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Institutionalization of Alternative Dispute Resolution by the State of California

Bruce Monroe

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Institutionalization of Alternative Dispute Resolution by the State of California*

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By integrating a system of alternative methods of dispute resolution into our existing legal framework, we can prepare our system for the plunge into the twenty-first century without sacrificing the achievements of our great legal heritage.¹

—Judge Thomas D. Lambros

I. INTRODUCTION

Institutionalization² is one of the most significant issues facing the alternative dispute resolution (ADR) movement.³ While the movement's impact, both in terms of magnitude and longevity, has shown that ADR is "here to stay,"⁴ use of ADR mechanisms has thus far been relatively limited.⁵ The reasons for this are undoubtedly varied, but lack of public funding,⁶ public awareness,⁷ and availability of ADR mechanisms⁸ seem to be prime contributing factors.

Institutionalization of ADR has the potential for stimulating more widespread use by increasing availability and visibility of ADR processes, as well as providing the needed funding. This comment discusses some of the rationales favoring institutionalization and

* For WESTLAW® computerized research regarding alternative dispute resolution, select the CA-ST or ALLSTATES or ALLFEDS or TP database, and use this search query: "Dispute Resolution" Arbitration Mediation. WESTLAW is a registered trademark of West Publishing Company.

1. Lambros, *The Alternatives Movement: Rekindling America's Creative Spirit*, 1 OHIO ST. J. DIS. RES. 3 (1985).

2. In this context "institutionalization" refers to the process of making alternative forms of dispute resolution (i.e., alternative to the courts) part of a community's formal, public system of resolving disputes. It is recognized that institutionalization occurs through private channels also, such as when a private dispute resolution center has survived long enough and functioned effectively enough to have become an institution within a community. However, use of the term in this comment refers exclusively to public institutionalization: either in the form of public *modes* of alternative dispute resolution [hereinafter ADR] (e.g., court-annexed arbitration) or public *funding/authorization* of private modes.

3. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (1983) [hereinafter PATHS TO JUSTICE], reprinted in L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION, 3, 15 (1985).

4. Mr. Lawrence Freedman, Staff Attorney for the American Bar Association's Standing Committee on Dispute Resolution, during an address at Pepperdine University School of Law, Feb. 3, 1987; see also Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984).

5. See S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION 503 (1985) [hereinafter GOLDBERG].

6. PATHS TO JUSTICE, *supra* note 3, at 15.

7. *Id.* at 18; Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 6 (1985).

8. GOLDBERG, *supra* note 5, at 503.

identifies methods of institutionalization currently authorized and/or funded by the State, such as codification, regulation, court rules, and school curricula. An extensive survey of California ADR statutes is also included, with three of the more important statutes analyzed in detail. Recommendations are made for broadening current legislative provisions, as well as for considering different approaches that have been tried in other jurisdictions.

II. WHY INSTITUTIONALIZE?

As used in this comment, "institutionalization" refers to the process of integrating ADR processes into a community's formal, public system of justice.⁹ Yet one of the most attractive aspects of the ADR movement has been its informal nature. This factor was recognized by the California Legislature in its identification of a "compelling need to explore informal methods of dispute resolution forums" ¹⁰ Popular reactions against the formality, expense, and inflexibility of traditional court adjudication have led to the formation of an "ideology of informality" in which parties have sought increased participation in both process and outcome.¹¹ Efforts have been made to "delegalize" treatment of minor disputes by resolving them via private, informal processes—sometimes without using legal rules.¹²

In light of this emphasis on informal dispute resolution mechanisms, it may seem paradoxical to suggest the need for integrating ADR with our formal system of justice. Why the need for institutionalization?

First, it will be shown that far from being an enemy of informal ADR processes, institutionalization may eventually become their savior. Second, it is suggested that substantive progress toward the major goals of ADR is unlikely to occur without a significant degree of institutionalization.

A. *Institutionalization and Formality/Informality*

To begin with, it must be recognized that the formal/informal distinction is not a dichotomy. Rather, in the context of ADR, it represents a continuum of experiences ranging from the most formal and forbidding of courtroom settings, to less formal—but still adjudicative—arbitration hearings, to voluntary mediation sessions, to settle-

9. See *supra* note 2.

10. Act of Mar. 4, 1980, CAL. CIV. PROC. CODE § 1143.10(c) (repealed Jan. 1, 1982).

11. C. HARRINGTON, *SHADOW JUSTICE THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 9, 30-31 (1985).

12. *Id.* at 80.

ment conferences.¹³ The various ADR techniques may thus be viewed in terms of a range of formality.

The setting in which less formal techniques have probably "flowered" best is that of community dispute resolution centers.¹⁴ Known by various names,¹⁵ these centers usually provide mediation services, in some cases offering the option of arbitration by mutual consent.¹⁶

The character and degree of relationship between relatively "informal" ADR mechanisms such as the community-based programs and the standard, formal legal system is a subject of current debate.¹⁷ A strong connection between the programs and the courts has been reported to be helpful in terms of funding, office space, and case referrals.¹⁸

Whatever the precise relationship between courts and less formal ADR programs in a given situation, the decision to institutionalize ADR need not require an all-or-nothing choice between formal and informal modalities. Public funding of informal programs can potentially offer the best of both worlds—the advantages of an informal setting for resolving disputes and the pluses that come primarily through the formal system.

B. Institutionalization and ADR Goals

One of the leaders of the movement, Frank Sander, has set forth four major goals of the ADR movement: "1) to relieve court congestion, as well as undue cost and delay; 2) to enhance community involvement in the dispute resolution process; 3) to facilitate access to justice; 4) to provide more 'effective' dispute resolution."¹⁹

ADR authorities Goldberg, Green, and Sander have expressed

13. See Schiffres, *Alternative Dispute Resolution*, in AM. JUR. 2D NEW TOPIC SERVICE (1985 & Supp. 1986).

14. American Bar Association, Special Committee on Dispute Resolution, *Growth in the Dispute Resolution Field: Letting a Thousand Flowers Bloom*, 19 DISPUTE RESOLUTION 1 (1986) [hereinafter American Bar Association].

15. For example, they are also referred to as "citizen complaint center[s]" or "'neighborhood justice center[s]." Sander, *supra* note 7, at 6.

16. See, e.g., AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, MONOGRAPH SERIES—NO. 1, STATE LEGISLATION ON DISPUTE RESOLUTION, 9 (1982) (proposed California legislation) [hereinafter AMERICAN BAR ASSOCIATION].

17. American Bar Association, *supra* note 14, at 8.

18. *Id.*

19. Sander, *supra* note 7, at 3; Sander suggests that factors such as "cost, speed, satisfaction (to the public and the parties) and compliance" should be considered in evaluating an ADR program's effectiveness. *Id.* at n.10.

doubts about ADR's potential for impact on the first two goals.²⁰ Sander warns that overly optimistic projections about the ability of ADR to relieve court congestion must be tempered with recognition of the complex social conditions that have brought about the problem of court crowding.²¹ However, some of California's experiences with institutionalized ADR in the form of judicial arbitration give hope for at least a limited degree of amelioration.²²

Since improved access to justice may be accomplished best by providing disputants with access to that particular dispute resolution mechanism best suited to the nature of the controversy (which in some cases will, of course, be the courts), the final two goals are interdependent and thus may be considered together.²³

Access to swifter, less costly, more effective justice represents both the promise and the hope of ADR.²⁴ But access is necessarily dependent upon availability of the proper resolution forum. Despite a "dispute resolution explosion" that has seen the number of community mediation programs grow from "a handful" in 1976 to over 350 in the country today,²⁵ many communities still do not offer any alternatives to the court system. Additionally, those people who need them often do not resort to the alternatives that do exist.²⁶

C. *Availability and Use of ADR Mechanisms*

In order for the ADR movement to contribute meaningfully to the four goals mentioned above, the programs encompassed must receive sufficient use in order to have a perceivably beneficial impact on the existing system for which it seeks to become an alternative. It is in the creation of new programs, and in the increased use of existing ones, that institutionalization offers two of its principle merits: funding and visibility.

20. GOLDBERG, *supra* note 5, at 5-6. The authors question both the capability and availability of lay community members in providing quality ADR services. *Id.* at 6. Schonholtz, on the other hand, presents a strongly countervailing viewpoint, emphasizing in his "community board model" the use of trained community members in dispute resolution processes. Schonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MED. Q. 3, 13-16 (1984), partially reprinted in *id.* at 365-67.

Other commentators have asserted the competence of non-attorneys as arbitrators. See, e.g., Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration*, 20 CAL. W.L. REV. 43, 58 (1983).

21. Snow & Abramson, *supra* note 20, at 58.

22. See *infra* notes 136-84 and accompanying text.

23. Sander, *supra* note 7, at 3.

24. PATHS TO JUSTICE, *supra* note 3, at 3, 9; see Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475 (1978).

25. American Bar Association, *supra* note 14, at 1.

26. See Sander, *supra* note 7, at 6.

1. Public Funding

*Full use [of the court system] requires expensive lawyers and the time of the disputants. These costs mean that courts are generally inaccessible to all but the most wealthy parties.*²⁷

—National Institute For Dispute Resolution.

Widespread use of ADR will probably require public funding.²⁸ Various forms of private funding have been used, including user fees, private donations, and foundation and corporate support.²⁹ However these sources often have not been adequate, with the result that many programs are financially insecure.³⁰ Institutionalization, on the other hand, can offer public funding, either through appending ADR programs to the court system (as in court-annexed programs) or by providing public grants for the establishment and maintenance of separate programs.³¹

2. Public Awareness

*Because some nonlitigative methods are not well known to large segments of the general public (including the legal profession), education of potential users about these methods and removal of barriers to their use are important steps in the institutionalization process.*³²

—National Institute for Dispute Resolution

Equally important is public awareness. A general unfamiliarity with ADR mechanisms leads many people to perpetuate a habit of turning first to the courts when a disagreement arises.³³ In this regard institutionalization, particularly with respect to compulsory court-annexed modes of ADR, provides enhanced visibility to the alternatives. When heightened awareness is combined with the increased satisfaction often reported by participants,³⁴ more frequent use seems a reasonable expectation in those communities where ADR programs are available.

27. PATHS TO JUSTICE, *supra* note 3, at 9.

28. *Id.* at 15.

29. *Id.*

30. *Id.*

31. *See id.*; see also AMERICAN BAR ASSOCIATION, *supra* note 16, at 2-3.

32. PATHS TO JUSTICE, *supra* note 3, at 18.

33. Sander, *supra* note 7, at 11-12.

34. Sander, *supra* note 7, at 15-16; Note, *supra* note 24, at 491, 499.

III. METHODS OF INSTITUTIONALIZING ADR

This section will feature discussion of *some* of the forms of institutionalized ADR that are currently authorized and/or funded by the state of California. This list is not intended to be exhaustive, but merely illustrative of some of the more significant approaches used by the State.

A. Codification

Codification is undoubtedly the most desirable method of institutionalization since it has the broadest impact and stamps the particular ADR program or technique involved with the legislature's imprimatur. California has codified a wide variety of ADR provisions.³⁵ Three of these provisions constitute a major focus of this paper and these, along with a summary of other California ADR statutes, are discussed in detail in section IV.

B. Administrative Hearings and Regulations

Hearings. As is true both with other states and with the federal government,³⁶ California administrative agencies conduct adjudicative hearings on disputes relating to matters within the particular agency's purview.³⁷ The agencies' decisions are rendered, recorded, and may be subject to judicial review.³⁸ In some cases parties to a dispute may have a choice between an agency hearing and a civil suit in court.³⁹

Regulations. The Administrative Code requires the use of ADR only in relation to arbitration, and only for resolving claims arising from contracts formed with public agencies⁴⁰ under the State Con-

35. See *infra* notes 65-135 and accompanying text.

36. Interview with Gregory L. Ogden, Professor of Law at Pepperdine University School of Law, Malibu, California (Feb. 13, 1987) (Professor Ogden is a professor of administrative law and civil procedure); see also Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1982). See generally B. SCHWARTZ, ADMINISTRATIVE LAW 24-25, 62-64 (1984); R. PIERCE, S. SHAPIRO, & P. VERKUIL, ADMINISTRATIVE LAW AND PRACTICE, 277-85 (1985).

37. See CALIFORNIA ADMINISTRATIVE HEARING PRACTICE (V. Chuan ed. 1984); for a listing of the agencies and the adjudicative functions they perform, see *id.* app. (Supp. 1986).

38. *Id.* at 3-5. The Administrative Procedure Act, CAL. GOV'T CODE §§ 11340-11528 (West 1980 & Supp. 1987), specifies a system of procedure for conducting administrative hearings. The system is similar in many ways to civil trial procedure and applies to some State agencies. Agencies (and functions within agencies) to which the Act does not apply derive their hearing procedures from applicable statutes, as well as regulations and agency-adopted procedures, or simply from informal agency practice. CALIFORNIA ADMINISTRATIVE HEARING PRACTICE, *supra* note 37, at § 1.2.

