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*Report to the Alaska Legislature:  
Alternative Dispute Resolution  
in the Alaska Court System*

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# **Alternative Dispute Resolution in the Alaska Court System**

## **Introduction and Structure of Report**

In May of 1997, the Alaska Legislature directed the Alaska Judicial Council (AJC) to propose a program for alternative dispute resolution (“ADR”) within the Alaska Court System (a copy of the legislation is attached at Appendix A). The legislature directed the AJC to review court-sanctioned alternative dispute resolution programs in other states and in the federal court system, consult with the Alaska Dispute Settlement Association, and confer with and obtain the approval of the Alaska Court System regarding the establishment of the ADR program. This report contains the requested research on court-connected ADR in other jurisdictions and the proposals developed by the Alaska Judicial Council and the Alaska Court System.

Part 1 summarizes programs in other state and federal courts. The section describes generally how other jurisdictions’ ADR programs are administered, what types of cases go to ADR, how cases are referred, the qualifications of the neutrals used by the litigants and how programs are funded. Subsection I contains the information about state courts and subsection II contains the information about the federal courts.

Part 2 contains proposals recommended jointly by the Alaska Judicial Council and the Alaska Court System for ADR programs within the Alaska Court System. The proposals were developed in consultation with the Alaska Court System’s Deputy Director and Staff Counsel, the Alaska Supreme Court Advisory Committee on Mediation, and the members of the Alaska Dispute Settlement Association (“ADSA”). They are based on the research from other state and federal jurisdictions, a written survey of all active members of the Alaska Bar Association, interviews with judges, meetings with heads of the Alaska Bar Association’s substantive law sections, input from a non-custodial parents’ group and numerous written and oral comments from members of ADSA and the Bar.

## **Part 1:**

### **Survey of Programs in Other Jurisdictions**

This section of the report first defines each of the three dispute resolution processes specified in the legislation and summarizes research regarding their effectiveness. It then surveys court-connected programs in other state courts and in the federal courts. The report does not include information about the many programs that operate outside of, or independent of, the courts.

#### **I. Definitions & Summary of Research Findings**

Alternative Dispute Resolution (ADR) in its most general sense refers to dispute resolution procedures other than adjudication by a court. For purposes of this legislation, the Alaska Legislature limited “alternative dispute resolution” to three processes: arbitration, early neutral evaluation and mediation. These procedures are defined below. (The following definitions come largely from the Center for Public Resource’s JUDGE’S DESKBOOK ON COURT ADR (1993). More detailed explanations of the three processes are included in Appendix B.)

##### **A. Arbitration**

Arbitration is a mandatory, adjudicative process in which a third party other than a judge or jury reviews facts and hears arguments from both sides and then renders a decision. When courts mandate arbitration, it is non-binding unless the parties themselves agree to be bound. Dissatisfied parties can reject the advisory arbitration award and insist on a trial de novo. Court-annexed arbitration is notable in several ways. First, it is relatively old, the first program having been set up in Philadelphia in 1952. Second, it is common, having spread by the early 1990s to both federal and state courts.

Federal arbitration programs typically include minor civil cases seeking no more than a specified upper dollar limit. Although the trend over time has been to increase the dollar limits, arbitration-eligible cases in the federal courts typically range from \$75,000 - \$150,000 in damages. In the state courts, arbitration-eligible cases typically have lower ceilings, usually around \$50,000 (although Hawaii’s arbitration program

has a \$150,000 ceiling). Most arbitration programs focus on routine contract, personal injury and property damage cases.

Court-ordered arbitration, unlike other forms of ADR, has been subjected to systematic empirical study for more than a decade.<sup>1</sup> Researchers first compared arbitrations to trials. They found that arbitration hearings were, on average, shorter than trials, involved less attorney preparation time than trials, cost both courts and private litigants less than trials, and generally required less time in the schedule queue than trials.<sup>2</sup>

A second generation of research examined arbitration's effects on case processing and settlement behavior. These analyses showed that in most instances, the arbitration process does not divert cases from trial, but rather provides an alternative to a settlement reached without a hearing.<sup>3</sup> In other words, arbitration provides an alternative form of adjudication to many cases that would settle without any hearing.<sup>4</sup>

Thus, most court-ordered arbitration programs do not significantly reduce the number or rate of trials.<sup>5</sup> However, litigants and their attorneys consistently have reported high levels of satisfaction with the arbitration process and its outcome, and this is true whether they won or lost.<sup>6</sup>

## **B. Early Neutral Evaluation**

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<sup>1</sup> *An Alternative View*, *supra* note 36, at 406.

<sup>2</sup> *Id.* at 406-07.

<sup>3</sup> *Id.* at 407. See also MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUSTICE SYSTEM JOURNAL 229 (1991). MacCoun reported on a study of court-annexed automobile arbitration in New Jersey. He found that after the arbitration program began, there was a significant reduction in the percentage of cases settled without third-party intervention, but no reliable decrease in the trial rate, and a significant increase in filing-to-termination time for auto cases assigned to the program. *Id.* at 229.

<sup>4</sup> *An Alternative View*, *supra* note 36, at 408.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 415.

Early Neutral Evaluation (“ENE”) began in 1983 with an experiment in the U.S. Northern District of California. The program became permanent in 1988. In early neutral evaluation, a neutral evaluator (usually a private attorney expert in the substance of the dispute) holds a brief, confidential, nonbinding session early in the litigation to hear both sides of the cases. The evaluator identifies the main issues in dispute, explores the possibility of settlement, and assesses the merit of the claims. The evaluator also may discuss and review ways of settling or simplifying the case with the parties, for example, a discovery or motion plan.

Courts experimenting with ENE have used it for a wide array of civil disputes including contract, product liability, labor and employment and personal injury cases. ENE also may be helpful in cases handled by inexperienced or poorly-prepared counsel, cases involving high levels of animosity among parties, complex legal disputes involving multiple issues or cases where the parties differ substantially on legal or factual issues.

The Western District of Missouri’s ENE demonstration program recently was evaluated by the Federal Judicial Center.<sup>7</sup> The program, known as the Early Assessment Program, was established in 1992. Cases were assigned to the program using a true experimental design, which is to say cases were randomly assigned to the program and to the regular litigation track. Data showed that the program led to earlier case resolution and decreased fees for clients in most cases as compared to the cases on the normal litigation track.<sup>8</sup>

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<sup>7</sup> See FEDERAL JUDICIAL CENTER, REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT ON THE CIVIL JUSTICE REFORM ACT DEMONSTRATION PROGRAMS (1997) [hereinafter “FEDERAL JUDICIAL CENTER REPORT”]. The report evaluated five demonstration programs established under the CJRA; two different state case management programs and three ADR programs.

<sup>8</sup> Cases required to participate in the program had a median age at termination almost three months shorter than cases not permitted to participate. *Id.* at 215. Also, over two-thirds of attorneys who participated in the program reported that the process did reduce their client’s litigation costs. *Id.* at 216.

### **C. Mediation**

In mediation, a neutral, third party helps the parties reach their own voluntary settlement of some or all of the issues in the case. Mediators facilitate settlement by promoting communication among parties, exploring bases for agreement and the consequences of not settling, developing a cooperative, problem-solving approach, identifying the parties' underlying interests and identifying options beyond the parties' perceptions. Mediation styles vary along a continuum from facilitative to evaluative, depending on the mediator and the parties' needs. Facilitative mediators concentrate on enhancing parties' communication and creating an atmosphere conducive to conciliation but do not attempt to evaluate the case. Evaluative mediators, on the other hand, may offer opinions about case value, liability and legal issues.<sup>9</sup>

Mediation is considered one of the most versatile ADR processes. It can be helpful in a wide variety of cases and circumstances. Most often cited are cases in which the parties have a continuing relationship (for example, divorces with children, landlord-tenant, business disputes, employment); however, mediation also has been effective in cases not involving a continuing relationship (for example, personal injury cases).

As mediation has become more popular, researchers have tried to quantify the effects that mediation has on case processing and case outcomes. Most of the research has involved family mediation, although some studies address non-family civil mediation. Research about family mediation suggests that mediation can be an effective and efficient service that can be more helpful than litigation to divorcing couples in conflict.<sup>10</sup> Research shows that the majority of clients entering family mediation across a variety of settings reach agreement (either in whole or in part), report satisfaction with the experience and consider it fair and responsive to their

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<sup>9</sup> Mediation should not be confused with judge-hosted settlement conferences. Judge-hosted settlement conferences typically are limited to discussions of the strengths and weaknesses of the case, case value, the legal arguments and the likely outcome at trial. The judge's status as a judicial officer invests the process with weight and commands the parties' respect. Traditionally, the judge's settlement role was mainly to referee a "horse trade," although that may be changing as judges are learning more techniques for facilitating settlement.

<sup>10</sup> Benjamin and Irving, *Research in Family Mediation: Review and Implications*, 13 *MEDIATION QUARTERLY* 53, 53 (1995). The article reviewed fifty-one mediation studies and summarized their findings on process, outcomes and predictors of mediated agreements. *Id.*

needs.<sup>11</sup> Also, relitigation rates among mediation couples have been found to be consistently low, and lower than those found among their litigation counterparts.<sup>12</sup> Not surprisingly, the studies further suggest that the most effective use of mediation involves matching clients amenable to it with the specific service model best suited to their needs, as opposed to blanket referrals to mediation.<sup>13</sup>

A limited amount of research has addressed non-family civil mediation's effects on pace, litigation costs, court workload, trial rates, settlement rates and participant satisfaction.<sup>14</sup> Studies on litigation pace are mixed but suggest that many mediation programs cause cases to be resolved faster than traditional adjudication. For example, two studies of state court programs showed that mediation cases were resolved more quickly than adjudicated cases, while another state court study found that cases referred to mediation had longer disposition times than cases that were adjudicated.<sup>15</sup> The recent RAND study of four federal court mediation programs<sup>16</sup> found significantly

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<sup>11</sup> *Id.* at 68. These judgments are characteristic of both men and women, but especially of women. *Id.*

<sup>12</sup> *Id.* at 64.

<sup>13</sup> *Id.* at 71.

<sup>14</sup> KEILITZ, ed., NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS — IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 6 (National Center for State Courts 1994) [hereinafter "NATIONAL ADR RESEARCH SYMPOSIUM"]. The report summarized the findings of four studies of non-family mediation programs in Minnesota, Maine, Florida and the District of Columbia. *Id.*

<sup>15</sup> *Id.* at 7-8.

<sup>16</sup> KAKALIK, DUNWORTH, HILL, MCCAFFREY, OSHIRO, PACE & VAIANA, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (RAND 1996) [hereinafter "RAND"]. While the RAND report is one of the most empirically rigorous evaluations of ADR, a number of commentators have concerns about applying the findings to other programs. See CPR Judicial Project Advisory Council of the CPR Institute for Dispute Resolution, *Statement of Concerns Regarding the RAND ADR Study* (1997). The RAND report evaluated several programs that were new and examined them early, or as program refinements were under way. In several of the courts studied, substantial revisions to the ADR programs were made after the RAND data were collected. In addition, several of the programs had significant design flaws that were in the process of being corrected at the time they were being studied. In fact, none of the six programs evaluated were model programs; they apparently were selected because they were pilot programs with sufficiently large case loads to allow analysis. *Id.* Indeed, the RAND authors themselves cautioned restraint in drawing any general conclusions about the effects of ADR on cost and delay, adding that the findings did not support any "definitive policy recommendations." *Id.* at 4. The authors did suggest the possibility that the programs studied "may have had smaller effects that could not be

shorter disposition times in one of the programs and disposition times that approached but did not reach statistical significance in two others.<sup>17</sup> In three of the four programs a majority of lawyers reported that mediation was helpful in reducing the time needed to resolve the case.<sup>18</sup>

Studies of court workloads showed that mediation cases required fewer court hearings and motions compared to control group cases.<sup>19</sup> With regard to settlement rates, one of the studies found that 20% of the control group cases were resolved through trial or judicial finding, compared to 13% of the assigned ADR cases and 8% of the voluntary ADR cases.<sup>20</sup> The RAND study found the likelihood that a case settled just before or as a result of the mediation session ranged from 31-72%.<sup>21</sup>

The research on litigant costs is limited; however, in several studies (including the RAND study) attorneys reported that they thought mediation was less costly than typical case processing.<sup>22</sup> On the other hand, the RAND study's empirical analysis of

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identified as statistically significant in the sample of cases studied." *Id.* at xxxiv.

<sup>17</sup> *Id.* at 34-35.

<sup>18</sup> *Id.* at 47, Table 4.21.

<sup>19</sup> NATIONAL ADR RESEARCH SYMPOSIUM, *supra* note 19, at 8.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> RAND, *supra* note 21, at 41. The program with the lowest settlement rate suffered from mandatory sessions that occurred very early in the process and were hosted by lawyers who were not required to be trained mediators. *Id.* at 92-93. Over half of the responding lawyers and mediators in that program said settlement was difficult because more discovery was needed. *Id.* at 46. For all the programs, impediments to settlement did not appear related to difficulty in the underlying subject matter such as factual or legal complexity. Nor did parties' or lawyers' reluctance to participate in mediation appear to bar success. Rather, the problem most often cited by lawyers and ADR providers was that the parties were not "ready" to settle. The second most often cited difficulty was that more discovery was needed. *Id.* at 45-46.

<sup>22</sup> NATIONAL ADR RESEARCH SYMPOSIUM, *supra* note 19, at 9; *see also* RAND, *supra* note 21, at 37-38 and Table 4.10 (reporting that half or more of the lawyers surveyed in two of the four mediation programs thought that mediation had decreased total case costs). The RAND report noted that the lawyers' subjective opinions on costs were not always in agreement with the objective data. *Id.* at 35.

attorney work hours found “no strong statistical evidence that lawyer work hours are significantly affected by ADR, either up or down....”<sup>23</sup>

Studies of participant satisfaction suggest that both litigants and attorneys find mediation to be fair and satisfactory, although the data comparing satisfaction in mediation to satisfaction in litigation are mixed. Ninety percent of lawyers and a slightly smaller percentage of litigants surveyed in the RAND study felt that the ADR process was fair.<sup>24</sup> In one mediation study from Minnesota, litigants in mediation rated it more favorably than did litigants in the judicial process, while attorneys rated the judicial process more highly.<sup>25</sup> In another study, parties rated mediation more highly than parties rated unassisted negotiations.<sup>26</sup>

Participants in ADR programs generally are supportive of them. In the RAND study, most of the lawyers felt that the programs were worthwhile in general and beneficial for their individual cases.<sup>27</sup> Only a small percentage in any district felt that the program should be dropped. Litigants felt the same, although they were a little less positive than the lawyers.<sup>28</sup>

## II. ADR in State Courts

A number of authors have published comprehensive surveys of court-connected ADR programs in other jurisdictions. The two upon which this report relies most heavily are: ELIZABETH PLAPINGER & MARGARET SHAW, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* (Center for Public Resources, 1992) and ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A*

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<sup>23</sup> RAND, *supra* note 21, at 37. The RAND researchers found that lawyer work hours per litigant were actually significantly higher for cases in one program. In this program, judges encouraged the tougher cases to volunteer for mediation. The RAND researchers concluded that the non-mediation cases in this program probably were not truly comparable to the mediation cases. *Id.*

<sup>24</sup> *Id.* at 49.

<sup>25</sup> NATIONAL ADR RESEARCH SYMPOSIUM, *supra* note 19, at 8. About 75% of both groups viewed mediation as fair. *Id.*

<sup>26</sup> *Id.* The parties in mediation also had a greater perception that the outcome was fair and that the full story was told. *Id.*

<sup>27</sup> RAND, *supra* note 21, at 51.

<sup>28</sup> *Id.*

SOURCEBOOK FOR JUDGES & LAWYERS (1996). Most of the information contained in this section comes from those sources, supplemented by information from the National Institute for Dispute Resolution, the National Center for State Courts, recent research, and discussions with program administrators in other jurisdictions. Because the number and variety of individual county or local programs throughout the nation is so large, this report will focus for the most part on statewide programs.

#### **A. Program Models in the State Courts**

State courts structure and administer their ADR programs in a variety of ways. While features of many programs are similar, they often differ in how they are established, their goals, policies and procedures.<sup>29</sup> They also vary in terms of whether case referrals are mandatory or voluntary,<sup>30</sup> what kinds of cases are referred to ADR and which types of ADR processes the cases are referred to.

ADR programs are organized with different levels of attachment to the court. In some states, court employees work as neutrals in the courthouse. In others, volunteer neutrals handle cases for the courts as needed. In yet others, the court system contracts with a bar association or nonprofit corporation to handle court-referred disputes. In some jurisdictions, individual neutrals certified by the courts take referrals but have no contractual relationship with the court.<sup>31</sup>

Second, programs vary by their goals. Goals cited by courts in adopting ADR programs have included: reducing judicial workload, speeding case resolution, decreasing the court or the parties' cost to resolve the case, handling cases more effectively, providing litigants with more options, better results or greater satisfaction with the process, decreasing relitigation, improving the relationship between the

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<sup>29</sup> Press, *Court-Connected ADR: Policies and Issues*, NIDR FORUM 4 (1995) [hereinafter "*Court-Connected ADR*"].

