The Use of ADR and Self-Represented Litigants

CONFLICT RESOLUTION CENTER OF SANTA CRUZ COUNTY
SMALL CLAIMS MEDIATION PROGRAM
Established June, 1994

BEST ADVICE: ESTABLISH & MAINTAIN POSITIVE RELATIONSHIPS

1) *Prior to implementation: identify and address the needs of all constituents*
   Litigants - information and reassurance
   Court personnel - minimal disruption, smooth coordination
   Judicial officers - management of caseload to eliminate downtime in courtroom
   Volunteer mediators - orientation to court environment

2) *Continually solicit and act upon feedback*
   Litigants- written evaluations
   Court personnel - individual check-ins
   Judicial officers - regular, informal reviews during pilot phase; ongoing check-ins
   Volunteer mediators - co-mediation and collective debriefing

ADDITIONAL SUCCESS FACTORS IN SANTA CRUZ COUNTY

- Prior notification to litigants
- Integration of mediation and litigation proceedings (same day)
- On-site orientation for litigants, 30 minutes prior to court proceedings
- Immediate screening of all cases
- Off-calendar disposition, with date of dismissal

CONFLICT RESOLUTION CENTER RESPONSIBILITIES

- Develop and refine paperwork and procedures
- Train and supervise volunteer mediators
- Manage case load, keeping court personnel informed
- Provide monthly statistical reports

COURT RESPONSIBILITIES

- Provide literature on mediation to plaintiffs and defendants prior to court date
- Provide court calendars for all mediators
- Call CRC to inform of any room changes
- Process and file mediated agreements; inform CRC of any errors

ATTACHMENTS

- Case Management Procedures
- Intake Sheet
- Mediated Agreement - Off Calendar
- Mediated Agreement - Continuance, Dismissal
- Sample Statistical Report

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Additional materials available upon request

SMALL CLAIMS MEDIATION PROGRAM
CASE MANAGEMENT PROCEDURES

1. After calling the calendar, the coordinator directs all litigants to proceed to the courtrooms to which they have been assigned. Litigants in default cases are asked to enter the courtroom and be seated in the first two rows; litigants in contested cases are asked to wait outside the courtroom, where a mediator will begin meeting with them individually to do some preliminary screening.

2. Mediators proceed to the courtroom(s) to which they have been assigned, and begin screening cases to assess their appropriateness for mediation. (See screening procedures, reverse.) Litigants whose cases will go to trial are directed to exchange documentation before entering the courtroom, and to be seated in the first two rows once inside. Litigants waiting for mediation are asked to enter the courtroom and be seated in the last two rows.

3. Once all cases have been screened, mediators begin taking cases to mediation, mindful of the relative caseloads for mediation and trial.

4. The coordinator updates the courtroom clerksas to the status of each case on their calendars (which cases will need to be heard, and which will go to mediation).

5. Once in mediation, mediators conduct a secondary "screening" of each case by assessing progress toward resolution at the twenty-minute point. If the litigants are moving toward resolution, mediation continues; if good-faith negotiation is not underway, the mediator may wish either to caucus with the parties for the purpose of "reality-testing," or to return the case to court.

6. While mediation is in progress, the coordinator continues to monitor the caseload in each courtroom, updating the courtroom clerks as new information becomes available, and informing the mediators if the judges are nearing completion of their hearings.

7. In the event that litigation in a particular courtroom is completed while mediation is still in progress, mediators will be given a time limit (set by the judge). Within that period, the mediators must either return to the courtroom with a signed Agreement to Continuance (in order to continue with the mediation) or return the case to court for trial.

SMALL CLAIMS MEDIATION PROGRAM INTAKE FORM

SCREENED MEDIATED

Date_____ **Dept. 1 2 3 10 or** ___ **Joseph Siegel Kelly Mulligan**

Line #____ **Case # SS**___ - _____ **Other Judge** _____

PLAINTIFF(S) _____ **$ Amount** _____

DEFENDANT(S) _____ **$ CC** _____

Screened By _____ **# Plaintiffs** _____ **# Defendants** _____

MEDIATOR(S) _____ **OBSERVER** _____

Start Time _____ **End Time** _____ **Total Time** _____

TYPE OF CASE
FROM PLAINTIFF'S PERSPECTIVE

AUTO ACCIDENT AUTO REPAIR AUTO SALE BUSINESS CONSUMER CONTRACT FAMILY

EMPLOYMENT GOV"T FEES HOUSEMATES INSURANCE LANDLORD-TENANT

COMMERCIAL LOAN PERSONAL LOAN NEIGHBOR FRIEND PROFESSIONAL SERVICES

REAL ESTATE OTHER _____

SCREENED
INAPPROPRIATE - REASON

UNWILLING TO MEDIATE UNWILLING TO NEGOTIATE NOT AUTHORIZED TO NEGOTIATE

DEFENDANT CLAIMS NO LIABILITY DEFENDANT'S BEST OFFER REFUSED BY PLAINTIFF

NO TRUST TOO ANGRY NO AGREEMENT RE: FACTS TOO COMPLEX LEGAL QUESTION

OTHER REASON _____

MEDIATED
DISPOSITION / OUTCOME

OFF CALENDAR / Date of Dismissal _____

CONTINUED / Date of Continuance _____

DISMISSED / With Prejudice _____ Without Prejudice _____

RETURNED TO COURT / Reason _____

2/00

Superior Court of California, County of Santa Cruz
Small Claims Court Mediation Program

MEDIATED AGREEMENT - OFF CALENDAR

Case #SS____ - _____

The parties to this action have reached a settlement in this case with the assistance of the Small Claims Court Mediation Program and enter into the following agreement:

PAYMENT PLAN

Plaintiff(s) _____ agree(s) to accept

from Defendant(s)_____ a total

of $ _____. Said amount will be paid by (cash, check, money order) in _____
(number or frequency)
installment(s). First payment in the amount of _____will be due on _____ and
(month, day, year)
subsequent payments of _____ will be due _____ until balance is paid in full.