39. Ogden, *supra* note 36, Feb. 13, 1987.

40. CAL. ADMIN. CODE tit. 1, §§ 300-99 (1984).

tract Act.⁴¹

C. ADR Activities of State Agencies

California State Mediation and Conciliation Service. A division of the State Department of Industrial Relations, called the California State Mediation and Conciliation Service,⁴² has been statutorily authorized to provide dispute resolution services for many types of labor disputes.⁴³ In some circumstances, these services are to be made available only upon request of parties to the dispute,⁴⁴ but in other cases, they may be offered at the initiative of the division.⁴⁵ Services offered by the division include mediation, conciliation, investigation, arbitration, and arranging arbitration boards.⁴⁶

Judicial Council. The state Judicial Council has been authorized by the legislature to engage in statewide coordination of ADR legislation pertaining to family law.⁴⁷ The Council's duties include, *inter alia*, developing a statistical reporting system, administering a program of grants to agencies performing research in family law ADR, and assisting counties in implementing the two statutes that require mediation for child custody and visitation cases.⁴⁸

41. CAL. PUB. CONT. CODE §§ 10240.5, 10245.2 (West 1985).

42. The division is named in CAL. LAB. CODE § 66 (West Supp. 1987).

43. See, e.g., CAL. LAB. CODE § 65 (West 1977) (labor disputes in general); CAL. GOV'T CODE § 3507.3 (West 1980) (appropriateness of units of representation for professional public employees).

44. E.g., in disputes regarding the appropriateness of units of representation for professional public employees. CAL. GOV'T CODE § 3507.3 (West 1980).

45. E.g., when work stoppage is threatened as a result of a labor dispute and neither party has requested intervention. CAL. LAB. CODE § 65 (West 1977 & Supp. 1987).

46. See CAL. LAB. CODE §§ 65-66 (West 1977 & Supp. 1987).

47. CAL. CIV. CODE §§ 5180-5183 (West Supp. 1987).

Legislative findings

The Legislature finds that it has made many significant changes in the area of family law in recent years, including legislation authorizing awards for the joint custody of children and requiring the mediation of child custody and visitation disputes. There presently is no statewide coordination of the application of these new laws, no uniform statistical reporting system as to family law matters, no ongoing training for personnel involved in the expanded family law system, and no evaluation of the effectiveness of current law for the purpose of shaping future public policy.

Id. § 5180. See *infra* note 115 and accompanying text.

48. *Id.* § 5181.

Judicial council duties

The Judicial Council shall do all of the following:

(a) Assist counties in implementing Sections 4351.5 [mandatory mediation for child visitation by stepparents or grandparents] and 4607 [mandatory mediation for contested child custody or visitation proceedings].

D. Court Rules

State rules of court are promulgated by the Judicial Council and the Supreme Court of the State of California.⁴⁹ In the area of ADR, a series of rules was adopted in 1979 following the legislature's enactment of the Judicial Arbitration Act.⁵⁰ The rules provide procedures for judicial arbitration, including composition of arbitrator panels, selection of arbitrators, assignment of cases, continuances, etc.,⁵¹ and are referenced where applicable during discussion of the Judicial Arbitration Act in section IV below.

E. State-Sponsored Formal Education

State-Operated Law Schools. An important part of institutionalizing ADR involves changing the way lawyers are educated. As long ago as 1976, Frank Sander commented that "law schools . . . should shift from their preoccupation with the judicial process and begin to expose students to the broad range of dispute resolution processes."⁵²

A national trend along these lines has resulted. Over half of all law schools offered some form of dispute resolution course during 1986, where no school had offered a course in 1976.⁵³ Four University of California campuses⁵⁴ now include formal courses either in ADR generally, or in specific modes of ADR, as part of their curriculum.⁵⁵ Three of the schools also offer clinical training.⁵⁶

Public Elementary and Secondary Schools. The California Legislature has strongly supported the training of public school children in ADR techniques.⁵⁷ A 1984 Assembly resolution called upon the State

(b) Establish and implement a uniform statistical reporting system relating to actions brought pursuant to this part, including, but not limited to, a custody disposition survey.

(c) Administer a program of grants to public and private agencies submitting proposals for research, study, and demonstration projects in the area of family law, including . . . :

(1) The development of conciliation and mediation and other newer dispute resolution techniques, particularly as they relate to child custody and to avoidance of litigation.

CAL. CIV. CODE § 5181 (West Supp. 1987). See *infra* notes 67 and 68 and accompanying text regarding §§ 4351.5 and 4607.

49. See WEST'S CALIFORNIA RULES OF COURT 3 (1987).

50. CAL. CIV. PROC. CODE §§ 1141.10-1141.32 (West 1982 & Supp. 1987).

51. CAL. R. CT. 1600-17.

52. 70 F.R.D. 79, at 131-32 (1976); see also Sander, *supra* note 7, at 18; PATHS TO JUSTICE, *supra* note 3, at 16.

53. American Bar Association, *supra* note 14, at 1.

54. These campuses are at Berkeley, Davis, Los Angeles, and San Francisco (Hastings College of Law). AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON DISPUTE RESOLUTION, DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS 13-16 (1986).

55. *Id.*

56. *Id.*

57. Cal. Ass'y Con. Res. 152 (filed Sept. 14, 1984).

Board of Education to consider incorporating dispute resolution training into the basic curriculum of all public schools, ranging from the kindergarten level through grade twelve.⁵⁸ Following through on this suggestion, the Board unanimously passed a resolution acknowledging the value of ADR training for students.⁵⁹ Superintendent of Public Instruction, Bill Honig, recently wrote a letter to all school district superintendents urging them "to seek whatever assistance and training are necessary to enable you and your staff to develop and implement appropriate conflict resolution programs and to make them available as part of your school curriculum at all levels"⁶⁰

Several private dispute resolution organizations within the State provide curriculum materials for use in schools.⁶¹ Some organiza-

58. *Id.*

59. Cal. State Bd. of Educ. Res. 85-15 (adopted June 13, 1985).

60. Letter from Bill Honig to all district superintendents (Feb. 12, 1987). The letter also stated:

Students, parents, teachers, and administrators have often expressed concern for resolving conflicts. In response to this concern, the State Board of Education has explored the feasibility of incorporating conflict resolution learning programs as an appropriate part of the basic curriculum in kindergarten through grade 12. After its study the Board of Education adopted unanimously a resolution that reinforces the position that student-to-student conflict resolution programs provide students with effective skills that address many interpersonal and intergroup conflicts. In addition, the Board acknowledged that conflict resolution skill training enables students to communicate more effectively about problems across age and cultural barriers and to resolve conflicts peacefully in their schools, homes, and communities.

It is the intent of the State Board of Education that all students should have the opportunity to be trained and educated in conflict resolution and communication skills.

Id.

61. *E.g.*, 1) Community Boards School Initiatives Program, San Francisco, California: "Through the Conflict Manager Program, selected students are trained in problem-solving, assertiveness, listening, and leadership skills. Encourages the incorporation and institutionalization of conflict management systems, grades K-12, nationwide. Effective training provided on request." American Bar Association Standing Committee on Dispute Resolution, School-Based Mediation Programs (unpublished written materials provided in Feb. 1987). The Community Boards program was selected for special commendation by the State Legislature. *See supra* note 57. 2) Golden Hill Mediation Center, San Diego, California: "An initial experimental effort to create a conflict resolution course for high school which includes mediator training for high-school students who may then use the skills to mediate student-to-student campus disputes. Training is coordinated by the San Diego Law Center with GHMC staff." *Id.* 3) Constitutional Rights Foundation, Los Angeles, California: "This program views conflict resolution on an international scale, provides curriculum for secondary schools, stresses the inter-connectedness of societies, and methods by which nations can settle disputes over trade, territory, and human rights." *Id.*

The National Association for Mediation in Education (N.A.M.E.), 127 Hasbrouck, University of Massachusetts, Amherst, MA. 01003, is an organization "dedicated to fur-

tions also provide training to interested parties in conflict resolution techniques for children.⁶²

IV. CODIFICATION OF ADR IN CALIFORNIA

Codification is the most comprehensive and far-reaching method of institutionalizing ADR currently being used in California. Through legislation, the state has legitimized alternative processes and has dealt with significant issues such as funding, scope of application, and confidentiality of proceedings.⁶³ California is not alone in this type of legislation—over twenty states now have statutes which deal with dispute resolution.⁶⁴

The legislature has codified a wide variety of ADR provisions. Part A of this section reviews the scope of relevant statutes. Three of the most significant statutes—pertaining to judicial arbitration, mediation in contested child custody proceedings, and dispute resolution programs—are then analyzed in detail.

It is hoped that this survey and analysis will provide a useful tool for persons engaged in research related to these topics. Readers with other purposes may wish to skim or omit this part and resume reading at part B.

A. Scope of Codification

Statutes in the various codes can be roughly divided into three categories: 1) mandatory (mandating use of an ADR mechanism), 2) permissive (permitting use of an ADR mechanism), or 3) regulatory (regulating use of an ADR mechanism if one is used). The few statutes which are mandatory regarding one party, and permissive regarding the other, have been listed in the mandatory category. All three categories are subdivided alphabetically by code.

1. Mandatory Statutes

The Business and Professions Code contains a provision requiring arbitration of attorney fees.⁶⁵

ther the advancement of mediation in school settings (especially K-12) by mediators, educators, and administrators." *Id.*

62. See *supra* note 61.

63. See generally Miller, *Crossing the Legislative Barrier: State Legislation and the Implementation of Alternative Methods of Dispute Resolution*, in A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION 188-218 (1984).

64. American Bar Association, *supra* note 14, at 1.

65. Arbitration of disputes regarding attorneys' fees is voluntary for a client, but mandatory for an attorney if the action is commenced by a client. CAL. BUS. & PROF. CODE § 6200(a)-(c) (West Supp. 1987). See generally Egelko, *Arbitrating fee disputes*, 5 CAL. LAW., Jan. 1985, at 21; Hargarten, *Fine Tuning California's Mandatory Attorney Fee Arbitration Statute*, 16 U.S.F. L. REV. 411 (1982).

The Civil Code contains three mandatory ADR statutes dealing with motor vehicle express warranties,⁶⁶ stepparent or grandparent visitation rights,⁶⁷ and contested child custody or visitation proceedings.⁶⁸

The Code of Civil Procedure features a significant statute requiring judicial arbitration of many small civil claims.⁶⁹

The Education Code includes four statutes in the mandatory category, including such subjects as disputes regarding the division of assets or obligations between school boards,⁷⁰ school board disputes regarding building fixtures,⁷¹ dismissal of community college employees,⁷² and grievances or disciplinary actions for State University aca-

66. The buyer of a motor vehicle must use a qualified third-party dispute resolution process, if one exists and he has been informed of its existence in writing, in order to assert a presumption that he has complied with applicable express warranties. CAL. CIV. CODE § 1793.2(e)(2), (3) (West Supp. 1987).

67. Mediation is required when a stepparent or grandparent has applied for visitation rights. CAL. CIV. CODE § 4351.5(c) (West Supp. 1987). See generally *Grandparents Have Rights Too*, 4 CAL. LAW., April 1984, at 20. See *supra* note 48 and accompanying text.

68. Mediation is required when it is apparent from the face of a petition that a child custody or visitation order will be contested by a parent. CAL. CIV. CODE § 4607 (West Supp. 1987). See generally Lynch, *Child Stealing*, 3 CAL. LAW., Dec. 1983, at 29; Freedberg, *Custody Compromise*, 3 CAL. LAW., June 1983, at 20; Reece, *Joint Custody: A Cautious View*, 16 U.C. DAVIS L. REV. 775 (1983); Phillips & Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231 (1983); King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW., Jan. 1982, at 40. See *supra* note 48 and *infra* part C in this section for further discussion. The text of the statute is found in Appendix A.

69. CAL. CIV. PROC. CODE §§ 1141.10-.30 (West 1982 & Supp. 1987). With certain exceptions, at-issue civil claims in superior courts with ten or more judges must be referred to judicial arbitration when, in the opinion of the court, the amount of the claim will not exceed \$25,000. *Id.* § 1141.11(a). Superior courts with fewer than ten judges and municipal courts may adopt the procedure by local rule. *Id.* § 1141.11(b), (c). A trial de novo may be requested by any party within 30 days after the arbitration award is filed. However, if the trial judgment is not more favorable for the requesting party, that party will be required to pay certain costs. *Id.* § 1141.21. See *infra* part B in this section for more extensive discussion.

70. An arbitration board must always be appointed to resolve disputes between school district governing boards regarding the division of funds, property, or obligations. CAL. EDUC. CODE § 35565 (West Supp. 1987).

71. An arbitration board must be appointed to resolve disputes related to the determination of which articles in the district's school buildings constitute fixtures. CAL. EDUC. CODE § 81501 (West 1978).

72. CAL. EDUC. CODE §§ 87673-87680 (West 1978 & Supp. 1987). If a community employee objects in writing to the governing board's decision to dismiss him, the matter must be submitted to arbitration. *Id.* §§ 87673-87674. If the parties cannot agree upon an arbitrator so as to confirm the arbitration agreement in writing within 30 days, an administrative hearing will be held instead. *Id.* §§ 87678-87680.

demic employees.⁷³

The Fish and Game Code contains three statutes that mandate arbitration for plans to alter the natural course of bodies of water that support wildlife,⁷⁴ appeals of an order closing or restricting a body of water,⁷⁵ and appraising the value of destroyed aquatic plants or animals.⁷⁶

The Food and Agriculture Code has statutes involving mandatory arbitration for disputes related to operation of dairy produce exchanges,⁷⁷ and for reapportionment of avocado districts.⁷⁸

The Government Code contains two mandatory dispute resolution statutes. One involves representation of professional state employees,⁷⁹ while the other concerns charges of unfair employment practices.⁸⁰

A Health and Safety Code statute requires arbitration related to the removal of hazardous substances.⁸¹

73. Arbitration is required when a faculty hearing committee's decision on a disciplinary action or grievance regarding an academic employee of the California State University differs from the decision of the university president. CAL. EDUC. CODE § 89542.5(d) (West Supp. 1987).