<sup>30</sup> The terms "voluntary" and "mandatory" describe how cases *enter* a court ADR process. "Voluntary" ADR generally refers to use which is consented to by all the parties. "Mandatory" ADR generally refers to ADR usage compelled by the court. Of course, the definitions can become blurred in some programs that have both compulsory and voluntary elements (for example, parties are required to attend an ADR orientation session but need not agree to use the process, or a judge strongly encourages but does not order the parties to use an ADR process). Some programs are "presumptively mandatory," meaning that the court presumes the parties will use an ADR process unless they opt out.

<sup>31</sup> *Court-Connected ADR*, *supra* note 2, at 5.

disputing parties, or responding to political or legislative directives.<sup>32</sup> The most successful ADR programs are adopted in response to a specific need or goal. Carefully designed programs have proven effective at meeting these and other goals; however, poorly designed programs have proven less effective.

Third, programs vary by their implementation authorization. Some programs are established by state statute, while others are established by court rule or even by administrative order. For example, all of the court-connected ADR programs in Florida, currently established by statute and comprehensive court rules, began as experiments.<sup>33</sup> In Texas, comprehensive statutes authorize court-annexed ADR and set out the details of the ADR system. In other states (for example Arizona, Indiana and Minnesota), laws authorize the state supreme court to use its rule-making authority to adopt ADR programs. Benefits to establishing comprehensive, statewide statutes or court rules include program consistency and continuity.<sup>34</sup> On the other hand, statewide rules or statutes lack the flexibility to respond to the changing needs of evolving programs.<sup>35</sup>

Fourth, programs vary by their funding. Dispute resolution advocates believe that public funding for dispute resolution options should be part of the justice system budget in every state. Thus, many court-connected ADR programs are funded by state legislative appropriations or local court budgets. On the other hand, state legislatures often are unwilling to devote scarce public funds to ADR programs, and some court administrators argue that court budgets should be reserved for “core” court functions. Alternatives to state funding include court filing fees, dispute resolution user fees, foundation grants or bar association assistance. Florida charges participating neutrals

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<sup>32</sup> PLAPINGER & SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN 2 (1992).

<sup>33</sup> *Court-Connected ADR*, *supra* note 2, at 6. Florida’s mediation program is one of the most comprehensive in the country. Under a 1987 statute, trial judges have the authority to refer any contested civil matter to mediation or arbitration, subject to limited exceptions. The program is operated by the Florida Dispute Resolution Center, a joint program of Florida State University College of Law and the Florida Supreme Court. The center mediates cases through citizen dispute resolution centers, county programs and circuit civil programs. *Id.*

<sup>34</sup> For example, programs implemented by an individual judge in the judge’s own court often fall into disuse when the judge is transferred or moves to another court.

<sup>35</sup> *Court-Connected ADR*, *supra* note 2, at 6.

“certification fees.” Some of the most effective programs rely on a combination of funding sources, along with reliance on volunteers.<sup>36</sup>

## **B. ADR Programs in Other States**

As of 1992, nineteen states had enacted statewide ADR legislation or had established task forces or commissions for statewide court-connected ADR program planning.<sup>37</sup> Information compiled by the National Center for State Courts in the early 1990s showed over 1,200 ADR programs throughout the country receiving referrals from state courts. In addition, numerous individual courts or judges have used ADR on a case-by-case-basis. The two most common forms of ADR in other jurisdictions are mediation and arbitration.

### **1. Mediation**

Mediation became more popular in state courts than arbitration in the 1990s.<sup>38</sup> As of 1995, 27 states had formally incorporated various ADR methods other than arbitration into their court systems statewide (most of these programs involved mediation).<sup>39</sup> The most common type of ADR program offered by courts probably is divorce mediation. Information published in 1993 showed that about 205 of the nation’s approximately 2,420 domestic relations courts offered court-based or court-annexed

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<sup>36</sup> *Id.*

<sup>37</sup> The states included: Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia and Wisconsin. PLAPINGER & SHAW, *supra* note 5, at x n. A6.

<sup>38</sup> California’s courts provide an example of the popularity of mediation services. A 1994 survey of 46 of the 58 California state superior courts found that thirty-six courts (78%) provided mediation for matters other than child custody disputes. Thirty-two courts (70%) conducted mediation in guardianship matters; nine courts (20%) provided mediation for certain juvenile dependence cases and in property disputes; eight courts (17%) provided mediation for certain civil disputes; and five courts (11%) provided mediation for child support. Providers of these services were primarily Family Court Services or mediation services staff (54% of courts) or probation officers (20% of courts). Contractors, court volunteers, other courts staff, outside referrals or other providers also provided mediation services. CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, A SURVEY OF CALIFORNIA FAMILY COURTS: ADR AND AUXILIARY SERVICES 2-3 (1994).

<sup>39</sup> Press, *Getting to Excellence in Court System ADR*, NIDR NEWS, No. 2, at 1 (1996).

services for divorce disputes.<sup>40</sup> In 1993, thirty-eight states and the District of Columbia had instituted programs to mediate custody, visitation, child support and other domestic relations disputes.<sup>41</sup> In recent years, a number of states (among them Arizona, California, Florida, Maine, Oregon, Washington and Wisconsin) have mandated mediation in child custody and visitation disputes. Others (for example, Colorado, Kansas, Kentucky and New Mexico) lack a statewide mediation requirement, but have mandated mediation in child custody and visitation disputes in most or all of their courts.

The usefulness of research on mediation is hampered by the great variability in mediation (and other ADR) programs throughout the federal courts and in the states. Programs differ substantially in program design, mediator training, funding, purpose and quality. This great variability makes it difficult to apply conclusions about one program to another program.<sup>42</sup> Future research hopefully will start to identify significant variables in program development and implementation that contribute to specific outcomes, such as reduced times to settlement or decreased costs.<sup>43</sup>

## **2. Arbitration**

During the 1980s, the largest growth in ADR programs was in the creation of court-connected arbitration programs. As of 1990, twenty states (including the District of Columbia) had implemented mandatory, non-binding, court-ordered arbitration

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<sup>40</sup> PEARSON, A REPORT ON CURRENT RESEARCH FINDINGS FOR THE NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 55 (1993). Of these, 75 categorically mandated participation, 75 permitted case-by-case judicial (mandatory) referrals, and the remaining 55 were initiated by one or both of the parties. About half of the programs focused on custody and visitation disputes, while the other half included child support, spousal support and property division issues as well. *Id.*

<sup>41</sup> NATIONAL CENTER FOR STATE COURTS, MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING 11 (1992) (hereinafter "MULTI-STATE ASSESSMENT"). The Association of Family and Conciliation Courts counted 33 states with mandatory mediation programs in at least one court hearing family issues. *Id.*

<sup>42</sup> Plapinger and McEwen have said that in one sense, the RAND study might be considered "a snapshot of six imperfect and changing versions of mediation...out of the 51 mediation...programs currently operating the federal district courts" rather than an evaluation of ADR's true potential in the federal courts. McEwen & Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, 3 DISPUTE RESOLUTION MAGAZINE 10 (Summer 1997).

<sup>43</sup> *Id.* at 11.

programs either statewide or in major metropolitan trial courts.<sup>44</sup> While a few programs applied to all civil damage suits, most had either an upper dollar limit, a substantive limitation or both.<sup>45</sup>

### **3. Early Neutral Evaluation**

To date, only a few state courts (among them Colorado, Ohio and Hawaii) have developed or have considered developing ENE initiatives. The District of Columbia began an experimental ENE program, but discontinued it because it duplicated its already-established mediation program. ENE has been more popular in federal courts; federal ENE programs are discussed *infra* at Section IIIC(3).

#### **C. Referring Cases to ADR**

An important consideration is how to refer cases to the ADR program. Should the court rely entirely on the parties' voluntary decision to use ADR processes or should the court order parties to use ADR?

##### **1. Voluntary Referrals**

Relying completely on voluntary referrals is problematic, because purely voluntary programs typically are underused.<sup>46</sup> Researchers have cited a number of possible reasons for this fact, including the observation that attorneys often are reluctant to request ADR because the opponent may see it as a sign of weakness. Yet ADR research consistently has shown that the vast majority of lawyers and litigants surveyed approved of the court ADR programs that they participated in, found them helpful and wanted them continued.<sup>47</sup> Because lawyer enthusiasm for the ADR experience typically does not translate into voluntary use, many courts with ADR

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<sup>44</sup> Hensler, *Court-Ordered Arbitration: An Alternative View*, U. CHICAGO LEGAL FORUM 399, 404 (1990) [hereinafter "*An Alternative View*"].

<sup>45</sup> *Id.*; *A Taxonomy of Judicial ADR* in ALTERNATIVES TO THE HIGH COST OF LITIGATION, at 109 (Center for Public Resources 1991).

<sup>46</sup> Voluntary programs studied in the RAND report had much lower case volumes than mandatory programs. RAND, *supra* note 21, at 52.

<sup>47</sup> *Id.* at 51.

programs have developed procedures for actively encouraging parties voluntarily to choose ADR.<sup>48</sup>

One method of encouraging voluntary use is to require the parties or their attorneys to confer with the opposing parties or attorneys to consider the feasibility of ADR options. For example, in Hawaii, the litigants are required to confer about ADR in person within eight months of filing the complaint.<sup>49</sup> The pretrial statement filed with the court must identify any party who objects to using an ADR process and the reason(s) for the objection.<sup>50</sup> Minnesota's Supreme Court calls on litigants to discuss case management issues, including selection and timing of an ADR process, within 45 days of filing, and to report their results to the court.

In Colorado, the rules of civil procedure require parties in district court civil cases to submit, within 45 days after the case is at issue, a proposed Case Management Order which includes the parties' "plans for future efforts to settle the case." In 1993, the Colorado Supreme Court adopted a rule of professional conduct exhorting lawyers to advise their litigation clients of alternative forms of dispute resolution.<sup>51</sup>

Other states encourage voluntary use by educating the parties about the availability and purposes of ADR services. For example, the metropolitan trial courts in Kansas City, Missouri have required lawyers to provide their clients with an ADR information sheet prepared by the court.

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<sup>48</sup> See McEwen & Plapinger, *supra* note 34, at 11. Future research hopefully will tell us more about how lawyers make decisions about using ADR. *Id.*

<sup>49</sup> See Hawai'i Rule of the Circuit Courts 12(b)(6).

<sup>50</sup> See *id.* at 12(b)(7).

<sup>51</sup> "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."

## **2. Mandatory Referrals**

Some state court ADR programs are mandatory, meaning that participation is mandated either by category of case or on a case-by-case basis. Statutes or court rules authorizing mandatory referral of cases to ADR typically include procedures for parties to remove the case from ADR.<sup>52</sup> Generally, parties may file a motion to opt out of the referral, with the granting of the motion left to the judge's discretion. Few statutes or rules provide criteria to guide the judge in deciding the motion other than "for good cause shown."<sup>53</sup>

While some mandatory ADR programs offer litigants a choice of ADR procedures (the "multi-door" courthouse), in most judges refer individually-selected cases to a specific ADR process. Alaska's Civil Rule 100 falls into the "case-by-case referral" category, although the Alaska Court System has no ADR program to take referrals. In Minnesota, judges supervise conferences with the parties to attempt to find an ADR process that the parties will accept; however, the judge makes the ultimate decision in ordering the parties to a particular non-binding process.

**(a) Mandatory Mediation.** Most court-based mediation programs rely on case-by-case referrals. Criteria for selecting cases for mediation are seldom articulated and often left to the discretion of individual judges or others (e.g., court staff) who screen cases for ADR suitability. In practice, most judges select cases for mediation based on the nature of the parties, the relationship between them, and the number and types of issues involved.

Some mediation programs, like Maine's, use a combination of mandatory and discretionary referrals. In Maine, mediation has been mandatory in domestic relations cases for over a decade; mediation of small claims cases has been mandatory since 1996. Judges may refer other civil cases to mediation at their discretion.

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<sup>52</sup> *Court-Connected ADR*, *supra* note 2, at 37.

<sup>53</sup> The Indiana Supreme Court rules are an exception. They list a number of factors for the judge to consider in deciding motions to opt out of mediation, including "the willingness of the parties to mutually resolve their dispute, the ability of the parties to participate in the mediation process, the need for discovery and the extent to which it has been conducted, and any other factors which affect the potential for fair resolution" through mediation. In Alaska, Civil Rule 100 authorizes a judge to consider "whether there is a history of domestic violence between the parties which could be expected to affect the fairness of the mediation process or the physical safety of the domestic violence victim."

**(b) Mandatory Arbitration.** Cases generally are selected for court-connected arbitration based on category of case (usually categorized by subject matter or amount in controversy). Many statutes or court rules limit arbitration programs to smaller money damage suits, personal injury, property damage and contract cases. Deborah Hensler, a well-respected researcher of court ADR with the RAND Corporation's Institute for Civil Justice, has suggested that arbitration, because of its discouragement of formal briefing and motions, "is not designed to deal with complex legal issues, which may arise in small or large money damage suits as well as in other disputes."<sup>54</sup>

One example of a longstanding arbitration program is Washington state's popular court-connected arbitration program. In effect since 1980, the program provides non-binding<sup>55</sup> arbitration for civil, non-domestic cases valued at \$35,000 or less per claim.

About five months after a case has been filed, the litigants must choose whether they will keep their trial date or go to arbitration instead. The parties may choose their own arbitrator or be assigned one by the program director. The state and the county each pay half of the arbitrators fees and the program administration costs. After arbitration, the disappointed party may ask for a trial de novo; however, a requestor who fails to better his or her outcome at trial becomes liable for the opposing side's trial fees and costs. The program administrator believes the program's strength comes from simple, precise rules; administrative support that permits the rules to be quickly and consistently enforced; a large and experienced pool of arbitrators to draw from; and a disincentive to appeal and training for the arbitrators. However, the program has not formally been evaluated.

**(c) Mandatory Early Neutral Evaluation.** Criteria for cases selected for ENE programs vary among jurisdictions. A state court ENE program in Denver, Colorado reported targeting cases possessing certain characteristics such as multiple parties, numerous claims for relief, complex legal issues, long trials and continuing discovery disputes. In practice, ADR selections often were made on the basis of the "fat

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<sup>54</sup> Hensler, *Court-Annexed Arbitration*, 23, 43, in CPR Legal Program, *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* (1987).

<sup>55</sup> In non-binding arbitration, either party may request a trial de novo after the arbitration.

file” theory, in which the fat files among a group of cases filed 90 days earlier ended up fitting the program’s selection criteria.

#### **D. Qualifications and Ethics of Neutrals**

Once court systems decide to refer cases to an alternative dispute resolution process, they often consider a host of issues related to managing the neutrals and assuring the quality of their performance, including selection, qualifications, funding, training and monitoring.

Many commentators believe that when courts employ mediators or early neutral evaluators or make referrals to private neutrals, some minimum standards are necessary to protect the public. Thus, courts in many other states that operate ADR programs establish and enforce minimum qualifications for neutrals to whom cases are referred.

States’ solutions to the question of neutral qualifications vary dramatically. First, neutral qualifications vary depending on the ADR process. Because mediation, arbitration and early neutral evaluation involve different skills, different qualifications often are required for the different processes.

Second, qualifications vary among programs. At one end, the District of Columbia has a comprehensive selection, training and monitoring program. At the other end, some states simply supply the names of neutrals who have put themselves on a list.

Maine’s Court Alternative Dispute Resolution Service (CADRES) selects and maintains four distinct rosters of ADR providers corresponding to case type: domestic relations, small claims, land use/environmental and general civil. CADRES established training and experience criteria for each roster.

An issue closely related to minimum qualifications concerns ethical standards of practice. Some states (Hawaii, Georgia and Florida among them) and national dispute resolution organizations (The Academy of Family Mediators, The Society of Professionals in Dispute Resolution, and the American Bar Association) have adopted independent codes of professional conduct for mediators or for neutrals in general.<sup>56</sup> In 1995, the American Arbitration Association, SPIDR and the ABA Section on Dispute

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<sup>56</sup> Press, *Getting to Excellence in Court System ADR*, *supra* note 12, at 8.

resolution adopted a joint code of professional conduct. In 1992, the Florida Supreme Court adopted a grievance procedure to accompany its code of conduct.<sup>57</sup> In 1995, the Center for Public Resources Institute for Dispute Resolution and Georgetown University Law Center established a comprehensive, multi-year project to encourage sound ADR ethics practices and rule-making.<sup>58</sup>

### **1. Mediator Qualifications**

No currently available research conclusively addresses the issue of mediator qualifications. No particular type or amount of education or job experience has been shown to predict success as a mediator. Successful neutrals come from many different backgrounds. Research has shown that the optimal way to qualify mediators is on the basis of performance, knowledge and skills, rather than by degree-based criteria. In other words, a good mediator exhibits certain skills and abilities that can not be predicted by legal training or experience. It follows that successful mediators need not be attorneys. Despite the lack of evidence that legal training predicts skilled mediators, many state courts require civil case mediators to possess law degrees and legal experience.