Payments will be (mailed or delivered) to Plaintiff at _____.
(address)
If any payment is not received within _____ days after its due date, the Plaintiff may consider the Defendant in default and petition the court for a judgment of the entire balance due. In the absence of correspondence from the parties, this case will be dismissed by the court on

_____.
(date of dismissal - month, day, year)

OTHER TERMS AND CONDITIONS:

_____

_____

_____

_____

_____

_____

_____

This case is hereby removed from the court calendar. Upon fulfillment of the terms of the agreement, the Plaintiff should notify the court in writing, formally dismissing the case against the Defendant.

All parties affirm that this agreement constitutes their own new contract which resolves all disputes related to this Small Claims lawsuit. The parties further agree to hold harmless the Superior Court of California, County of Santa Cruz, its employees and assigned personnel (including, but not limited to, the court mediators) for any ambiguities or unforeseen circumstances, or failures to comply with the terms as set forth in this contract.

Dated: _____ _____
(Plaintiff/s)

Dated: _____ _____
(Defendant/s)

Superior Court of California, County of Santa Cruz
Small Claims Court Mediation Program

MEDIATED AGREEMENT

Case # SS____- _____

The parties to this action have reached an agreement in this case with the assistance of the Small Claims Court Mediation Program, and hereby request the following disposition:

CONTINUANCE _____

Plaintiff(s), _____ and
Defendant(s), _____ agree
to a continuance of this case under the terms and conditions noted below. A new hearing has been set for _____, at the same time and in the same court as originally calendared. Should all the terms of the agreement be met before the new court date, no appearance will be necessary and the action will be dismissed by the court.

DISMISSAL WITHOUT PREJUDICE _____

Plaintiff(s) _____, and
Defendant(s), _____ agree
to the terms and conditions noted below in consideration for dismissal, without prejudice, of this case. All parties acknowledge that no judgment is being rendered herein and that if the terms of this contract are not complied with, this contract may be enforced in a later Small Claims lawsuit.

DISMISSAL WITH PREJUDICE _____

Plaintiff(s) _____, and
Defendant(s), _____ agree
to the terms and conditions noted below in consideration for dismissal, with prejudice, of this case. All parties acknowledge that this case is hereby dismissed and the Plaintiff cannot refile for the same claim.

Terms and conditions: _____

_____

_____

_____

_____

_____

_____

_____

All parties acknowledge that this agreement is in their own words and constitutes their own new contract. The parties agree to hold harmless the Superior Court of California, County of Santa Cruz, its employees and assigned personnel (including, but not limited to, the court mediators) for any ambiguities, or unforeseen circumstances, or failures to perform the terms as set forth in this contract.

Dated:_____ _____
Plaintiff(s)

Dated:_____ _____
Defendant(s)

SMALL CLAIMS MEDIATION PROGRAM
SUMMARY OF STATISTICS
December, 2000

Contested cases referred to mediation	**39**
Cases screened - not appropriate for mediation	**26**
Cases mediated	**13**
Cases resolved in mediation	**12**
Mediation success rate	**92%**

Small Claims Mediation Program - Superior Court, County of Santa Cruz
Case Record

Date	Case #	Type	Time	Outcome	Comments
12/21/2000	SS00-1097	auto accident	:10/scr	sent to court	n/a - legal question
12/21/2000	SS00-1135	auto repair	:10/scr	sent to court	n/a - defendant claims no liability
12/21/2000	SS00-1140	personal loan	1:15	agreement/off calendar	
12/21/2000	SS00-1148	contract	:05/scr	sent to court	n/a - previously arbitrated
12/21/2000	SS00-1158	prof. services	:20	agreement/continued	
12/21/2000	SS00-1160	contract	:20	agreement/off calendar	
12/21/2000	SS00-1164	real estate	:15	agreement/off calendar	
12/21/2000	SS00-1165	business	:10	agreement/off calendar	
12/21/2000	SS00-1104	personal loan	:20	agreement/off calendar	
12/21/2000	SS00-1066	unknown	:30	agreement/off calendar	

contested cases referred to mediation: 10 cases screened - not appropriate for mediation: 3
cases mediated: 7 cases resolved in mediation: 7 mediation success rate: 100%

LITIGANT COMMENTS ON SMALL CLAIMS MEDIATION
December, 2000

- It was very helpful for the mediator to have access to counsel with the judge during the mediation.
- We were pleased it was resolved in a friendly, appropriate manner
- Mediator did her best! Congratulations.
- Great to have someone else to use for communication when so much emotion is involved. Thanks for all the help.
- Calm, organized, non-judgmental – excellent mediation in otherwise highly emotional situation.
- Better if it were set up first – sometimes it ends up wasting too much time.