74. If State Department of Fish and Game representatives are unable to agree with certain parties, including governmental agencies and public utilities planning to alter the course of waterways that support wildlife, about proposed modifications to the plans by the Department, the dispute must be submitted to a panel of arbitrators. CAL. FISH & GAME CODE §§ 1601-1603 (West 1984).

75. An arbitration panel must be used to decide cases in which persons authorized to fish commercially appeal orders by the Director of Fish and Game to close or restrict a body of water. CAL. FISH & GAME CODE § 7710.1 (West 1984).

76. Arbitration is required when State action results in the destruction of privately owned aquatic plants or animals, and the appraisers—appointed jointly by the state and the owner—cannot agree on the value of the destroyed items. CAL. FISH & GAME CODE § 15512 (West Supp. 1987).

77. "The director shall act as arbitrator in all cases of dispute or contention which concerns the maintenance or operation of any licensed dairy produce exchange, or the bylaws, rules, or regulations which pertain to it." CAL. FOOD & AGRIC. CODE § 57161 (West 1986).

78. An arbitrator must determine the boundaries of avocado districts if the responsible commission is required to redistrict and is unable to agree on the boundaries. CAL. FOOD & AGRIC. CODE § 67044 (West 1986).

79. Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute. CAL. GOV'T CODE § 3507.3 (West 1980).

80. The Public Employment Relations Board must investigate and decide any charges of unfair practice submitted by an employee, employee organization, or employer. CAL. GOV'T CODE §§ 3563(g)-(m), 3563.2 (West 1980). Judicial review of Board decisions is available only under limited circumstances. *Id.* § 3564.

81. A panel of arbitrators is required to apportion liability for costs of removal and remedial action related to hazardous substances. CAL. HEALTH & SAFETY CODE § 25356.2 (West Supp. 1987).

The Insurance Code contains a statute requiring arbitration of disputes related to uninsured motorist coverage.⁸²

Two Labor Code statutes feature mandatory ADR for disputes regarding agents of athletes⁸³ or talent agencies.⁸⁴

2. Permissive Statutes

The Business and Professions Code allows arbitration for certain types of construction disputes.⁸⁵ A new act in this Code authorizes counties to fund nonprofit dispute resolution programs by increasing civil action filing fees.⁸⁶

The Civil Code contains three statutes permitting ADR in cases of cost apportionment for maintenance of easements,⁸⁷ public agency construction contracts,⁸⁸ and division of community property.⁸⁹

82. Disputes between an insurance company and its insured regarding the entitlement to, and amount of damages recoverable by a holder of uninsured motorist coverage must be decided by arbitration. CAL. INS. CODE §§ 11580.2(f) (West Supp. 1987). See generally Comment, *Financial Responsibility Laws in Constitutional Perspective*, 61 CALIF. L. REV. (1973); *Uninsured Motorist Coverage: Can Signed Waiver in Statutory Form be Relied Upon in California*, 4 GOLDEN GATE U.L. REV. 19 (1973).

83. Disputes related to the work of an athlete's agent must be decided by the Labor Commissioner, whose decision is subject to subsequent request for trial de novo. CAL. LAB. CODE § 1543 (West Supp. 1987). An exception to the preceding is provided when the contract between the parties provides for resolution of the dispute by arbitration and fulfills certain other requirements. CAL. LAB. CODE § 1544 (West Supp. 1987). Contractual provisions specifying arbitration which do not meet the requirements are not validated by CAL. CIV. CODE § 1281. *Id.*

84. Disputes involving the fee charged by a talent agency must be decided by the Labor Commissioner, whose decision is subject to subsequent request for trial de novo. CAL. LAB. CODE § 1700.44 (West Supp. 1987). An exception to the foregoing requirement is provided when a contract between the parties provides for resolution of the dispute by arbitration and fulfills certain other requirements. CAL. LAB. CODE § 1700.45 (West Supp. 1987). Contractual provisions specifying arbitration which do not meet the requirements are not validated by CAL. CIV. CODE § 1281. *Id.*

85. The registrar may refer a dispute between complainant and licensee to arbitration if both parties concur and if the registrar determines that public interest is better served by arbitration than by disciplinary proceedings, the complainant has, or probably will suffer material damages caused by the licensee, and the licensee meets certain criteria. CAL. BUS. & PROF. CODE § 7085 (West Supp. 1987). "Material damages" means damages from \$500-15,000 inclusive. *Id.* § 7085(f).

86. CAL. BUS. & PROF. CODE §§ 465-471.5 (West Supp. 1987) (effective January 1, 1987). See part D in this section for further discussion.

87. At the request of an easement owner or an owner of the land to which the easement is attached, the court may appoint an arbitrator to apportion liability for maintenance and repair of an easement. CAL. CIV. CODE § 845 (West Supp. 1987).

88. "Any dispute arising from a construction contract with a public agency, which contract contains a provision that one party to the contract or one party's agent or employee shall decide any disputes arising under that contract, shall be resolved by submitting the dispute to independent arbitration, if mutually agreeable, otherwise by litigation in a court of competent jurisdiction." CAL. CIV. CODE § 1670 (West 1985).

In the Code of Civil Procedure there are statutory provisions allowing ADR in conjunction with eminent domain⁹⁰ and medical services contracts.⁹¹

The Education Code permits referral of truant and insubordinate students to a truancy mediation program under certain circumstances.⁹² Another section in the Code extends the right to a mediation conference and administrative hearing regarding several kinds of school-related disputes.⁹³

89. "The court may submit the matter to arbitration at anytime it believes the parties are unable to agree upon a division of the property." CAL. CIV. CODE § 4800.9(b) (West Supp. 1987). Additionally, the court may use the state's judicial arbitration procedure (see CIV. PROC. CODE §§ 1141.10-1141.30 (West 1982 & Supp. 1987)) if the parties have failed to agree on a division of the property in writing and if, in the court's opinion, the value of the property is \$25,000 or less. *Id.* See discussion in parts B and C of this section.

90. A person authorized either to acquire public property or to settle a claim arising from the taking of property, or the damaging of property already taken, may make an agreement to arbitrate the amount of related compensation. CAL. CIV. PROC. CODE § 1273.010 (West 1982).

91. (a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

CAL. CIV. PROC. CODE § 1295(a)-(b) (West 1982); see CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1982 & Supp. 1987). See generally Novick, *Medical Malpractice: Arbitrating Disputes*, 2 L.A. LAW., March 1979, at 34; Case Note, *An Agent's Authority to Bind a Principal to Arbitration*, 65 CALIF. L. REV. 355 (1977); Note, *California Medical Malpractice Arbitration and Wrongful Death Actions*, 51 S. CAL. L. REV. 401 (1978); Comment, *The Price of Health Care Availability: The Economics of Medical Malpractice*, 11 SW. U.L. REV. 1371 (1979).

92. The school attendance review board may refer a truant or insubordinate child to a truancy mediation program by notifying the district attorney, probation officer, or county superintendent of schools, as appropriate in the circumstances, if available community resources are unable to resolve the problem or if the child, his parents, or guardians have ignored school attendance review board directives or services provided. CAL. EDUC. CODE §§ 48263-48263.5 (West Supp. 1987).

93. CAL. EDUC. CODE §§ 56501-56505 (West Supp. 1987). The right to a mediation conference and/or administrative hearing extends to the pupil, parent, and the appropriate public education agency in specified situations. *Id.* § 56501(a)(1)-(3). The agency and parent may meet informally prior to the mediation conference to resolve the issues if they so desire. *Id.* § 56502(b).

A provision in the Food and Agriculture Code allows mediation and arbitration in relation to data gaps in the use of pesticides.⁹⁴

The Government Code contains five statutes permitting ADR for negotiations between the Governor and public employee organizations,⁹⁵ negotiations between public school employers and employee representatives,⁹⁶ negotiations between public higher education employers and employee representatives,⁹⁷ public works contracts,⁹⁸ and deregulation of cable television franchises.⁹⁹

Included in the Harbors and Navigation Code is statutory permission for the operator of a small boat to request arbitration in relation

94. The Director of Food and Agriculture is authorized to use, *inter alia*, mediation and arbitration to resolve disputes or fund the filling of data gaps regarding use of pesticides. CAL. FOOD & AGRIC. CODE § 13127(c) (West Supp. 1987).

95. If the Governor and an employee organization fail to reach agreement after a reasonable length of time, the parties may agree to appoint a mutually acceptable mediator, or may ask the board to appoint a mediator. CAL. GOV'T CODE § 3518 (West 1980).

96. CAL. GOV'T CODE §§ 3548-3548.7 (West 1980 & Supp. 1987). When an impasse is reached in negotiations between a public school employer and an employee representative, either party may request appointment of a mediator. *Id.* § 3548. Should mediation be unsuccessful, a factfinding panel may be appointed if appropriate. *Id.* § 3548.1. Public School employers and employee representatives may include provisions for binding arbitration in written agreements. *Id.* § 3548.5. *Cf.* CAL. GOV'T CODE §§ 3589-3594 (West 1980 & Supp. 1987) (regarding public higher education employers). *See supra* note 79. *See generally* Galgani, *Judicial Review of Arbitrability and Arbitration Awards in the Public Sector*, 18 SANTA CLARA L. REV. 937 (1978); Johnson, *The Scope of Injunction in California Public School Employee Strikes*, 17 U.S.F.L. REV. 203 (1983).

97. CAL. GOV'T CODE §§ 3589-3595 (West 1980 & Supp. 1987). When an impasse has been reached in negotiations between a public higher education employer and an employee representative, either party may request appointment of a mediator. *Id.* § 3590. Should mediation be unsuccessful, a factfinding panel may be appointed if appropriate. *Id.* § 3591. Public higher education employers and employee representatives may include provisions for binding arbitration in written memoranda of understanding. *Id.* § 3589. *Cf.* CAL. GOV'T CODE §§ 3548-3548.7 (West 1980 & Supp. 1987) (regarding public school employers). *See supra* note 80.

98. Unless otherwise prohibited by law, the terms of any public works contract may include, at the time of bidding and of award, a provision for arbitration of any claim pursuant to the provisions of Article 8.1 (commencing with Section 14410) of Chapter 3 of Part 5 of Division 3 of Title 2. CAL. GOV'T CODE § 4601 (West Supp. 1987). *See generally* 63 C.J.S. *Municipal Corporations* § 1000 (1950 & Supp. 1986).

99. Legislative bodies having jurisdiction over cable television franchises may establish ordinances which provide for resolution of individual consumer complaints by mediation, arbitration, and administrative hearings and appeals. CAL. GOV'T CODE § 3066.1(n)(1) (West Supp. 1987). Ordinances may also be adopted which require binding arbitration when franchisors and franchisees disagree over penalties for violation of material franchise terms. *Id.* § 3066.1(n)(2). *See generally* Marticorena & Marticorena, *State Preemption of Cable Television Regulation—Whatever Happened to the Sanctity of Contract?*, 10 PEPPERDINE L. REV. 691 (1983).

to towing services.¹⁰⁰

The Health and Safety Code contains a statute permitting binding arbitration for employer-employee relations in fire protection districts.¹⁰¹

The Insurance Code includes a provision allowing arbitration to determine the amount of loss covered by fire insurance.¹⁰²

Two statutes in the Labor Code allow use of ADR. The first relates to investigation and mediation of labor disputes,¹⁰³ and the second to arbitration of workers compensation insurance claims for self-employed persons.¹⁰⁴

100. CAL. HARB. & NAV. CODE §§ 617-625 (West Supp. 1987).

(a) Any small boat towing business registered under this chapter which renders aid or assistance to a distressed or disabled small boat may sue for compensation for the services rendered in a court of competent jurisdiction. Any person receiving the services may file with the court and the director a request for arbitration in lieu of further court proceedings.

Id. § 617(a).

101. (a) In counties of the fifth class where the board of directors is composed of the supervising authority, the district board may call an election to be held in the district for the purpose of submitting to the qualified electors thereof the question of whether the district board may provide for a system of binding arbitration for the resolution of impasses in employer-employee relations.

CAL. HEALTH & SAFETY CODE § 13852.5(a) (West 1984). *See generally* 51A C.J.S. *Labor Relations* § 402 (1967 & Supp. 1986).

102. CAL. INS. CODE §§ 8073-8077 (West 1972). "If in any case there is a failure of the parties to agree upon the amount of such [fire] loss they may submit the question of the amount to arbitration." *Id.* § 8073.

103. The department [of Industrial Relations] may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. Records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.

CAL. LAB. CODE § 65 (West 1977). The unit within the department which provides the services referred to in § 65 is called the California State Mediation and Conciliation Service. *Id.* § 66 (West Supp. 1987). *See generally* CAL. EVID. CODE § 1152.5 (West Supp. 1987) (restrictions on admissibility of statements made during mediation); 51 C.J.S. *Labor Relations* § 16 (1967 & Supp. 1986); 51A C.J.S. *Labor Relations* § 402 (1967 & Supp. 1986); Comment, *Boys Markets Injunctive Relief in the Sympathy Strike Context: Buffalo Forge from a Management Perspective*, 17 SANTA CLARA L. REV. 665 (1977).