Some state courts have adopted qualifications based on experience and training. For example, the Ohio Supreme Court requires qualifications for mediators employed by the court or to whom the court refers cases involving the allocation of parental rights and responsibilities for the care of or visitation with minor children. Minimally qualified family mediators have: (1) a bachelor's degree or equivalent educational experience as is satisfactory to the court, (2) at least two years of professional experience with families, (3) completion of at least twelve hours of basic mediation training or equivalent experience as a mediator as is satisfactory to the court, and (4) after satisfying requirements 1-3, completion of at least forty hours of specialized family or divorce mediation training in a program approved by the Supreme Court Commission on Continuing Legal Education. "Professional experience with families" includes counseling, casework, legal representation in family law matters or equivalent experience satisfactory to the court.

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<sup>57</sup> *Id.*

<sup>58</sup> Plapinger, *CPR and Georgetown Collaborate on Ethics and Standards*, NIDR NEWS, Vol. 3, No. 2, at 6 (1996).

Only a minority of states qualify mediators based on performance, primarily because performance-based tests are expensive to administer and difficult to develop. However, the trend toward performance-based qualifications is increasing: Oklahoma, Texas and Utah base mediator eligibility on performance, knowledge and skills.

Of particular note is the San Diego Mediation Center's performance-based credentialing program, developed in 1992. The eleven-member Credentialing Committee identified certain standards of practice, including specific skills, techniques and abilities, that predict mediator competence. The Committee created a procedure, including a performance-based test, to assess mediator competence. A credential from the San Diego Mediation Center requires that the applicant pass the performance-based test, complete a minimum of 25 hours of skills training, and have performed a minimum of six mediations (may include up to two simulated and four actual cases) within the past three years or 18 hours of actual mediating.

Most state and federal courts require mediators to complete training programs before they can handle cases. While the duration and format of the trainings vary, most states require twenty to forty hours of classroom training, often supplemented by supervised mediations and observations. Some courts ask the trainers to evaluate the candidates' performance during the training program. A few states require continuing education and apprenticeships.

Several resources exist to help lawyers and litigants evaluate the qualifications of potential mediators. The Alaska Judicial Council has developed a consumer guide to selecting a mediator that lists some of the most important skills, abilities and attributes to look for in a mediator. The Ohio Commission on Dispute Resolution has developed a consumer guide for mediation training ("what you need to know to select a trainer"). The Alaska Court System publishes information about mediators who asked to be placed in the court system's Directory of Mediators.

## **2. Arbitrator Qualifications**

Most courts require arbitrators to be attorneys, although some courts permit non-lawyer arbitrators to serve at the parties' request. Attorney-arbitrators typically must be admitted to practice to the bar of the jurisdiction with five to fifteen years of

experience as a practicing attorney, and certification from the court that the attorney is eligible to serve. Arizona requires arbitration applicants to identify three areas of legal expertise and limits their arbitration referrals to those areas. Classroom training for arbitrators is not widely required, although Florida and Georgia have required some classroom training (four to six hours).

### **3. Early Neutral Evaluator Qualifications**

The handful of state courts that have offered early neutral evaluation have sought lawyers who are experts in the substantive areas targeted for the ENE programs. Some courts require specialized training.

#### **E. Funding**

Funding for ADR programs involves two separate yet related issues: how to pay the court's administrative costs, and how to compensate the neutrals who provide the services. States have come up with a variety of solutions to both these problems.

##### **1. Program Funding**

With regard to funding the administrative costs of ADR programs, states look to a number of sources. The most common sources include:

- ◆ state or local budget allocation;
- ◆ filing fee additions on state court filings;
- ◆ grants;
- ◆ pilot project funding;
- ◆ bar or other association funding;
- ◆ dispute resolution service fees assessed against users of the service; and
- ◆ practitioner fees (for example, for certification).<sup>59</sup>

New Jersey is an example of a state court ADR program funded by statutory appropriations. The Denver metropolitan courts have funded individual ADR programs out of their own operating funds. In California, the Los Angeles Bar Association and the Superior and Municipal Courts of Los Angeles County jointly sponsored dispute resolution services. Oklahoma, Oregon and Texas courts have funded court ADR programs by adding surcharges to general civil filing fees. The Middlesex County,

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<sup>59</sup> *Court-Connected ADR*, *supra* note 2, at 8.

Massachusetts Superior Court has imposed a \$50 administrative fee on ADR participants in the multi-door courthouse. Florida charges participating neutrals “certification fees” which help fund ADR services.

Maine funds its ADR program using a statutorily dedicated funding stream based on retention of a percentage of ADR fees. Fees are relatively low; for example, \$120 for a domestic relations mediation, \$175 for a land/environmental mediation. For other civil case mediation, the court charges an administrative fee of \$20, and the parties pay the mediator directly.

## **2. Compensation of Neutrals**

The second issue is that of how to compensate the neutrals. Plapinger and Shaw reported in 1992 that “the majority of federal and state court ADR programs continue to rely on volunteer neutrals.”<sup>60</sup> However, reliance on pro bono service raises two potential problems: can volunteers be expected to handle the volume of cases referred to ADR, and how does reliance on volunteers affect the quality of the ADR services? These concerns suggest that pro bono service should be limited to ADR assignments of limited duration and infrequent service, and that pro bono neutrals should be well trained and supervised.

Many state court ADR programs that do not use pro bono neutrals require parties to pay the fees of the ADR neutral. Data collected by the National Center on State Courts in the early 1990s suggested that litigants paid neutrals in about 29% of all mediation programs handling contract and tort claims accepting referrals from state courts. Some states fund neutrals’ services in the same manner as judges are funded, from their own operating budgets.

Some states regulate neutrals’ fees in an effort to minimize litigants’ costs. Courts regulate fees by court rule, case-by-case or by statute. Court-regulated fees and fees paid outright by the court often fall below market rates.

## **III. ADR in Federal Courts**

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<sup>60</sup> PLAPINGER & SHAW, *supra* note 5, at 49.

The main impetus behind ADR program adoption in the federal courts was the Civil Justice Reform Act of 1990 (28 U.S.C. §§ 471 *et seq.*).<sup>61</sup> The CJRA changed federal court ADR procedures from individual judge-based initiatives to court-managed, district wide programs.

#### **A. ADR in Alaska's Local District Court**

Alaska's local district court has endorsed the concept of alternative dispute resolution as one that can help reduce cost and delay, but it has not established any court-connected programs. The local federal court based its decision not to implement an ADR program on the CJRA advisory group's conclusion that the district is too small and its resources too limited to offer court-connected ADR. More recently, however, the federal court has been reconsidering the possibility of establishing a court-based ADR program. A committee has been established to study the issue.

Recently, the federal court adopted a local rule on mediation. It is modeled after the state court's Civil Rule 100.<sup>62</sup>

#### **B. Program Models in Other Federal Courts**

By 1995, almost all of the 94 federal districts had authorized or established at least one court-wide ADR program, including mediation, arbitration, early neutral evaluation (ENE), summary jury trials, judge-hosted settlement conferences and settlement weeks.<sup>63</sup> Some courts' programs predated the CJRA.

Under the CJRA, Congress specifically designated three courts (the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia) as "demonstration districts."<sup>64</sup> Congress instructed these courts to experiment with various methods of reducing cost and delay in civil litigation,

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<sup>61</sup> Fewer than one-third of the districts had ADR programs before the Act. PAMPLINGER & STIENSTRA, AIR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 3 (1996) [hereinafter "FEDERAL SOURCEBOOK"].

<sup>62</sup> See D.Ak.L.R. 52.2 (Mediation).

<sup>63</sup> FEDERAL SOURCEBOOK *supra* note 59, at Table 1 (pp.15-19).

<sup>64</sup> The courts were chosen based on individual judges' demonstrated interest in and knowledge about ADR.

including alternative dispute resolution. Under another provision of the CJRA, ten other districts were selected by the Judicial Conference to serve as pilot courts for implementation of six case management principles considered promising by Congress, among them alternative dispute resolution.

By 1995, nearly a dozen federal courts had appointed a full-time ADR administrator or director to manage and monitor the court's ADR programs.<sup>65</sup> While some courts used special funding under the CJRA to pay the ADR coordinator, others supported the position from their general budget. Courts without ADR administrators often assign part-time ADR responsibilities to a member of the clerk's office staff.

### **C. Types of ADR Offered in Federal Courts**

The federal courts offer mediation, arbitration, early neutral evaluation and other forms of ADR, including mini-trials and judge-hosted settlement conferences.

#### **1. Mediation**

By 1995, mediation had become the primary ADR process offered in the federal district courts, followed by arbitration. Forty-nine of the federal districts had established mediation programs by 1995.<sup>66</sup>

#### **2. Arbitration**

Twenty-two federal district courts had arbitration programs in 1995.<sup>67</sup> Those included eighteen courts in which arbitration was statutorily authorized,<sup>68</sup> and two

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<sup>65</sup> FEDERAL SOURCEBOOK, *supra* note 59, at 12.

<sup>66</sup> *Id.* at Table 3.

<sup>67</sup> *Id.* at Table 4.

<sup>68</sup> Federal law authorizes ten courts to require parties to participate in arbitration and ten to offer arbitration at the parties' option. *Id.* at 4 n.1.

others that offered arbitration as the second step of a combined mediation/arbitration procedure. Several other courts authorized use of arbitration but had not established court-annexed procedures.

### **3. Early Neutral Evaluation**

In 1995, fourteen federal district courts had established ENE programs.<sup>69</sup> Recently, one of the first two courts to use ENE, the District of Columbia, disbanded its program, finding it unnecessary in light of the court's mediation program.<sup>70</sup> The Western District of Missouri's early assessment program was recently evaluated by the Federal Judicial Center, which found that cases were resolved earlier at less cost to clients as compared to cases on the normal litigation track.<sup>71</sup>

### **4. Multi-Door**

Several courts offered a variety of ADR options. Most of the ten courts authorized to establish mandatory arbitration programs added mediation to their offerings. At least six courts offered a full array of options, including arbitration, mediation, ENE and summary jury trial.<sup>72</sup> The Northern District of California's ADR Multi-Option program, established in 1993, is an example of this "menu" approach to ADR.

The Northern District of California's multi-option ADR program is a demonstration program. California Northern offers attorneys their choice of ADR processes. Under that program, litigants in certain civil cases are presumptively required to participate in one non-binding ADR process offered by the court. Litigants may substitute a similar process offered by a private provider if they wish. If the parties cannot agree on an ADR procedure before the case management conference, the judge discusses the ADR options at that conference. The parties may seek by motion

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<sup>69</sup> *Id.* at Table 5.

<sup>70</sup> *Id.* at 5.

<sup>71</sup> See Section I(B) for details.

<sup>72</sup> FEDERAL SOURCEBOOK, *supra* note 59, at 5.

or at the case management conference to persuade the judge that ADR would be inappropriate.<sup>73</sup>

#### **D. Referring Cases to ADR**

As with the state court programs, some federal programs are mandatory and some voluntary. Within the category of mandatory referrals, referral procedures range from offering litigants a choice of ADR options (the “multi-door” courthouse), referring individually-selected cases to a specific ADR process, or referring categories of cases (usually categorized by subject matter or amount in controversy) to a particular ADR process. Generally, federal courts hold ADR sessions relatively early in the litigation.

Most of the federal court programs leave to the judge or parties the identification of cases suitable for ADR. Many courts expect attorneys to understand ADR in general and the court’s ADR programs in particular. Local rules often require attorneys to discuss ADR with clients and opponents, to address ADR in case management plans, and to be prepared to discuss ADR with judges at regularly scheduled status conferences. The Northern District of California published a glossy brochure describing each of the court’s numerous ADR programs and distributed the brochure with each civil complaint.

##### **1. Mediation**

Referrals to mediation programs seldom are made mandatorily and automatically by case type. Instead, most programs require the judge, often in consultation with counsel, to identify cases appropriate for ADR. In this way, judges educate attorneys and clients about ADR.<sup>74</sup> In some courts, mediation sessions are held shortly after the answer is filed. Across all courts, discovery planning often is linked to mediation, and mediation often occurs well before discovery is complete.<sup>75</sup>

##### **2. Arbitration**

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<sup>73</sup> *Id.* at 91-92.

<sup>74</sup> *Id.* at 7.

<sup>75</sup> *Id.* at 8-9.

Even within the mandatory arbitration programs, referrals generally are presumptively mandatory. Courts with presumptively mandatory programs provide mechanisms for seeking removal from arbitration. Courts with voluntary arbitration programs either permit participation only if the parties voluntarily come forward or refer cases on the basis of objective criteria and then permit unquestioned opt-out by the parties.<sup>76</sup>

### **3. Early Neutral Evaluation**

In the Western District of Missouri's ENE program, a percentage of all civil cases (except prisoner and social security) are randomly assigned to the ENE program. The ENE meeting, which clients must attend, is held within thirty days of filing responsive pleadings. The Western District of Missouri holds the first early neutral evaluation session within thirty days of filing the answer, and the Eastern District of Pennsylvania holds the conference as soon as possible after the defendant's first appearance.

#### **E. Qualifications and Ethics of Neutrals**

Almost every district has created its own rosters of neutrals, rather than turning to outside organizations for ADR services.<sup>77</sup> Most courts set eligibility criteria for listing on the court roster. A significant number of courts include on the roster anyone certified as an ADR neutral by a bar association or state court system.<sup>78</sup> Most federal courts require neutrals to be attorneys, although some permit non-lawyers to serve at the parties' request.<sup>79</sup>

Courts take a number of different approaches to training the neutrals on their rosters. Some give no training, some accept as sufficient training from other court systems or organizations, and some courts conduct the training themselves.<sup>80</sup> A few

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

federal courts have developed ethical guidelines or standards of practice for the neutrals on their rosters.

### **1. Mediator Qualifications**

Some federal courts use judges or magistrate judges to provide mediation services; however, most districts rely on nonjudicial neutrals. Of the forty-three federal court mediation programs that used nonjudge neutrals in 1996, only three relied on an outside organization to provide ADR services. However, lawyer-neutrals on court rosters also work as private neutrals. One court (the Western District of Missouri) has hired an in-house mediator.

Like the state courts, federal courts often require mediators to possess a law degree and legal experience; however, a number of federal courts permit the appointment of nonlawyer mediators. The District of Columbia's federal court mediation program selects lawyer-mediators on the basis of recommendations from local bar association presidents and others. Federal courts also usually require mediators to complete training programs before handling cases.

### **2. Arbitrator Qualifications**

Like the state courts, most federal courts require arbitrators to be attorneys, although some permit non-attorneys to serve at the parties' request. Attorney-arbitrators typically must be admitted to practice to the bar of the jurisdiction with five to fifteen years of experience as a practicing attorney, and certification from the court that the attorney is eligible to serve. Classroom training for arbitrators is not widely required, although some courts also require a recommendation from a judge or committee stating that the candidate is competent to perform the duties of an arbitrator.<sup>81</sup> The Northern District of California requires that attorney-arbitrators spend at least 50% of their professional time in litigation, or have substantial neutral or negotiating experience.

### **3. Early Neutral Evaluator Qualifications**

Some federal courts use judges or magistrate judges to provide ENE services; however, most districts rely on nonjudicial neutrals. They generally seek lawyers who

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<sup>81</sup> See e.g., District of New Jersey Rule 47.2.

are experts in the substantive areas targeted for the ENE programs. The earlier programs seldom had other formal eligibility requirements, although some of the newer programs are more specific about years of practice. One federal court (the Eastern District of New York) required in addition “maturity and strong interpersonal skills.” The Western District of Missouri established a sixteen-hour training requirement.

## **F. Funding**

### **1. Program Funding**

Unlike the state courts, the federal courts generally administer ADR programs in-house and fund discrete programs either through specific congressional appropriations or through general operating funds.<sup>82</sup> Sometimes the federal courts rely on local bar associations or universities to fund ADR training, outreach or evaluations.<sup>83</sup> Occasionally, independent nonprofits provide court-related ADR services, with varying contributions from the participating court.<sup>84</sup>

### **2. Compensation of Neutrals**

While most ADR programs started before 1990 relied on volunteers as neutrals, more recent programs usually have required parties to compensate the mediator. Of the forty-one courts offering attorney-based mediation in 1995, only nine provided that service pro bono (one provided the service through a staff mediator).<sup>85</sup> Fee programs have been instituted even where litigants are required to use ADR.

Courts generally have used four different approaches to determine the fee: market rate, court-set rate, pro bono, or court-set fee after a specified number of pro

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<sup>82</sup> PLAPINGER & SHAW, *supra* note 5, at 44.

<sup>83</sup> *Id.* at 44-45.

<sup>84</sup> *Id.* at 45.

