmed* (9th Cir 2002) 283 F3d 1198. A third panel, looking beyond the language of the challenged agreement, examined the particular circumstances of the case and concluded that the employer had pressured the plaintiff not to "opt out," which rendered the agreement procedurally unconscionable. *Circuit City Stores, Inc. v Mantor* (9th Cir 2003) 335 F3d 1101.

The issue of unconscionability has been raised in a series of cases involving employment agreements that contain provisions by which the employee waives the right to bring a class action against the employer and agrees that all disputes shall be resolved through binding arbitration. Some agreements specify that the employee can at the outset "opt out" of this waiver, preserving the employee's right to pursue a class action.

The question confronting the courts in these cases, *e.g.*, *Gentry v Superior Court* (2007) 42 C4th 443, 466–472, 64 CR3d 773, is under what circumstances the employee's opportunity to opt out saves these agreements from being procedurally unconscionable.

The following are some of the other contexts in which the criteria stated in *Armendariz* have been applied to strike down mandatory arbitration provisions:

Automobile rental agreement. See *Gutierrez v Autowest, Inc.* (2003) 114 CA4th 77, 87–93, 7 CR3d 267 (procedurally unconscionable because arbitration clause appeared in small print and substantively unconscionable because lessee could only initiate arbitration by posting a mandatory fee, with no opportunity to obtain waiver of fee if it exceeded lessee's ability to pay).

Cellular telephone service agreement. See *Gatton v T-Mobile USA, Inc.* (2007) 152 CA4th 571, 579, 61 CR3d 344 (arbitration provision deprived service subscribers of right to pursue class action).

Condominium agreement. See *Villa Milano Homeowners Ass'n v Il Davorge* (2000) 84 CA4th 819, 828–833, 102 CR2d 1 (arbitration requirement regarding claims against developer was hidden in the covenants, conditions, and restrictions (CC&Rs)).

Credit card agreement. See *Discover Bank v Superior Court* (2005) 36 C4th 148, 158–163, 30 CR3d 76 (arbitration provision designed to deprive card holders of right to pursue class action).

Franchise agreement. See *Bolter v Superior Court* (2001) 87 CA4th 900, 909, 104 CR2d 888 (agreement required California franchisees to submit all disputes to arbitration in Utah); *Nagrampa v Mailcoups Inc.* (9th Cir 2006) 469 F3d 1257, 1281–1289 (arbitration provision was unconscionably one-sided, giving only franchisor access to a judicial forum, and forum for arbitration was inconvenient for franchisee).

Health care services agreement. See, *e.g.*, *Coast Plaza Doctors Hosp. v Blue Cross of Cal.* (2000) 83 CA4th 677, 687–690, 99 CR2d 809, which held that, under the circumstances prevailing at the time the plaintiff signed the contract, the inclusion of the provision in an agreement to provide health care services was within the plaintiff's reasonable expectations, and the contract's substantive elements were not so one-sided or unfair as to shock the conscience.

Homeowner-contractor agreement. See *Harper v Ultimo* (2003) 113 CA4th 1402, 1406–1407, 7 CR3d 418 (agreement artfully disguised the severe limitations it imposed on homeowners' remedies); *Baker v Osborne Dev. Corp.* (2008) 159 CA4th 884, 894–896, 71 CR3d 854 (arbitration agreement was procedurally unconscionable because buyer received it only at closing, and agreement referred only to related warranty and was substantially unconscionable because it was one-sided, favoring only the builder).

Landlord-tenant agreement. See *Jaramillo v JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 404–406, 3 CR3d 525 (arbitration clause was buried in the small print, with no opportunity to decline it, and administrative fees and costs were required to be advanced before the arbitration).

Loan agreement. See *Flores v Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 853–855, 113 CR2d 376 (rejecting argument that provisions compelling borrower, but not lender, to submit claims to arbitration were dictated by "business realities").

In contrast to the above cases, a contract's mandatory arbitration provision will be enforced if the party that claims it is unconscionable fails to establish the requisite elements, as in the following example:

Motor home purchase agreement. See *Crippen v Central Valley RV Outlet, Inc.* (2004) 124 CA4th 1159, 1162, 22 CR3d 189, in which the purchaser failed to present extrinsic evidence supporting his claim of procedural unconscionability, and none was inferable from the agreement itself or from the relationship between the dealer and the purchaser.

f. [§5.11] Waiver

A petition to compel arbitration may be denied when the petitioner has waived the right to arbitrate. The issue of whether a waiver has occurred is for a judge, not an arbitrator to decide. CCP §1281.2(a); *Wagner Constr. Co. v Pacific Mechanical Corp.* (2007) 41 C4th 19, 28, 58 CR3d 434.

California courts have found a waiver of the right to compel arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. See *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 983, 64 CR2d 843, and *Wagner Constr. Co. v Pacific Mechanical Corp., supra*, 41 C4th at 30–31. Both of these cases were remanded by the Supreme Court to the trial court for a determination of the issue of waiver.

The factors that you may consider, in determining whether a party has waived its right to compel arbitration include (*Simms v NPCK Enters., Inc.* (2003) 109 CA4th 233, 239, 134 CR2d 557):

- Whether the party's actions are inconsistent with the right to arbitrate.
- Whether the litigation machinery has been substantially invoked, and the parties were well into preparation of a lawsuit before the party notified the opposing party of the intent to arbitrate.
- Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.
- Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings.
- Whether important intervening steps (*e.g.*, taking advantage of judicial discovery procedures not available in arbitration) had taken place.
- Whether the delay affected, misled, or prejudiced the opposing party.

A defendant that has been served with a complaint waives the right to compel arbitration unless it files a motion under CCP §1281.2 within 30 days after service of the summons and complaint. CCP §1281.5(b); *Dial 800 v Fesbinder* (2004) 118 CA4th 32, 44–45, 12 CR3d 711.

When an agreement that requires arbitration involves interstate commerce, the Federal Arbitration Act (FAA) (9 USC §§1–16) applies, and waiver of the right to compel arbitration is governed by federal law, unless the parties have expressly contracted around the FAA via a choice-of-law clause that adopts state procedural law. See *Volt Info. Sciences, Inc. v Board of Trustees of the Leland Stanford Junior Univ.* (1989) 489 US 468, 486, 109 S Ct 1248, 103 L Ed 2d 488; *Stone & Webster, Inc. v Baker Process, Inc.* (SD Cal 2002) 210 F Supp 1177, 1187–1189; §5.4.

A party does not waive its right to compel arbitration under a provision of an agreement merely by filing a lawsuit seeking to rescind that agreement. CCP §1281.5; see *St. Agnes Med. Ctr. v Pacificare of Cal.* (2003) 31 C4th 1187, 1200–1203, 8 CR3d 517.

When a party claims that the entire agreement is revocable, it must make this claim before participating in the arbitration. *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 31, 10 CR2d 183 (having been raised before the arbitrator at the outset, claim of illegality was preserved for judicial review).

g. [§5.12] Unenforceability of Agreement That Arbitrator's Decision Shall Be Judicially Reviewable

A provision in an arbitration agreement that purports to make the arbitrator's award judicially reviewable for errors of fact or law is unenforceable. The only grounds available for reviewing the merits of the award are those specified in the California Arbitration Act (CCP §§1280 et seq), *i.e.*, in CCP §1286.2 (vacating the award) or §1286.6 (correcting the award). In that Act, the Legislature limited a trial court's jurisdiction and the parties cannot by agreement expand that jurisdiction. *Crowell v Downey Comm. Hosp. Found.* (2002) 95 CA4th 730, 739, 115 CR2d 810; see also *Oakland-Alameda County Coliseum Auth. v CC Partners* (2002) 101 CA4th 635, 645, 124 CR2d 363 (unenforceability of provision in agreement that purported to enable any party to obtain de novo judicial review of arbitrator's rulings on questions of law did not invalidate entire agreement, and arbitrator's award was upheld).

h. [§5.13] Procedure for Enforcing Agreement To Arbitrate

A party to a controversy that alleges both the existence of an agreement to arbitrate the controversy and a refusal by another party to that agreement to submit that controversy to arbitration may petition for an order compelling the other party to arbitrate. See CCP §1281.2; 9 USC §§2, 4.