104. The appeals board has jurisdiction to determine controversies arising out of insurance policies [sic] issued to self-employing persons, conferring [workers compensation] benefits identical with those prescribed by this division.

The appeals board may try and determine matters referred to it by the parties under the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, with respect to controversies arising out of insurance issued to self-employing persons under the provisions of this division. Such controversies may be submitted to it by the signed agreement of the parties, or by the application of one party and the submission of the other to its jurisdiction, with or without an express request for arbitration.

The Probate Code authorizes a guardian or conservator to make a written agreement providing for arbitration of disputes against or by the ward, conservatee, or estate.¹⁰⁵

The Public Resources Code contains two statutes that permit arbitration concerning fair market value for the sale of a working interest in oil and gas resources¹⁰⁶ and concerning the establishment of high-water or low-water marks of bodies of water.¹⁰⁷

Two sets of statutes in the Public Utilities Code permit mediation, arbitration, and/or factfinding for resolution of impasses in transit development board employment contract negotiations.¹⁰⁸

The Revenue and Taxation Code includes two statutes that allow use of ADR for resolving conflicting tax claims regarding the domicile of a decedent¹⁰⁹ and for disputes concerning tax apportionments

CAL. LAB. CODE § 5308 (West 1971). *See generally* 100 C.J.S. *Workmen's Compensation* § 383 (1958 & Supp. 1986); 6 C.J.S. *Arbitration* § 11 (1975 & Supp. 1986).

105. The guardian or conservator may enter into an agreement in writing with a person having a disputed claim against the ward or conservatee or the estate, or with a person against whom the ward or conservatee or the estate has a disputed claim, to submit the matter in controversy to arbitration under Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, but no such agreement is effective unless it has first been approved by the court and a copy of the approved agreement has been filed in the guardianship or conservatorship proceeding.

CAL. PROB. CODE § 2406 (West 1981). *See generally* 39 C.J.S. *Guardian and Ward* § 77 (1976); J. GODDARD, *PROBATE COURT PRACTICE*, §§ 21, 2406 (1977 & Supp. 1986).

106. An arbitration committee may be appointed to resolve disputes regarding fair market value of oil and gas interests in a tract of land. CAL. PUB. RES. CODE § 3647 (West 1984).

107. "The commission may establish the ordinary high-water mark or the ordinary low-water mark of any of the swamp, overflowed, marsh, tide, or submerged lands of this State, by agreement, arbitration, or action to quiet title, whenever it is deemed expedient or necessary." CAL. PUB. RES. CODE § 6357 (West 1977). *See generally* 65 C.J.S. *Navigable Waters* § 89 (1966 & Supp. 1986); Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953); McKnight, *Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions*, 47 CAL. ST. B.J. 408 (1972).

108. The parties to stalled transit development board employment contract negotiations may request resolution by mediation (North San Diego County Board only) or binding arbitration; if the dispute has not been submitted to arbitration, a fact-finding commission may be appointed by the Governor. CAL. PUB. UTIL. CODE §§ 120502-120503 (San Diego Metropolitan Transit Development Board) and §§ 125524-125526 (North San Diego County Transit Development Board) (West Supp. 1987). *See generally* 51A C.J.S. *Labor Relations* § 402 (1967 & Supp. 1986).

109. CAL. REV. & TAX. CODE §§ 14197-14197.13 (West 1970).

When the State Controller claims that a decedent was domiciled in this State at the time of his death and the taxing authorities of another state or states make a like claim on behalf of their state or states, the State Controller may make a written agreement with the other taxing authorities and with the ex-

and allocations.¹¹⁰

The Water Code permits use of arbitration for settling disputes involving the taking or diverting of bodies of water by municipal corporations.¹¹¹

3. Regulatory Statutes

A set of Business and Professions Code statutes requires reporting of settlements and arbitration awards to health care licensing agencies in malpractice cases.¹¹²

Three statutes in the Civil Code regulate ADR use in the release of

ecutor or administrator to submit the controversy to the decision of a board consisting of one or any uneven number of arbitrators.

Id. § 14197. See generally 6 C.J.S. *Arbitration* § 41 (1975 & Supp. 1986); 85 C.J.S. *Taxation* §§ 1118, 1221, 1223 (1954 & Supp. 1986); Barnett, *California Inheritance and Gift Taxes, A Summary*, 43 CALIF. L. REV. 49 (1955); Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 S. CAL. L. REV. 375 (1957).

An alternative statutory procedure for the same purpose, which potentially involves arbitration, is found in CAL. REV. & TAX. CODE §§ 14199-14199.13 (West 1970 & Supp. 1987). See generally 85 C.J.S. *Taxation* § 1114 (1954 & Supp. 1986); Committee on Continuing Education of the Bar, *Determination of Domicile by Arbitration: Alternative Method*, 32 CAL. ST. B.J. 621 (1957); Marsh, *Multiple Death Taxation in the United States*, 8 UCLA L. REV. 69 (1961).

110. CAL. REV. & TAX. CODE § 38006 art. IX (West 1979). "Whenever the [Tax] Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provision of Article VII." *Id.* at subd. 1. Under this article taxpayers are allowed to submit a tax apportionment or allocation to arbitration when they may be subject to multiple tax liability involving two or more states. *Id.* at subd. 3.

111. CAL. WATER CODE §§ 1245-1246 (West 1971).

For the purpose of ascertaining the amount of any damage claimed to have been suffered or sustained by reason of any of the acts or things mentioned in Section 1245, every municipal corporation and every person, firm or corporation causing any such damage, is authorized to enter into an agreement for the arbitration or compromise of any claims, and all of the laws of this State relating to arbitration of controversies are made applicable to such claims.

Id. § 1246. See generally 64 C.J.S. *Municipal Corporations* § 2182 (1950 & Supp. 1986); Feldman, *supra* note 109.

112. CAL. BUS. & PROF. CODE §§ 800-804 (West Supp. 1987). Insurers who provide professional liability insurance for non-physician health care professionals and technicians are required to report settlements and arbitration awards above \$3,000 in malpractice cases to the appropriate state licensing agency. *Id.* § 801(a). Insurers of physician surgeons must make the same type of report for settlements/awards over \$30,000. *Id.* § 801(b). Uninsured persons in the same occupational groups must make similar reports or face fines between \$50 and \$500 for unintentional noncompliance, and between \$5,000 and \$50,000 for willful noncompliance. *Id.* § 802(a)-(b). Courts are required to report malpractice judgments above \$30,000. *Id.* § 803. See generally 6 C.J.S. *Arbitration* § 102 (1975 & Supp. 1986); 70 C.J.S. *Physicians and Surgeons* § 3 (1951 & Supp. 1986); 45 C.J.S. *Insurance* § 1107 (1946); Comment, *Family Exclusion Clauses: Whatever Happened to the Abrogation of Intrafamily Immunity?*, 21 SAN DIEGO L. REV. 415 (1984); Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979).

medical records when requested by an arbitrator,¹¹³ in the use of an arbitration award against a surety,¹¹⁴ and in the statewide coordination of family mediation and conciliation services.¹¹⁵

The Code of Civil Procedure features the largest single series of ADR statutes in the California Codes.¹¹⁶ This statutory scheme regulates disputes arising from agreements to arbitrate that are not other-

113. (a) No provider of health care shall disclose medical information regarding a patient of the provider, without first obtaining an authorization, except as provided in subdivision (b) or (c).

(b) A provider of health care shall disclose medical information if the disclosure is compelled by any of the following:

....

(5) By an arbitrator or arbitration panel, when arbitration is lawfully requested by either party, pursuant to a subpoena duces tecum issued under Section 1282.6 of the Code of Civil Procedure, or any other provision authorizing discovery in a proceeding before an arbitrator or arbitration panel.

CAL. CIV. CODE § 56.10 (West Supp. 1987). *See generally* 97 C.J.S. *Witnesses* §§ 293, 312 (1957 & Supp. 1986); Comment, *Confidentiality of Genetic Information*, 30 UCLA L. REV. 1283 (1983); Comment, *Toward a Uniform Right to Medical Records: A Proposal for Model Patient Access and Information Practices Statute*, 30 UCLA L. REV. 1349 (1983).

114. "An arbitration award rendered against a principal alone shall not be, be deemed to be, or be utilized as, an award against his surety." CAL. CIV. CODE § 2855 (West Supp. 1987); *see generally* 6 C.J.S. *Arbitration* §§ 123-125 (1975 & Supp. 1986).

115. CAL. CIV. CODE §§ 5180-5183 (West Supp. 1987). *See supra* note 47 for text and further discussion of these code provisions.

116. CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1982 & Supp. 1987). *See generally* 6 C.J.S. *Arbitration* §§ 2, 3, 7, 14, 15, 18, 19, 21, 33, 40, 60-62, 84, 87, 89, 90, 97, 121, 122 (1975 & Supp. 1986); Collins, *Arbitration of Fee Disputes*, 36 CAL. ST. B.J. 87 (1961); Feldman, *Arbitration Modernized—The New California Arbitration Act*, 34 S. CAL. L. REV. 413 (1961); Feldman, *supra* note 109; Fernandez, *The Pending Proposal for Mandatory Fee Arbitration*, 52 CAL. ST. B.J. 520 (1977); Jones, *An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes*, 11 UCLA L. REV. 327 (1964); Jones, *Judicial Review of Arbitral Awards—Common-Law Confusion and Statutory Clarification*, 31 S. CAL. L. REV. 71 (1957); Jones, *The Nature of the Court's "Jurisdiction" in Statutory Arbitration of Post-Award Motions*, 46 CALIF. L. REV. 411 (1958); Knight, *Private Judging*, 56 CAL. ST. B.J. 108 (1981); *State Courts Seeking to Draw Blueprint for the Future*, 64 A.B.A. J. 653 (1978); Comment, *Arbitration and Award: Commercial Arbitration in California*, 17 CALIF. L. REV. 643 (1929); Comment, *Arbitration: Validity of Arbitration Clause in Contract*, 12 CALIF. L. REV. 32 (1923); Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CALIF. L. REV. 1239 (1983); Comment, 55 CALIF. L. REV. 521 (1967); Comment, *Applying the Brakes to Acceleration Clauses: Controlling Their Misuse in Real Property Secured Transactions*, 9 CAL. W.L. REV. 514 (1973); Comment, *Waiver of the Right To Compel Arbitration—A Directional Analysis*, 16 CAL. W.L. REV. 375 (1980); *Arbitrator Selection: Non-Neutrality Prohibited*, 8 PEPPERDINE L. REV. 1156 (1981); Comment, *Private Means to Public Ends: Implications of the Private Judging Phenomenon in California*, 17 U.C. DAVIS L. REV. 611 (1984); Comment, *Some Problems Relating to Enforcement of Arbitration Awards Under the New California Arbitration Act*, 9 UCLA L. REV. 422 (1962).

wise codified.¹¹⁷ It also delineates procedures to be followed in arbitration proceedings,¹¹⁸ and covers the validity of arbitration agreements,¹¹⁹ appointment of arbitrators,¹²⁰ representation by counsel,¹²¹ stay of pending court actions,¹²² and the form and contents of awards.¹²³ Another statute in this code states that sanctions against parties and attorneys for bad-faith or frivolous actions during adjudication also apply to arbitration proceedings.¹²⁴ A final statutory provision relates to written arbitration agreements in construction contracts.¹²⁵

The Corporations Code contains a statute requiring agreement of all partners before actions related to a partnership may be submitted to arbitration.¹²⁶

Two sections of the Evidence Code regulate ADR use. One section

117. Other code provisions sometimes specify that these sections of the Civil Procedure Code will govern the conducting of arbitration proceedings for the type of case in question, e.g., CAL. PROB. CODE § 2406 (West 1981) (agreements to arbitrate claims against a ward or conservatee), or state that some other arbitral rules may apply, e.g., CAL. GOV'T CODE § 53066.1(n)(2) (West Supp. 1987) (disputed penalties for violation of cable television franchise terms).

118. See CAL. CIV. PROC. CODE §§ 1282-1284 (West 1982 & Supp. 1987).

119. See *id.* § 1281.

120. See *id.* § 1281.6.

121. See *id.* § 1282.4.

122. See *id.* § 1281.4.

123. See *id.* § 1283.4.

124. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith action or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

CAL. CIV. PROC. CODE § 128.5 (West Supp. 1987). See generally 20 C.J.S. Costs § 218 (1940 & Supp. 1986); Croskey, *Litigation Cost Shifting: An Economical Path to Court Reform*, 8 L.A. LAW., Sept. 1985, at 16; Patten & Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891 (1984); Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419 (1985); Comment, *Combating Vexatious Family Law Litigation by Imposing Attorney's Fees as Sanctions*, 12 SAN FERN. V.L. REV. 59 (1984).

125. The parties to a construction contract with a public agency may expressly agree in writing that in any arbitration to resolve a dispute relating to the contract, the arbitrator's award shall be supported by law and substantial evidence. If the agreement so provides, a court shall, subject to Section 1286.4, vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or that it is based on an error of law.

CAL. CIV. PROC. CODE § 1296 (West 1982). See generally 6 C.J.S. Arbitration § 100 (1975 & Supp. 1986).