<sup>85</sup> FEDERAL SOURCEBOOK, *supra* note 59, at 10.

bono hours.<sup>86</sup> Ten courts used a market-rate fee, although a number reserved the right to review the reasonableness of the fee. Eight courts specified a fee (either hourly or per session).<sup>87</sup> Five courts authorized both a market-rate and court-set fee, at the judge's discretion. Four courts required the neutral to serve pro bono for a specified number of hours, ranging from one to six, before the parties must pay either a court-set or market-rate fee.<sup>88</sup> Nine of the forty-three courts offering mediation permitted low-income or indigent parties to waive or reduce the fee. Some courts required mediators to serve a specified number of pro bono hours or cases in order to provide this service.

The statutory arbitration programs are an exception to the rule that the parties pay a fee. In those programs, congressional appropriations cover arbitrators' fees.<sup>89</sup> Where the court paid the fee, it also usually set the fee amount. In some of the non-statutory arbitration programs, the parties shared the fee.<sup>90</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 11.

<sup>88</sup> *Id.*

<sup>89</sup> *See id.* at Table 3.

<sup>90</sup> *See id.*

**Part 2:**  
**ADR Program Proposals Recommended by**  
**the Alaska Judicial Council and the Alaska Supreme Court**

The proposals detailed below in Part 2, Section II are recommended jointly by the Alaska Court System and the Alaska Judicial Council. The Council worked with the ACS Deputy Director and Staff Counsel, the Alaska Supreme Court Advisory Committee on Mediation, and the members of the Alaska Dispute Settlement Association (“ADSA”). The proposals are based on the research from other state and federal jurisdictions, a written survey of all active members of the Alaska Bar Association, interviews with judges, meetings with heads of the Alaska Bar Association’s substantive law sections, input from a non-custodial parents’ group and numerous written and oral comments from members of ADSA and the Bar.

The proposal to establish a task force to set neutral qualifications (Part 2, Section III) and the proposal to produce a litigant pamphlet on ADR (Part 2, Section IIB2c on Page 42) are proposed solely by the Judicial Council.

**I. Background Information**

**A. Past Efforts of the Alaska Court System and Judicial Council**

This report, and the legislative request which led to it, are only the most recent chapter concerning the use of ADR in Alaska. Both the Alaska Court System and the Judicial Council previously have taken numerous steps to encourage the use of alternative dispute resolution.

The Alaska Supreme Court originally established a Standing Advisory Committee on Mediation in 1991. The committee has worked since that time to establish and improve the use of ADR by the Alaska Court System. It worked with the Judicial Council to develop the proposals contained in this report.

Before the standing mediation committee was established, the Alaska Supreme Court established a Mediation Task Force in response to legislative intent language

included in the Alaska Court System's fiscal year 1989 budget appropriation document. The Alaska Supreme Court asked the task force to explore the "uses, availability and limits of mediation" and to issue a report. The report, completed in 1990, summarized the history of mediation in Alaska and made ten recommendations to the supreme court.<sup>91</sup>

Even before this the court system had experimented with conciliation boards in rural areas. From 1975-77, the Alaska Court System used federal funds to create and evaluate conciliation boards in six southwestern Alaska villages. The evaluation concluded in part that the boards "can be viewed as a viable adjunct to the court system in the provision of limited problem-solving services in those Eskimo villages which desire them...."<sup>92</sup>

Civil Rule 100, promulgated by the supreme court in 1993, authorizes judges to order parties to attend an initial mediation session upon the request of a party or on the judge's initiative. A recent survey sent by the Judicial Council to all state trial court judges showed that 71% of the trial court judges who responded had ordered mediation at least once in the past two years.<sup>93</sup> About 54% of the judges who had ordered ADR reported that they had ordered it between 1-5 times in the past year.

The court system has provided judges with information on mediation at a judicial conference and in written materials describing Civil Rule 100. In addition, the Alternative Dispute Resolution Section of the Alaska Bar Association offers a continuing legal education program on ADR once a year.

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<sup>91</sup> The recommendations were: (1) the Alaska Court System should undertake a mediation pilot project; (2) the ACS should more widely distribute mediation information; (3) the ACS should seek statutory confidentiality for mediation; (4) the ACS should adopt a new court rule on mediation; (5) the ACS should train judges about mediation; (6) the ACS should encourage judges to use mediated settlement techniques; (7) the ACS should consider imposing a requirement in pretrial orders that attorneys advise their clients of available ADR services; (8) a system should be developed to provide mediation to indigents; (9) the ACS should support local efforts throughout Alaska to establish mediation programs; (10) the ACS should appoint a standing committee on mediation. All recommendations, except those requiring legislation, were implemented.

<sup>92</sup> REPORT OF THE TASK FORCE ON MEDIATION TO THE SUPREME COURT OF ALASKA 9-10 (1990), citing from MARQUEZ & SERDAHELY, AN EVALUATION FOR THE ALASKA COURT SYSTEM'S VILLAGE CONCILIATION BOARD PROJECT (1977).

<sup>93</sup> Twenty-eight of the 50 judges responded.

One form of ADR long used by the Alaska Court System which is not generally recognized as such is the use of judges to host settlement conferences for litigants and their attorneys. Settlement conferences, usually conducted by a judge other than the one assigned to the case, are an extremely effective method of settling civil cases.

The Alaska Judicial Council has been involved in alternative dispute resolution studies, initiatives and projects since the late 1980s. One of the Council's first projects was a seventeen-month child visitation mediation pilot project created and funded by the Alaska Legislature in 1990. The Council designed, implemented and evaluated this project, which was created to provide parents with mediators to help them resolve their child visitation disputes, and to evaluate the effectiveness of visitation mediation.

The Council's next ADR effort involved researching how rural Alaskans use alternatives to the state court system to resolve local disputes. In 1992, the Council issued a report documenting how residents in three Alaskan locations (Barrow, Sitka and Minto) used local organizations, including tribal courts, to resolve disputes (RESOLVING DISPUTES LOCALLY: ALTERNATIVES FOR RURAL ALASKA). The Council issued a follow up report in 1993 (RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY) that surveyed all the villages in rural Alaska and reported whether they had a tribal court, village council, or other local organization that included dispute resolution as a part of its activity.

In 1994, the Alaska Judicial Council requested and received funding from the State Justice Institute (SJI) to fund a brochure to help consumers evaluate mediator competence and suitability. The Judicial Council developed the brochure based on research presented at the 1993 National Symposium on Court-Connected Dispute Resolution Research sponsored by SJI and the National Institute on Dispute Resolution, and on other research. The Council solicited input from a variety of interested parties nationwide, including the American Bar Association, national mediator membership organizations, mediators, researchers and policy-makers. In 1996, the *Consumer Guide to Selecting a Mediator* was recognized by the Notable Documents Committee of the American Library Association's Government Documents Roundtable as one of the fifteen best state publications in the nation. The committee chooses government publications which are outstanding for their content and presentation.

Over the course of these projects, Judicial Council staff have developed expertise in designing and evaluating alternative dispute resolution programs. Staff have been

invited to present at mediation conferences and classes in Alaska and outside Alaska. The Judicial Council staff attorney has served on the Alaska Court System's Mediation Advisory Committee since its inception, and serves on the Executive Board of the Alternative Dispute Resolution Section of the Alaska Bar Association. In addition, the Judicial Council staff attorney serves on the board of directors of the Community Dispute Resolution Center, which offers free and low-cost community mediation services and runs the successful juvenile victim offender mediation project in Anchorage.

While this report is devoted mainly to court-connected alternative dispute resolution in Alaska, several non-court programs should be mentioned as well. One program currently operating in Anchorage as part of the municipality's Making a Difference Partnership is the Juvenile Victim-Offender Mediation Project (VOMP). VOMP is based on principles of restorative justice, attention to victims' rights, and personal accountability for juvenile offenders. The program, which is administered by the nonprofit Community Dispute Resolution Center, recruits, trains, and assigns trained, volunteer mediators to facilitate face-to-face meetings between certain non-violent juvenile offenders and their victims. Participation is voluntary for both victims and offenders; offenders are referred by juvenile intake and probation officers. During the mediation, the victim and offender address informational and emotional needs, discuss the victim's losses, and often negotiate a mutually acceptable restitution agreement. VOMP staff and volunteers monitor performance of any contracts established during the mediation.

The Judicial Council and faculty from the University of Alaska at Anchorage (Justice Center and School of Social Work) helped design the program and are evaluating its effectiveness, including whether the program is meeting its internal goals and what effect the program has on juvenile offender recidivism. VOMP's internal goals relate to the needs of victims and offenders, juvenile justice system workers and the community as a whole. The goals include: increasing offenders' feelings of accountability; providing an additional referral option for Intake and other juvenile justice workers; providing an opportunity for conciliation (or reconciliation) between victim and offender; creating and maintaining positive community investment in the problem of (and the solutions to) juvenile crime; providing an opportunity to create and implement a restitution agreement; providing an opportunity for "healing" or closure around the criminal incident for both the victim and the offender; and empowering the victim to exert some control over the process. In 1996, VOMP collected more than \$13,000 in restitution for victims that participated in its program.

## **B. Ongoing Alaska Court System Projects**

The Alaska Court System has been in the process of developing three ADR related projects completely independently of the legislative request which led to this report. The Alaska Supreme Court and Judicial Council agree that these are promising projects which the Court System will continue to pursue.

### **1. Appellate Case Settlement Program**

For the past year, the Mediation Committee has been designing an appellate case settlement program at the request of the supreme court. The proposed program will run as a pilot project and initially will target only a limited number of cases. If the pilot proves successful, the court may consider whether to expand it. As currently designed, the program uses retired judges and justices to host the settlement sessions. The Mediation Committee finished designing the program in November of 1997. After review by the Appellate Rules Committee, the proposal will go to the supreme court for final consideration.

### **2. Mediation of Child in Need of Aid Cases**

For the past two years, the court system has been participating in a federal initiative to improve the way state courts handle child abuse and neglect cases. As part of that initiative, the court system asked the Alaska Judicial Council to do a formal assessment of CINA cases in Anchorage, Bethel, Fairbanks and Sitka. The resulting report found delay to be a major problem in these cases, and recommended that the court system experiment with mediation as a way to help parties come to agreement sooner on important issues such as treatment plans and case plans. After the assessment, the court system created a special committee to implement the report's recommendations.

In November, this CINA Committee recommended that the supreme court establish a pilot mediation project in Anchorage. The committee is looking at programs developed in other states, and at the needs of the parties. The court system will use federal grant money to fund the pilot project.

### **3. Child Custody Mediation Pilot Projects**

A significant part of the superior court's case load consists of divorce cases. Judges and attorneys favor mediation in this area,<sup>94</sup> and research generally shows mediation to be particularly beneficial in the family area.<sup>95</sup> A carefully designed child custody mediation program could increase participant satisfaction, decrease judicial workload and increase the parties' control over outcomes for their children.

The court system has received a federal grant to offer access and visitation mediation in Anchorage. The project will provide for court-ordered mediation in cases in which there are disputed issues regarding child support, custody, access and visitation. Its goals are to reduce the number of contested hearings and expedite resolution of custody and visitation matters. Another goal is to offer parties and their attorneys a non-litigious model for resolving disputes and to encourage them to use alternative dispute resolution to address future conflicts.

The office of custody investigations will administer the project and will screen cases for eligibility. Eligible cases will include original divorce actions, paternity and support actions, and post-decree motions to modify or enforce support, custody and visitation orders. The ACS plans to contract with private mediators to conduct the approximately 200 mediation sessions that it anticipates the grant will cover.

The ACS will evaluate the program as required by federal regulation. Factors likely to be addressed in the evaluation include the project's impact on the number of contested hearings, the time needed to resolve cases and the rate of subsequent filings for motions to enforce and modify custody and visitation orders. If the program is successful in Anchorage and funds are available, the ACS may extend it to other court locations.

The Fairbanks court also is exploring how to make better use of mediation in child custody disputes. The Fairbanks custody investigators educate divorcing parents about mediation during a mandatory parent education program, and they discuss mediation with parents at their intake interview. Custody investigators recommend mediation referrals in cases in which the parents seem willing and able to settle their

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<sup>94</sup> Eighty-five percent of the 20 judges who responded to the AJC's ADR survey ranked mediation of divorce cases as very promising (70% gave it a ranking of "1" on a 1-5 scale.) No other proposal received such favorable responses from the judges. Attorneys also ranked mediation of divorce cases very favorably.

<sup>95</sup> See pp. 5-6, *supra*, for research supporting the usefulness of mediation in divorce and custody cases.

custody dispute in mediation. These practices are designed to encourage parents to resolve their custody disputes without an investigation. However, not all parents who are open to using mediation receive referrals, because of disincentives such as the cost of private mediation, and the fact that some judges do not follow through in ordering the recommended mediation. Thus, the Fairbanks court currently is considering ways to make mediation referrals more systematic. The supreme court currently is studying the use of custody investigators and whether their role should be expanded or changed to include mediation.

Judges on the Kenai Peninsula also are exploring increased use of mediation in child custody and divorce cases and post-decree litigation. Mediators in the Kenai/Soldotna area have begun dialogue with judges and other interested stakeholders about an ADR initiative in that area. There is support in the community and on the Kenai Superior and Homer District Court benches for a proposal to create an independent body (a nonprofit corporation modeled after the Community Justice Centers) to perform ADR intake, screening, evaluation and possibly to offer mediation services in divorce cases. While the proposal is still in the formative stages, supporters would like to work with the Supreme Court Advisory Mediation Committee as their local activity emerges.

### **C. The Process for Developing Further Recommendations**

Although time was extremely limited, the AJC and the ACS designed the proposals described in this report in consultation with the Supreme Court Advisory Mediation Committee, the Civil Rules Committee, the Alaska Bar Association, trial lawyers' associations, the Alaska Dispute Settlement Association, mediators, judicial officers, attorneys and legislators.

AJC staff consulted regularly with ACS Deputy Administrator and Staff Counsel to understand the Alaska Court System's goals, fiscal limitations and personnel resources. In July and September, AJC staff discussed this project with the Alaska Supreme Court Advisory Mediation Committee. AJC staff sent a written survey to all state court judges and followed up with individual telephone interviews.

In July, the Alaska Bar Association generously hosted a luncheon for all the heads of substantive sections, heads of local bar associations, and representatives from plaintiff and defense trial lawyers' associations. At the luncheon, AJC staff gave a brief overview of the legislation and explained some of the most important considerations

in designing a court-connected ADR program. Attendees then gave suggestions about what program design might be most useful from the Bar's perspective.

As follow up, AJC staff made presentations to three interested Bar sections (the Employment Law section, the ADR section and the Probate section). In addition, the AJC sent a written ADR survey to all members of the Alaska Bar in August. The results of that survey have been incorporated into the following recommendations.

#### **D. Objectives of these Proposals**

Successful court-related ADR programs generally respond to specific problems or needs. The Alaska Legislature's goal in passing the law was to "promote the timely, inexpensive, and efficient resolution of civil disputes." These goals encompass the specific objectives of saving litigants time and money by streamlining and speeding up case resolution. The legislation also requires consideration of the cost of the program to the Alaska Court System.

Saving the court system significant existing funding is not a realistic goal for an ADR program. While ADR can make better use of existing judicial resources and perhaps allow current staffing to better handle an expanding caseload, it will not produce a windfall of savings for the state.

The Alaska Court System's program criteria focus mainly on resource issues. From the administrators' point of view, an ADR program should not require significant additional funding, should not require significant personnel resources to administer, should be narrowly drawn, should be a pilot project of limited duration, and the pilot project should contain an evaluation component. In addition, the court system lacks adequate financial and personnel resources to immediately implement a large, multi-faceted program. Finally, the ACS and the AJC do not believe that the ACS should license or certify mediators or other neutrals.

Goals for an ADR program mentioned by attorneys included improving the quality of pretrial practice by attorneys, encouraging early attorney and client attention to cases and having a neutral person speak candidly to clients about the merits of their case.

Goals mentioned by individual judicial officers included resolving divorce custody cases in a less adversarial forum, relieving court burdens by diverting cases from the

trial track, and moving settlements earlier in the pretrial period to avoid calendaring unnecessary trials. Judicial officers also expressed interest in training to improve their own settlement skills.

Evaluations of programs in other jurisdictions suggest that realistic goals for well-designed ADR programs can include: increasing the parties' satisfaction with the process used to resolve their dispute, saving the parties money in the form of decreased attorneys' fees, and reducing judicial workloads.<sup>96</sup> Goals that might reasonably be achieved in Alaska include increasing litigant satisfaction, decreasing trial court workload (specifically bench time), and increasing efficiency by helping judges calendar only those cases most likely to go to trial, thus freeing the judges' calendars of cases likely to settle before trial.

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<sup>96</sup> For example, an evaluation of the Western District of Oklahoma's voluntary mediation program showed that cases referred to mediation were more likely to terminate in dismissals than were similar cases that were not referred to mediation. Oklahoma cases not referred to mediation were more likely to receive a pretrial judgment or trial verdict (non-referred cases had almost twice as many trials). RAND, *supra* note 21, at 134-35. Also, cases not referred to mediation had more discovery motions. *Id.* In the Southern District of New York's mandatory mediation program, comparison group cases were nearly four times as likely to go to trial and more likely to have a dispositive motion made than were those in the ADR sample. *Id.* at 67. Rand's review of other mediation programs revealed varying settlement rates, impact or litigant costs, and disposition times. See discussion at pages 6-8, *supra*, for details.