JUDGES GUIDE TO ADR

CALIFORNIA CENTER FOR JUDICIAL EDUCATION AND RESEARCH

CONTINUUM OF METHODS FOR RESOLVING DISPUTES

Method	Description	Most Common Usage	Must Court Case Be Filed to Use Method?	Must Parties Agree to Use Process?	Who Pays For Neutral's Services?
Negotiation	Parties and/or their attorneys communicate directly with each other to try to resolve the dispute; no neutral is involved.	Appropriate for almost every dispute; the most commonly used ADR method.	No	Yes	N/A; no neutral involved.
Mediation	Neutral facilitates communication between the parties and helps them to work out mutually agreeable solutions.	Parties want to preserve a business or personal relationship; there are communication problems or emotional barriers; it is a multi-party dispute; or parties want a multi-faceted solution.	Voluntary: No	Yes	Parties generally pay, unless mediator is from county service.
			Mandatory child custody/visitation (Fam C §§3170–3173) or civil action mediation pilot project (CCP §§1775–1775.16) or other court-ordered (local rule): Yes	No	County generally pays **[CHECK RE CUSTODY]**; judicial arbitration money available for pilot project mediation.
Neutral Evaluation	Neutral(s) hears brief presentations, offers a confidential evaluation of the dispute, and may assist in negotiations.	In civil disputes when an estimate of damages is needed, when parties have unrealistic expectations, or when there are technical issues.	Voluntary: No	Yes	Parties generally pay.
			Court-ordered (local rule): Yes	No	Court generally pays.
Mini-trial	Brief presentations of each party's case are made to parties themselves or to those with settlement authority (*e.g.*, CEO's). Neutral typically moderates presentations and may facilitate negotiations.	Resolve complex business disputes.	No	Yes	Parties pay.
Summary Jury Trial	Mock jury listens to presentations and renders advisory verdict(s). Neutral typically moderates presentations and may facilitate negotiations.	Parties hold divergent views of how jury would react to various aspects of case, and a full jury trial would be lengthy.	No	Yes	Parties pay.
Settlement Conference	Parties meet with neutral to explore settlement options.	Unfacilitated negotiation has not been successful at resolving dispute.	Voluntary: No	Yes	Parties generally pay.
			Court-ordered (Cal Rules of Ct 222 or local rules): Yes	No	County generally pays.
Neutral Fact-Finding	Neutral reviews information submitted by parties and/or conducts independent investigation and makes findings of fact.	Resolution of dispute hinges on critical issues of fact or resolution of factual issues requires technical expertise.	Voluntary: No	Yes	Parties pay.
			Court-ordered special reference (CCP §§638, 639): Yes	Involuntary references (CCP §639): No	Parties generally pay; some neutrals serve pro bono.
Arbitration	Neutral(s) reviews evidence, hears arguments, and renders a decision.	Parties want a quick, confidential decision or a neutral with specific expertise.	Contractual (CCP §§1280–1294.2): No	Yes	Parties pay.
			Judicial (CCP §§1141.10–1141.31): Yes	No	County generally pays; some arbitrators serve pro bono.
Private Judging	A nonjudicial officer, selected and compensated by the parties, is appointed by the court to hear and decide the case.	Parties want a trial, but would like to avoid delay or would like a particular person or persons to decide the case.	Yes. Court must order appointment, whether as temporary judge (Cal Const art VI, §21) or as referee (CCP §638)	Yes	Parties generally pay; occasionally temporary judge is an attorney serving pro bono or a retired judge or attorney paid by county.
Court Adjudication	Judge hears and decides case.		Yes	No	County pays.

CONTINUUM OF METHODS FOR RESOLVING DISPUTES

Method	Is Judicial Approval of Neutral's Appointment Required?	Do Rules of Evidence Apply?	Is Judicial Confirmation of Neutral's Decision Required?	Is Neutral's Decision Enforceable in Court?	Is Neutral's Decision Appealable in Court?
Negotiation	N/A; no neutral involved.	No	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Mediation	Voluntary: No Mandatory child custody/visitation (Fam C §§3170–3173): Mediators generally appointed by family court services. Civil action mediation pilot project (CCP §§1775–1775.16): No, but if parties do not select mediator, court assigns mediator from court list Other court-ordered (local rule): Local rules may provide for appointment by court.	No; however, under mandatory child custody/visitation (Fam C §§3170–3173), in some counties the mediator makes recommendation to the court which the court may adopt.	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Neutral Evaluation	Voluntary: No Court-ordered (local rule): Local rules may provide for appointment by court.	No	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Mini-trial	No	No	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Summary Jury Trial	No	Generally no; depends on the parties' agreement.	No; verdict(s) purely advisory.	No; verdict(s) purely advisory. However, settlement agreement entered into by parties generally enforceable.	No; verdict(s) purely advisory.
Settlement Conference	Voluntary: No Court-ordered (Cal Rules of Ct 222 or local rules): Court generally appoints neutral.	No	N/A; neutral does not render decision.	N/A; neutral does not render decision. However, settlement agreement entered into by parties generally enforceable.	N/A; neutral does not render decision.
Neutral Fact-Finding	Voluntary: No	Depends on the parties' agreement.	See next box.	No; but parties may stipulate to the neutral's findings and this stipulation may be enforceable	No
	Court-ordered special reference (CCP §§638, 639): Yes	Yes		Referee does not render judgment; referee's decision has effect of special verdict.	Court's judgment may be appealed.
Arbitration	Contractual (CCP §§1280-1294.2): No, but if parties do not select an arbitrator, court may appoint one.	Rules of evidence generally relaxed; depends on the parties' agreement.	Yes, in order to enforce.	Yes	Very limited review.
	Judicial arbitration (CCP §§1141.10–1141.31): No, but if parties do not select an arbitrator, court assigns one from court list. Rules generally relaxed; depends on the parties' agreement.	Rules of evidence relaxed.	If no trial de novo requested, award entered as judgment of court.	Yes	Very limited review.
Private Judging	Yes	Generally apply; depends on the parties' agreement.	See next box.	Temporary judge (Cal Const art VI, §21): Renders judgment on behalf of court. Referee (CCP §638): Renders statement of decision on which judgment is entered by the court.	Subject to appeal like any other court
Court Adjudication	No	Yes	No	Judge renders court's judgment.	Yes

What To Ask or Determine	Why Ask/ What Procedure Suggested
Parties	
Are all necessary parties named? How many are there? Are they individuals or institutions? Do the parties have a continuing relationship?	Multiple parties with differing claims or defenses may be best served by mediation or a special master reference. Parties with a continuing relationship are often good candidates for mediation.
Are the parties in unequal bargaining positions?	A party in a weaker bargaining position may be better served by a method in which the neutral maintains control, such as arbitration, private judging, or adjudication.
Do there appear to be emotional barriers between the parties?	Emotional issues may be best addressed in a process such as mediation.
Claims	
What type of claims are involved?	Tort, P.I., and other money-centered matters often lend themselves to neutral evaluation or arbitration.
Are they complex?	Mediation or a special master may be appropriate if the issues are unusually complex.
Are there technical or scientific issues?	Neutral evaluation, arbitration, and special references are often well suited to technical/scientific issues.
Are there claims of public interest?	Adjudication may be appropriate if a public sanctioning is desired.
Do there appear to be moral issues involved?	If a party wants a clear-cut decision without any compromise, adjudication may be appropriate.
Relief Sought	
Is relief sought equitable?	Mediation or court adjudication may be suited to equitable issues.
Is relief sought monetary? Is a fixed sum sought or will a subjective determination of amount be required?	Neutral evaluation or arbitration may be best suited to cases involving only money damages.
Is liability admitted?	A settlement conference or binding arbitration is especially appropriate when liability is admitted.
Is a clear-cut decision desired?	Adjudication or arbitration may be appropriate when a decision is needed.
Time and Costs	
Do the parties understand and accept the time it will take to resolve a case in court?	If the parties need the case resolved quickly, binding arbitration or private judging may be appropriate. Other ADR methods are generally quicker than court adjudication.
Do they understand the full costs involved and are they prepared to pay them?	Most other ADR methods are less costly than court adjudication.
Party Control	
Do the parties want to keep control over the resolution?	Methods in which the neutral guides the parties' decision (such as settlement conferences, mediation, neutral evaluation, fact-finding, nonbinding arbitration, mini-trial, or summary jury trial) allow party control.
Do the parties want someone to decide the case for them?	A conclusive decision can be rendered by a neutral in a binding arbitration, private judging, or court adjudication setting.
Discovery/Case Readiness	
Are there motions whose timely resolution would impact ADR use?	Court action on motions or binding arbitration of certain issues can allow parties to narrow the issues in the case.
Should parties pursue discovery during ADR?	There may be key pieces of discovery that would facilitate the ADR proceeding.
Are parties having multiple discovery disputes?	A discovery referee may be needed to assist the parties in this phase.
Can the parties agree to limit discovery or share certain experts?	A referee may be able to assist the parties in making these agreements.