126. "(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to: . . . (e) Submit a partnership claim or liability to arbitration or reference." CAL. CORP. CODE § 15009(3) (West Supp. 1987). See generally Comment, *Apparent Authority and the Joint Venture: Narrowing the Scope of Agency Between Business Associates*, 13 U.C. DAVIS L. REV. 831 (1980).

affirms the applicability of privileges in arbitration proceedings.¹²⁷ The other provides for the confidentiality of mediation conferences.¹²⁸

The Government Code includes two regulatory statutes that relate to use of arbitration in an educational setting¹²⁹ and to the amount of fees for small claims mediators.¹³⁰

The Health and Safety Code provides that health care plans using arbitration to settle disputes must have a statement to that effect in the plan disclosure form.¹³¹ The plan contract must also describe the arbitration procedure and scope of applicability.¹³²

A statute in the Labor Code deals with the awarding of attorneys'

127. CAL. EVID. CODE § 901 (West 1966). See generally Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 UCLA L. REV. 1241 (1966); Reutlinger, *Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353 (1973).

128. (a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.

CAL. EVID. CODE § 1152.5 (West Supp. 1987).

129. This section requires the Educational Employment Relations Board to exhaust the grievance provisions, if any, of the employment agreement before issuing a complaint in cases of unfair employment practice. CAL. GOV'T CODE § 3541.5 (West Supp. 1987). See generally 51A C.J.S. *Labor Relations* §§ 510, 524-531 (1967 & Supp. 1986); Johnson, *The Scope of Injunction in California Public School Employee Strikes*, 17 U.S.F. L. REV. 203 (1983).

130. Mediators in small claims proceedings in San Bernardino County under Section 116.7 of the Code of Civil Procedure shall receive for their services such fees, not to exceed one hundred dollars (\$100) per day, as may be established by the court upon authorization and approval of the board of supervisors. CAL. GOV'T CODE § 73112 (West Supp. 1987).

131. CAL. HEALTH & SAFETY CODE § 1363 (a)(10) (West Supp. 1987).

132. CAL. HEALTH & SAFETY CODE § 1373(i) (West Supp. 1987).

fees in court actions compelling or enforcing arbitration.¹³³

The Penal Code makes bribing an arbitrator a felony; arbitrators receiving bribes are subject to the same penalty.¹³⁴

The Public Contract Code establishes an arbitration committee to assist with the arbitration of public works contracts.¹³⁵

*B. The Court-Appended Approach: California's Judicial Arbitration Act*¹³⁶

1. Introduction

Judicial arbitration is a prime example of institutionalization by appending an ADR program to the court system.¹³⁷ In many ways this is the optimal type of institutionalization since it consolidates the traditional courtroom form of dispute resolution with an alternative thereto, creating a centralized vehicle for dispute resolution¹³⁸ that offers the advantages of each approach: the visibility and public fund-

133. The statute requires a court to award attorneys' fees to the prevailing party in actions to compel arbitration or to enforce an arbitration award concerning a collective bargaining agreement unless the opposing party has raised "substantial issues involving complex or significant questions of law." CAL. LAB. CODE § 1128(c) (West Supp. 1987). See generally 51A C.J.S. *Labor Relations* § 477 (1967 & Supp. 1986).

134. CAL. PENAL CODE §§ 92, 93 (West Supp. 1987).

Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, or umpire, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the state prison for two, three or four years.

Id. § 92.

Every judicial officer, juror, referee, arbitrator, or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or decision upon any matters or question which is or may be brought before him for decision, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three or four years.

Id. § 93. See generally Uelmen, *Making Sense out of the California Criminal Statute of Limitations*, 15 PAC. L.J. 35 (1983).

135. CAL. PUB. CONT. CODE §§ 10245-10245.4 (West 1985). See generally 72 C.J.S. *Public Contracts* § 25 (1975 & Supp. 1986); 81A C.J.S. *States* § 172 (1977 & Supp. 1986).

136. CAL. CIV. PROC. CODE §§ 1141.10-1141.30 (West 1982 & Supp. 1987). See generally 6 C.J.S. *Arbitration* §§ 2, 6, 11, 17, 22, 60-66, 69, 96, 123-125 (1975 & Supp. 1986); P. EBNER & D. BETANCOURT, *COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE* (1985); *Arbitration of Superior Court Cases: A Preliminary Guide*, 51 CAL. ST. B.J. 472 (1976); Snow & Abramson, *supra* note 20, at 43; Stevens, *Economical Litigation Rules: Municipal Courts Enter a New Era*, 9 S.F. ATT'Y No. 3, 17 (1983); Comment, *Private Means to Public Ends*, *supra* note 116; Note, *supra* note 24.

137. See *supra* note 31 and accompanying text.

138. Of course the ultimate embodiment of this principle is the dispute resolution center proposed by Frank Sander at the Pound Conference in 1976, later termed the "multi-door courthouse." See 70 F.R.D. 79, at 130-31 (1976). See generally Ray, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future. . . Today*, 1 OHIO ST. J. DIS. RES. 7 (1985). See *infra* notes 296-305 and accompanying text for further discussion.

ing of the court system¹³⁹ and the less-formal nature of an arbitration hearing.¹⁴⁰

Goldberg, Green, and Sander state the case for judicial arbitration in this way:

Since courts are publicly provided, why should an alternative process that might be more effective in particular cases not be publicly provided? Unless it is, society will have created a financial disincentive to the use of the more effective process. Moreover, for better or worse, the courthouse is where most American citizens ultimately go if they cannot otherwise resolve their disputes. Hence, from the point of view of public education and exposure, as well as enhanced credibility, government provision of alternatives in the courthouse itself may be essential.¹⁴¹

Another important issue concerns the compulsory nature of judicial arbitration. Court-annexed arbitration differs from traditional arbitration in that the process is public,¹⁴² nonbinding, and compulsory, while arbitration has traditionally been private, binding, and voluntary.¹⁴³ Though the mandatory nature of court-annexed arbitration may seem undesirable at first blush, that same coerciveness stimulates its utilization and can prove an essential feature for some participants.¹⁴⁴

As suggested earlier, ADR mechanisms must receive sufficient use in order to impact the current system positively.¹⁴⁵ The National Institute for Dispute Resolution has indicated that "[i]f nonlitigative methods of dispute resolution are to gain broad use, participation may have to be compulsory. The disputing party without influence may not be able to summon other parties to a nonlitigative forum if it is voluntary."¹⁴⁶ This position is especially persuasive in considering

139. GOLDBERG, *supra* note 5, at 504.

140. "Arbitration hearings shall be as informal and private as possible and shall provide the parties themselves maximum opportunity to participate directly in the resolution of their disputes, and shall be held during nonjudicial hours whenever possible." CAL. CIV. PROC. CODE § 1141.10(b)(2) (West 1982).

141. GOLDBERG, *supra* note 5, at 504. See *supra* note 31 and accompanying text.

142. Though the proceedings themselves may be conducted in private (*see infra* note 157 and accompanying text), judicial arbitration is established and maintained by public laws and the procedure is publicly initiated through the court system. See CAL. CIV. PROC. CODE §§ 1141.10-1141.30 (West 1982 & Supp. 1987).

143. EBNER & BETANCOURT, *supra* note 136, at 4.

144. PATHS TO JUSTICE, *supra* note 3, at 17. "A compulsory arbitration statute which makes the decision of the arbitrators final and conclusive is invalid, but a statute for compulsory arbitration is not invalid if it gives a right of appeal to a judicial tribunal for trial of the issues or sufficient review of the award." 6 C.J.S. *Arbitration* § 6 (1975).

145. See *supra* notes 25-28 and accompanying text for discussion.

146. PATHS TO JUSTICE, *supra* note 3, at 17.

court-annexed approaches such as judicial arbitration, which function alongside the traditional and compulsory court system.

The historical background of the Judicial Arbitration Act will be considered next, followed by an analysis of its statutory provisions.

2. Historical Background

The precursor of judicial arbitration¹⁴⁷ in California was a voluntary program known as the Los Angeles Attorneys' Special Arbitration Plan.¹⁴⁸ Established in 1971, this plan was sponsored by the local bar association and provided for voluntary arbitration of pending civil suits by stipulation of the parties.¹⁴⁹ The parties had complete control over the proceedings, and the local superior court's only participation was in selecting an arbitrator from a panel by the court administrator.¹⁵⁰ Participant satisfaction with the plan was reportedly high, but the number of cases submitted to arbitration constituted only a small fraction of the cases awaiting trial.¹⁵¹

In 1975 the legislature approved a statute permitting court-supervised arbitration for certain types of civil suits.¹⁵² This step was slightly more coercive in nature than the Los Angeles voluntary plan. The parties could still voluntarily stipulate to arbitration, or a plaintiff could elect arbitration and compel the defendant's participation in claims under \$7,500.¹⁵³ The number of cases referred under the statutorily authorized process substantially exceeded the highest totals realized by the Los Angeles plan and was accompanied by similarly positive responses from most litigants.¹⁵⁴

The year 1976 marked the advent of compulsory judicial arbitration in California, but only on a limited geographic scale. Santa Clara County adopted compulsory judicial arbitration by local court rule.¹⁵⁵ In so doing the superior court was able to maintain an average time interval of six months from filing of at-issue memorandum to trial.¹⁵⁶

3. The Act

The legislative intent as expressed in the opening words of the Act evinces a strong public policy in favor of reducing the cost and com-

147. Judicial arbitration is also known as court-annexed arbitration. Both terms describe a system of arbitration that is attached to the court and must be used prior to a trial. See generally Snow & Abramson, *supra* note 20; Note, *supra* note 24.

148. See Note, *supra* note 24, at 490.

149. *Id.*

150. *Id.* at 490-91, 498.

151. *Id.* at 491-92.

152. CAL. CIV. PROC. CODE § 1141.10 (West 1982 & Supp. 1987).

153. Note, *supra* note 24, at 497.

154. *Id.* at 499-500.

155. SANTA CLARA COUNTY SUPERIOR CT. R. 23.

156. Note, *supra* note 24, at 494.

plexity of small civil claims and at the same time providing an atmosphere of greater informality for their resolution.¹⁵⁷

This sequence of statutes requires that most at-issue civil claims in superior courts of ten or more judges be submitted to judicial arbitration when, in the court's opinion, the amount in controversy is \$25,000 or less.¹⁵⁸ With certain restrictions,¹⁵⁹ smaller superior courts and municipal courts may adopt the statute's provisions by local rule if this is determined to be in the best interests of justice.¹⁶⁰

Excepted from the requirement of judicial arbitration are actions requesting equitable relief,¹⁶¹ class actions,¹⁶² small claims actions and appeal therefrom,¹⁶³ unlawful detainer proceedings,¹⁶⁴ Family Law Act proceedings,¹⁶⁵ and cases deemed by the court to be unsuitable for arbitration.¹⁶⁶

Arbitration may also be initiated by election of the plaintiff, where plaintiff agrees that the amount of award will not exceed \$25,000,¹⁶⁷ or by stipulation of the parties, regardless of the amount in controversy or type of action.¹⁶⁸ However, when a case submitted to arbitration by plaintiff election involves a cross-complaint of over \$25,000, the cross-complainant may move to have the case removed from the arbitration hearing list.¹⁶⁹

Within ninety days after filing suit, or at least ninety days before trial, whichever occurs first, a conference must be held (in cases not involving stipulation or plaintiff election) in which the court deter-

157. CAL. CIV. PROC. CODE § 1141.10(b)(2) (West 1982). "Arbitration hearings shall be as informal and private as possible and shall provide the parties themselves maximum opportunity to participate directly in the resolution of their disputes, and shall be held during nonjudicial hours whenever possible."

158. *Id.* § 1141.11 (West Supp. 1987); CAL. R. CT. 1600(c). Previously the limit was \$15,000 in all counties but Los Angeles, San Bernardino, Santa Barbara, and Ventura, which had \$25,000 limits. CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1987).

159. *See* CAL. CIV. PROC. CODE § 1141.11(d).

160. *Id.* § 1141.11(b)(c); CAL. R. CT. 1600(d), (e).

161. CAL. CIV. PROC. CODE § 1141.13 (West 1982); CAL. R. CT. 1600.5(a).

162. CAL. R. CT. 1600(b); *see* CAL. CIV. PROC. CODE §§ 1141.14-1141.15 (West 1982).

163. CAL. R. CT. 1600.5(c).

164. *Id.* 1600.5(d).

165. *Id.* 1600.5(e).

166. *Id.* 1600.5(f),(g).

167. *Id.* 1600(b); CAL. CIV. PROC. CODE § 1141.12(b)(ii) (West Supp. 1987). Plaintiffs who elect to arbitrate a claim and receive the maximum award allowable under this act may not later seek a larger damage award through trial de novo. *Robinson v. Superior Court*, 158 Cal. App. 3d 98, 204 Cal. Rptr. 366 (1984).

168. CAL. CIV. PROC. CODE § 1141.12(b)(i); CAL. R. CT. 1600(a). The stipulation must be filed with the court no later than thirty days before the trial date. *Id.* 1601(a).