You must grant the petition if you determine that such an agreement exists, unless (CCP §1281.2(a), (b)):

- The respondent has grounds for revoking the agreement (see §§5.8–5.10).
- The petitioner has waived the right to compel arbitration (see §5.11).
- There are other grounds making the agreement unenforceable (see §5.12).

i. [§5.14] Severability of Unenforceable Provisions

The provision in CCP §1281.2(b) regarding revocation of "the agreement" refers to the agreement to submit disputes to arbitration, not to the underlying contract; the other provisions of the underlying contract remain enforceable via a lawsuit. See *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 31–33, 10 CR2d 183. For a discussion of the severability of unenforceable contract provisions relating to mandatory arbitration generally, see *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 122–124, 99 CR2d 745, discussed in §5.10.

When a party has moved to compel arbitration, the judge must sever the arbitrable causes of action from those that are not arbitrable, so that the latter may be adjudicated in a judicial forum. *Warren-Guthrie v Health Net* (2000) 84 CA4th 804, 816–817, 101 CR2d 260. In such a case, you have discretion to stay proceedings on the claims that are not arbitrable pending resolution of the arbitration. CCP §1281.4; *Cruz v PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 320, 133 CR2d 58. A stay is appropriate when, in the absence of a stay, the proceedings in the court will disrupt the arbitration proceedings and render them ineffective. 30 C4th at 320. Conversely, there may be circumstances in which you should stay the arbitration proceedings pending resolution of the nonarbitrable claims in the court. See CCP §1281.2(c).

Judicial practice. In determining whether to stay the court action *or* to stay the arbitration proceedings, the considerations are the same, *i.e.*, you should consider the effect that one proceeding would have on the other, whether the resolution of one proceeding would render the other moot, the extent to which proceedings in one forum would undermine or disrupt proceedings in the other forum, and which alternative is likely to be more fair and efficient. You may conclude that a stay of the court action is appropriate when the gist of the action is arbitrable, the arbitration is likely to resolve the entire controversy, or the arbitration is likely to result in a narrowing of the issues or a reduction in the number of parties in the case. Conversely, you may conclude that a stay of the court action is *not* appropriate when the claims in the two proceedings involve different facts or the judge believes that a ruling in the court action may result in settlement of the case. You may suggest to the parties that they consider submitting all of their claims to arbitration.

j. [§5.15] Intervention, Joinder, or Stay

If you determine that a party to the arbitration is also a party to litigation in a pending action or special proceeding with a third party arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact, you may do any of the following (CCP §1281.2):

- Refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action or proceeding.
- Order intervention or joinder as to all or only certain issues.
- Order arbitration among the parties who have agreed to arbitration and stay the pending action or special proceeding pending the outcome of the arbitration proceeding.
- Stay arbitration pending the outcome of the action or special proceeding.

If you determine that there are other issues between the petitioner and the respondent that are not subject to arbitration and that are the subject of a pending action or special proceeding and that a determination of those issues may make the arbitration unnecessary, you may delay the order to arbitrate until the determination of those other issues or until a specified earlier time.

You may not refuse to compel arbitration because you conclude that the petitioner's contentions lack merit. CCP §1281.2.

2. General Reference

a. [§5.16] Agreements To Use Referee

Perhaps mindful of the increasing number of judicial decisions that have struck down mandatory arbitration provisions in various types of agreements on grounds of procedural and substantial unconscionability (see §5.10), some parties with strong bargaining positions are employing another strategy. With the same objective as the use of mandatory arbitration provisions, *i.e.*, to avoid having disputes adjudicated in jury trials, they are including provisions that require disputes to be conclusively resolved by a referee under a general reference (also called a judicial reference). For a discussion of general references, see §§2.99–2.107.

The referee in such a proceeding renders a statement of decision on which judgment is entered as if the dispute had been tried by a judge without a jury. The court's opinion in *Pardee Constr. Co. v Superior Court* (2002) 100 CA4th 1081, 1091, 123 CR2d 288 (discussed in §5.17), mentions, in passing, that counsel for both parties represented that "significant portions of construction defect cases" are now resolved in this way.

b. [§5.17] Unenforceability of Unconscionable Provisions

The factors that you should consider when unconscionability is claimed with respect to a contract provision that requires disputes to be conclusively resolved by a referee, are similar to those that apply when a claim of unconscionability is directed at a contractual provision that mandates binding arbitration. See §5.8. In *Pardee Constr. Co. v Superior Court* (2002) 100 CA4th 1081, 1086–1092, 123 CR2d 288, the appellate court applies the criteria that were established by the Supreme Court in *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113–121, 99 CR2d 745).

Pardee was a class action brought by homeowners alleging construction defects against the builder of their homes. The builder sought to have a referee appointed, as stipulated in the agreements that all the plaintiffs had signed.

Enforcement was refused, because the court found (100 CA4th at 1086–1092):

- *Adhesion*. The builder's form contracts put each buyer in a take-it-or-leave-it situation. None of the hundreds of buyers struck out the mandatory reference provision, or engaged in any negotiations about it.

- *Procedural unconscionability*. The wording of the crucial paragraph of the agreement, by which the buyers waived the right to have a jury trial resolve disputes and also waived the right to punitive damages, was misleading.
- *Substantive unconscionability*. The buyers got nothing in return for their waivers of a jury trial and of punitive damages. These provisions were so one-sided as to shock the conscience.

A contract's mandatory reference provision will be enforced if the party that claims that it is unconscionable fails to establish the requisite elements of unconscionability, as in the following examples:

In *Greenbriar Homes Communities, Inc. v Superior Court* (2004) 117 CA4th 337, 11 CR3d 371, the situation presented was similar to *Pardee Constr. Co. v Superior Court, supra,* but the builder prevailed over the homeowners who, when purchasing their homes from the builder, had agreed to having all disputes resolved by a judicial reference under CCP §§638–645.1. The appellate court in *Greenbriar* applied criteria similar to those applied in *Pardee*. After analyzing the contract's provisions and the circumstances under which the original homeowners signed it, the court concluded that there was no adhesion and neither procedural nor substantial unconscionability. 117 CA4th at 343–346.

The situation presented in *Trend Homes, Inc. v Superior Court* (2005) 131 CA4th 950, 32 CR3d 411, was similar to *Greenbriar Homes, Inc. v Superior Court, supra,* as were the analysis and appellate court's disposition.

III. [§5.18] STATUTES AND COURT RULES MANDATING USE OF ADR

A number of statutes mandate the use of *nonbinding* ADR for certain types of disputes. Two familiar examples are judicial arbitration (see §2.67) and child custody mediation (see §2.26). Other statutes give the courts authority to mandate the use of ADR under specific circumstances. For example, some courts may refer cases otherwise eligible for judicial arbitration to mediation. See §2.69. Courts also have the authority under CCP §639 to make special references on an involuntary basis for certain purposes, and with the agreement of the parties, courts may make voluntary references under CCP §638. See §§2.50–2.51.

Use of a *nonbinding* ADR process may also be mandated by either statewide or local court rules. A familiar example is settlement conferences, which are mandated by Cal Rules of Ct 3.1380. See §2.44. A number of local court rules authorize the court to mandate the use of various nonbinding ADR processes, including mediation (see§§2.15, 2.25) as an alternative to judicial arbitration (see §2.69).

Statutes mandating the use of *binding* arbitration have been challenged and found to violate the parties' right to due process of law, which includes access to the courts. See *Bayscene Resident Negotiators v Bayscene Mobilehome Park* (1993) 15 CA4th 119, 130, 18 CR2d 626 (striking down as unconstitutional a city ordinance mandating binding arbitration of mobilehome rent disputes). The *Bayscene* opinion reviews cases from other states in which statutes making binding arbitration mandatory have been upheld. It found that only one California statute (Ins C §11580.2(f)) requires disputants to submit to binding arbitration, and that statute governs disputes between insurers and insureds regarding damages recoverable under uninsured motorist coverage. 15 CA4th at 133. That statute makes the arbitration award conclusive even when the insurance agreement provides for a trial de novo. *United Servs. Auto. Ass'n v Superior Court* (1990) 221 CA3d 79, 83–84, 270 CR 376; *Chrisman v Superior Court* (1987) 191 CA3d 1465, 1468, 236 CR 703.