## **II. New Proposals Recommended by the Alaska Judicial Council and the Alaska Court System**

The legislation asked the Alaska Judicial Council and the Alaska Court System jointly to develop ADR programs. This section describes those proposals, some of which already are being implemented.

### **A. Overview of the Proposals**

First, the Judicial Council and the Alaska Court System agree that the court system should continue to develop the initiatives already underway which are described above. These are specific projects that respond to specific needs, and they can be implemented with little or no additional funding from the State of Alaska.

Second, the AJC and the ACS agree that the court should undertake three additional initiatives. First, the court system will take a number of important steps to encourage the increasing tendency of Alaska attorneys and parties voluntarily to use ADR to resolve civil cases. These steps will require only relatively modest legislative funding, but are probably the most significant of all the proposals.

Also, the AJC and the ACS agree that the ACS should take steps to implement two pilot projects, one small and one relatively large scale.<sup>97</sup> The smaller pilot project involves mediation of probate and guardianship cases. The larger pilot project involves early neutral evaluation of non-family (primarily commercial and tort) cases. The probate mediation project will require little or no additional funding and no new legislation. The ENE pilot project does not require legislation, although it does require additional funding by the Legislature before it can be implemented.

### **B. Steps to Encourage More Voluntary Use of ADR**

The most important and significant recommendation of this report is that the Alaska Court System, Judicial Council, Alaska Bar Association, and the Alaska Legislature take a series of steps to encourage the increasing tendency of Alaska attorneys and parties voluntarily to use ADR to resolve civil litigation. These steps are

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<sup>97</sup> The AJC and ACS also considered an arbitration pilot project based on the program in Washington state (see page 16, *supra*). This project was rejected, primarily because of its high cost.

relatively easy and inexpensive to take, but we believe will result in significant benefits.

This proposal includes steps to educate Alaska judges, attorneys and litigants about ADR. Second, the proposal requires litigants to consider and discuss with each other the use of ADR; and that the judge follow up on this discussion.

### **1. Amendments to Civil Rules and Court Forms**

The Alaska Supreme Court is amending its rules of court to encourage voluntary use of ADR. Civil Rule 100 will be broadened to address all three forms of court-connected ADR defined in the legislation. Other court rules will be amended to require opposing counsel to “meet and confer” very early in the litigation to develop an ADR plan, and to meet with the judge to discuss ADR options.

**(a) Broaden Civil Rule 100.** Civil Rule 100 (Mediation) is the only court rule that addresses alternative dispute resolution. Thus, Civil Rule 100 is the logical place to put information about other forms of ADR besides mediation. Appendix C shows how CR 100 is being amended to include information and procedures concerning early neutral evaluation and arbitration.

**(b) Amend Civil Rules 26 and 16.** Civil Rule 26 is being amended to require attorneys to meet and confer about ADR at the discovery planning conference.<sup>98</sup> It also will require attorneys to incorporate ADR into their written discovery plan (or to explain why an ADR process is not appropriate).<sup>99</sup> The parties will include in their case management plan a description of the ADR process they have agreed on (or why they agree that ADR is not appropriate, or a statement that they cannot agree on which ADR process to use), when the ADR process will occur (especially what if any discovery or motion practice needs to occur before the ADR process will be productive), and (possibly) their choice of neutral. (See Appendix C for revisions).

Civil Rule 16 is being amended to require the judges to educate the parties about ADR at the conference required by Rule 16. The judge will discuss possible benefits of

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<sup>98</sup> The discovery planning conference is required by rule and occurs very early in the case.

<sup>99</sup> The court also should amend question 6 on form CIV-203 (Report of Parties' Planning Meeting) to include appropriate references to early neutral evaluation.

ADR and the relative merits of each process. The judge should include the parties' choice of an ADR process in the written scheduling order (See Appendix C for text of revisions).

**(c) Consider requiring attorneys to discuss ADR with their clients.** The court system's Civil Rules Committee and Mediation Committee will review and circulate for comment a proposed rule amendment to specifically require attorneys to discuss ADR with their clients in litigation cases. After taking comment, the committee will make a recommendation to the supreme court. This requirement also will be submitted to the Alaska Bar Association for comment.

## **2. Educational Programs**

**(a) Educate Judges.** The court system will request funding from the legislature for a day-and-a-half or two-day ADR conference for judges in the fall of 1998. The conference would provide judges with information about the different types of ADR and which procedures are most effective for which cases, actual hands-on training about how to mediate and/or how to run a settlement conference, and specific training about the court system's ADR programs and initiatives. These skills would help judges conduct effective settlement conferences, as well as bring them the in-depth knowledge about ADR necessary to encourage attorneys in its use. The court system is seeking grant funding for this conference, and will ask the legislature to match the grant funding.

The funding to conduct this conference is critical to the increased use of ADR in Alaska. Experience in Alaska and elsewhere has shown that judges play an important role in encouraging voluntary use of ADR. The judges will be most effective in encouraging voluntary use of ADR if they themselves understand and support ADR.

**(b) Educate Attorneys.** Training for attorneys is particularly important in programs that rely on attorneys and parties to decide which type of ADR to use and the timing of the ADR process. A central feature of mediation and, to a lesser degree, early neutral evaluation, is that it requires lawyers and parties to do the work of settlement. Thus, lawyers need to learn how best to benefit from the ADR session. They also need to know how to prepare their clients for the session. In addition, attorneys should receive training on current research and thinking on how to evaluate a proposed neutral's qualifications to be of assistance in a given dispute.

The Alaska Court System and the Judicial Council will work with the Alaska Bar Association to train attorneys about the court system's pilot projects in ADR.

The Judicial Council recommends that the Alaska Bar Association (through the ADR section) continue to offer continuing legal education classes to teach attorneys about how, when and why to use an ADR process, and specifically about the court system's ADR programs. The brochure about the use of ADR in Alaska which is discussed immediately below also would be helpful to educate attorneys about ADR.

(c) **Educate the public.**<sup>100</sup> Finally, the Alaska Judicial Council recommends that the state provide more information to the public about ADR. The Judicial Council will request a small increment in its budget to develop and print a pamphlet explaining various ADR processes, discussing the potential benefits of ADR and explaining the court system's ADR programs. The brochure will be geared towards litigants, but also would be useful for attorneys. (Details about this brochure and its funding are provided in Appendix E.)

### **C. Pilot Projects**

Most courts that have implemented ADR programs have begun with one or more pilot projects. Pilot projects should be discrete and should respond to a specific need or articulated goal in a particular court location. The pilot projects suggested in this section and the next are based on research from other states, suggestions from local attorneys, judges, neutrals and legislators, and on ideas or initiatives that already had been suggested or were being considered in response to a specific need or goal at a specific court location. Any pilot program should operate for two or three years, to ensure that the program has time to become established and make initial adjustments before being evaluated.

#### **1. Probate mediation**

The probate section of the Alaska Bar Association has agreed to develop a court-connected probate and guardianship mediation pilot program. Section leaders are working with the court system's probate masters and the Probate Rules Committee on the details of the program, including training for mediators. Goals cited by the probate

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<sup>100</sup> The court system did not recommend for or against this proposal because it would be completed solely by the Judicial Council.

section included decreasing bottle necks encountered with creditor claims (often intra-family) and will contests. In addition, the probate section hopes mediation will cut down the number of cases needing a hearing before the master, as calendar congestion apparently has become a significant problem in Anchorage. While the probate section's initial proposal involved a pilot project in Anchorage, the Probate Rules Committee has recommended that the program be instituted statewide.

## ***2. Early neutral evaluation pilot project***

The court system will seek legislative funding to implement a structured ADR pilot project for business and commercial cases. Early neutral evaluation has been successful in reducing case disposition time and party costs in the Western District of Missouri's program. The ENE pilot project proposed here relies on existing rules of civil procedure and uses judges (and private providers if the parties request them and agree to cover the costs) as early neutral evaluators.

The goals of the ENE project would be to promote earlier settlement, to save the parties money, and to promote the efficient use of judicial resources. In addition, the procedure should be perceived by parties and attorneys to be fair. The Judicial Council will request an increment in its budget to evaluate the project. (See Appendix D for more details of the program design).

The court system will select at least one judge from three of the four judicial districts (Anchorage, Fairbanks and perhaps Kenai and Juneau or Ketchikan) to participate in the pilot project. Participating judges will receive ENE training and will act as early neutral evaluators in selected, contested civil cases. Excluded civil cases should include divorce custody cases, FEDs, children's cases, domestic violence and perhaps others.

If the legislature approves funding, the court system will sponsor a training session at which all judges learn about the goals of the program, the administration of the program, and how the ENE sessions are to be conducted. The court system also should assign someone (or assign the neutrals) to spend time talking to the bar about the program and its goals.

#### **D. Evaluation**

The Alaska Supreme Court and the Alaska Judicial Council believe that the new pilot projects should be evaluated to see what effects they may be having. Evaluations for the pilot projects should include, where possible, surveys of attorney and litigant satisfaction, time savings (parties and courts) and cost savings (parties and courts). The evaluations should focus on identifying significant variables in program design and implementation that contribute to the outcomes highlighted by the legislature: time and cost savings and efficiency. The evaluations also should seek to document how lawyers understand and employ ADR, since lawyers largely drive the pace and course of civil litigation. The Judicial Council will request an increment to conduct the evaluations. The increment is more fully described in Appendix E to this report.

The rule changes will be monitored by the Alaska Judicial Council in connection with its responsibilities for monitoring civil case settlements. The Judicial Council currently is collecting baseline data on voluntary use of ADR in civil cases. The Judicial Council can analyze any change in use after the rule changes go into effect. The Judicial Council will report to the supreme court and the legislature.

#### **E. Program Funding**

The Alaska Court System does not have extra funds to provide ADR services, although a number of its ongoing ADR initiatives can be implemented with little or no extra money. The ACS would need additional funding, from a legislative appropriation to implement the ENE pilot project.

### **III. Qualifications of Neutrals**

The legislature asked the Alaska Judicial Council to include in this report “the qualifications of the neutral parties, including nonlawyers, who will provide dispute resolution services under the [ADR] program.”

The Alaska Judicial Council recommends that qualifications of neutrals should be based as much as possible on criteria that accurately predict successful performance and ethical practice. The criteria should not be so restrictive that they exclude otherwise competent people, for example Alaska Native elders who may not have formal mediation training but who could mediate fairly and effectively in certain cases.

The criteria also should take into account as much as possible, the differences between urban and rural areas of the state.<sup>101</sup>

The Alaska Court System has no experience setting mediator and arbitrator qualifications. The ACS has no experience and no administrative structure for licensing or certifying neutrals. An alternative is to establish minimum qualifications by statute, and to direct an entity other than the court system to monitor the neutrals.

**A. Task Force to establish minimum qualifications for neutrals**

The Alaska Judicial Council recommends that the legislature should appoint a task force to establish minimum qualifications for mediators, early neutral evaluators and perhaps arbitrators. The task force ultimately would make recommendations to the legislature for establishing minimum qualifications for court-connected neutrals by statute or through some other mechanism.

The task force should include non-lawyers as well as lawyers, community mediators, a court system judge and administrator, the business community, an arbitrator, legislative representation, the Attorney General or his designee and perhaps the state ombudsman. A federal court representative or liaison also might be helpful. All task force members should demonstrate prior involvement in ADR, either as a neutral or a party. The task force should develop different qualifications for mediators, arbitrators and early neutral evaluators, since those three processes involve different skills.

The final report of the ADSA Committee on Credentialing and Standards of Practice, which has been formally adopted by ADSA's membership, would be a good starting point for the task force in considering minimum qualifications for mediators. The report was intended to "serve as threshold, minimum qualifications which a body [such as a court system] may consult." The report concluded first that all neutrals should adhere to a recognized code of ethics. It then discussed three potential paths by which a neutral could become minimally qualified to practice in Alaska. First, the report concludes that "affiliation with or credentialing by an entity or organization may serve to minimally qualify in [sic] neutral in Alaska," depending on the sufficiency of the entity's training requirements and its criteria to achieve and maintain

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<sup>101</sup> For example, minimum qualifications for neutrals might vary depending on the size of the city or village in which the neutral practices.

membership in good standing, among other things.<sup>102</sup> Second, training alone may in some instances minimally qualify neutrals, depending on the quality and length of the training.<sup>103</sup> Finally, experience alone may minimally qualify mediators or arbitrators, depending on certain factors enumerated in the report.<sup>104</sup>

The task force also should study the issue of what entity should recruit, train and supervise neutrals who receive court referrals, and how those responsibilities should be funded. Possibilities for entities that could take on the training and supervision responsibilities include the Alaska Dispute Settlement Association, the Community Dispute Resolution Center, or perhaps the Alaska Bar Association. The ACS has suggested that the Division of Occupational Licensing take on any licensing and certification functions.

The following suggestions on qualifications are not comprehensive but might be considered by the task force.

#### **B. Ethical Standards for Neutrals**

Any neutrals appointed by the court, with or without party choice, should adopt and adhere to a code of ethical standards of practice. For purposes of court appointment, the court system could recognize codes of ethics adopted by the American Arbitration Association, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Association of Securities Dealers, the Society of Professionals in Dispute Resolution, the Academy of Family Mediators or the American Bar Association.<sup>105</sup> If a neutral does not adhere to one of these standards, the neutral should provide to the judge and to prospective clients information sufficient to determine whether the neutral will engage in ethical practice, for example, a written copy of the ethical standards that the neutral has adopted and a statement of the neutral's philosophy and approach.

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<sup>102</sup> ADSA CREDENTIALING AND STANDARDS OF PRACTICE COMMITTEE, FINAL REPORT ON RECOMMENDED MINIMUM QUALIFICATIONS FOR MEDIATORS AND ARBITRATORS IN ALASKA 1-2 (August, 1997).

<sup>103</sup> *Id.* at 5-6.

<sup>104</sup> *See id.* at 6-8.

<sup>105</sup> Appendix F contains the AAA, ABA, and SPIDR model standards of conduct for mediators.

### **C. Mediator Qualifications**

Mediator qualifications should be based as much as possible upon criteria likely to predict competent and ethical performance. While credentialing, certification or training alone may in some instances predict competent and ethical performance, Alaska should look to other criteria as well. One such criterion that Alaska could explore is the use of performance-based tests. Alaska should consider developing a performance-based test for mediators, perhaps combined with a classroom training requirement (twenty to forty hours) and perhaps an apprenticeship period. Mediators who wish to be appointed to handle child custody or visitation cases should demonstrate special knowledge of families and domestic violence.

### **D. Early Neutral Evaluator Qualifications**

Based on information from the Northern District of California and the Western District of Missouri, effective ENEs usually are people with substantial litigation experience. Mediation-type skills might be helpful. Neutrals in the Northern District of California's ENE program have been a member of a state bar for at least fifteen years and a member of the bar of the court or a faculty member at an accredited law school. The neutrals have subject-matter expertise in one or more of the categories of cases eligible for the ENE program. They also have the temperament to listen well, facilitate communication and if called on, assist in settlement negotiations. Each evaluator is required to successfully complete the ENE training session.

### **E. Arbitrators**

The Task Force need not consider qualifications for arbitrators unless the court system institutes a court-connected arbitration program. There is no need to regulate arbitrators who are hired pursuant to a private contract or other non-court-connected mandate.<sup>106</sup>

## **IV. Summary of Recommendations to the Legislature**

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<sup>106</sup> If the task force wishes to consider qualifications for court-connected arbitrators, it might consider looking to certification from another body such as the American Arbitration Association or from another state or federal court. The emphasis for arbitrators should be on area of expertise. Some disputes might lend themselves to lawyer-arbitrators, while others might require expertise possessed by a non-lawyer. The parties should not be overly limited in their ability to select the arbitrator.

None of the pilot projects proposed in this report require new legislation, although a few require relatively small amounts of funding for training or other one-time start up costs. Recommended court rule changes already are being made by the Alaska Supreme Court. The only recommendation that would require new legislation is for the establishment of a task force to report back to the legislature on the issues of neutral qualifications and ethical standards.

In summary, the court system will request funding to:

- (1) hold a special judges conference on ADR and settlement;
- (2) hire a temporary program administrator to work out the details of the ENE project and to administer it; and
- (3) cover other project expenses;

The Judicial Council will request funding to:

- (1) evaluate the probate mediation and early neutral evaluation pilot projects; and
- (2) develop, print and distribute an educational pamphlet geared towards litigants;

## **Conclusion**

This report has set out the research on ADR requested by the legislature and several alternatives which the court system can pursue to fulfill the legislative goal of increasing the use of ADR to resolve civil disputes in Alaska. We believe that these proposals will significantly increase the use of ADR in litigation cases with only a minimal monetary investment.