169. CAL. R. CT. 1601(b).

mines the amount in controversy and whether to submit the case to arbitration.¹⁷⁰ A case may be submitted to arbitration earlier pursuant to plaintiff election, but this action is subject to a defendant's motion to postpone the arbitration hearing for good cause.¹⁷¹

Parties to the action may designate an arbitrator by stipulation, or the court will select one from a panel of attorneys and retired judges.¹⁷²

The mechanics of assigning arbitrators to cases, powers of arbitrators, guidelines for continuances, procedural rules for discovery, hearings, and other procedural rules are specified in the State Rules of Court.¹⁷³

The arbitration award is final unless a request for trial de novo is made within thirty days after the award has been filed with the court.¹⁷⁴ In the event such a request is made, the case is placed on the trial calendar list in the same position it would have occupied had it not been submitted for arbitration,¹⁷⁵ and the trial is conducted without reference to the arbitration proceedings or award.¹⁷⁶ If the result of the trial de novo is not more favorable to the requesting party, either in the amount of damages or the type of relief granted, the requestor must pay the arbitrator's fees and the other party's costs incurred after election of trial de novo.¹⁷⁷

California law¹⁷⁸ requires that a civil claim be dismissed if trial is not commenced within five years of the date the action is filed. The Judicial Arbitration Act tolls the running of that time for cases which have been submitted to judicial arbitration for more than four and one-half years after initial filing of the case. Time which passes after that point, up to the date on which a trial de novo is requested, is not counted toward the five year period.¹⁷⁹

Applicability of the Judicial Arbitration Act to a case does not prohibit the parties from agreeing to arbitrate the claim under the

170. CAL. CIV. PROC. CODE § 1141.16(a) (West Supp. 1987); CAL. R. CT. 1601(c).

171. CAL. CIV. PROC. CODE § 1141.16(c) (West Supp. 1987); CAL. R. CT. 1601(b).

172. CAL. CIV. PROC. CODE § 1141.18 (West 1982); CAL. R. CT. 1602, 1604. Attorney arbitrators must be members of the California Bar. *Id.* 1604(b).

173. CAL. R. CT. 1605, 1607, 1612-1614.

174. CAL. CIV. PROC. CODE § 1141.20 (West Supp. 1987); CAL. R. CT. 1615(c).

175. CAL. CIV. PROC. CODE § 1141.20 (West Supp. 1987); CAL. R. CT. 1616(b).

176. CAL. CIV. PROC. CODE § 1141.20 (West Supp. 1987); CAL. R. CT. 1616(c).

177. CAL. CIV. PROC. CODE § 1141.21 (West Supp. 1987). AB 2554, Cal. Leg. 1987-88 Reg. Sess. (introduced in the Assembly Mar. 6, 1987), proposed by Assemblyman Harris, would amend California Code of Civil Procedure section 1141.21. Passage of the bill would expand the costs which must be borne by a requesting party, when trial de novo results are not more favorable than the arbitration award, to include up to \$2500 in attorney fees. AB 2554 is scheduled to be heard next year in the assembly. Telephone interview with the office of Assemblyman Harris (Aug. 20, 1987).

178. CAL. CIV. PROC. CODE §§ 583.310-360 (West Supp. 1987).

179. CAL. CIV. PROC. CODE § 1141.17 (West Supp. 1987).

State's general arbitration statute.¹⁸⁰

4. Discussion

California's experience with judicial arbitration has been decidedly positive. The results of over 20,000 cases undergoing arbitration during the first three years after the law's enactment in 1979 caused the Judicial Council to remark in its 1984 Report to the Governor and the Legislature that court-annexed arbitration had become "an essential tool in managing . . . civil calendars effectively" for those courts required to use it.¹⁸¹

Parties using the system generally favor it, and frequently remark that the arbitration process is speedier and less expensive than trial.¹⁸² Average awards have been roughly equal to verdicts granted in the few cases which continued to trial after arbitration.¹⁸³

California should consider raising the dollar limit on cases eligible for arbitration. A cap of \$50,000 would allow more parties to experience the advantages of efficiency, economy, and informality offered by this modality, while still ensuring that only relatively minor and uncomplicated conflicts are submitted.¹⁸⁴

*C. The Mechanism Matching Approach: California's Child Custody Mediation Statute*¹⁸⁵

1. Introduction

An important aspect of gaining maximum benefit from ADR is the

180. See *id.* § 1141.30; see also CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1982 & Supp. 1987). See *supra* notes 116-25 and accompanying text.

181. Judicial Council of California, REPORT ON EFFECTIVENESS OF JUDICIAL ARBITRATION, at 11 (1984). This was the last report in which statewide judicial arbitration statistics were listed.

182. *Id.*

183. Only 1.4% of cases submitted to arbitration were subsequently tried. *Id.* Total damages, mean, and median of arbitration awards were \$411,020, \$7,211, and \$6,500 respectively, compared with \$403,792, \$8,778, and \$4,691 for trial verdicts (excluding defense awards and verdicts; almost twice the number of defendants were victorious at trial than in arbitration). *Id.* at 9.

184. A bill was introduced in the House of Representatives in Washington, D.C. last year that would authorize use of judicial arbitration in federal courts (11 district courts already use it) in certain cases when the relief sought is only monetary and not above \$100,000. American Bar Association, Special Committee on Dispute Resolution, *Legislation on Dispute Resolution Update Service*, July 1986, at 1-3.

185. CAL. CIV. CODE § 4607 (West Supp. 1987) [hereinafter Child Custody Mediation Statute]. See generally Freidman & Anderson, *Divorce Mediation's Strengths* . . . , 3 CAL. LAW. 36 (1983); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1979); King, *supra* note 68; Jenkins, *Divorce California Style*, 9 STUDENT LAW.,

matching of particular types of disputes to those ADR mechanisms most appropriate for their resolution.¹⁸⁶ More research is needed before truly definitive matching can be accomplished,¹⁸⁷ but authorities have identified some significant factors involved. These findings may form the basis for tentative conclusions about the relative effectiveness of the different basic ADR forms.¹⁸⁸

Some conflicts require adjudication and are best resolved through litigation or arbitration.¹⁸⁹ Others are best resolved by the parties' working independently through negotiation.¹⁹⁰

Mediation appears to be the method of choice when the dispute involves a long-term relationship between parties, when restructuring of a relationship would be beneficial, and/or when parties' bargaining power is relatively equal.¹⁹¹

The National Institute for Dispute Resolution has described several specific benefits of mediation:

It may provide an opportunity to deal with underlying issues in a dispute.

It may build among disputants a sense of accepting and owning their eventual settlement.

It has a tendency to mitigate tensions and build understanding and trust among disputants, thereby avoiding the bitterness which may follow adjudication.

It may provide a basis by which parties negotiate their own dispute settlements in the future.

It is usually less expensive than other processes.¹⁹²

The change to no-fault divorce laws in most states was precipitated by California's enactment of a no-fault statute in 1970.¹⁹³ This fundamental change in the law governing marital dissolution was accompanied by an altered perception of the legal process involved. The statute made it unnecessary for one spouse to establish that the other was guilty of a wrongful act, and as a result, the justification for adversarial proceedings was substantially diminished.¹⁹⁴ As a further

Jan. 1981, at 30; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Pearson, *Child Custody: Why Not Let the Parents Decide?*, 20 JUDGES' J., Winter 1981, at 4; Note, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. DIS. RES. 149 (1985). See *infra* Appendix A for full text of statute.

186. See GOLDBERG, *supra* note 5, at 7; Sander, *supra* note 7, at 3.

187. PATHS TO JUSTICE, *supra* note 3, at 13.

188. See *id.* at 13-14; Sander, *supra* note 7, at 13-15; Schriffes, *supra* note 13, at 7.

189. See PATHS TO JUSTICE, *supra* note 3, at 9; Sander, *supra* note 7, at 13.

190. See Schiffres, *supra* note 13, at 14. See generally Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

191. Sander, *supra* note 7, at 13-14; see also GOLDBERG, *supra* note 5, at 12; PATHS TO JUSTICE, *supra* note 3, at 12.

192. PATHS TO JUSTICE, *supra* note 3, at 12.

193. Note, *supra* note 185, at 152. See CAL. CIV. CODE § 4506(1) (West 1983 & Supp. 1987).

194. Note, *supra* note 185, at 149-50.

result, new methods of resolving marital disputes developed, and arbitration, mediation, and counseling services were soon being offered by domestic courts.¹⁹⁵

Several other states have recognized the advantages offered by mediation in the family law context, and several now require mediation of divorce disputes.¹⁹⁶ California was the first state to mandate mediation for contested child custody and visitation rights cases legislatively by enacting its statute in January of 1981.¹⁹⁷ Other state legislatures are expected to follow California's lead.¹⁹⁸

2. The Statute

As indicated above, California's statute requires mediation of cases involving contested child custody and/or visitation rights. Subsection (a) states:

In any proceeding where there is at issue the custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1 or 4601 [general child custody statutes], the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.¹⁹⁹

Each superior court must provide a mediator who meets minimum qualifications set forth in another section of the code.²⁰⁰ The qualifications required include a master's degree related to marriage and family relationships, knowledge of child development, adult psychopathology, family psychology, an awareness of community referral resources, and a general understanding of the State's family law system.²⁰¹

The mediation proceedings themselves are to be private and confidential.²⁰² All communication therein, whether written or oral, is to be treated as "official information" as defined in the Evidence

195. *Id.*

196. *Id.* at 151 n.20 (as of 1985 Alaska, Iowa, Michigan, and Oregon).

197. CAL. CIV. CODE § 4607 (West Supp. 1987).

198. Note, *supra* note 185, at 152.

199. CAL. CIV. CODE § 4607 (West 1983 & Supp. 1987).

200. *Id.* § 4607(b).

201. CAL. CIV. PROC. CODE § 1745 (West Supp. 1987).

202. CAL. CIV. CODE § 4607(c) (West Supp. 1987).

Code,²⁰³ which renders confidential information received in the course of duty by public employees privileged.²⁰⁴

The mediator is given authority and discretion to exclude counsel from the proceedings,²⁰⁵ and to recommend the appointment of counsel to represent minor children involved, if in their best interests.²⁰⁶ The mediator is also duty-bound to evaluate the needs of the children, has discretion to interview them, and may recommend the issuance of restraining orders for their protection when necessary.²⁰⁷

In conformity with local court rules, mediators may make recommendations to the court regarding the disputed custody or visitation.²⁰⁸ They may also recommend any other appropriate action necessary to resolve the controversy, such as investigation by the probation officer or domestic relations investigator.²⁰⁹ An agreement reached by the parties through mediation must be reported to the court and to counsel on the day agreement is reached, unless a later reporting date has been set by the court.²¹⁰

3. Discussion

Despite drawbacks related to confidentiality and the inappropriateness of some cases for mediation,²¹¹ California's requirement of mandatory mediation of disputed child custody and visitation cases has achieved substantial success. Courts in San Francisco and Los Angeles Counties reported dramatic reductions in court custody hearings after initiation of mandatory mediation.²¹² A survey conducted by the Los Angeles Superior Court indicated that results similar to those produced by traditional court hearings occurred when the parties reached agreement through mediation, but at a fraction of the

203. *Id.*

204. "As used in the section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." CAL. EVID. CODE § 1040(a) (West Supp. 1987). See generally *Defendant v. Witnesses: Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935 (1978).

205. CAL. CIV. CODE § 4607 (West 1983 & Supp. 1987).

206. *Id.* § 4607(f).

207. *Id.* § 4607(d)-(f).

208. *Id.* § 4607(e).

209. *Id.* See *id.* § 4602.

210. *Id.* § 4607(e).

211. According to the statute, local court rules may allow the mediator to give the court a recommendation concerning visitation or custody. *Id.* § 4607(e). This may have the effect of compromising the confidentiality of the mediation proceedings.

Four types of cases identified as not suitable for custody/visitation mediation involve: 1) abused or neglected children, 2) situations with multiple psychiatric or social agency contacts, 3) enduring bitter conflict and repeated court appearances between the parents, and 4) psychological problems or antisocial behavior on the part of at least one parent. Note, *supra* note 185, at 166.

212. Note, *supra* note 185, at 160-61.

cost, and with the benefit of a less hostile environment.²¹³

It would seem that additional benefits of a similar nature could be gained by expanding the scope of mandatory mediation to include other divorce-related matters, such as child and/or spousal support, alimony, and property division. These matters could naturally and reasonably be mediated concurrently with child custody and visitation since they arise out of the same relationships.²¹⁴

*D. The Funding Approach: California's Dispute Resolution Program Act*²¹⁵

This set of statutes provides for state authorization and funding of independent dispute resolution centers, a clear-cut example of the benefits conferred by institutionalization of ADR.²¹⁶ The Act's historical development will be explained below, followed by an analysis of its provisions.

1. Historical Background

An inexplicable "mistaken veto" by then-Governor Edmond G. Brown during a "midnight signing session" prevented enactment of a comprehensive dispute resolution bill in 1978.²¹⁷ The alleged mistake occurred after strong support of the bill by the administration and passage by both houses of the legislature. Had it been enacted, the statute would have been similar to a New York law passed in 1981.²¹⁸ It would have provided for the establishment of nonprofit neighborhood dispute resolution centers to be administered by a State committee, and funded with a combination of private, State, and federal

213. *Id.* at 161. Sixty-two percent of the parties reached agreement on their own or through an attorney prior to mediation. *Id.*

214. Delaware has provided for pre-trial mediation of all such issues by court rule. DEL. FAM. CT. R. 151, 465, 470, reprinted in AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON DISPUTE RESOLUTION, MONOGRAPH SERIES—No. 2, LEGISLATION ON DISPUTE RESOLUTION 215-17 (1984). The California Civil Code permits courts to submit the division of community property to arbitration any time it believes the parties are unable to come to agreement. CAL. CIV. CODE § 4800.9(b) (West Supp. 1987). See *supra* note 89 and accompanying text.