Similarly, making a general reference of a case to a referee for hearing and decision without the consent of the parties has been held to be an unconstitutional abdication of judicial authority. *Aetna Life Ins. Co. v Superior Court* (1986) 182 CA3d 431, 435, 227 CR 460 (reference order purported to be for special reference, but judge erroneously treated referee's decision as binding).

IV. [§5.19] SUCCESSIVE MANDATORY PROCEDURES

In general, there is no prohibition against cases being referred to more than one ADR process in succession, and many courts use this option when it appears that referral to another ADR process will be helpful. For example, in some counties, if a case emerges from mandatory judicial arbitration unresolved, it proceeds to a mandatory settlement conference rather than going directly to trial.

Although the use of successive ADR processes is permissible in most circumstances, the Civil Action Mediation statute (CCP §§1775–1775.15; see §§2.15–2.23) prohibits the referral to judicial arbitration of any case that was previously referred to mediation under that statute, or the referral to mediation under that statute of any case that was previously referred to judicial arbitration. CCP §1775.4.

Chapter 6
QUALITY ASSURANCE

I. [§6.1] OBJECTIVES

When a court establishes an ADR program or refers parties to neutrals, it is important to consider measures to ensure the quality of the neutrals and of the program, especially when litigants are mandated to participate in an ADR program. Litigants' experience in any ADR process offered through the court is likely to impact their perception of and satisfaction with the court and the judicial system as a whole. A high-quality, well-run ADR program with high-quality neutrals reflects positively on the court and can enhance trust and confidence in the court system.

II. NEUTRALS

A. [§6.2] QUALITY ASSURANCE MEASURES

As discussed in §3.4, courts face difficult challenges when recruiting, training, and evaluating neutrals. Measures that courts may use to ensure the quality of the performance by neutrals who are listed on their panels or to whom they make referrals include:

- Setting minimum qualification criteria (see §6.3) such as:
  - — Education requirements, *e.g.*, completing a minimum number of hours of mediation training.
  - — Experience requirements, *e.g.*, serving as a mediator in a minimum number of cases.
  - — Observation or mentoring requirements, *e.g.*, completing a minimum number of hours of service while observed by a mentor neutral.
  - — Performance-based requirements, *e.g.*, passing a performance test.
- Setting continuing education requirements. See §6.4.
- Setting up feedback mechanism, *e.g.*, litigant satisfaction surveys (see §6.6) or periodic observation by mentor neutrals.
- Setting minimum standards of conduct. See §6.7.

- Setting up a complaint procedure to handle any litigant complaints against these neutrals. See §6.8.

B. [§6.3] MINIMUM QUALIFICATIONS

For some court ADR programs, minimum qualifications for neutrals have been set by statute or by rule of court. For example, the qualifications for mediators in child custody and visitation mediation are set by Fam C §1815 and include a masters' degree in psychology, social work, marriage, family and child counseling, or in another behavior science substantially related to marriage and family interpersonal relationships (see §2.27). Likewise, CCP §1141.18 requires that the arbitrators on courts' judicial arbitration panels be members of the State Bar, retired judges, or retired commissioners (see §2.73).

For other ADR programs, including mediation programs for civil cases, each court is responsible for setting the minimum qualifications for neutrals in its program. The Rules of Court and the Standards of Judicial Administration address how courts should set such minimum standards.

The presiding judge in each trial court must designate the clerk or executive officer, or another court employee who is knowledgeable about ADR processes, to serve as the ADR program administrator (Cal Rules of Ct 10.783(a); see §3.4). The ADR program administrator's duties include, among other things, supervising the development and maintenance of any panels of ADR neutrals maintained by the court. Each court with 18 or more authorized judgeships is also required to form an ADR committee that is responsible for overseeing the court's ADR programs for civil cases. Other courts are encouraged to form a committee including one or more judges, attorneys, and ADR neutrals, plus the ADR administrator, to oversee the court's ADR program and its panels of neutrals for general civil cases. The court, through its ADR administrator and these committees, should evaluate the ADR training, experience, and skills of potential ADR neutrals. Cal Rules of Ct, Standards of J Admin 10.71–10.72.

After the court has sufficient experience with an ADR neutral, continuing referrals to that neutral should be based on client satisfaction, settlement rate, and the neutral's continuing ADR education and adherence to applicable standards of conduct. Cal Rules of Ct, Standards of J Admin 10.72(b). An advisory committee comment to Standard 10.72 warns against giving a neutral's settlement rate too much weight, observing that some disputes will not be resolved despite the best efforts of a skilled ADR neutral, and that neutrals should not feel pressure to achieve a settlement when it may not be in the best interest of one or more parties.

Courts that implement the Civil Action Mediation Program under CCP §§1775–1775.15 are required to consult with local bar associations and ADR providers in identifying persons who may be appointed as mediators. This identification process must consider the criteria set out in Standard 10.72 (discussed above) as well as the criteria stated in 16 Cal Code Regs §3622 for the qualification of neutrals under the Dispute Resolution Programs Act (DRPA) (Bus & P C §§465–471.5). Cal Rules of Ct 3.872. That section provides as follows:

> §3622. ORIENTATION AND TRAINING OF NEUTRAL PERSONS
>
> (a) Each Grantee shall require that all persons who provide dispute resolution services on its behalf complete a training program. The training must be completed before the provision of dispute resolution services by that person.

(b) For purposes of fulfilling the requirements of section 468.2(g) of the Act, each Grantee shall provide an orientation and training program for mediators and other facilitators. The program shall consist of a minimum of 25 hours of classroom and practical training.

(c) The classroom training shall consist of a minimum of 10 hours of lecture and discussion, and shall address the following topics:

(1) The history of dispute resolution as a problem solving technique and its relationship to the traditional justice system;

(2) The Act and these Regulations;

(3) An overview of the structure of the California justice system and the traditional methods of processing civil and criminal cases;

(4) The structure, design, practice, and theory of dispute resolution proceedings and services, as defined, including the varying roles, functions and responsibilities of neutral persons, and the distinction between binding and nonbinding processes;

(5) Communication skills and techniques, including developing opening statements, building trust, gathering facts, framing issues, taking notes, empowerment tactics, effective listening and clarifications skills. Face-to-face as well as over-the-telephone communications skills shall be addressed;

(6) Problem identification and disagreement management skills, including instruction in the establishment of priorities and areas of agreement and disagreement, and the management of special problems that threaten the process;

(7) Techniques for achieving agreement or settlement, including instruction in creating a climate conducive to resolution, identifying options, reaching consensus, and working toward agreement;

(8) General review of fact patterns present in typical disputes, including landlord-tenant, customer-merchant, and neighbor cases;

(9) Administrative and intake skills related to dispute resolution services, including completion of paperwork involved in handling and tracking cases, administrative and reporting forms, correspondence with disputants and referral agencies, agreements to mediate or arbitrate, and the drafting of settlement agreements and awards;

(10) The role and participation of attorneys and witnesses in dispute resolution proceedings;

(11) The organization and administration of dispute resolution programs, including intake procedures, follow-up procedures, and record-keeping; and

(12) The necessity of the voluntary and consensual nature of a disputant's participation in any dispute resolution proceedings.

(d) The practical training shall consist of a minimum of 10 hours, which shall include role plays of simulated disputes and observations of actual dispute resolution services, including intake procedures as well as actual dispute resolution proceedings.

(e) The training shall provide for personal assessment and evaluation of the trainee.

(f) Grantees shall provide written verification of the dates and times at which the training was attended and completed to all trainees who satisfactorily complete the required orientation and training program.

(g) Any neutral person who has received training which complies substantially with these Regulations, or who has had at least 25 hours of dispute resolution experience before his or her provision of dispute resolution services, shall be deemed to have met the orientation and training requirements mandated by these Regulations. Such prior training or experience shall be verified by the program or organization through which it was rendered.

Individual courts have adopted a variety of minimum qualification requirements for neutrals, as well as a variety of procedures for ensuring that these minimum qualification requirements are met. For example, mediators on the Fresno Superior Court's panel are required to have a minimum of 25 hours of formal mediation training. The court sponsors a 25-hour training program for potential panelists; training is also available from other sources. Potential panelists are also required to attend a mediator orientation program developed by the court that provides information about local procedures.

On the DRPA generally, see §3.2.

Anyone who wants to be eligible to serve on the San Diego Superior Court's civil mediation panel must have completed a minimum of 30 hours of mediation training and have conducted at least eight mediations, each at least two or more hours in duration, during the past three years. At least four of these mediations must have been in civil proceedings.