b. [§33] Mandatory Mediation Programs Established by Court Rule

The Ventura County Superior Court has adopted a mandatory mediation program through a local rule. Ventura Super Ct R 3.24. The following types of disputes are considered appropriate for mediation in this program: those involving neighbors, homeowners associations, businesses or partnerships, sexual harassment, employment, discrimination, and code enforcement. To assist in classifying cases, every plaintiff must file a case information sheet with the complaint.

A number of counties have local rules related to voluntary ADR programs. See Butte Super Ct R 5; Contra Costa Super Ct R 5; San Francisco Super Ct R 18; Sonoma Super Ct R 16.

c. Child Custody/Visitation Mediation

(1) [§34] Application of Provisions

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

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

(2) [§35] Qualifications and Selection of Neutral

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

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

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

(3) [§36] Confidentiality

All mediation proceedings under these provisions must be held in private and are confidential. Fam C §3177. All communications, verbal or written, from the parties to the mediator in the proceedings are official information within the meaning of Evid C §1040. However, the mediator may, consistent with local court rules, make a recommendation to the court as to the custody of or visitation with the child. Fam C §3183. For a general discussion of confidentiality, see §156.

d. [§37] Dependency Mediation

Welfare and Institutions Code §350(a)(2) provides for juvenile courts in certain pilot counties (Contra Costa, Los Angeles, Orange, Sacramento, San Diego, Santa Clara, Tulare) to develop a dependency mediation program using moneys collected from birth certificate fees. This pilot program is intended to assist courts in intervening constructively by offering mediation in appropriate cases. The pilot program is designed to provide a problem-solving forum for developing a plan in the best interests of the child, emphasizing the preservation and strengthening of the family. Pending legislation would allow any county to develop a dependency mediation project using moneys generated from birth certificate fees.

The confidentiality provisions of Evid C §1152.5 apply to program participants. Under the Child Abuse and Neglect Reporting Act (Pen C §§1164–1166), however, any mandated reporter must report new allegations of child abuse or neglect that are discussed in mediation.

e. [§38] Statutory Mediation Programs Not Connected With the Courts

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

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

(2) Court Automatically Refers by Case Type

(a) [§132] Ventura County

Ventura County's "Multi-Door Courthouse" approach to ADR includes a mandatory mediation program under which every plaintiff must submit a completed mediation information sheet (Ventura Super Ct R 3.10) when filing a complaint in any action of a type (listed on the information sheet) that is eligible for mandatory mediation, *e.g.*, a business, employment, or code enforcement dispute. If the case is eligible for mandatory mediation, the court may appoint a mediator and schedule a mediation session at which each party must be represented by someone who has full authority to resolve all disputed issues. Ventura Super Ct R 3.24(A). Appointment and scheduling occur either when the court's mediation clerk reviews the pleadings (approximately 110 days after the initial filing) or at the time of the case management conference (approximately 150 days after the filing).

On Ventura County's mandatory early settlement conference program, see §52.

(b) [§133] Marin County

In Marin County, the court clerk provides the plaintiff with five forms, each of which the plaintiff is required to serve on all other parties when serving the summons and complaint. These are: a general notice describing the court's delay reduction and ADR programs; a notice of the first status/ADR assessment conference, indicating the date of this conference and the assigned judge; a blank status conference questionnaire; an ADR stipulation form; and a blank ADR evaluation form. Marin Super Ct R 5.05, 5.07. Contra Costa County's procedures are similar. Contra Costa Super Ct R 5(i)(1)–(2).

(c) [§134] Contra Costa County

Contra Costa County's status conference questionnaire, which each party must complete and file at least five days before the first status conference, requires a certification. Each party's attorney must certify (by signing immediately below this item in the body of the form): "I have reviewed the various ADR options described in the attached ADR Information Sheet with my client(s)."

4. How Method Is Chosen

a. [§135] Court Review of Case Management Conference Questionnaire or Pleadings

A judge or court staff member must decide whether to refer a case to ADR, *i.e.*, to compel the parties to engage in a nonbinding ADR process before the case can be put on the trial calendar. If the case is referred, the process selected should be based on review of the case file and, if possible, on the parties' response to a form such as a Case Management Conference Questionnaire. See §179. The parties' claims, relief sought, case type, stage of the litigation, and the parties' needs can be further assessed by asking them questions such as those listed in §136.

(3) *California Practice Guide: Alternative Dispute Resolution*

To keep up with developments in ADR, many judges use Knight, Fannin, Disco & Chernick, *California Practice Guide: Alternative Dispute Resolution*, a looseleaf service published by The Rutter Group.

(4) *Civil Proceedings—Before Trial*

The California Center for Judicial Education and Research's benchbook CIVIL PROCEEDINGS—BEFORE TRIAL provides an extensive treatment of ADR and other pretrial proceedings. Much of this guide draws on chapter 3 of that book. A separate CJER benchbook covers civil discovery.

(5) *Guide to Early Dispute Resolution*

In September 1994 the State Bar Office of Research published a *Guide to Early Dispute Resolution: Making ADR Work for You*. Directed mainly at attorneys, it contains considerable information of interest to judges, especially on the advantages and disadvantages of various forms of voluntary ADR. It sells for $20; each court and each bar association may obtain one free copy. A 31-page condensed version of this guide in pamphlet form, entitled *Mini-Guide to Early Dispute Resolution: Making ADR Work for You*, is also available.