215. CAL. BUS. & PROF. CODE §§ 465-471.5 (West Supp. 1987) [hereinafter Dispute Resolution Program Act].

216. *Id.*

217. AMERICAN BAR ASSOCIATION, *supra* note 16, at 7.

218. N.Y. JUD. LAW §§ 849-a to 849-g (McKinney Supp. 1987). See generally AMERICAN BAR ASSOCIATION, *supra* note 16, at 2-6 for discussion. It should be noted that the New York law applies only to criminal disputes, where the California law would have applied to both civil and criminal matters.

funds (if available).²¹⁹

When the same bill was reintroduced the following year, it came in the wake of Proposition 13's revenue reductions. An altered set of fiscal perspectives wielded legislative scalpels that effectively "gutted" the bill's substantive provisions and resulted in a statute that simply authorized State support of neighborhood dispute resolution centers "in the event federal funds are made available."²²⁰ This portion of the Code of Civil Procedure was repealed by its own terms in 1982 when the legislature failed to extend it.²²¹

With recognition of the importance of this type of law already established, California was not to be accused of surrendering easily. In 1984 the State Bar appointed an Alternative Dispute Resolution Task Force to develop a program for the bar, and to draft legislation.²²² The resulting legislation was basically a revision of the earlier bills vetoed by Governor Brown.²²³

The Task Force's bill was passed by the legislature in 1985, but was vetoed once again—this time by Governor Deukmejian.²²⁴ He disapproved of the bill's broad-based funding, believing instead that the program should be funded locally.²²⁵

The bill was eventually passed and signed into law in 1986, and became effective January 1, 1987.²²⁶ It is similar in some respects to funding statutes enacted in Oklahoma and Texas,²²⁷ and reflects the color and determination of its history. Its provisions are described below.

2. The Act

The Dispute Resolution Program Act's stated purpose reflects a public policy of encouraging "more effective and efficient dispute resolution . . . [through] greater use of alternatives to the courts, such as

219. AB 1186 §§ 1143.13-1143.15, Cal. Leg. 1979-80 Reg. Sess., reprinted in AMERICAN BAR ASSOCIATION, *supra* note 16, app. I at 19-20.

220. See Act approved Sept. 27, 1980, ch. 1176, § 1, 1980 Cal. Stat. 3951 (repealed January 1, 1982); see also American Bar Association, *supra* note 14, at 7 (1982).

221. Act approved Sept. 27, 1980, ch. 1176, § 1, 1980 Cal. Stat. 3951 (repealed January 1, 1982 under provisions of CAL. CIV. CODE § 1143.14).

222. American Bar Association, Special Committee on Dispute Resolution, *Legislation on Dispute Resolution Update Service*, Jan. 1985, at 1.

223. *Id.* at 1-2.

224. Petillon, *Recent Developments in Alternative Dispute Resolution*, 14 PEP-
PERDINE L. REV. 936 (1987). See generally Phillips, *Alternative Dispute Resolution
Centers*, L.A. LAW., May 1985, at 5.

225. Petillon, *supra* note 224, at 936.

226. SB 2064, Cal. Leg. 1985-86 Reg. Sess. (1986).

227. See OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West Supp. 1987); TEX. REV. CIV.
STAT. ANN. art. 2372aa (Vernon Supp. 1987). See generally Comment, *The Dilemma of
Regulating Mediation*, 22 HOUS. L. REV. 841 (1985); Comment, *Mediation and
Oklahoma's New Dispute Resolution Act*, 20 TULSA L.J. 114 (1984).

mediation, conciliation, and arbitration"²²⁸ Increased use of ADR is also suggested for the Judicial Council, the courts, prosecuting authorities, law enforcement agencies, administrative agencies, and county governments.²²⁹ The statute expresses approval of community dispute resolution programs and the use of local resources, including volunteer assistance.²³⁰

The Act creates a seven-member Dispute Resolution Advisory Council in the Department of Consumer Affairs.²³¹ The Council is directed to develop rules and regulations to effect the Act's legislative purposes, and to produce program training guidelines, provisions for monitoring and evaluating the programs, and cost analyses. Temporary guidelines must be established within six months of the Council's first meeting. The Council is also responsible for analyzing the feasibility of operating a Statewide grant system at the time the State assumes responsibility for funding trial courts.²³²

The Act also permits counties to establish systems of grants to public entities and nonprofit nonpartisan corporations for the purpose of operating dispute resolution programs.²³³ Funding for the grants is to be obtained through contributions and by allowing participating counties to increase civil filing fees by one to three dollars. Funds raised via filing fees may be used only for dispute resolution programs authorized by this Act.²³⁴

Grants may be distributed only to eligible programs—i.e., those meeting certain requirements: voluntary participation by the parties, provision of services with fees on a sliding scale (free to indigents), provision of neutral persons adequately trained to conduct the dispute resolution, and production of written agreements or awards upon consent of the parties.²³⁵

Eligible programs are subject to additional rules once they become grant recipients. They are required to provide potential users of their services with a written statement prior to initiation of proceedings.²³⁶

228. CAL. BUS. & PROF. CODE § 465(b) (West Supp. 1987).

229. *Id.* § 465(d)-(f).

230. *Id.* § 465(b), (c).

231. *Id.* § 467(a).

232. *Id.* §§ 467(a), 468.4. SB 709 (signed into law by the Governor September 27, 1987), transfers some of the trial court funding responsibilities to the state effective July 1, 1988. SB 709, Cal. Leg. 1986-87 Reg. Sess. (1987).

233. *Id.* § 467(b).

234. *Id.* §§ 470, 470.1, 470.3.

235. *Id.* § 467.2.

236. *Id.* § 467.3.

The statement must inform participants of such topics as the nature of the dispute, the type of dispute resolution process to be employed, and various rights and responsibilities of the parties, such as calling and examining witnesses, whether parties may be assisted by attorneys, and procedural rules under which the proceedings will be conducted.²³⁷ If arbitration is available, the written statement must indicate whether an arbitrator's decision will be binding.²³⁸

Upon advance agreement of the parties, the proceedings may be made confidential,²³⁹ and/or the outcome made binding.²⁴⁰ Absent prior agreement, the outcome or award resulting from a dispute resolution process is neither enforceable nor admissible as evidence in any judicial or administrative proceeding.²⁴¹ The parties may also toll applicable statutes of limitation by written agreement.²⁴²

Applicants seeking grants must provide the county with an extensive description of their program.²⁴³ Those programs selected to receive a grant must make annual reports containing various operating statistics.²⁴⁴

The Act establishes deadlines for completion of several processes. The Legislative Analyst must make a progress report on implementation of the Act on or before March 1, 1988.²⁴⁵ By January 1, 1989, the Dispute Resolution Advisory Council is to have completed its duties.²⁴⁶ The Act itself is self-repealing on January 1, 1992 if not extended by the legislature before January 1, 1991.²⁴⁷

3. Discussion

At present, it cannot be determined how effective the new Act will be. Nevertheless, this does not prevent speculation as to what the future may hold.

As statewide funding of dispute resolution centers has proven politically impossible for the time being,²⁴⁸ the Act's provision for optional participation and funding by counties appears to be a reasonable alternative. By October 1987, Los Angeles, San Francisco, Contra Costa, Alameda, Mono, San Mateo, Ventura, and Marin Coun-

237. *Id.* § 467.3(a)-(d).

238. *Id.* § 467.3(e).

239. *Id.* § 467.5 (as provided by CAL. EVID. CODE § 1152.5 (West Supp. 1987)).

240. *Id.* § 467.7 (West Supp. 1987).

241. *Id.* § 467.4(a).

242. *Id.* § 467.4(b).

243. *Id.* §§ 468.1, 468.2.

244. *Id.* § 471.5.

245. 1986 Cal. Legis. Serv. 409 (West).

246. CAL. BUS. & PROF. CODE § 467(a) (West Supp. 1987). *See supra* notes 231-232 and accompanying text for discussion of the Council's duties.

247. 1986 Cal. Legis. Serv. 409 (West).

248. As evidenced by three consecutive gubernatorial vetoes. *See supra* notes 217-225 and accompanying text.

ties had already opted in.²⁴⁹ It is hoped that enough other counties will follow suit to provide sufficient data for evaluation after the system has been in operation for a period of time.

V. DISCUSSION AND CONCLUSIONS

The State of California presently employs a variety of institutional approaches to alternative dispute resolution which were reviewed earlier in this comment.²⁵⁰ ADR has been established in the form of statutory code,²⁵¹ administrative regulation,²⁵² court rule,²⁵³ and curriculum in both public schools and state-sponsored law schools.²⁵⁴ Foremost among these methods, and that which has been the primary focus of this comment, is the codification of ADR mechanisms in mandatory, permissive, and regulatory forms.

The array of current California legislation dealing with ADR is impressive. Over sixty sets of statutory provisions²⁵⁵ now deal with a multitude of dispute types ranging from disruption of the ecological balance in streams²⁵⁶ to public employment negotiations.²⁵⁷ Three of the more significant statutes relate to attachment of ADR to the court system,²⁵⁸ to matching an appropriate form of ADR to a specific kind of dispute,²⁵⁹ and to funding independent dispute resolution centers with publicly administered grants.²⁶⁰

The question now becomes where should California go from here in institutionalizing ADR? The answer suggested is that the State should thoughtfully expand the solid base already established, and

249. Telephone interview with Susan Lancara (relating information from Mary Alice Coleman) of the California Department of Consumer Affairs (Oct. 21, 1987); see also Petillon, *supra* note 224, at 936.

250. See *supra* notes 35-62 and accompanying text for discussion.

251. See *supra* note 35 and accompanying text.

252. See *supra* notes 40-41 and accompanying text.

253. See *supra* notes 49-51 and accompanying text.

254. See *supra* notes 52-62 and accompanying text.

255. See *supra* notes 65-135 and accompanying text.

256. See CAL. FISH & GAME CODE §§ 1601-1603 (West 1984). See *supra* note 74 and accompanying text.

257. See CAL. GOV'T CODE §§ 3548-3548.7 (West 1980 & Supp. 1987). See *supra* note 96 and accompanying text.

258. See *supra* notes 136-184 and accompanying text for discussion of the Judicial Arbitration Act.

259. See *supra* notes 185-214 and accompanying text for discussion of the Child Custody Mediation Statute.

260. See *supra* notes 215-249 and accompanying text for discussion of the Dispute Resolution Program Act.

carefully consider the employment of new methods now being tried experimentally in other locations.

Suggestions will be offered with regard to current legislation. Proposed legislation will then be considered, followed by discussion of possible additional approaches.

A. *Current Legislation*

The diversity of subjects covered by California statutes suggests that many types of disagreements are amenable to ADR. While a headlong rush to codify alternative approaches to the resolution of every conceivable dispute would undoubtedly be ill-advised,²⁶¹ it is suggested that the State populace would benefit from thoughtful expansion of current code provisions to include additional areas of conflict within the realm of institutionalized ADR.

By far the ADR mechanism most frequently receiving statutory authorization is arbitration. This seems natural considering the lengthy history of arbitration's use in resolving commercial contract and labor disputes,²⁶² and the fact that this mechanism is often a desirable replacement for litigation in cases where adjudication is appropriate.

However, the heart of the ADR movement is also that general process which intuitively appears the best approach to human conflict: encouraging the parties to work out their own solutions to problems via mediation and negotiation.²⁶³ Bearing in mind the need for further research in this area,²⁶⁴ it is important for legislators and lawyers alike to encourage the growth of these processes. Harvard University president Derek C. Bok's remarks in relation to legal education provide an appropriate model for legislative direction in this context:

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.²⁶⁵

B. *Proposed Legislation*

A bill was passed by both houses of the State legislature last year

261. See generally Edelman, *supra* note 4 (discussion of pitfalls of institutionalizing too rapidly or on too large a scale).

262. See Sander, *supra* note 7, at 5.

263. Interview with Professor L. Randolph Lowry, Director, Institute for Dispute Resolution, Pepperdine University School of Law (Feb. 24, 1987). See generally Riskin, *The Special Place of Mediation in Dispute Processing*, 37 U. FLA. L. REV. 19 (1985).

264. See *supra* notes 186-92 and accompanying text for discussion.

265. Derek C. Bok, *A Flawed System*, HARVARD MAGAZINE, May-June 1983, at 45.

that would have centralized administrative ADR mechanisms for disputes involving government entities.²⁶⁶

The bill would have established an Office of Dispute Settlement Assistance (ODSA) within the State Commission on Economic Development.²⁶⁷ The Office would have provided information and training, and made services available for resolution of disputes involving government entities or agencies.²⁶⁸

Funding was to have come from a \$100,000 appropriation from the State's general fund that would have been repaid with interest from a special fund maintained within the ODSA.²⁶⁹ This special fund was to have been composed of fees paid by State agencies for services received from ODSA, along with contract fees paid by other government agencies, grants, and reimbursements from disputing parties whose disputes have been settled through monies taken out of the special fund.²⁷⁰

Both legislative houses passed the bill by large majorities, but Governor Deukmejian vetoed it on September 30, 1986.²⁷¹ The Governor's veto statement indicated general support for ADR, but expressed the opinion that the proposed funding appropriation was not justified in light of the ample authority for ADR utilization already possessed by State agencies.²⁷²

The Governor's action is unfortunate. The bill's goal was not to increase agency authority in dispute resolution, but rather to centralize that authority. In light of the somewhat haphazard and normally ad-

266. SB 2588, Cal. Leg. 1985-86 Reg. Sess. (introduced in the Senate Feb. 21, 1986).

267. *Id.* § 13997.