The following publications provide information on neutral qualifications, recruitment, screening, and training:

*Society of Professionals in Dispute Resolution, *Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs* (1999). How courts can develop meaningful, achievable, and fair standards for qualifying, selecting, training, and evaluating dispute resolution practitioners.

*Society of Professionals in Dispute Resolution, *Ensuring Competence and Quality in Dispute Resolution Practice* (1995).

Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, under a grant from the State Justice Institute (1992), Standards 6, 7 and 8.

*Society of Professionals in Dispute Resolution, *Qualifying Neutrals: The Basic Principles* (1989).

*Available from the Association for Conflict Resolution, the first organization listed in the appendix.

C. [§6.4] CONTINUING EDUCATION REQUIREMENTS

Some courts have set minimum continuing education requirements for the neutrals on their panels. The San Diego Superior Court, for example, requires mediators on its civil mediation panel to participate in at least four hours of continuing mediation education annually. The court's Mediator Manual specifies that one of the four hours must focus on disclosure and disqualification issues. Some courts also require the neutrals on a panel to maintain a minimum level of experience, *e.g.*, by conducting at least a minimum number of ADR sessions each year in order to stay on the panel.

D. FEEDBACK MECHANISMS

1. [§6.5] Objectives

Some courts have established ongoing mechanisms to provide neutrals with feedback on their performance.

Many courts ask participants in their ADR programs to fill out short exit surveys about their experience in the ADR process. Samples, illustrating different approaches, are exhibited in §6.6.

Although the courts typically keep the individual survey responses confidential unless the person who completed the survey indicates that the response can be shared with the mediator, courts often use information from multiple surveys about a particular mediator to determine if there is any pattern of responses indicating that the mediator could benefit from additional training or that some other intervention is needed.

Some courts also require, as a condition for being on the court's panel, that neutrals agree to be observed by the ADR administrator or some other representative of the court who is knowledgeable about the particular ADR process. Such observations allow the ADR administrator or other observer to see whether neutrals are engaging in appropriate practices and to provide these neutrals with personal feedback on their performance.

2. [§6.6] Sample Survey Forms

Superior Court of California - County of San Mateo

San Mateo County Superior Court, Multi-Option ADR Project, MAP

Client Evaluation

In accordance with **Local Rule 2.3 (i) (5)**, please submit evaluation by mail or fax within 10 days of completion of the ADR process. Telephone: (650) 599-1070 Fax: (650) 599-1754

MAP staff and committees use this *confidential* information to assess the impact on the court, to track quality, to provide feedback to neutrals and to inform our decisions regarding redesign of program procedures. Other staff and trial judges do not see specific evaluations. This information will be aggregated for blind statistical reports to the Judicial Council, the Court and the community.

Case Name: **Case Number:**

Type of Case: **Name of Neutral:** **Date of Session:**

1. I am: ☐ Plaintiff ☐ Other _____
2. ☐ Defendant

I participated in an ADR Session ☐ YES ☐ NO

If you answered NO above, please indicate the reason(s) why below. If you answered YES continue to question 2:

☐ Parties unwilling ☐ Not yet scheduled ☐ Other, Describe: _____

3. Please indicate which, if any, of the following occurred during the ADR session: Please check all that apply.

☐ Communication between the parties was improved.
☐ Parties came away with a better understanding of the case.
☐ Parties clarified, resolved and eliminated some issues.
☐ Other comments:

Superior Court of California - County of San Mateo

San Mateo County Superior Court, Multi-Option ADR Project, MAP

Client Evaluation

4. On a scale of 1 to 5, 1 being the lowest level and 5 being the highest level, please indicate your satisfaction by rating the following statements:

	Lowest				Highest
1. This process was fair to all parties	1	2	3	4	5
2. This process allowed all to be heard.	1	2	3	4	5
3. This process offered a safe secure setting.	1	2	3	4	5
4. I did not feel unduly pressured by the neutral to reach agreement.	1	2	3	4	5
5. The neutral skillfully structured the process.	1	2	3	4	5
6. The neutral understood key issues.	1	2	3	4	5
7. I would use this neutral again.	1	2	3	4	5
8. I would use the MAP program again	1	2	3	4	5

Please provide any additional comments: _____

Send to:

Multi Option ADR Project – SMC 127
400 County Government Center
Redwood City, CA 94063-1655

Superior Court of California, County of Los Angeles

JOHN A. CLARKE
EXECUTIVE OFFICER/CLERK

ALTERNATIVE DISPUTE RESOLUTION (ADR) OFFICE
111 NORTH HILL STREET, ROOM 113
LOS ANGELES, CA 90012-3014
(213) 974-5425

CASE INFORMATION

Q1 Date of ADR Process (mm/dd/yy):

Q2 Name of Neutral (Arbitrator/Mediator/Settlement Officer):

Q3 Case Name:

Q4 Case Number:

Q5 ADR Process (please check box):

- ☐ Arbitration
- ☐ Mediation
- ☐ Settlement Conference

Q6 You represented:

- ☐ Plaintiff
- ☐ Defendant
- ☐ Cross-Defendant
- ☐ Self

Other (specify):

Q7 Case Type:

- ☐ Business/Contract
- ☐ PI/PD Auto
- ☐ PI/PD Other
- ☐ Real Estate
- ☐ Consumer/Merchant
- ☐ Employment
- ☐ Family/Domestic

Other (specify):

Q8 If the case was resolved, it was: (If case did not resolve, please proceed to Q13)

- ☐ As a direct result of the ADR Process.
- ☐ As an indirect result of the ADR Process.
- ☐ Unrelated to ADR Process.

Q9 Check the closest dollar amount that you estimate was saved (attorneys fees, expert witness fees, and other costs) by using this ADR process compared to resolving this case through litigation, whether by settlement or trial.

- ☐ $0
- ☐ $250
- ☐ $500
- ☐ $750
- ☐ $1,000

More than $1,000 (specify):

To keep other people from seeing what you entered on your form, please press the Clear This Form button at the end of this form when finished.

Q10 If the ADR process caused a net increase in your costs in this case, check the closest dollar amount of the additional cost.

- ☐ $0
- ☐ $250
- ☐ $500
- ☐ $750
- ☐ $1,000

More than $1,000 (specify):

Q11 Check the closest number of court days that you estimate the court saved (motions, hearings, conferences, trial, etc.) as a result of this case being referred to this ADR process.

- ☐ 0
- ☐ 1 day

More than 1 day (specify):

Q12 If the ADR process caused a net increase in court time for this case, check the closest number of additional court days.

- ☐ 0
- ☐ 1 day

More than 1 day (specify):

[Please check the box that best reflects your opinion (5=strongly agree and 1=strongly disagree)]

Q13 Although no settlement was reached, the ADR process clarified and narrowed the issues. 5 ☐ 4 ☐ 3 ☐ 2 ☐ 1 ☐

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ADR FOLLOW-UP SURVEY

Q14 The following factors contributed to the case not settling:

	5	4	3	2	1
Parties' relationship very hostile	☐	☐	☐	☐	☐
Complex legal factors	☐	☐	☐	☐	☐
Client uncooperative	☐	☐	☐	☐	☐
Attorney uncooperative	☐	☐	☐	☐	☐
Both uncooperative	☐	☐	☐	☐	☐
Skills and expertise of neutral	☐	☐	☐	☐	☐
Credibility issues	☐	☐	☐	☐	☐
A different ADR process would have been better suited for this case	☐	☐	☐	☐	☐
Other (specify):	☐	☐	☐	☐	☐

NEUTRAL ASSESSMENT

Q15

	5	4	3	2	1
a. The neutral made useful suggestions that moved the parties toward settlement.	☐	☐	☐	☐	☐
b. The neutral acted in a fair, impartial manner.	☐	☐	☐	☐	☐
c. The neutral was courteous.	☐	☐	☐	☐	☐
d. The neutral was knowledgeable about the case.	☐	☐	☐	☐	☐
e. The neutral was knowledgeable about the ADR process.	☐	☐	☐	☐	☐
f. The neutral possessed the skills and competency needed to handle the case.	☐	☐	☐	☐	☐
g. The neutral maintained confidentiality.	☐	☐	☐	☐	☐
h. The neutral explained the ADR process clearly so I knew what to expect.	☐	☐	☐	☐	☐
i. The neutral allowed me or my attorney to fully explain the case.	☐	☐	☐	☐	☐
j. Overall, I was satisfied with the way the neutral handled the case.	☐	☐	☐	☐	☐
k. The agreement/settlement was complied with by all parties.	☐	☐	☐	☐	☐
l. Overall, I believe the settlement agreement or award was fair.	☐	☐	☐	☐	☐
m. Overall, I believe the settlement agreement was adequate.	☐	☐	☐	☐	☐

Q16 Would you be willing to use our services again?