(6) *Should I Try To Settle My Problem Out of Court?* and *You Don't Have To Sue*

The 1991 pamphlet *Should I Try To Settle My Problem Out of Court?* is published by the State Bar of California, and the 1995 pamphlet *You Don't Have To Sue* is published jointly by the Judicial Council and the State Bar.

B. [§169] Helpful Organizations

Persons interested in keeping up-to-date on ADR developments should consider joining the Courts Sector of the Society for Professionals in Dispute Resolution, and the American Bar Association's Dispute Resolution Section. Members of each organization receive newsletters and may attend conferences and other events. In addition, the California Dispute Resolution Council issues a quarterly newsletter with briefings on legislative developments.

1. American Bar Association—Dispute Resolution Section

1800 M Street, NW
Washington, DC 20036
202/331-2258

2. Center for Public Resources

366 Madison Avenue, 14th Floor
New York, NY 10017
212/949-6490
Elizabeth Plapinger, Judicial Project

3. Society for Professionals in Dispute Resolution—Courts Sector

815 15th Street, NW Suite 530
Washington, DC 20005
202/738-7277

4. National Institute for Dispute Resolution

1726 M Street, NW Suite 500
Washington, DC 20036-4502
202/466-4764

5. State Justice Institute

1650 King Street, Suite 600
Alexandria, VA 22314
703/684-6100

6. Judicial Council of California and California Center for Judicial Education and Research

Administrative Office of the Courts
303 Second Street, South Tower
San Francisco, CA 94107
415/396-9300
John Toker, Staff Attorney

7. State Bar of California

555 Franklin Street
San Francisco, CA 94102
415/561-8200
David Long, Director, Office of Research
Ellen Miller, Dispute Resolution Program Developer, Office of Legal Services

8. California Dispute Resolution Council

c/o DRS
Box 55020
Los Angeles, CA 90055

For more information, please see the

GUIDE TO COURT-RELATED ADR: PROGRAMS TO FACILITATE SETTLEMENT

State Bar of California
Office of Research
September 1993

PLEASE DETACH AND RETURN

FAMILY LAW ADR PROGRAM

REGISTRATION FORM AND AGREEMENT

YOU **MUST** AGREE TO ONE:

☐ **MEDIATION** ☐ **ARBITRATION**

— IF UNABLE TO AGREE, MEDIATION WILL BE SELECTED —

In the case of: _____ Case No. _____
(Name of case, for example "Marriage of Clark")

PETITIONER: _____
(Print Name Above)

Address: _____

_____

_____

Tel: _____

RESPONDENT: _____
(Print Name Above)

Address: _____

_____

_____

Tel: _____

1. We agree to pay $50 per party ($100 per couple) directly to the mediator or arbitrator immediately upon receiving the name and address of the mediator or arbitrator assigned to our case. We understand that the mediation or arbitration appointment will not be set until the mediator or arbitrator has received payment from both parties. This payment is in exchange for a single mediation session or arbitration hearing date, which will last a maximum of ninety (90) minutes. We understand that only one session will qualify for this reduced hourly rate, and that we must pay for further sessions at the attorney's regular hourly rate. We also understand that the first session must be held within 45 days of the mediator or arbitrator receiving the $100 payment or the payment may be forfeited.

2. We understand that it is our responsibility to continue (postpone) any pending court dates, if desired, and to seek reissuance of temporary restraining orders, if previously issued.

3. We understand that the mediation offered through this program is not meant as a substitute for mandatory mediation as required by law in matters where child custody is involved.

4. We understand that neither the San Mateo County Superior Court nor the Bar Association warrants (promises) that we will reach an agreement during mediation, nor that all issues will be addressed at the first session, regardless whether or not we choose arbitration or mediation.

Petitioner's Signature _____ Date: _____

Respondent's Signature _____ Date: _____

FAMILY LAW ADR PROGRAM

A COURTROOM ALTERNATIVE SAVING YOU TIME EXPENSE AND ANXIETY

MULTI-OPTION ADR PROJECT
FAMILY LAW ADR PROGRAM

DRAWBACKS of GOING TO COURT

- Higher cost
- A third party (Judge) decides the outcome of your situation
- Lower satisfaction with the end result
- High conflict situation
- Increase in hostility

BENEFITS of USING MEDIATION / ARBITRATION

- Lower cost
- In mediation, you design your own outcome
- Higher satisfaction with the results
- Improves understanding, reduces conflict with other party
- Reduces hostility

ALTERNATIVES TO COURT

■ THE FAMILY LAW ADR PROGRAM

There is a panel of Family Law Attorneys experienced, specially trained and screened in mediation / arbitration who will be assigned to your case. You can tackle all issues including property division, child custody and visitation, child support, spousal support and tax issues.

You can participate in Arbitration or Mediation at any time; you can sign up even if you have a hearing scheduled today. The Judge will help you postpone today's hearing. You can participate even if you already have an attorney. Any party who is involved in a Family Law case pending in San Mateo County may use the Family Law ADR Program. Although the "neutrals" are attorneys, it is important that you understand that they are NOT serving as any one person's advocate, but rather as a knowledgeable "neutral" third party.

■ HOW YOU CAN SIGN UP

1. Complete and return attached registration form.
2. We will send you the name, address and phone number of the Neutral assigned to your case along with a calendar telling the Neutral when you are available.
3. You send $50 ($100 per couple)* to the Neutral along with the calendar.
4. Neutral contacts you to schedule the first session within 45 days of receiving the $100 fee.

***NOTE:** The $100 is for the first 90 minutes ONLY — thereafter you pay the Neutral's normal hourly rate.

QUESTIONS? Call the program at
650/599-1070 or 599-1073

The San Mateo County Superior Court, in partnership with the Bar Association and the community, operate a Family Law ADR Program giving you a chance to use Mediation or Arbitration as an alternative to going to court.

■ MEDIATION

Mediation is a cooperative, private and informal dispute resolution process which uses the resources of a neutral (mediator) to assist parties in discussing and reaching their own resolution on disputed issues. Mediation is an entirely voluntary process, and can continue only so long as each person wishes to participate.