**Appendix A**  
**ADR Legislation**

Laws of Alaska 1997  
An Act Relating to civil actions;....

18 \* Sec. 54. ALTERNATIVE DISPUTE RESOLUTION. (a) It is the intent of this  
19 legislation to create an alternative dispute resolution procedure within the existing civil  
20 litigation system in order to promote the timely, inexpensive, and efficient resolution of civil  
21 disputes. It is also the intent of this legislation that the Alaska Supreme Court implement the  
22 alternative dispute resolution procedure not later than July 1, 1998.  
23 (b) The Alaska Judicial Council shall consult with the Alaska Dispute Settlement  
24 Association, review court sanctioned alternative dispute resolution programs in other states  
and  
25 in the federal court system, and shall confer with and obtain the approval of the Alaska Court  
26 System regarding the establishment of a program for alternative dispute resolution within the  
27 Alaska Court System. The Alaska Judicial Council shall submit a proposed statute or rule  
28 change, or both, and a report to the legislature by December 31, 1997. The proposed statute  
29 or rule change and report must include specific types of programs, specific types of cases  
30 within each program that are amenable to alternative dispute resolution, the cost to the parties  
31 and to the Alaska Court System under these programs, and the qualifications of the neutral  
01 parties, including nonlawyers, who will provide dispute resolution services under the  
program.  
02 The work required under this section shall be completed for the amount of money appearing  
03 on the fiscal note submitted by the Alaska Judicial Council dated March 17, 1997.  
04 (c) In this section, "alternative dispute resolution" is limited to arbitration, mediation,  
05 and early neutral evaluation.  
06 \* Sec. 55. APPLICABILITY. This Act applies to all causes of action accruing on or after  
07 the effective date of this Act.  
08 \* Sec. 56. SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the  
09 application of a provision of this Act to any person or circumstance is held invalid, the  
10 remainder of this Act and the application to other persons shall not be affected.

## **Appendix B**

**Definitions: Arbitration  
Early Neutral Evaluation  
Mediation**

# 1. MEDIATION

- 1.01 DEFINITION
- 1.02 THE PROCESS
- 1.03 NEUTRALS
- 1.04 CLIENT ROLES
- 1.05 SELECTING CASES FOR MEDIATION
- 1.06 TIMING
- 1.07 BENEFITS AND CONCERNS

## 1.01 DEFINITION

Mediation is a flexible, nonbinding dispute resolution process in which an impartial neutral third party — the mediator — facilitates negotiations among the parties to help them reach settlement. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy.

Mediation is considered by many the settlement process of first-choice, because of its wide applicability and relatively low cost to litigants and the court. The mediator, trained in communication and negotiation techniques, and knowledgeable about federal litigation, assists the negotiations in the following ways:

- Works to improve communication across party lines;
- Helps each party clarify its understanding of its underlying interests and concerns, as well as those of its opponents;
- Probes the strengths and weaknesses of each party's legal positions;
- Explores the consequences of not settling;
- Generates options for mutually agreeable resolution to the dispute.

The mediation process can take various forms, depending on the nature of the dispute, the approach of the mediator, the timing of the intervention, and the goals of the court. All or part of a dispute may be mediated. Federal court mediation may occur under the auspices of a court-wide program or pursuant to individual judge initiative. Referrals may be based on party consent or mandated by the court.

**1.02 THE PROCESS**

A typical mediation progresses through the following stages:

- **Preparing for Mediation.** To educate the mediator about the dispute, some courts require counsel to submit key documents and short written statements shortly before the first mediation session. These materials, which describe the substance of the suit, do not become part of the court file and are returned to the parties at the conclusion of the process.
- **Locale.** Court-based mediation is generally conducted either at the courthouse or at the offices of the attorney-mediator. Some suggest that a courthouse location is preferable, space permitting, because the setting invests the process with a seriousness and dignity that is often helpful to the negotiations.
- **Initial Joint Session.** A typical mediation consists of a series of joint and separate sessions between the mediator and the parties. At the initial joint session, the mediator usually explains the mediation process, hears short presentations from each side, and asks open-ended questions to clarify positions and interests.
- **Initial Separate Sessions (or Caucuses).** The mediator often then meets privately with each party and counsel to explore in a confidential setting each party's underlying interests and concerns, both legal and non-legal, and to help them weigh the import of multiple interests and determine their priorities.
- **Subsequent Separate and Joint Sessions.** The parties are helped to develop options and alternative proposals that will result in a mutually acceptable resolution. At this stage, the mediator may help the parties generate ideas, evaluate alternatives realistically, and consider the consequences of not settling.
- **Completing the process.** Courts differ as to who will draft the agreement in cases where the parties reach settlement. Usually the mediator will record an outline of the terms, and one of the attorneys will be given responsibility for preparing a final draft. If complete settlement is not possible, the mediator will seek partial agreements and/or help the parties consider other dispute resolution options.

How long a mediation lasts varies with the complexity of the dispute. Recent data from the Southern District of New York indicate that mediation of a standard civil case takes on average nine-to-eighteen hours and involves several sessions. Some court mediation guidelines set a deadline for completing the process, e.g., 30-90 days after the referral. Other courts do not, leaving this issue to the assigned judge and/or the mediator.

**1.03 THE NEUTRALS**

Mediators in federal court programs are usually lawyers (although sometimes experts from other disciplines are asked to serve), who are invited by the court to serve as mediators because of their experience in federal court litigation, their standing in the local legal community, and/or their process skills.

In the better programs, the participating neutrals attend two-to-four day mediation training programs sponsored by the courts. Most serve on a volunteer basis, although some courts offer modest compensation from public funds or require parties to pay the neutral's fee. In a few districts, fees are set by the court; in others market rates prevail. In many courts, pro bono service by mediators and sliding scale fees are in place for low-income litigants.

In some courts, magistrate judges or district judges serve as mediators. Occasionally, two or more mediators are used.

**1.04 CLIENT ROLES**

To promote greater involvement by clients in resolving the dispute, a number of court-based mediation programs encourage or require the attendance of the client or a settlement-empowered representative at the mediation sessions. In cases involving insurance carriers, the court may also require attendance by an insurance representative with full authority to settle. Similarly, in cases involving a governmental unit, some courts require a representative of the government agency to attend, in addition to counsel.

This emphasis on client participation is also true of other court-based ADR processes, such as early neutral evaluation (*see infra at 3*), summary jury trial (*see infra at 19*), and the minitrial (*see infra at 25*). Client participation is also increasingly required in judicially-hosted settlement conferences. *See, e.g., G. Heilman Brewing Co. Inc. v. Joseph Oat Corp., 848 F.2d 1415 (1989)*. The nature of client participation differs from process to process.

**1.05 SELECTING CASES FOR MEDIATION**

Some mediation programs target complex cases; others select simpler cases; many are open to all or almost all civil cases. Mediation has proved useful in so many kinds of disputes that some court ADR experts favor its use in almost all cases, both for case management and settlement.

Because of mediation's wide applicability, selection guidelines are not easily articulated. Most court mediation programs do not specify precise criteria for identifying cases for mediation. A few courts divert specified categories of cases to mediation; most courts however, ask the assigned judge to assess the suitability of individual cases on his or her docket to mediation.

One commonly-used listing of selection criteria identifies the following kinds of disputes as well-suited to mediation:

- Cases involving a bench trial, where it would be inappropriate for the assigned judge to become involved in intensive settlement discussions;
- Complex cases requiring creative solutions that cannot be fashioned through traditional adjudication;
- Cases in which the parties have a continuing relationship, including employment/labor, business disputes, and family disputes;
- Environmental, regulatory, and public policy disputes involving public or private parties, or both;
- Cases in which the dispute is caused by poor communication between the parties.

Mediation has also proved useful in so many situations that this listing, while often cited, provides only partial guidance. For example, while mediation is thought to be particularly helpful in disputes involving continuing relationships, the process has also proved worthwhile in personal injury cases, consumer cases and many other cases involving *non-continuing* relationships. Additionally, mediation has been effective in many other kinds of legal disputes, involving commercial, financial and real estate transactions, construction, technology, product liability, consumers, trademark, patent and unfair competition, antitrust, insurance coverage, partnerships and joint ventures, mineral extraction, discrimination, and defamation. *For more information about ADR case selection, see Referring Cases to ADR: A Framework for Judicial Analysis, infra at 53.*

Often excluded from eligibility for mediation are:

- Cases handled by other ADR programs in the district (such as contract and tort disputes under \$100,000 referred to a mandatory arbitration program).
- Categories of cases generally resolved without hearings, such as administrative agency appeals, habeas corpus or extraordinary writs, forfeitures or bankruptcy appeals, social security, and prisoner cases.
- Cases brought by unrepresented parties.

1.06 TIMING OF MEDIATION USE

Mediation is used at every stage of litigation. Interest in mediation as an *early* settlement device is increasing, with some courts testing mediation's capacity to resolve disputes before the parties' positions are hardened and substantial costs incurred. Where parties need additional information or legal rulings to assess settlement options, early resolution of key motions and targeted disclosure or discovery can be arranged to facilitate the effort. Mediation is also used at the end of the pretrial period in some courts.

1.07 BENEFITS AND CONCERNS

Some of the principal benefits claimed for court-sponsored mediation include:

- Offers litigants a consensual problem-solving approach and the opportunity for creative, mutually satisfactory resolutions.
- Broadens the court's dispute resolution services at a relatively low cost and meets increased litigant demand for facilitated settlement assistance.
- Provides a catalyst for settlement in many kinds of cases.
- Results in high litigant satisfaction.

Concerns voiced about court-based mediation programs include:

- Concern whether courts can and will devote sufficient staff and other resources to mediation programs to ensure quality mediator training, judicial education, bar outreach, and evaluation.
- Because some cases do not settle, concern about adding an additional layer to the pretrial process and increasing litigation costs.
- Fear that referral will be used by some judges to divert litigation and litigants they consider undesirable.
- Concern that judges will exert undue pressure on litigants to mediate or that the mediation process itself will compel settlements.
- Concern about the effect unpaid or modestly-compensated mediators will have on the quality of services rendered over time.
- Concern that issues of public significance are resolved without public visibility or accountability.

## **2. ARBITRATION**

- 2.01 DEFINITION**
- 2.02 THE PROCESS**
- 2.03 SELECTING CASES FOR ARBITRATION**
- 2.04 RESEARCH RESULTS**
- 2.05 BENEFITS AND CONCERNS**

### **2.01 DEFINITION**

Court-annexed arbitration is an adjudicatory dispute resolution process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing. The arbitrator's nonbinding decision addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and request a trial de novo in district court.

Court-annexed arbitration is believed to be particularly suited to contract and tort cases involving modest amounts of money, where litigation costs are often disproportionate to the amounts at stake. Federal statute currently authorizes ten federal district courts to institute mandatory court-annexed programs in which party participation is compulsory. Ten other districts are authorized to implement voluntary court-annexed programs in which parties participate by choice. Where arbitration is voluntary, the parties can make the arbitrator's decision final and binding by mutual agreement.

### **2.02 THE PROCESS**

Court-annexed arbitration programs generally work as follows:

- **Referral.** Cases are referred to arbitration either by court mandate or by agreement of the parties. The hearing is conducted by a single arbitrator or a panel of three arbitrators.
- **Arbitrator.** The arbitrators are lawyers who meet qualification standards set by the court and who serve for a small fee or no fee at all. Arbitrators may be assigned by one of several methods: by random draw from a pool of potential arbitrators (often with the opportunity for parties to strike names), by parties reaching consensus on a nomination, or by the court selecting the arbitrator(s).

- **Timing.** The hearing is generally held after limited discovery and within two-to-six months of the time the case is at issue.
- **Case Presentations.** At the hearing, each side presents its case under relaxed rules of evidence.
- **Decision.** After the hearing, the arbitrator issues a decision on the merits and, where appropriate, determines an award. The decision is nonbinding.
- **Trial De Novo.** Parties dissatisfied with the decision may file a demand for trial de novo. If a demand is filed, the case returns to the regular docket for trial by the assigned judge, and the trial proceeds as though the arbitration had not occurred. In most courts, trial requests must be accompanied by a deposit equal to arbitrator's fees. If the trial requester does not improve on the arbitrator's award, the deposit is forfeited.
- **Judgment.** If a trial de novo is not demanded, the arbitration award becomes a non-appealable judgment of the court.

**2.03 SELECTING CASES FOR ARBITRATION**

The primary targets of *mandatory* federal court arbitration programs are small-to-moderate contract, personal injury, and property damage disputes where the amount in controversy does not exceed \$100,000. Suits involving constitutional rights, civil rights, or elective franchise, as well as claims exceeding \$100,000, are excluded by statute (except for two courts with a \$150,000 cap that pre-dated the statute). Some Civil Justice Reform Act Advisory Groups and others have recommended raising the federal monetary ceiling to \$150,000 or higher, on the theory that disputes in this range are fairly characterized as modest and well-suited to resolution through this shortened form of adjudication.

In *voluntary* federal arbitration programs, cases are selected for referral by consent of the parties and the assigned judge.

**2.04 RESEARCH RESULTS**

Court-annexed arbitration is the only court ADR process that has been extensively studied. The main studies suggest that the process can reduce both court burden and litigant costs, though the design and conduct of particular programs strongly affect their impact.

The following summarizes major findings of a 1990 study by the Federal Judicial Center of the ten mandatory federal programs.<sup>1</sup>

- **Litigant Satisfaction and Views on the Fairness of Procedures.** The study found no evidence that litigants felt that they had received second-class justice. Both lawyers and parties involved in the mandatory programs approved the arbitration procedures generally and believed that the procedures used in their individual hearings were fair.
- **Increased Options for Litigants.** Arbitration offers litigants in smaller cases the opportunity to have their cases resolved by a third-party adjudicator, an option which many of the litigants found attractive. Under traditional court processes, most smaller cases terminate without a decision on the merits. Even where a trial de novo demand was made, over half of the parties and attorneys surveyed in the Federal Judicial Center research did not consider their arbitration a waste of time.
- **Cost Reduction.** Arbitration programs may reduce the costs of litigation. When asked whether they thought savings were achieved through arbitration, about two-thirds of the attorneys responded affirmatively. When asked whether their dispute was resolved at a reasonable cost, about two-thirds of the parties responded in the same way.
- **Reduction in Time to Disposition.** Parties reported reasonable case processing times for arbitration cases, and arbitration did not appear to delay resolution of de novo cases. Other research has found that arbitration programs can, but do not always, reduce disposition times.
- **Reduction in Court Burden.** A large majority of the judges supported their court's arbitration program and believed that arbitration reduced court burden.

B. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990).

#### 2.05 BENEFITS AND CONCERNS

In summary, some benefits claimed for court-annexed arbitration include:

- Provides litigants in small-stakes cases with a low-cost semi-formal adjudication and a "day in court."
- Ensures, when mandatory, that court-annexed arbitration programs handle

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<sup>1</sup> B. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990).

enough cases to reduce a court's caseload burden and justify the administrative costs of the program.

- Offers litigants a speedy and inexpensive avenue for resolution, while preserving access to full court process if litigants choose.
- Reduces judicial caseload burden so that judicial resources can be reallocated elsewhere.

Some concerns raised about court-annexed arbitration include:

- The additional staffing and other resources required by major court-annexed arbitration programs.
- Despite litigant approval, concern about the long-term impact on the public justice system of diverting large categories of federal litigants to the process, particularly the impact on the perception and reality of equal access by all litigants to the public courts.
- Uncertainty over the quality of arbitrators, the adequacy of selection and training, and the effect unpaid or modestly compensated arbitrations will have on the quality of services rendered over time.
- Uncertainty over whether mandatory referrals coupled with disincentives for rejecting awards unduly interfere with the right to trial.
- Concern about lower-stakes cases receiving second-class justice.

### 3. EARLY NEUTRAL EVALUATION

- 3.01 DEFINITION
- 3.02 THE PROCESS
- 3.03 SELECTING CASES FOR ENE
- 3.04 RESEARCH RESULTS
- 3.05 BENEFITS AND CONCERNS

#### 3.01 DEFINITION

Early Neutral Evaluation (ENE) is an ADR process that brings all parties and their counsel together early in the pretrial period to present summaries of their cases and receive a nonbinding assessment by an experienced neutral attorney with subject-matter expertise. The evaluator also provides case planning guidance and, if requested by the parties, settlement assistance.

Early neutral evaluation (ENE) began in 1983 in the Northern District of California under the aegis of the late Chief Judge Robert F. Peckham and Magistrate Judge Wayne D. Brazil. To reduce pretrial costs and to sharpen the pleading process, a court-appointed task force of lawyers proposed this confidential system for early exchange of information and case assessment by an impartial and respected attorney. The Northern District of California program became permanent in 1988, with ENE mandatory for some categories of cases. ENE has since been instituted in several other federal districts and state courts, with the Civil Justice Reform Act of 1990 (CJRA) spurring particular interest in ENE. Under the CJRA, a few districts are experimenting with ENE conferences conducted by magistrate judges.