☐ Yes
☐ No

Q17 Would you be willing to recommend our services to others?

☐ Yes
☐ No

Q18 May we share your comments with the neutral?

☐ Yes
☐ No

Q19 Additional Comments:

(OPTIONAL)

Q20 Name:

Q21 Address:

Q22 Phone:

END OF SURVEY

To protect your privacy, please press the Clear This Form button after you have printed this form.

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Print This Form

ADR FOLLOW-UP SURVEY

Clear This Form

E. [§6.7] STANDARDS OF CONDUCT

Canon 6D of the Code of Judicial Ethics (Cal Rules of Ct, Code of Judicial Ethics) establishes ethics standards for temporary judges, referees, and court-appointed arbitrators, including standards relating to disclosure, disqualification, ex parte communication, and acceptance of gifts. California Rules of Court 2.831, 3.816, 3.904 impose additional disclosure obligations for temporary judges, referees, and court-appointed arbitrators.

For a comprehensive discussion of Cal Rules of Ct 3.850–3.868, which establish standards of conduct for mediators in court-connected mediation programs for civil cases, including rules relating to disclosure, disqualification, party self-determination, acceptance of gifts, marketing, and fees, see §§2.13–2.14.

F. [§6.8] COMPLAINT PROCEDURES

Any temporary judge, referee, or court-appointed arbitrator who is a member of the State Bar of California is subject to the Bar's system for disciplining attorneys. The State Bar has the authority to prosecute these neutrals for violations of Canon 6D.

Under Cal Rules of Ct 3.865–3.867, courts that maintain panels of mediators or make referrals to mediators are required to establish a procedure for handling complaints against those mediators , and these procedures must be kept confidential. For details, see §2.14.

The Los Angeles Superior Court's ADR Committee has a Quality Assurance Subcommittee that evaluates complaints received regarding the performance of mediators whose names appear on the list that the ADR Department makes available to litigants in general civil cases. The subcommittee reviews inquiries made by the department's staff about these complaints and, when warranted, conducts further investigations that may result in a private admonishment of the mediator, or in the mediator's suspension or removal from the list.

III. [§6.9] QUALITY ASSURANCE PROGRAMS

The overall quality of ADR programs implemented by a court can be addressed through a combination of program monitoring and evaluation.

Program monitoring generally involves ongoing assessments of how a program is operating and whether policies and procedures are being implemented as intended. Program evaluation generally involves a one-time assessment or periodic assessments to determine whether a program is meeting its articulated goals and how its performance compares with the performance of other programs. Both monitoring and evaluation may consider similar information, such as the number of cases referred to the program, the timing of ADR, party satisfaction with the process and outcome, and settlement rates. The objectives are to identify and correct problems in program implementation and to adjust program procedures to better serve the needs of litigants and the court.

Many courts use exit surveys to help gather information for their ADR program monitoring or evaluation. They ask participants for their views about the court's ADR program and whether it was helpful to them. For example, a postmediation survey may ask mediation participants if they feel that the mediation process helped them to resolve their dispute, narrow the issues in dispute, save time, or save money; whether they were satisfied with the court's services; and whether they would use these services again. Participants' answers to these questions can help the court determine if the ADR program is meeting any goals that it set in these areas.

Courts may also use information from their case management systems or other systems to gather information for their ADR program monitoring or evaluation, *e.g.*, the date that the parties stipulated to participate in ADR or the court referred the case to ADR; the date that the ADR process took place; how much time was spent in the ADR process; and the date that the case reached disposition.

The following publications provide examples of program evaluations or information on program monitoring and evaluation:

Center for Analysis of ADR Systems, www.caadrs.org. Guidelines for evaluating court-connected mediation programs.

California Administrative Office of the Courts, *Evaluation of the Early Mediation Pilot Programs* (February 2004).

Brazil, *Continuing the Conversation About the Current Status and Future of ADR: A View from the Courts*, Journal of Dispute Resolution 11 (2000). See 24–25, 36–39 on ensuring quality control and effective measures for program evaluation.

The Maine Superior Court Alternative Dispute Resolution Pilot Project Evaluation Final Report, Administrative Office of the Courts, State of Maine, and Edmund S. Muskie School of Public Services, University of Southern Maine (1999).

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). Contains summaries of evaluation research reports on court-connected dispute resolution programs.

Stienstra, Johnson, & 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).

Ostermeyer & Keilitz, *Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers*, National Center for State Courts, SJI (1997). A practical guide for courts to plan and implement an evaluation of a court-connected ADR program.

Bakke, Green, & Solomon, *Integrating ADR Into Trial Court Civil Caseflow Management Systems: An Implementation Guide* 33–37, The Justice Management Institute, under a grant from the State Justice Institute (1996). Implementation of systems to conduct program monitoring and evaluation.

Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, RAND Institute for Civil Justice (1996).

Evaluating Agency Alternative Dispute Resolution Programs: A User's Guide to Data Collection and Use, RAND Institute for Civil Justice (1995). Discusses designing evaluations, lays out approaches to data collection, provides sample data analysis plans, with some prototype data collection instruments.

Court-Ordered Civil Case Mediation in Northern Carolina: An Evaluation of Its Effects, North Carolina Administrative Office of the Court (1995).

Keilitz, *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings Implications for Court and Future Research Needs*, National Center for State Courts, SJI (1994). Contains summaries of evaluation research reports on court-connected dispute resolution programs.

Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, under a grant from the State Justice Institute (1992). See Standards 1, 2, 6, 8 and 16.

Lowe & Keilitz, *Middlesex Multi-Door Courthouse Evaluation Project, Final Report*, National Center for State Courts (1992).

Tyler, *How to Measure "Success,"* 66 Denver University Law Review 419 (1989).

Luban, *What Should the Criteria for ADR Success Be?* 66 Denver University Law Review 381 (1989).

Chapter 7
CONFIDENTIALITY AND IMMUNITY

I. [§7.1] GENERAL CONFIDENTIALITY PROVISIONS

Evidence Code §1152(a) provides for the general confidentiality of all offers of compromise and statements made in negotiation, as follows:

> Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

Certain types of evidence, *e.g.*, evidence of partial satisfaction of an asserted claim and a debtor's promise to pay a preexisting debt, constitute exceptions to this general rule. Evid C §1152(b)–(c).

Evidence Code §703.5 makes you as well as all mediators, arbitrators, and other persons presiding at any judicial or quasi-judicial proceeding generally incompetent to testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling essentially occurring at or in conjunction with those proceedings. These ADR neutrals should therefore not be subpoenaed to provide such testimony. Exceptions are provided for

> [A] statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Business and Professions Code §467.5 makes the confidentiality provisions of Evid C §§1115–1128 (see discussion, §7.2) applicable to all proceedings conducted by a program

funded under the Dispute Resolution Programs Act (DRPA) (Bus & P C §§465–471.5), including mediation and arbitration.

II. PROVISIONS SPECIFICALLY PROTECTING THE CONFIDENTIALITY OF MEDIATION

A. [§7.2] EVIDENCE CODE §§1115–1128

Evidence Code §§1115–1128 protect the confidentiality of mediation. The following must remain confidential (Evid C §1119(c)): All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation.

Evidence of the following is inadmissible, is not subject to discovery, and its disclosure may not be compelled in any noncriminal proceeding (Evid C §1119(a)): Anything said or any admission made for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation.

Evidence of the following is inadmissible, is not subject to discovery, and its disclosure may not be compelled in any noncriminal proceeding (Evid C §1119(b)): Any writing (as defined in Evid C §250) that is prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation.

No report, evaluation, or finding by the mediator concerning a mediation may be submitted to a court or other adjudicative body or be considered by that body without the agreement of all parties to the mediation. An exception is made for a report that is mandated by a court rule or other law and that states only whether an agreement was reached. Evid C §1121. See also Evid C §703.5.