■ ARBITRATION

Arbitration is similar to going to court in that a third party makes a decision regarding your case, but it is less formal than litigation. You and the other party each present your evidence, including your witnesses. The arbitrator than makes a decision based on that evidence. You and the other party decide before the arbitration hearing begins whether it will be binding (final) or advisory (the arbitrator gives you his/her opinion).

■ COLLABORATIVE LAW

An affiliated but separate option is collaborative law. Both parties have attorneys who agree with their clients that they will never "go to court," but instead will work toward a mutually acceptable resolution of the dispute. Participants agree that if they choose to go to court, they are prohibited from using the same attorneys or any information gathered during the collaborative law process. For more information, please see the Peninsula Collaborative Family Law Group's website at **www.collaborative-law.com**

PLEASE DETACH AND RETURN

THE MEDIATION SERVICE...

■ HOW CAN I INITIATE MEDIATION?

If you are the plaintiff ask to have your case put on one of the two calendars when mediators are available (see below).

■ WHEN AND WHERE IS THE MEDIATION SERVICE PERFORMED?

On-site mediations are held at two locations:

San Mateo Central Courthouse
800 Humboldt Street, San Mateo
2nd and 4th Tuesdays of the month
6:00 in the evening

Redwood City Southern Branch
500 County Center, Redwood City
2nd and 4th Fridays of the month
9:00 in the morning

■ FOR INFORMATION, QUESTIONS, COMMENTS PLEASE CONTACT:

Ana Navarro
Coordinator
Small Claims Mediation Program

Tel (650) 573-3907
Fax (650) 342-5418
Email Anavarro@co.sanmateo.ca.us

MULTI-OPTION ADR PROJECT
SMALL CLAIMS MEDIATION ADR PROGRAM
800 NORTH HUMBOLDT STREET
SAN MATEO, CA 94401
(650) 573-3907

SMALL CLAIMS MEDIATION PROGRAM

THERE IS ANOTHER OPTION AT THE COURTHOUSE

MULTI-OPTION ADR PROJECT
SMALL CLAIMS MEDIATION ADR PROGRAM

THE MEDIATION PROCESS...

Emphasizes the participants' responsibility for making decisions that affect their lives.

SMALL CLAIMS MEDIATION

■ WHAT IS SMALL CLAIMS MEDIATION?

It is a helpful alternative to Small Claims Court.

It is a voluntary, private and simple way to discuss problems and reach a settlement before or after court hearings.

It is non-adversarial.

It allows the outcome to be determined by the parties themselves.

■ WHEN SHOULD MEDIATION BE USED?

Many types of disputes can be settled through mediation in a prompt, private and relatively inexpensive manner.

Business/Consumer	Landlord/Tenant
Practitioner/Client Relations	Employer/Employee
Debt Collection	Neighbor to Neighbor
Contract/Liability	Consumer Issues
Property/Condo Association	Family Conflicts
Construction	Real Estate

■ WHO ARE SMALL CLAIMS MEDIATORS?

They are experienced mediators who have been conducting volunteer mediations for at least 10 years.

They are community members, professionals, attorneys and non-attorneys highly trained in conflict resolution techniques.

They are sensitive to people of various racial, ethnic and religious backgrounds.

They are experienced in managing complex cases.

■ WHAT DO THE MEDIATORS DO?

Mediators do not give legal advice and will not judge you or your case. They do not make decisions, but rather try to help you communicate clearly, identify issues and underlying concerns, and help you reach a voluntary agreement.

■ WHAT ARE THE BENEFITS OF MEDIATION?

Services are FREE, less stressfull, and less time-consuming than litigation.

The process is confidential.

Cases may settle prior to a court hearing.

Parties create mutually satisfactory resolutions.

Experienced, skilled volunteer mediators help to facilitate agreements between you and the other side.

■ WHATSHOULD I EXPECT?

After arriving at the courthouse:

— Parties check in at the Mediation Desk.

— After both parties have checked in, a mediator is assigned to the case.

— The mediation session takes place (normally about 45 minutes).

— If there is no voluntary agreement, parties will return to the court and have their case heard in court.

— In contrast to a judgment by the court, a voluntary agreement is not a matter of public record.

— If parties need more time to complete the mediation, they can ask for a "continuance."

— If a voluntary agreement is reached, the Judge will ask how parties would like the court to dispose of the case:

- Dismiss the case "with prejudice" (cannot re-file);
- Dismiss "without prejudice" (can be re-filed);
- Continue the case to allow parties to perform the voluntary agreement.

Parties are encouraged to make a strong and good faith effort to work out an acceptable voluntary agreement. If parties cannot do this, the court will decide the outcome.

How do I contact the ADR Director?

MULTI-OPTION ADR PROJECT

401 MARSHALL STREET

COURTROOM 2F

REDWOOD CITY, CA 94063

650 363 4148

FAX 650 599 1754

ADR PROCEDURES

A COURTROOM ALTERNATIVE

MULTI-OPTION ADR PROJECT

A PARTNERSHIP OF THE

SAN MATEO COUNTY COURT, BAR & COMMUNITY

Table of Contents

Why does the court offer ADR?
A Message from the Judges of the San Mateo Courts 2

How can ADR help in my case? 4

Which ADR processes does the court offer? 6

How do I get my case go into an ADR process? 7

How do I pick an ADR provider? 8

How much does it cost? 8

Can pro bono and modest means arrangements be made? 8

What ADR processes are offered?
Mediation 8
Community mediation referrals 10
Neutral Evaluation 12
Binding Arbitration 15
Private Settlement Conferences 17
Judicial Non-Binding Arbitration 19
Voluntary/Mandatory Court Provided
Settlement Conferences 21
Other ADR Processes 23

Which is the most suitable ADR process for my case? 24

How likely is each ADR process to deliver the specific benefit?
Comparison table 25

What else do I need to know?
Concerns about ADR, The Multi-Option Project
Miscellaneous questions answered 26

Where can I get more information? 28

WHY DOES THE COURT OFFER ADR?

A Message from the Judges of the San Mateo Courts

It is the mission of this court to do everything it can to help parties resolve their disputes as fairly, quickly and efficiently as possible. The cases filed in our court present a wide range of issues and circumstances. No single process can be expected to meet the needs of all of these cases. While traditional litigation can serve parties interests well in some situations, many cases have needs that can be better met through other procedures. We offer a wide selection of non-binding appropriate dispute resolution (ADR) options—each of which provides different kinds of services—so that parties can use the procedure that best fits the particular circumstances of their case.