ENE is designed to enhance pretrial practice by:

- Offering parties an early opportunity to communicate directly about the case and to exchange key information;
- Encouraging parties and counsel to analyze their situations early in the litigation;
- Providing counsel and their clients with an early opportunity to present their positions to their adversaries and to hear the other side present its case;
- Offering counsel and litigants a confidential assessment of the relative strengths and weaknesses of their positions, an assessment of the judgment value of the case, and case planning assistance;

- Providing parties with an early opportunity to negotiate settlement with the help of a skilled neutral third-party.

*How does ENE differ from a Rule 16 or other case management conference?* Judges and commentators answer this question in several ways. First, judicial officers usually do not have time to offer parties in-depth case planning assistance. Second, it may be inappropriate for the presiding judicial officer — who theoretically will adjudicate the matter — to offer candid case assessments early in the litigation. Third, parties are generally much less candid with judicial officers than with non-judicial evaluators. And fourth, the evaluator can often improve the quality of information offered the litigants because of his or her subject matter expertise.

### 3.02 THE PROCESS

The courts that use ENE vary in their case eligibility rules, the style and format of the ENE session, and the degree to which participation is mandatory.

- **Referral.** Cases are referred to ENE in three main ways: (1) certain categories of civil cases are automatically and mandatorily referred to ENE at the time of filing; (2) parties stipulate to participate, with the approval of the assigned judge; (3) the assigned judge refers the matter to ENE after an early status conference, either at a party's request or on his or her own motion. Where referral is mandatory, motions to opt-out of the process for good cause are permitted.
- **Evaluator.** After notification from the court that the case has been referred to ENE, the clerk or ADR administrator selects an evaluator with subject matter expertise and determines that no conflict of interest bars the evaluator's service. Evaluators are volunteer lawyers who are highly regarded and experienced in the types of cases for which they serve as evaluator.
- **Timing.** Once an evaluator has been appointed, the evaluator schedules the ENE session and notifies the parties. ENE sessions in the Northern District of California are required to be held within 45 days of the evaluator's appointment and within 150 days from filing of the complaint. ENE sessions may be postponed because of other activity in the case. Generally, litigation activity proceeds concurrently with the ENE.
- **Case Presentations.** ENE sessions begin with the evaluator presenting an opening statement, explaining the purposes of the sessions, and outlining the procedures to be followed. Following the opening statements, the evaluator may ask open-ended questions of both sides, attempting to clarify arguments and evidence, filling in evidentiary gaps and probing strengths and weaknesses. Next the evaluator helps the parties focus their cases and assists in identifying areas of agreement and dispute.

- **Case Assessment.** The evaluator retires to another room to prepare his or her case evaluation, generally in writing. The evaluation includes the likelihood of liability (noting the central reasons) and the range of damages (noting major elements and calculations). The assessment is intended to reflect judgment value, not settlement value.
- **Settlement Discussions.** The evaluator returns to the ENE conference room, asking the parties whether they would like to explore settlement before the case assessment is announced. If either party is unwilling to begin settlement discussions, the evaluator discloses the case evaluation. If both sides are then interested in pursuing settlement, the evaluator begins those discussions using any settlement process or format agreeable to the parties and the evaluator.
- **Case Planning.** If there are no settlement discussions or if discussions are not successful in producing a settlement, after disclosure of the evaluation, the evaluator discusses with the parties a pretrial case management plan. This may include helping to schedule motions or discovery that would put the case in a position for rapid settlement or disposition.
- **Follow-up.** After the ENE session, the parties may agree to a follow-up session or other activity. In some districts, parties may engage the evaluator for additional sessions on a compensated basis, with the consent of the court.
- **Return to Docket.** Unless settled, the case returns to the assigned judge, with no information from the confidential session relayed to the judge or included in the case file.

### 3.03 SELECTING CASES FOR ENE

Like mediation, ENE is thought to be widely applicable to civil cases of varying types and complexity. Several current programs select cases for referral by case type, targeting for mandatory ENE disputes involving contract, product liability, securities, labor and employment, personal injury, fraud, antitrust, banking, environmental, copyright, patent, and trademark. Where ENE referrals are made on a case-by-case basis, other kinds of selection criteria are used, such as the presence of inexperienced or poorly-prepared counsel; high levels of animosity between the parties; or complex legal disputes and multiple issues.

Some commentators recommend that ENE be made available to litigants in all civil cases, arguing that no data support limiting ENE to certain case types and that the ENE process provides useful case management assistance in all types of cases. ENE is thought to be particularly appropriate for cases where the parties differ substantially on legal or factual issues. ENE can also be appropriate in complex cases where subject matter expertise may be helpful in narrowing issues or simplifying them for trial.

Often excluded from ENE programs are class actions, cases in which the principal relief sought is injunctive, and cases involving unrepresented clients.

### 3.04 RESEARCH RESULTS

A study of the ENE program in the Northern District of California, conducted by the University of San Francisco School of Law in 1992 and reported by Joshua Rosenberg, Jay Folberg and Robert Barrett, produced the following findings:<sup>2</sup>

- **Litigant and Party Satisfaction.** 59% of the attorneys and 66% of the clients surveyed believed that ENE was worth the resources devoted to it, and 67% of the attorneys and 66% of the parties reported satisfaction with the process. When attorneys were asked what kind of meeting would have been most useful within the first four months of a lawsuit's filing, ENE received higher rankings than a Rule 16 conference with a judge, a settlement conference with a judge or magistrate judge, or a mediation session. 67% of the parties and 52% of the attorneys stated that they developed a more realistic assessment of the likely outcome of their case as a result of the ENE process and that their changed assessment contributed at least moderately to improved prospects for earlier settlement of the case.
- **Reducing Litigation Costs.** The study revealed a split of opinion among participants (parties and counsel) about ENE's impact on attorney costs and fees. The cost of the session was estimated at about \$3,300 by attorneys and at about \$5,800 by parties. ENE was believed to have resulted in a mean net savings of nearly 40% by attorneys' reports and 42% by clients' reports. The mean amount estimated to have been saved was about \$44,000.
- **Reducing Case Processing Time.** About half of the participants in ENE believed that the process reduced the time to final disposition, and almost half the participants believed that it reduced the time they themselves spent on the case. Reductions in case processing time were also borne out by objective measures.
- **Predicting ENE Success.** The study found that the skill of the evaluator is the most important determinant of ENE success. The next most important factor is the attitude of the assigned judge. If the judge endorses the process and makes clear to the litigants that they should pay attention to it and can expect to find it helpful, the

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<sup>2</sup> J. Rosenberg, J. Folberg, R. Barrett, *Report Regarding the Early Neutral Evaluation Program of the U.S. District Court for the Northern District of California* (submitted to the Task Force on Alternative Dispute Resolution of the Civil Justice Reform Act Advisory Group for the Northern District of California) (December 1, 1992).

litigants and their attorneys report that they do tend to participate more actively and to find the process helpful.

Based on their findings, the study's authors offered the following assessment of the ENE program in the Northern District of California, as well as some guidelines for modifying current program structure:

ENE has varied markedly in both procedure and utility from case to case. Litigants and attorneys often know little about the process beforehand, and most cases are assigned to ENE automatically, rather than based on any specific characteristics of the case. Our recommendations are intended to ensure: (1) that ENE will become a more consistent, and more consistently helpful, process; (2) that evaluators, attorneys, litigants and judges will be more knowledgeable about what the ENE process entails; (3) that cases will be assigned to ENE on a more *case-specific* basis, resulting in its use in matters where ENE is most likely to be productive; and (4) that ENE will be integrated into court procedures along with other ADR options. We believe that assignment of cases to ENE and to other ADR processes should be made in coordination with the Court's new case management system, and that the choice should be made by the parties, or where the parties cannot decide, by the judge assigned to the case, with as much input as possible from the parties and the Court's professional ADR staff.<sup>3</sup>

### 3.05 BENEFITS AND CONCERNS

Among the main benefits asserted for ENE are:

- It enables attorneys and parties to increase their understanding of their cases, to evaluate them more realistically, and to pursue a more efficient path to resolution.
- It provides a valuable supplement to judicial case management, offering more in-depth case planning and settlement assistance than is normally possible or appropriate for the assigned judicial officer.

Among the concerns expressed about ENE are:

- Concern whether courts can and will devote sufficient resources to ENE programs to assure quality ENE training, judicial education, bar outreach, and evaluation.

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<sup>3</sup> *Id.* at 64.

*ADR PROCESSES*

*Early Neutral Evaluation*

- Reluctance to add an additional layer to pretrial process.
- Concern about the effect unpaid or modestly-compensated evaluators will have on the quality of services rendered over time.
- Concern about duplication between ENE and other case management conferences.

**Appendix C**

**Revisions to**  
**Civil Rules 100, 26 and 16**

**Rule 100. Mediation, Early Neutral Evaluation, Arbitration and Settlement Conferences**

**(a) Application.** At any time after a complaint is filed, a party may file a motion with the court requesting mediation or early neutral evaluation for the purpose of achieving a mutually agreeable settlement. The motion must address which process will be used and how the mediation or early neutral evaluation should be conducted as specified in paragraph (b), including the names of any acceptable mediators or early neutral evaluators. If domestic violence has occurred between the parties and mediation or neutral evaluation is requested in a matter covered by AS 25, mediation or neutral evaluation may only be ordered when permitted under AS 25.20.080, AS 25.24.060, or 25.24.140. In matters not covered by AS 25, the court may order mediation or neutral evaluation in response to such a motion, or on its own motion, whenever it determines that mediation or neutral evaluation may result in an equitable settlement. In making this determination, the court shall consider whether there is a history of domestic violence between the parties which could be expected to affect the fairness of the mediation or early neutral evaluation process or the physical safety of the domestic violence victim. Mediation or early neutral evaluation may not be ordered between the parties to, or in, a case filed under AS 18.66.100 - 18.66.180.

**(b) Order.** A order of mediation or early neutral evaluation must state:

- (1) the name of the mediator or neutral evaluator, or how the mediator or neutral evaluator will be decided upon;
- (2) any changes in the procedures specified in paragraphs (d) and (e), or any additional procedures;
- (3) that the costs of mediation or early neutral evaluation are to be borne equally by the parties unless the court apportions the costs differently between the parties; and
- (4) a date by which the initial mediation or early neutral evaluation conference must commence.

**(c) Challenge of Mediator or Neutral Evaluator.** Each party has the right once to challenge preemptorily any mediator or neutral evaluator appointed by the court if the “Notice of Challenge of Mediator” or “Notice of Challenge of Neutral Evaluator” is timely filed pursuant to Civil Rule 42(c).

**(d) Mediation Briefs.** Any party may provide a confidential brief to the mediator or neutral evaluator explaining its view of the dispute. If a party elects to provide a brief, the brief may not exceed five pages in length and must be provided to the mediator or neutral evaluator not less than three days prior to the mediation or evaluation. A party's mediation-brief may not be disclosed to anyone without the party's consent and is not admissible in evidence.

**(e) Conferences.** Mediation and early neutral evaluation will be conducted in informal conferences at a location agreed to by the parties or, if they do not agree, at a location designated by the mediator or neutral evaluator. All parties shall attend the initial conference at which the mediator or neutral evaluator shall first meet with all parties. Thereafter the mediator or neutral evaluator may meet with the parties separately. Counsel for a party may attend all conferences attended by that party.

**(f) Termination.** After the initial joint conference and the first round of separate conferences if separate conferences are required by the mediator or neutral evaluator, a party may withdraw from mediation or neutral evaluation, or the mediator or neutral evaluator may terminate the process if the mediator or neutral evaluator determines that mediation further efforts are likely to be unsuccessful. Upon withdrawal by a party or termination by the mediator or neutral evaluator, the mediator or neutral evaluator shall notify the court that mediation efforts have been terminated.

**(g) Confidentiality** Mediation and neutral evaluation proceedings shall be held in private and are confidential. The mediator or neutral evaluator shall not testify as to any aspect of the mediation proceedings. Evidence of conduct or statements made in the course of court-ordered mediation or neutral evaluation shall be inadmissible to the same extent as conduct or statements are inadmissible under Alaska Rule of Evidence 408. This rule does not relieve any person of a duty imposed by statute.

**(h) Dismissal.** If the mediation or neutral evaluation is successful, the party requesting mediation or neutral evaluation shall prepare a stipulation for dismissal which dismisses all or such portions of the action as have been concluded by mediation as agreed upon at the mediation or neutral evaluation.

**(i) Arbitration.** The parties may stipulate to use arbitration to resolve a case without order of the court.

**(j) Settlement Conference.** At any time after a complaint is filed, a party may file a motion with the court requesting a settlement conference with a judge for the purpose of achieving a mutually agreeable settlement;

**Rule 26. General Provisions Governing Discovery; Duty of Disclosure.**

(1) Initial Disclosures. Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under paragraph (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

*Civil Rule 26*

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(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

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(4) Form of Disclosures. Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(3) Trial Preparation: Materials. Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject

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matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery

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other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) **Timing of Discovery--Non-Exempted Actions.** In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under Rule 33(a) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) **Timing of Discovery--Exempted Actions.** In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under Civil Rule 30, a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service by publication if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under Civil Rule 30(a)(2)(C).

(B) For depositions upon written questions under Civil Rule 31, a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under Civil Rules 33, 34, and 36, discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) **Sequence of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting

discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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(e) **Supplementation of Disclosures and Responses.** A party who has made a disclosure under paragraph (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

**(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution.** Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) the plan for alternative dispute resolution, including its timing, the method of selection a mediator, early neutral evaluator or arbitrator, or an explanation of why alternative dispute resolution is inappropriate.

(5) whether a scheduling conference is unnecessary; and

(5) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and

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(c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

**Rule 16. Pretrial Conferences; Scheduling; Management.**

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating the settlement of the case, including use of alternative dispute resolution procedures such as mediation, early neutral evaluation, arbitration and settlement conferences.

(b) Scheduling Order; Mandatory Scheduling Conference.

(1) Except in categories of actions exempted under Rule 16(g), the judge shall, after receiving the report from the parties under Rule 26(f), enter a scheduling order that limits or establishes the time:

- (A) to join other parties and to amend the pleadings;
- (B) to file motions;
- (C) to disclose expert witnesses and reports required under Rule 26(a)(2);
- (D) to supplement disclosures required under Rule 26(a);
- (E) to identify witnesses and exhibits;
- (F) to complete discovery; and
- (G) for trial or the trial setting conference.

The scheduling order may also address:

- (H) modification of the discovery limitations contained in these rules, including the length of depositions in light of the factors listed in Rule 30(d)(2), and the extent of discovery to be permitted;
- (I) the date or dates for conferences before trial; and

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(J) the use and timing of an alternative dispute resolution procedure; and

(K) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of the defendants. A schedule shall not be modified except upon a showing of good cause and by leave of court.

(2) The judge shall meet with the attorneys for the parties and any unrepresented parties prior to entering the scheduling order unless the parties have waived this conference in their report and the judge determines that a conference is unnecessary. The court shall distribute notice of the conference date as soon as practicable after the appearance of the defendants. The conference may be held on or off the record.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Evidence Rule 702;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

(10) the form and substance of the pretrial order;

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- (11) the disposition of pending motions;
- (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
- (13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;
- (14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a);
- (15) an order establishing a reasonable limit on the time allowed for presenting evidence; and
- (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses

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unjust.

(g) Actions Exempted from Rule 16(b). The following categories of cases are exempted from the requirement of scheduling conferences and scheduling orders under Rule 16(b):

- (1) special proceedings listed in Part XII of these rules, including habeas corpus petitions and dissolution of marriage and divorce actions;
- (2) paternity cases;
- (3) small claims cases;
- (4) actions to enforce out-of-state judgments;
- (5) eminent domain cases;
- (6) proceedings for post-conviction relief under Criminal Rule 35.1; and
- (7) proceedings to obtain a domestic violence protective order under AS 18.66.100 and AS 18.66.110.

**Appendix D**

**Early Neutral Evaluation  
Pilot Project**

## MEMORANDUM

**TO:** Alaska Supreme Court  
**FROM:** Alaska Judicial Council  
**DATE:** November 24, 1997  
**RE:** Early Neutral Evaluation Pilot Project

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The Alaska Court System has agreed to request legislative funding to implement a two-year early neutral evaluation pilot project in 1998-99. This memo describes the program's goals, scope, design and evaluation.

### **I. Goals**

This program is designed to promote the timely and efficient resolution of selected civil cases in a manner that parties and attorneys perceive to be fair, and to promote the efficient use of judge time. Specifically, the project's goals are:

- (1) to promote earlier case settlement,
- (2) to save the parties money, and
- (3) to promote the efficient use of judicial resources,
- (4) the program should be perceived by parties and attorneys to be fair.

## **II. Scope**

The program will target the non-family (primarily commercial and tort) caseloads of participating judges, and will involve at least five judges at four court locations who volunteer to participate. The project will test the hypothesis that cases will settle earlier, at less cost to the parties, and will require less judge time if the judge takes an early, active case management and settlement role. The program will run for two years. The Alaska Court System will consider expanding it statewide if it is successful.