Neither a mediator nor a party may reveal communications made during mediation. Evid C §§1119, 1121. A mediator may not report to the court about any conduct of the participants and sanctions may not be imposed against a party based on a mediator's report of such communications. *Foxgate Homeowners' Assoc., Inc. v Bramalea Cal., Inc.* (2001) 26 C4th 1, 17–18, 108 CR2d 642. This protection against disclosure may be waived, but only by an express waiver. *Eisendrath v Superior Court* (2003) 109 CA4th 351, 362–365, 134 CR2d 716 (implied waiver, based on party's raising a claim concerning the agreement reached during the mediation, held insufficient).

The protection afforded by Evid C §§1119 and 1121 renders confidential all communications materially related to the mediation between the mediation participants before the end of the mediation even if they occur outside the mediator's presence. *Eisendrath v Superior Court, supra*, 109 CA4th at 363–364. To be protected, a communication must have been made for the purpose of, in the course of, or pursuant to a mediation. *Wimsatt v Superior Court* (2007) 152 CA4th 137, 161, 61 CR3d 200 (conversation concerned discovery matters during regular course of the litigation and was not linked to a mediation session).

In *Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643, the Supreme Court emphatically upheld the protection that Evid C §1119 provides for information disclosed during a mediation. Differentiating the broad protection for discovery afforded by Evid C §1119 from the narrower protection of the CCP §2018(b) work product rule, the Supreme Court rejected the court of appeal's interpretation that Evid C §1119 does not protect pure evidence such as photographs and witness statements and that court's holding that a good cause exception applies to derivative material. 33 C4th at 415–417, 423–424.

This protection has some limitations. Although written statements may be protected under Evid C §1119, this does not render the *facts* set forth in those statements inadmissible or protect them from disclosure solely by their introduction or use in a mediation. Otherwise, parties could use mediation as a pretext to immunize from admissibility documents otherwise discoverable by offering them in the mediation. See Evid C §1120(a); *Rojas v Superior Court, supra*, 33 C4th at 417 n5 , 423 n8; *Wimsatt v Superior Court, supra*, 152 CA4th at 160–161.

Because they are not "writings" under the Evid C §250 definition that is incorporated into Evid C §1119, physical objects are not protected by mediation confidentiality. *Rojas v Superior Court, supra,* 33 C4th at 416.

Evidence of a party's conduct is also not precluded from discovery or admissibility by Evid C §1119, unless it amounted to a "communication" in the course of the mediation. See *Foxgate Homeowners' Ass'n, Inc. v Bramalea Cal., Inc., supra,* 26 C4th at 17–18.

If a person subpoenas or otherwise attempts (in violation of Evid C §703.5 or §§1115–1128) to compel a mediator to testify or produce a writing, the mediator must be awarded reasonable attorney's fees and costs against the violator. Evid C §1127.

Any reference to the mediation during any subsequent trial constitutes an irregularity in the proceedings for the purposes of CCP §657 (vacating verdicts). Evid C §1128.

For a discussion of when settlement agreements resulting from mediation are *not* protected from disclosure, see §§7.5–7.8.

These confidentiality rules do not apply to family law conciliation proceedings, including child custody and visitation mediation, or to mandatory settlement conferences. Evid C §1117(b).

In a juvenile delinquency proceeding under Welf & I C §602, the confidentiality protection of Evid C §1119 must yield if it conflicts with the minor's constitutional right to impeach a witness. You should, however, conduct a hearing in chambers and weigh the competing rights before allowing the minor's attorney to question the mediator. *Rinaker v Superior Court* (1998) 62 CA4th 155, 169–171, 74 CR2d 464.

B. [§7.3] Mediation Under CCP §§1775–1775.15

Any reference during a subsequent trial to either the mediation or to the statement of nonagreement filed by a mediator is grounds for granting a motion for mistrial not only under Evid C §§1115–1127, but also under CCP §§657, 1775.10, 1775.12.

C. [§7.4] Child Custody and Visitation Mediation

Under child custody and visitation mediation (see §§2.26–2.29), all mediation proceedings must be held in private and are confidential. Fam C §3177. All communications, oral or written, from the parties to the mediator in the proceedings are official information within the meaning of Evid C §1040. However, the mediator may, consistent with local court rules, make a recommendation to the court as to the custody of or visitation with the child. Fam C §3183.

D. [§7.5] Admissibility of Agreements Reached in Mediation

As discussed in§§7.2–7.3, Evid C §§1115–1128 broadly protect the confidentiality of communications made in conjunction with a mediation. This includes both written and oral agreements that may have been reached in mediation. However, evidence of such agreements is admissible in noncriminal proceedings, if certain strict conditions are satisfied. These conditions are discussed in §§7.6–7.7.

1. [§7.6] Written Agreements

If any of the following conditions are satisfied, an agreement made in the course of a mediation that is signed by the settling parties is not made inadmissible or protected from disclosure:

- The agreement provides that it is admissible or subject to disclosure, or words to that effect. Evid C §1123(a).
- The agreement provides that it is enforceable or binding or words to that effect. Evid C §1123(b).
- All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure. Evid C §1123(c).
- The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute. Evid C §1123(d).

To satisfy Evid C §1123(b), the writing in question must directly express the parties' agreement to be bound by the document they sign. It must include a statement that it is "enforceable" or "binding" or a declaration in other terms with the same meaning. *Fair v Bakhtiari* (2006) 40 C4th 189, 197–200, 51 CR3d 871 (lacking such language, document entitled "Settlement Terms," which stated that disputes under it were subject to JAMS arbitration rules, failed to satisfy statute).

2. [§7.7] Oral Agreements

Evidence Code §1124(a) states that an oral agreement made in the course of a mediation is not inadmissible or protected from disclosure if it is made in accordance with Evid C §1118, which requires *all* of the following conditions to be satisfied:

(a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Evidence Code §1124(b) states as an alternative that an oral agreement is admissible and subject to disclosure if it is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

Evidence Code §1124(c) states as another alternative that it is sufficient if the oral agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

E. [§7.8] Waiver of Protection of Confidentiality

The protection against disclosure that the Evidence Code provides may be waived, but only by an express waiver. *Eisendrath v Superior Court* (2003) 109 CA4th 351, 362–365, 134 CR2d 716 (implied waiver, based on party's raising claim concerning agreement reached during mediation, held insufficient).

III. [§7.9] JUDICIAL ARBITRATION

Any reference to the arbitration proceedings or arbitration award from an arbitration conducted under the judicial arbitration program during any subsequent trial constitutes an irregularity in the proceedings for the purposes of CCP §657 (vacating verdicts). CCP §1141.25.

IV. [§7.10] NONCONFIDENTIAL NATURE OF PRIVATE JUDGING

The public may attend any proceeding conducted by a private judge (also known as a temporary judge). On any person's written request, or on a judge's own motion, an order may be issued requiring the trial to be held at a site easily accessible to the public, with appropriate seating for those who have made known their plan to attend. Cal Rules of Ct 2.833.

A party that wants any records related to these proceedings sealed must file a motion to seal. See Cal Rules of Ct 2.834.

V. [§7.11] IMMUNITY

ADR neutrals may be protected from tort liability by common law, quasi-judicial immunity. See *Stasz v Schwab* (2004) 121 CA4th 420, 430–433, 17 CR3d 116; *Howard v Drapkin* (1990) 222 CA3d 843, 855–860, 271 CR 893.

Chapter 8
ENFORCING AGREEMENTS OR AWARDS REACHED IN ADR

I. [§8.1] STIPULATED JUDGMENTS

Code of Civil Procedure §664.6 provides that if the parties stipulate in writing or orally before the court for settlement of all or part of the case, the court, on motion, may enter judgment under the terms of the settlement. Some court settlement programs that use attorneys or other nonjudicial officers to conduct settlement conferences use the authority of this section to enhance the formality and enforceability of agreements reached. All settlements are entered in the record before a judge.