The Multi-Option ADR Project, MAP, is a partnership involving the court, bar and community. The court recognizes that many dispute can be resolved without the time and expense of traditional litigation and we encourage parties in civil cases to explore and pursue the use of ADR. MAP is a voluntary program, providing information on pre-screened, trained and experienced neutral mediators, neutral evaluators, private arbitrators (separate from the judicial arbitration program) and private settlement conference neutrals. Neutrals are paid at market rates but ADR staff are happy to screen cases that need pro bono assistance or a modest means arrangement.

As discussed in the following pages, ADR processes can offer numerous advantages over both formal litigation and direct negotiations between the parties. In contrast to formal litigation and direct negotiations, ADR procedures may lead to resolutions that are:

- faster
- less expensive
- more creative
- better tailored to all parties underlying interests

We urge you to consider using an ADR process in any civil case, at any time. The court?s professional ADR Director, an attorney with expertise in ADR procedures, is available to help you select a suitable option or to customize an ADR procedure to meet your needs. Our ADR processes, which are governed by Ethics Standards and Guidelines, are available in each civil case.

This handbook informs you about:

- the benefits of ADR
- available ADR options
- selecting an appropriate ADR process
- procedures in ADR programs

To help ensure that you make informed choices, the court expects that every attorney and CLIENT certify that they have read this handbook and considered the ADR options. Reading this handbook is not a substitute for understanding the ADR Referral Procedures and Neutral Evaluation Guidelines.

We have committed substantial resources to our ADR programs because we are confident that litigants who use them conscientiously can save significant money and time and will often obtain more satisfying results.

Hon. Judith W. Kozloski, Presiding Judge, 1998

How can ADR help in my case?

Most cases can benefit in some way from ADR. The various ADR processes offer different types of benefits. Each ADR process offers at least some of the following advantages over traditional litigation or direct settlement negotiations.

Produce more satisfying results

After litigating a case through trial, even the winners may feel they have lost. The costs and time commitment on both sides may be enormous. Sometimes neither side is satisfied with the result—and any relationship that may have existed between the parties is likely to have been severely strained. On the other hand, ADR may:

- help settle all or part of the dispute much sooner than trial
- permit a mutually acceptable solution that a court would not have the power to order
- save time and money
- preserve ongoing business or personal relationships
- increase satisfaction and thus result in a greater likelihood of a lasting resolution

Allow more flexibility, control and participation

In formal litigation, the court is limited in the procedures it must follow and the remedies it may award—and submitting a case to a judge or jury can be extremely risky. ADR processes are more flexible and permit parties to participate more fully and in a wider range of ways. They afford parties more control by providing opportunities to:

- tailor the procedures used to seek a resolution
- broaden the interests taken into consideration
- fashion a business-driven or other creative solution that may not be available from the court
- protect confidentiality
- eliminate the risks of litigation

Enable a better understanding of the case

In traditional litigation, sometimes the parties stop communicating directly—and it is only after a significant amount of time and expensive discovery or motions that the parties understand what is really in dispute. ADR can expedite the parties access to information. It can also improve the quality of justice by helping the parties obtain a better understanding of their case early on. It may:

- provide an opportunity for clients to communicate their views directly and informally
- help parties get to the core of the case and identify the disputed issues

- enhance the parties understanding of the relevant law and evidence and the strengths and weaknesses of their positions
- help parties agree to exchange key information directly

Improve case management

Attorneys in litigation sometimes find it difficult, early in the case, to devise a cost-effective case management plan, to reach stipulations or narrow the dispute. An ADR neutral can help parties:

- streamline discovery and motions
- narrow the issues in dispute and identify areas of agreement and disagreement
- reach factual and legal stipulations

Reduce hostility

Due to its adversarial nature, litigation sometimes increases the level of hostility between sides which can make communication more difficult and impede chances for settlement. In contrast, a trained ADR neutral can:

- improve the quality and tone of communication between parties
- decrease hostility between clients and between lawyers
- reduce the risk that parties will give up on settlement efforts

WHEN ADR MAY NOT BE USEFUL

Although most cases can benefit in some way from ADR, some cases might be better handled without ADR. These include suits in which:

- a party seeks to establish precedent
- a dispositive motion requiring little preparation will probably succeed
- a party needs the protections of the formality of traditional litigation
- a party prefers that a judge preside over all processes

If your dispute might benefit from one or more of the listed advantages, you should seriously consider trying ADR and should give careful thought to selecting the most appropriate process for your case.

WHICH ADR PROCESSES DOES THE COURT OFFER?

Voluntary Settlement Conferences See pages 21-22

Judicial Non-Binding Arbitration See pages 19-20

The court also refers cases to four major private ADR processes:

Mediation See pages 8-11

Neutral Evaluation See pages 12-14

Binding Arbitration See pages 15-16

Settlement Conferences conducted by private judges and attorneys See pages 17-18

Each of these programs is described separately in the next few pages. The court's ADR Director will help parties customize an ADR process to meet their needs.

The four private panels (mediation, arbitration, neutral evaluation, private settlement conferences) have in common referral mechanisms and the fee arrangements. There are also the traditional court ordered judicial arbitration and mandatory settlement conference.

HOW DO I GET MY CASE INTO AN ADR PROCESS?

There are three ways cases can enter an ADR process:

- **At filing**
  The court provides the following at the time of filing:
  - Plaintiff receives "ADR Information Sheet" and is expected to serve this on Defendant
  - Stipulations to ADR
  - A Binder of Information on prescreened ADR Panelist is available at the Clerk's Office

- **By stipulation/proposed order**
  A civil case may enter the project when all the parties stipulate in writing to use an ADR process. The stipulation shall be filed with the Clerk's Office and indicate the neutral's name and the date of session. The parties choose and contact an ADR provider to schedule sessions.