268. *Id.* §§ 13997.5-13998.

269. *Id.* §§ 13998.5, 13999.8 SEC. 2.

270. *Id.* § 13998.5(b).

271. Letter from California Governor George Deukmejian to the California Senate (Sept. 30, 1986).

To the Members of the California Senate:

I am returning Senate Bill No. 2588 without my signature.

This bill would create the Office of Dispute Settlement Assistance, within the State Commission on Economic Development, to provide dispute resolution services. Creation of the proposed Office would require an addition of two positions and increased costs to the General Fund of \$100,000.

While I believe that public agencies should be encouraged to use informal alternative dispute resolution techniques in their decision making processes, I do not believe that there is a clearly demonstrated need to establish a new state office for this purpose. The benefits of resolving disputes informally instead of pursuing administrative adjudication or litigation are clear; however, state agencies have ample authority under existing statutes to make use of these techniques.

Id.

272. *Id.*

judicative nature of current State agency dispute resolution,²⁷³ the proposed law should have been welcomed as offering increased efficiency in dealing with the covered class of disputes. Further, the bill focused on a less-coercive methodology (i.e., mediation),²⁷⁴ and would probably have reduced the expense of the process.²⁷⁵ It is also ironic to note that the fiscal provisions of the proposed law appear rather conservative in that they require payment for the ODSA's services by the participants in most instances²⁷⁶ and provide for repayment of appropriations to the State.²⁷⁷

At this time the bill's co-author, Assemblyman Hauser, plans to reintroduce the bill in the Assembly later this year.²⁷⁸ Enactment of the bill would be a positive step.

C. Additional Options

Following is a brief discussion of three alternative approaches to ADR institutionalization which have either been tried or suggested in other jurisdictions and which merit consideration by the State of California.

*Alternative Dispute Resolution Promotion Act.*²⁷⁹ This bill was discussed in public hearings held by the United States Senate Judiciary Committee on February 21, 1986.²⁸⁰ Its goal was to mitigate the effects of "hyperlexis"²⁸¹ by requiring lawyers to inform their clients of nonlitigative methods of dispute resolution, such as mini-trials,

273. The Administrative Procedure Act (APA), CAL. GOV'T CODE §§ 11340-11528 (West 1987), which covers many State agencies, provides a simplified system for adjudicating administrative matters that includes many of the major elements of civil procedure. Agencies not subject to the APA often do not have comprehensive adjudicatory systems, and informal agency practice may develop to fill the gap. CALIFORNIA ADMINISTRATIVE HEARING PRACTICE, *supra* note 37 at § 1.2. See *supra* notes 36-39 and accompanying text.

274. SB 2588 § 13995(g), Cal. Leg. 1985-86 Reg. Sess. (introduced in the Senate Feb. 21, 1986).

275. Section 13995 of the proposed bill states:

(a) Existing decisionmaking processes concerning development of necessary public facilities and services, and decisions relating to controversial land development proposals are frequently unable to successfully resolve multiple-party disputes.

(b) When state or local decision processes fail there are adverse costs to disputing parties and the public. The usual recourse is through the courts, which is an expensive option

Id. § 13995(a)-(b).

276. *Id.* § 13998.5.

277. *Id.* § 13999.8, subd. 2.

278. Telephone interview with the office of Senator Russell (Feb. 24, 1987).

279. SB 2038 (1986), described in AMERICAN BAR ASSOCIATION, *supra* note 214.

280. *Id.*

281. "Hyperlexis" is a term coined by the bill's sponsor, Senator Mitch McConnell, which refers to the tendency of United States residents to resort to litigation first for conflict resolution.

mediation, court-annexed arbitration, and summary jury trial.²⁸² The parties would then be at liberty to accept or reject the alternative approach.

The proposed law provided that agreement by both disputants to employ an ADR mechanism would entail waiver of further court proceedings and require them to act in good faith in pursuing resolution.²⁸³ Unreasonable rejection of a settlement offer could subject the offending party to court-imposed sanctions.²⁸⁴

This approach would have had the distinct advantage of forcing clients and attorneys alike to consider employment of ADR options and become more knowledgeable about them. The proposed law would certainly have stimulated use of the alternatives.

Early Neutral Evaluation. The innovative Early Neutral Evaluation (ENE) procedure was recently developed by the federal district court in San Francisco.²⁸⁵ It is designed to "force the parties to confront the merits of their own case and their opponent's at an early stage, to identify which matters of fact and law actually were in dispute, to develop an efficient approach to discovery, and to provide a frank assessment of the case."²⁸⁶

Early in the course of certain civil cases²⁸⁷ a two-hour case-evaluation session is conducted by a neutral private attorney selected to act as evaluator by the court under its inherent power to appoint special masters.²⁸⁸ The session must be attended by the parties and their attorneys, who have already had an opportunity to examine a written "Evaluation Statement" from the other side. The statement identifies important legal and factual issues and suggests promising avenues of discovery.²⁸⁹

The case-evaluation session consists of four basic elements: 1) a fifteen- to thirty-minute presentation by each side, 2) efforts by the evaluator to reduce the scope of the dispute by identifying points of agreement, 3) objective assessment by the evaluator of the relative

282. SB 2038 (1986), described in AMERICAN BAR ASSOCIATION, *supra* note 214.

283. *Id.*

284. *Id.*

285. Levine, *Early Neutral Evaluation: A Follow-up Report*, 70 JUDICATURE Dec.-Jan. 1987, at 236.

286. *Id.* at 240.

287. For a list of applicable case types, see General Order No. 26(2), U.S. Dist. Ct., N.D. Cal. (as amended July 22, 1986).

288. Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE, Feb.-Mar. 1986, at 280, 285.

289. *Id.* at 281.

merits of the parties' cases and a valuation of the case (i.e., an estimate of the likelihood of establishing liability and probable amount of damages), and 4) the evaluator's facilitation of future discovery and communication between the parties that is intended to expedite settlement discussion.²⁹⁰

The ENE program has just completed a one-year trial period involving 100 cases.²⁹¹ Evaluation by Professor David I. Levine²⁹² indicates that the program has generally been successful in meeting its goals, and will now be extended to include a larger sample of cases.²⁹³ Since the next stage of evaluation will feature comparison of ENE with judicial arbitration (also used by this district court) and traditional judicial case management,²⁹⁴ California State officials would do well to watch the results of this study carefully.

Multi-Door Courthouse. Complementing, and perhaps even subsuming the ENE process, is the quintessential form of institutionalized ADR: the multi-door courthouse (MDC). Conceived by Frank Sander, and first presented publicly by him at the Pound Conference in 1976,²⁹⁵ MDC consists of a single facility which houses many different dispute resolution mechanisms under one roof.²⁹⁶

Basically, the MDC procedure attempts to "let[] the forum fit the fuss,"²⁹⁷ and centers around an intake specialist who listens to a client's problem and then refers him to the "door" in the dispute resolution complex which contains the ADR mode most appropriate for his situation.²⁹⁸ Referrals potentially come from a wide range of sources.²⁹⁹

The American Bar Association sponsored three MDC's on an experimental basis in Tulsa, Oklahoma; Houston, Texas; and Washington, D.C.³⁰⁰ The first center began operation in 1984 and each of the three has now processed thousands of cases.³⁰¹ Analysis of combined data from all three centers has thus far been encouraging. Seventy-four percent of the disputants said the center helped at least some-

290. *Id.* at 280.

291. *Id.* at 285.

292. Associate Professor of Law at Hastings College of Law, University of California, San Francisco.

293. Levine, *supra* note 285, at 240.

294. *Id.*

295. 70 F.R.D. 79, at 130-31 (1976). Sander's original term was "Dispute Resolution Center." *Id.* at 131. Other commentators later coined the term "multi-door courthouse." Sander, *supra* note 7, at 12.

296. Sander, *supra* note 7, at 12; see flow chart in Appendix B.

297. U.S. Dep't of Just., Nat'l Inst. of Just., *NIJ Reports*, July 1986, at 2 (quoting former Asst. Attorney General Maurice Rosenberg).

298. GOLDBERG, *supra* note 5, at 514-15.

299. See *infra* Appendix B.

300. U.S. Dep't of Just., *supra* note 297, at 2.

301. *Id.* at 4.

what with the dispute;³⁰² eighty-two percent planned to use MDC again in the future.³⁰³

The initial project in these three locations has been sufficiently rewarding that the ABA has decided to improve services at the existing sites and to seek creation of new programs.³⁰⁴ Why not place a new MDC facility in one of California's urban areas?

In conclusion, the State of California has now established a significant base in the institutionalization of ADR, but several key challenges remain. Will legislators and other State officials be able to expand upon this base in a manner that will be at once reasonable, politically acceptable, and salutary for the resolution of a large number of conflicts? Can we avoid making ADR a second-class system of justice for the nonaffluent? And finally, as institutionalization of ADR advances, will it survive its success, or will it join the court system it supplements in "suffer[ing] from the woes common to other heavily used institutions—increasing costs and delays, bureaucratization, and perfunctory performance?"³⁰⁵

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302. Fifty-nine percent stated that it *did* help. *Id.* at 7.

303. *Id.*

304. *Id.*

305. GOLDBERG, *supra* note 5, at 514.

* The author wishes to express his sincere appreciation to L. Randolph Lowry, III, Assistant Professor of Law and Director, Institute of Dispute Resolution at Pepperdine University School of Law, Malibu, California; member of California's Dispute Resolution Advisory Council. Professor Lowry's assistance in the conceptualization and research stages of this comment, as well as in review of the manuscript, has been invaluable.

APPENDIX A

California Civil Code Section 4607

(a) In any proceeding where there is at issue the custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1 or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

(b) Each superior court shall make available a mediator. Such mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court. In order to provide mediation services, the court shall not be required to institute a family conciliation court. The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1745 of the Code of Civil Procedure.

(c) Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

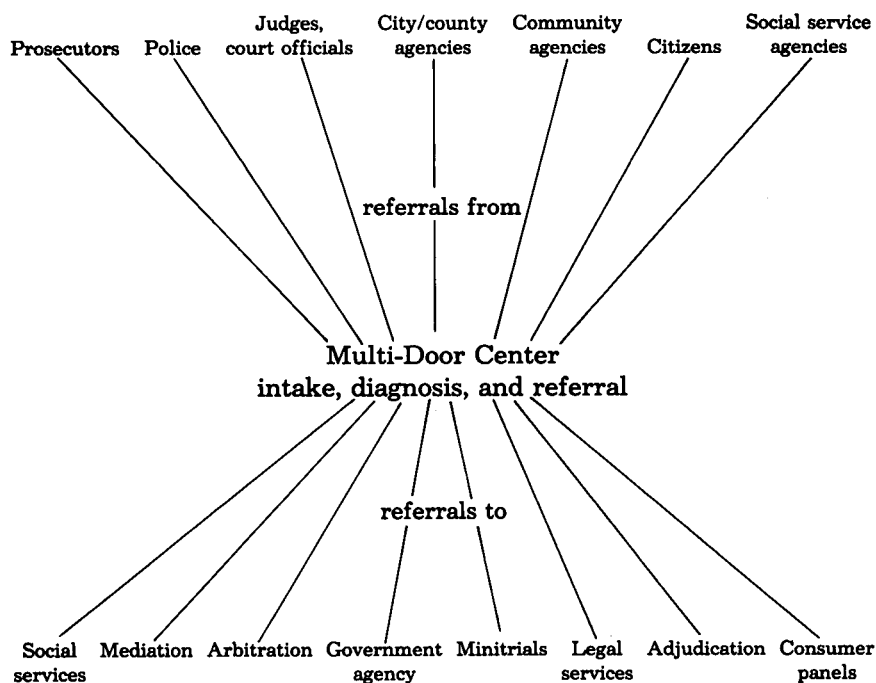
(d) The mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary. The mediator shall have the duty to assess the needs and interests of the child or children involved in the controversy and shall be entitled to interview the child or children when the mediator deems such interview appropriate or necessary.

(e) The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children. The mediator may, in cases where the parties have not reached agreement as a result of the mediation proceeding, recommend to the court that an investigation be conducted pursuant to Section 4602, or that other action be taken to assist the parties to effect a resolution of the controversy prior to any hearing on the issues. The mediator may, in appropriate cases, recommend that mutual restraining orders be issued, pending determination of the controversy, to protect the well-being of the children involved in the controversy. Any agreement reached by the parties as a result of mediation shall be reported to the court and to counsel for the parties by the mediator on the day set for mediation or any time thereafter designated by the court.

(f) Nothing in this section shall prohibit the mediator from recommending to the court that counsel be appointed pursuant to Section 4606 to represent the minor child or children. In making any recommendation, the mediator shall inform the court of the reasons why it would be in the best interests of the minor child or children to have counsel appointed.

APPENDIX B
MULTI-DOOR COURTHOUSE*

Multi-door dispute resolution flow chart



* U.S. Dep't of Just., Nat'l Inst. of Just., *NIG Reports*, July 1986, at 3.