In *Murphy v Padilla* (1996) 42 CA4th 707, 712–713, 49 CR2d 722, the court held that an oral agreement reached in a mediation to which the parties were referred by the court and in which the mediator was not empowered to act in an adjudicatory fashion was not enforceable under CCP §664.6. Following the reasoning in *Marriage of Assemi* (1994) 7 C4th 896, 906, 30 CR2d 265, the court held that oral stipulations before a subordinate court officer must meet a two-part test to be considered "before the court" under the provisions of CCP §664.6: (1) the court officer must have adjudicatory powers, and (2) the court officer must have, in fact, acted in that capacity. Applying this reasoning, the court stated that

- An oral stipulation before a *general* referee can support an enforceable settlement agreement under CCP §664.6 because a general referee, like a temporary judge or a private arbitrator, may be empowered to make binding decisions about controverted issues.
- An oral stipulation before a *special* referee, however, cannot satisfy the "before the court" requirement because of the nonbinding nature of the referee's decision.

II. [§8.2] JUDICIAL ARBITRATION

An award made by an arbitrator under the judicial arbitration provisions is final unless a trial de novo is requested. CCP §1141.20. The court clerk must enter the award as a judgment if no party files a request for a trial de novo within 30 days after the arbitrator files the award with the clerk. Cal Rules of Ct 3.827(a). The judgment is then enforced like a judgment in a civil matter or proceeding, except that it is not subject to appeal. Cal Rules of Ct 3.827(c).

A judgment entered on the basis of a judicial arbitration award may be challenged only by moving to have the judgment vacated. The party against whom such a judgment has been entered must file a motion to vacate within six months after entry of the judgment and the motion must be based on one of the following grounds (Cal Rules of Ct 3.828(a)):

- The arbitrator was subject to disqualification not disclosed before the hearing and of which the arbitrator was then aware.
- One or more of the grounds set forth in CCP §473 (mistake, inadvertence, surprise, or excusable neglect) apply.
- The award was procured by corruption, fraud, or other undue means. CCP §1286.2(a).
- There was corruption in any of the arbitrators. CCP §1286.2(b).
- The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. CCP §1286.2(c).

III. CONTRACTUAL ARBITRATION

A. [§8.3] ENFORCING AGREEMENTS TO USE BINDING ARBITRATION

Unless the arbitration agreement specifically provides otherwise, a contractual arbitration award is final and binding. The grounds for judicial review of the award are limited to the bases for correcting or vacating an award.

On the enforceability of agreements to use binding arbitration, see §§5.4–5.15.

B. [§8.4] ENFORCING ARBITRATOR'S AWARD

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 the following (CCP §1286.6):

- 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.

Similarly, the FAA permits correction in the following circumstances (9 USC §11):

- 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.

The CAA and the FAA also contain similar grounds for vacating an arbitration award. The CAA provides for vacatur if the court determines any of the following (CCP §1286.2):

- 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.
- An arbitrator making the award failed to comply with the applicable disclosure or self-disqualification requirements.

Petitions under CCP §1285 to vacate arbitration awards are specifically made subject to CCP §128.7, which authorizes the imposition of sanctions against attorneys, law firms or parties that file petitions containing unwarranted legal contentions or unsupported factual contentions.

The FAA provides for vacating an award on the following grounds (9 USC §10(a)–(d)):

- 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.

Under the CAA, the grounds for vacatur are limited to those set forth in CCP §1286.2. In 1992, the California Supreme Court observed that in the CAA the Legislature "expressed its strong support for private arbitration and the finality of arbitral awards" and held in *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 12, 32–33, 10 CR2d 183, that contractual arbitration awards are reviewable only on those grounds, even if an error of law apparent on the face of the award causes substantial injustice. In contrast, some federal courts have allowed arbitration awards to be challenged for "manifest disregard of the law." See *Todd Shipyards Corp. v Cunard Line, Ltd.* (9th Cir 1991) 943 F2d 1056, 1060.

Under both the CAA and the FAA, any party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award. CCP §1285; 9 USC §§10–11. The CAA specifically provides that the court must confirm the award as made unless it corrects the award and confirms it as corrected, vacates the award, or dismisses the proceeding. If the award is vacated, the court may order a rehearing before new arbitrators or, if the award was vacated on the basis of CCP §1286.2(d) or (e), the court, with the consent of the parties, may order a rehearing before the original arbitrators. CCP §1286.8. If an award is confirmed, judgment must be entered in conformity with the arbitration award. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action and may be enforced like any other judgment. CCP §1287.4. An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration. CCP §1287.6.

Chapter 9
LIMITATIONS ON JUDGE'S ACTIONS

I. DISQUALIFICATION OF JUDGE BASED ON EMPLOYMENT OR SERVICE AS DISPUTE RESOLUTION NEUTRAL

A. [§9.1] GROUNDS FOR DISQUALIFICATION

A judge is disqualified in any proceeding if he or she was employed or served as a dispute resolution neutral in the past two years, has a current arrangement concerning future employment or other compensated service, or has participated within the last two years in discussions regarding such employment or service, and any of the following applies (CCP §170.1(a)(8)(A)):

- The arrangement is, or the prior employment or discussion was, with a party to the proceedings.
- The matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or an award or other final decision by a dispute resolution neutral.
- The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service.
- The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.

For the purposes of this determination, all of the following apply (CCP §170.1(a)(8)(B)):

- "Participating in discussions" or "has participated in discussion" means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral or responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in that employment or service, making any inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about the possible employment or service.

- "Party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.
- "Dispute resolution neutral" means an arbitrator, mediator, temporary judge appointed under Cal Const art VI, §21, referee appointed under CCP §638 or §639, special master, neutral evaluator, settlement officer, or settlement facilitator.

But a judge is not participating in discussions by responding negatively to or declining to discuss an unsolicited statement regarding a question about, or an offer of prospective employment or other compensated service as a dispute neutral. CCP §170.1(a)(8)(B). A judge is therefore not disqualified from hearing any case if the "discussion" ended with the judge declining the unsolicited offer or declining to discuss it.

Even if the judge did participate in such discussions, the judge is disqualified only if one of the criteria stated in CCP §170.1(a)(8)(A) applies, *e.g.*, if the arrangement involved a party to the case, the matter before the judge involves the enforcement of an ADR award, or the judge is directing the parties to participate in ADR with a specific ADR neutral.

B. WAIVER

1. [§9.2] Judge May Initiate Waiver; Disclosure

As an alternative to recusal, a judge may, on the record, disclose the interest or relationship that might give rise to a disqualification and ask the parties and their attorneys if they agree to waive the disqualification. CCP §170.3(b)(1).

The judge must not exert any pressure to induce anyone to agree to a waiver. CCP §170.3(b)(3). Some judges never initiate waiver discussions, to avoid any appearance of pressure.

There can be no waiver when the basis for the disqualification is that the judge either has a personal bias or prejudice against a party or has been a material witness or served as an attorney in the matter in controversy. CCP §170.3(b)(2).

Even if convinced that there is no cause for recusal, the judge should disclose, on the record, any information that the parties might consider relevant to the question of disqualification. Cal Rules of Ct, Code of Judicial Ethics, Judicial Council's Commentary to Canon 3E.

The disclosure on the record enables a reviewing court to determine, if the judge is subsequently challenged for cause, when the earliest practicable opportunity for making the challenge occurred.

For a discussion of the judge's disclosure of reasons for his or her disqualification and the parties' waiver of the disqualification, see Rothman, CALIFORNIA JUDICIAL CONDUCT HANDBOOK §§7.16–7.26 (3d ed CJA/Thomson Reuters/West 2007).

2. [§9.3] Procedure

The waiver must be *in writing* and must recite the basis for the disqualification. For a sample form, see §9.4. Some judges keep a supply of blank waiver forms on hand and direct court personnel to fill them out, to keep the interruption of the proceedings to a minimum. The waiver is effective only when it is signed by *all* of the parties *and* their attorneys and filed in the record. CCP §170.3(b)(1). If any party or attorney does not sign, the judge must proceed to

recuse himself or herself and must not seek to discover which persons favored or opposed the waiver. CCP §170.3(b)(3).