## **III. Program Design**

Civil Rule 16(b) currently requires judges to meet with counsel very early in the life of a contested case to set the case for trial and discuss other scheduling matters. The judges participating in this pilot project will include clients in the 16(b) meeting and will use this meeting to help the parties structure and evaluate the case for early settlement.

Before the 16(b) meeting, the judge will review the case file and the parties' written report of their discovery planning meeting. If necessary, the judge will research the cause of action and other legal issues. The judge will be prepared to discuss settlement with the attorneys and parties at the 16(b) meeting, or if the parties prefer, the judge will arrange for another judge or a private mediator or other neutral to discuss settlement. This procedure will require participating judges to change the way they handle their caseloads by actively encouraging and helping the parties to settle the case, or to structure the case for earlier settlement.

## **IV. Training**

Before the project begins, the Alaska Court System will train all judges in early neutral evaluation and other settlement techniques. The judges participating in this project will receive additional training on the goals and procedures of this project.

#### **V. Conduct of Rule 16(b) Meetings**

The goal of the meeting should be to settle the case. The participating judges will be trained to conduct the ENE sessions in a way that facilitates early and friendly communications between opposing sides. Both lawyers and clients will be required to attend the sessions, since participation and education of the parties is necessary for earlier case resolution. The attorney who will be primarily responsible for handling the case at trial also will be required to attend.

At the ENE session, the judge will advise the parties and their lawyers of the various ADR options available, refine the parties' discovery plan to facilitate early settlement (if necessary), and help the parties explore areas of agreement and explore the possibility of settling the case at the meeting. If the parties wish to try to settle the case there, the judge can begin a settlement conference. Or, if the parties requested someone other than the assigned judge, the judge can refer them to another judge, a private mediator, or a private early neutral evaluator.

The judge/evaluator will help the parties realistically discuss of the relative strengths and weaknesses of their respective cases. The process should aim to confront facts and issues before the attorneys engage in expensive and time-consuming discovery. The judge/evaluator should help the parties evaluate their cases, understand the other side's view, and lay the groundwork for settlement by identifying needed information. If the case can not settle at this meeting, the meeting should be used to determine whether another ADR process would be suitable and to schedule it to occur.

#### **VI. Monitoring and Evaluation**

The court will hire a full-time, temporary project director to monitor the program, respond to unanticipated problems and field complaints and questions.

The Alaska Judicial Council will evaluate the program's success. The Council will provide limited feedback during the time the project is in operation, and will prepare a final report at the end of the project.

The evaluation will include quantitative and qualitative measures. First, the evaluation will collect descriptive information about the types of cases in the program,

including the case type, number of parties and the cases' complexity. Second, the evaluation will monitor settlement rates and disposition times of participating judges' cases and compare them to similar caseloads of judges who did not participate. Third, the evaluation will compare the amount of time participating judges spent per case to the amount of time spent by judges who had similar case loads. Fourth, the Judicial Council will survey all attorneys and litigants who participated in the program to ask their opinions of the fairness and effectiveness of the program, and their level of satisfaction with it. The Council also will interview each of the participating judges for their impressions of the usefulness of the program, and how it might be improved.

#### **VII. Budget**

The Alaska Court System will request increments in its FY 1999 and FY 2000 budgets to implement this program. The Alaska Judicial Council will request increments in its FY 1999 and FY 2000 budgets to evaluate the program.

**Appendix E**  
**Judicial Council**  
**FY99 ADR Budget Increments**

## **Attachment A**

### **ADR Information Brochure**

*To implement the alternative dispute resolution provisions of the Alaska legislature's 1997 "tort reform" legislation, the Judicial Council requests an increment to develop, print and distribute a short brochure explaining various alternative dispute resolution procedures such as mediation, arbitration and early neutral evaluation. The brochure will be aimed at litigants, as well as attorneys.*

In response to the alternative dispute resolution provisions of the legislature's 1997 "tort reform" legislation, the Alaska Supreme Court is amending several of its rules of civil procedure to increase the voluntary use of ADR processes such as mediation. In addition, the court system is developing several initiatives for ADR programs in child custody, probate, guardianship and commercial cases. Thus, litigants will need more information about ADR. The Judicial Council proposes using ADR guides developed in other states to design a guide for Alaska's litigants. The information also will be useful for attorneys. The booklet will be similar in format to others developed by the Judicial Council: concise, easy to read, relatively short (10-20 pages), and attractively laid out. The Council also will distribute the booklet in electronic format to attorneys who wish to print out copies for their clients and to other members of the public who request them. The Council will post the booklet on its web site, and distribute printed copies to court locations statewide. The aim is to provide Alaskan litigants with information on how they can minimize litigation costs by using forms of alternative dispute resolution.

#### **Costs**

This booklet will be relatively inexpensive to develop; the main costs will include printing and dissemination.

**Staff.** The Council will use existing staff to research and write the guide.

**Layout/Design/Typesetting:** The Council will contract with a graphic designer to layout the brochure: \$4,000.

**Printing:** The Council initially will print 5,000 to 7,500 copies of the booklet, \$5,000. (In subsequent years when we will distribute the booklet over the entire fiscal year, printing will be increased.)

**Postage:** The brochure will be posted on the Council's web site using existing staff. The Council will rely on the Alaska Court system to disseminate copies at all its court locations. The Council will mail copies of the brochure or diskettes to Alaskans who request them: \$100.

**Supplies.** Costs for 100 computer disks and diskette mailing envelopes, \$200.

**Total Costs:** Staff, travel, postage, printing, and supplies will total \$9,300.

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*FY99 Budget Submittal*

## **Attachment B**

### **Evaluations of Court System's Alternative Dispute Resolution Pilot Projects**

*In response to the alternative dispute resolution (ADR) provisions of the 1997 "tort reform" legislation, the Alaska Court System is planning two ADR pilot projects. The first is an early neutral evaluation (ENE) pilot project for commercial cases, and the second involves mediation of probate and guardianship cases. The ENE project will use judges and some private subject-matter experts to help parties settle non-family cases earlier and at less cost. The probate/guardianship mediation project will use trained, private mediators to help parties resolve those cases in a less adversarial manner and with fewer court hearings. The Alaska Court System has asked the Alaska Judicial Council to evaluate these experimental projects to determine whether they are meeting their goals. The AJC requests an increment to evaluate the projects.*

In response to the alternative dispute resolution provisions of the 1997 "tort reform" legislation, the Alaska Court System is planning two ADR pilot projects. The first is an early neutral evaluation (ENE) pilot project for commercial cases, and the second involves mediation of probate and guardianship cases. The Alaska Court System has asked the Alaska Judicial Council to evaluate these programs to determine whether they are meeting their goals. The ACS and the Legislature need to know whether the projects are successful in order to decide whether to continue to devote resources to them. In addition, the Court system will take steps to encourage the voluntary use of ADR. These efforts also should be evaluated.

**1. ENE Pilot Project Evaluation.** The ENE pilot project will target non-family cases and use judges (and some private experts) to help attorneys and clients settle these cases earlier, with less cost to the parties and more efficient use of judges' time. Assuming the court system receives funding, the Early Neutral Evaluation Pilot Project could begin as soon as November of 1998. The project will run for two years in order to give cases time to work through the system. However, the evaluation will need to begin as soon as the project begins, with the final report anticipated at the end of the project (November of 2000).

To evaluate this pilot project, the Judicial Council will compare results in cases that received early neutral evaluation conferences to results in cases that did not. The Council also will collect information from attorneys and litigants whose cases received early neutral evaluations, and from the judges who performed the early neutral evaluations. The evaluation of this project thus would include both qualitative and quantitative measures. The data will be gathered over a two year period, beginning in July of 1998.

First, the AJC will compare cases from judges that held early neutral evaluation sessions to the case loads of judges who did not. The AJC will gather information from the experimental and

control case files, including the number of parties involved, the nature of the case, the causes of action, how long the case took to be resolved, how it was resolved and how many hearings occurred. The AJC will enter the data onto an electronic database for analysis.

Second, the AJC will send written surveys to attorneys and clients who participated in the pilot project cases. The surveys will ask about satisfaction with the early neutral evaluation session, whether they thought it was fair, whether they found it helpful, and how many hours the attorney spent on the case.

Finally, the AJC will interview the judges who participated in the pilot project and those who did not, and compare how the judges handled their cases. In addition, the pilot project judges will keep track of the amount of time they spent on each case; this information will be compared to baseline data that the court system collected several years ago to see whether the pilot judges spent more or less time on their cases than judges who did not participate in the pilot project.

### ***Costs for ENE Pilot Project Evaluation***

Existing Judicial Council staff will manage the project, analyze the data and write the final report. The main expenses incurred for this two-year project thus will be for data collection and data entry.

#### ***Staff:***

During the first year, a researcher will collect data from 200 control cases in Anchorage, 50 control cases in Fairbanks, 30 control cases in Kenai and 25 control cases in Ketchikan (approximately 180 hours total). In addition, the researcher will begin collecting file data from experimental cases in Anchorage and Fairbanks as they begin to close, probably toward the end of the year (50 cases in Anchorage and 25 in Fairbanks), for a total of approximately 35 hours. The researcher will spend about 70 hours cleaning the case file data. In addition, the researcher will spend about 40 hours entering and cleaning data from the attorney and litigant surveys. Finally, the researcher will enter the judge time data (30 hours). Total = 355 hours, 11E, \$13,585.

A secretary will spend about 230 hours over the course of the first year sending out litigant and attorney surveys and following up on those; the secretary also will spend about 50 hours

performing general secretarial and administrative support for the project. Total = 280 hours, 11D, \$6,493.

**Travel:**

The researcher will travel to Fairbanks, Kenai and Ketchikan to collect the case file data. In addition, Judicial Council staff will make one trip to each location to observe an ENE session and interview the judges in that location. Airfare and per diem for these trips will total \$3,500.

**Contractual:**

**Consultant.** The Judicial Council will contract with an academic consultant to help design the data collection instruments and the overall evaluation design. The consultant will spend 20 hours @ \$75/hour for a total of \$1,500.

**Postage:** The Judicial Council will mail attorney and litigant surveys. Postage will cost \$400.

**Printing:** The Court System will print the attorney and litigant surveys at no cost.

**Supplies:**

Envelopes, paper, and miscellaneous supplies for survey and data collection instruments. Costs will be \$647.

**Total:** Staff, travel, postage, printing, and supplies will total = \$21,000.

**2. Evaluation of Probate Mediation Pilot Project.** At the recommendation of the Probate Section of the Alaska Bar Association and the Alaska Court System's Probate Rules Committee, the Alaska Supreme Court is amending its probate rules to specifically authorize use of mediation in estate and guardianship cases. Judges will be authorized to order mediation on their own motion or at the parties' request. The court system will request funding to train mediators to handle these disputes. Project goals include resolving guardianship disputes and estate disputes in a more non-adversarial manner than litigation, speeding the resolution of cases, and decreasing the number of cases needing a hearing before a master. The Judicial Council requests a small increment to evaluate whether the rule change is effective in achieving these goals during its first year.

The Judicial Council proposes an evaluation that relies on information from case files and from surveys of attorneys, litigants, mediators and other involved parties. The Council will work with the court system to identify cases ordered to mediation. The Council then will gather information from the case files, including the type of case, the identities of the parties, how the case was resolved and when it was resolved. The Council will send written surveys to the attorneys, litigants, mediators and others involved in the cases (for example, public guardians) about whether they thought the mediation was fair, their satisfaction with mediation and their satisfaction with the outcome of the case. The Judicial Council will write a report containing its findings and conclusions, and will disseminate it to legislators, the court system, the Office of Public Advocacy, members of the Probate Section of the Alaska Bar Association, and other interested agencies and individuals.

### **Costs**

#### **Staff:**

The Council will use existing staff to design data collection instruments, to set up the data base, to analyze the information collected and to write the final report. No cost.

During FY 1999, a researcher will locate and review approximately 50 probate files statewide that have been ordered into mediation, enter the data into a database and clean the data (about 30 hours). In addition, the researcher will enter and clean the survey data (about 30 hours). Total = 60 hours, 11E, \$1,430.

A secretary will send out surveys to the litigants, attorneys and mediators involved in the cases and will follow up on those. The secretary will spend about 80 hours over the course of the year. Total = 80 hours, 11D, \$1,855.

#### **Contractual:**

**Postage.** The Judicial Council will mail attorney, litigant and mediator surveys (approximately five per case). The Council will mail the final report to legislators, the court system, members of the Probate Section of the Alaska Bar Association and other interested individuals and agencies. Postage will cost \$900.

**Printing.** The Court System will print attorney, litigant and mediator surveys, and the final report, at no cost.

**Supplies:**

Envelopes, paper, and miscellaneous supplies for the report, and survey and data collection instruments. Costs will be \$1,215.

**Total:** Staff, travel, postage, printing, and supplies will total \$5,400.

**3. Evaluation of ADR Education and Court Rule Changes.** In response to the legislature's "tort reform" legislation, the Alaska Supreme Court is changing three court rules to encourage the voluntary use of alternative dispute resolution. The goal of these rule changes is to increase the frequency with which attorneys and litigants use mediation, arbitration, and early neutral evaluation. In addition, the Alaska Court System intends to train its judges to better understand the various ADR processes so that they can assist and encourage litigants to choose an ADR process that suits their needs.

The Judicial Council proposes evaluating whether the rules changes and judge training are effective in increasing the appropriate use of ADR to resolve civil cases. The Council's evaluation will survey attorneys (and some litigants) about whether the rule changes and encouragement and information from the judges affected their decision to use ADR, and if so, how. The Council also would ask about satisfaction with the ADR process. The Council already is collecting baseline data on the frequency of ADR use, in connection with its statutory responsibility to collect information about the resolution of civil cases. The evaluation thus would use the data already collected to identify increased use of ADR, and to identify litigants and attorneys who reported using ADR.

The Judicial Council will write a report containing its findings and disseminate it to legislators, the court system, the Office of Public Advocacy, members of the Probate Section of the Alaska Bar Association, and other interested agencies and individuals.

**Costs**

**Staff:**

The Judicial Council would use existing staff to design data collection instruments, to set up the data base, to analyze the information collected, and to write the final report. No cost.

During FY 1999, a researcher will identify approximately 100 closed civil cases in which ADR was used. The researcher will enter the data into a database and clean the data (about 30 hours). In addition, the researcher will enter and clean the survey data (about 25 hours). Total = 55 hours, 11E, \$1,311.

A secretary will send out surveys to the litigants, attorneys and mediators involved in the cases and will follow up on those. The secretary will spend about 80 hours over the course of the year. Total = 80 hours, 11D, \$1,855.

***Contractual:***

***Postage.*** The Judicial Council will mail attorney, litigant and mediator surveys (approximately five per case). The Council will mail the final report to legislators, the court system, selected members of the Alaska Bar Association and other interested individuals and agencies. Postage will cost \$1,500.

***Printing.*** The Court System will print attorney, litigant and mediator surveys, and the final report, at no cost.

***Supplies:***

Envelopes, paper, and miscellaneous supplies for the report, and survey and data collection instruments. Costs will be \$1,534.

***Total:*** Staff, travel, postage, printing, and supplies will total \$6,200.

## **Appendix F**

### **Model Standards of Conduct for Mediators**

## **MODEL STANDARDS OF CONDUCT FOR MEDIATORS**

### **Introductory Note**

The initiative for these standards came from three professional groups: the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it - a beginning, not an end. The standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

### **Preface**

The Model Standards of Conduct for Mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party – a mediator – facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties

to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

**L Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.**

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

- COMMENTS:
- The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.
  - A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

**II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.**

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS: • A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.
- A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

**III. Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate Unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest Also Governs Conduct that Occurs During and After the Mediation.**

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS: • A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

- Potential conflicts of interest may arise between the administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside of the mediation process should never influence the mediator to coerce parties to settle.

**IV. Competence: A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the**

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### **Parties.**

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

- COMMENTS:
- Mediators should have available for the parties information regarding their relevant training, education and experience.
  - The requirements for appearing on a list of mediators must be made public and available to interested persons.
  - When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

### **V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.**

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party

expects to be confidential unless given permission by all parties or unless required by law or other public policy.

- COMMENTS:
- The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
  - If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
  - In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
  - Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
  - Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation, of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to

individual case files, observations of live mediations, and interviews with participants.

**VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.**

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

- COMMENTS:
- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
  - Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
  - The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
  - The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client

relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

- A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
- A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.
- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

**VII. Advertising and Solicitation: A Mediator Shall Be Truthful in Advertising and Solicitation for Mediation.**

Advertising or any other communication with the public concerning services offered or

regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

**COMMENTS:** • It is imperative that communication with the public educate and instill confidence in the process.

- In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

**VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.**

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

**COMMENTS:** • A mediator who withdraws from a mediation should return any unearned fee to the parties.

- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

**IX. Obligations to the Mediation Process: Mediators have a duty to improve the practice of mediation.**

**COMMENTS:** • Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.