3. [§9.4] Sample Form: Waiver of Disqualification

[Title of court]

No. _____

[Title of case]

WAIVER OF

DISQUALIFICATION OF JUDGE

The parties to this matter and their attorneys stipulate to a waiver of the following disqualification(s) of the Honorable _____, judge of the above named Court, to sit and act in this matter: [*Describe specifically the disqualification(s) being waived.*]

Dated: _____

[Signature of party]

[Name]

[Signature of party's attorney]

[Name]

[Signature of party]

[Name]

[Signature of party's attorney]

[Name]

II. [§9.5] LIMITATIONS ON SITTING JUDGE'S ACTING AS AN ADR NEUTRAL IN PRIVATE CAPACITY

A sitting judge is prohibited from acting as an arbitrator or mediator in a private capacity unless expressly authorized by law. Cal Rules of Ct, Code of Judicial Ethics, Canon 4F. The Advisory Committee to this Canon confirms that this does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of his or her judicial duties. For a discussion of Canon 4F, see Rothman, CALIFORNIA JUDICIAL CONDUCT HANDBOOK, §9.03 (3d ed CJA/Thomson Reuters/West 2007).

Prospective private employment as a dispute resolution neutral after retirement, or even engaging in discussions regarding such prospective employment can result in a sitting judge's disqualification. See §9.1.

No retired judge may participate in compensated private dispute resolution activities during his or her tenure in the Assigned Judges Program. Standards and Guidelines for Judicial Assignments IV.B(1).

APPENDIX: RESOURCES

Organizations and Their Web Sites

Persons interested in keeping up-to-date on ADR developments should consider joining the Association for Conflict Resolution and/or the American Bar Association's Dispute Resolution Section. Members of each organization receive newsletters and may attend conferences and other events. The California Dispute Resolution Council, a statewide nonprofit organization, issues a quarterly newsletter with briefings on legislative developments.

These are among the organizations listed in the following roster, originally prepared for a statewide conference on ADR that was sponsored by the Judicial Council and held in San Diego in January 2001. The information was updated in July 2008.

National Organizations

Association for Conflict Resolution
(a merged organization of AFM, CREnet and SPIDR)
1015 18th Street, NW, Suite 1150
Washington, DC 20036
Tel: 202-464-9700
Fax 202-464-9720
E-mail: acr@acrnet.org
Web: www.acresolution.org
(for California chapters, see next page)

National Center for the State Courts
300 Newport Avenue
Williamsburg, VA 23185–4147
Tel: 800-616-6164
Web: www.ncsconline.org

State Justice Institute
1650 King Street, Suite 600
Alexandria, VA 22314
Tel: 703-684-6100
Fax: 703-684-7618
Web: www.statejustice.org

American College of Civil Trial Mediators
20 North Orange Avenue, Suite 704
Orlando, FL 32801
Tel: 407-843-8878
Fax: 407-843-1996
Web: www.acctm.org\

American Bar Association
Section of Dispute Resolution
740 Fifteenth Street, NW
Washington, DC 20005
Tel: 202-662-1680
Fax: 202-662-1683
E-mail: dispute@abanet.org
Web: www.abanet.org/dispute

Center for Public Resources
575 Lexington Avenue, 21st floor
New York, NY 10022
Tel: 212-949-6490
Fax: 212-949-8859
E-mail: info@cpradr.org
Web: www.cpradr.org

National Association for Community Mediation
1514 Upshur Street, NW
Washington, DC 20011
Tel: 202-545-8866
Fax: 202-545-8873
E-mail: nafcm@nafcm.org
Web: www.nafcm.org

California Organizations

Association for Conflict Resolution

(California Chapters)
Los Angeles www.mediate.com/acrla/

San Diego www.adr-sandiego.com

Central California www.mediate.com/acrcentralca/

California Dispute Resolution Council and California Dispute Resolution Institute

P.O. Box 177
La Jolla, CA 92038
Tel: 866-216-CDRC
Fax: 858-454-1021
Web: www.cdrc.net

Association for Dispute Resolution of Northern California
601 Van Ness Avenue, #E3-102
San Francisco, CA 94102-6300
Tel: 650-745-3842
Fax: 650-745-3842
Web: www.mediate.com/adrnc

State Bar of California Committee on ADR
180 Howard Street
San Francisco, CA 94105–1639
Tel: 415-538-2000
Web: www.calbar.ca.gov

Southern California Mediation Association

75 South Grand Avenue, Suite 108
Pasadena, CA 91105
Tel: 877-963-3428
Fax: 626-974-5439
E-mail: scma@scmediation.org

Administrative Office of the Courts Office of the General Counsel
Attn: Heather Anderson or Alan Wiener
455 Golden Gate Avenue
San Francisco, CA 94102–3660
Tel: 415-865-4200

Administrative Office of the Courts Center for Families, Children & the Courts
Attn: George Ferrick
455 Golden Gate Avenue
San Francisco, CA 94102–3660
Tel: 415-865-4200

Other Web Sites

www.caadrs.org
Information on evaluation of court-connected mediation programs.

www.policyconsensus.org
Web site for the Policy Consensus Initiative. Includes links to ADR organizations and other information.

http://adrr.com
Extensive clickable lists of ADR organizations and other information.

www.spea.indiana.edu/icri
Short summaries of research findings from the Conflict Resolution Institute, Indiana University.

Publications

Note: For publications on qualifications, recruitment, screening, and training of ADR neutrals, see §6.3; on monitoring and evaluating ADR programs, see §6.9.

California Center for Judicial Education and Research, CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, SECOND EDITION (2008), chaps 3–5.

6 Witkin, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§481–629 (5th ed 2008, with annual pocket part supplements).

Knight, Chernick, Haldeman & Bettinelli, *California Practice Guide: Alternative Dispute Resolution* (The Rutter Group 2007, looseleaf, supplemented annually).

California Continuing Education of the Bar, *A Litigator's Guide to Effective Use of ADR in California* (2005, looseleaf, supplemented annually).

American Bar Association Section of Dispute Resolution, *ADR Handbook for Judges* (2004).

American Bar Association Section of Dispute Resolution, *Dispute Resolution Ethics: A Comprehensive Guide* (2002).

Garcia, *Alternate Dispute Resolution: Alternatives to Litigation*, American Bar Association (2000).

State Bar of California, Office of Research, *Guide to Court-Related ADR: Programs to Facilitate Settlement* (1993).

Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, under a grant from the State Justice Institute (1992).

California Administrative Office of the Courts, *Evaluation of the Early Mediation Pilot Programs* (February 2004).

Federal Judicial Center, *Guide to Judicial Management of Cases in ADR* (2001).

Purcell, *Growing Mediation in Our Courts: Why and How One Court Made the Journey*, Spring 2007 California Courts Review 12.

Brazil, *Continuing the Conversation About the Current Status and Future of ADR: A View from the Courts*, 2000 Journal of Dispute Resolution 11 (2000).

California Administrative Office of the Courts, *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* (1999) [available on the courts Web site at www.courtinfo.ca.gov].

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* (1998). Contains summaries of evaluation research reports on court-connected dispute resolution programs.

Edward Bergman and John Bickerman, *Court Annexed Mediation: Critical Perspective on Selected State and Federal Programs* (1998).

Welsh and McAdoo, *The ABC's of ADR: Making ADR Work in Your Court System*, Winter 1998 The Judges' Journal 11.

Ostermeyer and Keilitz, *Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers*, National Center for State Courts, SJI (1997). A practical guide for courts to plan and implement an evaluation of a court-connected ADR program.

Hanna and Suh, *Presenting Dispute Resolution to Judges: A Guide for Developing Judicial Training on Alternative Dispute Resolution*, American Bar Association (1996).

Bakke, Green and Solomon, *Integrating ADR Into Trial Court Civil Caseflow Management Systems: An Implementation Guide*, The Justice Management Institute, under a grant from the State Justice Institute (1996).

Keilitz, *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings Implications for Court and Future Research Needs*, National Center for State Courts, SJI (1994). Contains summaries of evaluation research reports on court-connected dispute resolution programs.

Justice in the Balance 2020: Report of the Commission on the Future of the California Courts (1993). Chapter 2 covers multidimensional justice.

Center for Public Resources, *ADR and the Courts: A Manual for Judges and Lawyers* (1987).

Cole, Rogers and McEwen, *Mediation: Law, Policy, Practice* (Thomson Reuters/West, 2d ed 2005).

Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (Ashgate Dartmouth 2006).

TABLE OF STATUTES AND RULES

CALIFORNIA

Standards of Judicial Administration

Code of Judicial Ethics

Ethics Standards for Neutral Arbitrators

LOCAL RULES

Los Angeles

San Francisco

Sonoma

TABLE OF CASES