- **At the case management conference**
  When a case appears to be suitable for an ADR process based upon a review of the case management questionnaire or other information, the ADR staff or judge hearing the case will invite the attorneys to meet with the ADR Director to discuss the possibility of a referral to ADR. Parties may also suggest that they would like to meet with ADR staff. The court provides the following:
  - Case Management/ADR Questionnaire
    — This is due 15 days prior to conference
    — Judges and staff will review this for completeness
  - Consultation with ADR staff/volunteers at the time of Case Management
  - A conference on the suitability of a particular case for various ADR methods (mediation, private arbitration, settlement conferences and neutral evaluation)

How do I pick an ADR provider?

Parties may look at individual résumés or a binder, provided by MAP, which contains a list of providers and select a neutral of their choice within ten days of meeting with the ADR Director. If parties are unable to agree on a selection, the ADR Director will select a list of providers with one more provider than there are parties in the case and each party can strike one name. The ADR Director can provide a list of potential neutrals with particular subject matter expertise.

How much does it cost?

Services are provided at market rates. Generally parties split the cost equally. Check with the neutral regarding administrative or other fees beyond the hourly fees.

Can pro bono and modest means arrangements be made?

Pro bono and modest means panelists are available upon screening by ADR staff. There is a one page pro bono/modest means request form you will be asked to complete. For those who qualify, the program asks that you submit three names of neutrals you agree on with the other parties. The Director will then contact panelists.

What private ADR processes are offered?

Mediation

Goal:

The goal of mediation is to reach a mutually satisfactory agreement resolving all or part of the dispute by carefully exploring not only the relevant evidence and law, but also the parties underlying interests, needs and priorities.

Process:

Mediation is a flexible, non-binding, confidential process in which a neutral lawyer-mediator, non-lawyer professional mediator, or private judge facilitates settlement negotiations. The informal session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with the parties in joint and separate sessions, works to:

- improve communication across party lines
- help parties clarify and communicate their interests and understand those of their opponent
- probe the strengths and weaknesses of each party's legal positions
- identify areas of agreement
- help generate options for a mutually agreeable resolution

The mediator generally does not give an overall evaluation of the case. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy.

Preservation of right to trial:

The mediator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties discovery, disclosure and motion practice rights are fully preserved. The parties may agree to a binding settlement under Code of Civil Procedure Section 664.6. If no settlement is reached, the case remains on the ordinary litigation track.

The neutral:

The parties choose a mediator who is available and has no apparent conflicts of interest.

All mediators on the MAP panel have the following qualifications:

- experience in communication, mediation, and negotiation techniques
- have conducted at least five mediations
- knowledge about subject matter and mediation process
- approximately forty hours of mediation training

Attendance:

The following individuals are strongly encouraged to attend the mediation session:

- Client(s) with settlement authority and knowledge of the facts are strongly encouraged to participate actively in the mediation.
- Attorneys — Discuss with the mediator the role to be played by the attorneys. We encourage you to clarify procedures.
- Insurers of the parties — representatives from the insurance companies with full authority to settle within the amount of the plaintiff's current demand.

Confidentiality:

Communications made in connection with a mediation may not be disclosed to the assigned judge or to anyone else not involved in the session, unless otherwise agreed. (See Evidence Code §1115 - §1128)

Timing:

A mediation may be requested at any time. Usually, the time for holding the mediation is:

- Within 30-90 days after the referral to mediation

The attorneys or unrepresented parties contact the neutral to schedule an initial telephone conference to set the date, time and location of the mediation session. The parties and their attorneys are encouraged to discuss creative ways to make the mediation session of maximum benefit to all.

Written submissions:

Counsel exchange and submit written statements to the mediator if requested. These statements are NOT filed with the court.

Appropriate cases/circumstances:

All civil cases are eligible. Cases with the following characteristics may be particularly appropriate:

- the parties desire a business-driven or other creative solution
- the parties may benefit from a continuing business or personal relationship
- multi-party cases
- equitable relief is sought—if parties, with the aid of a neutral, might agree on the terms of an injunction or consent decree
- communication appears to be a major barrier to resolving or advancing the case

COMMUNITY MEDIATION REFERRALS

Community Partners

The Peninsula Conflict Resolution Center (PCRC) is a nonprofit organization that has been providing mediation and facilitation services to residents of San Mateo County since 1986.

Process

As a part of the MAP Partnership, PCRC offers mediation services in many court referred cases. Once the court has referred a case to PCRC, the parties contact the PCRC Court Mediation Program and discuss the case and mediation process with a case manager. A time and place for the mediation session are determined. Court dates which have already been set can usually be rescheduled in order to accommodate the scheduling of the mediation. After the session, the parties report the results of their mediation to the court which referred them.

How much does community mediation cost?

The cost of community mediation is $150. The fee is shared equally by the parties. This fee is due at the time the mediation is scheduled, but may be waived, if necessary.

Isn't mediation voluntary?

Mediation is a voluntary process. Since you have been referred to mediation by the court, you will be expected to participate in the first steps of the process. However, no one will be compelled to develop or sign an agreement. If the mediation of the agreement is not acceptable to you, you may withdraw from the process.

Who are the community mediators?

The community mediators are members of the community, from all walks of life, who have received specialized training in strategies to assist people to voluntarily resolve disputes.

What does it mean that the process is "confidential"?

Everything said during the mediation is private and cannot be repeated to anyone outside the mediation or used in subsequent court proceedings. All participants in the mediation sign a document agreeing to this condition. Parties may agree to present their resolution to the court and to make the agreement legally binding.

Does community mediation work?

In approximately 80% of the cases mediated, parties are able to develop and sign agreements. About 90% of mediated agreements are upheld.

Can my attorney be present?

Because community mediation is a more informal process than court, participants are encouraged to speak for themselves in the course of the community mediation. Attorneys may be present, but their participation is usually limited.

How long does it take?

A community mediation can normally be scheduled within two weeks from the time the parties contact PCRC. The mediation sessions last about two to three hours; some require less and some more time. Therefore, parties are asked to be flexible with their schedule. Occasionally participants decide that need more than one session to complete their work.

What if restraining orders are in effect?

Since the parties are being recommended to community mediation by the court, participating in a mediation session is not considered a violation of a restraining order.

The phone number for PCRC is 650/373-3490.

Neutral Evaluation

Goal:

The goals of Neutral Evaluation (sometimes called "ENE" for early neutral evaluation) are to:

- enhance direct communication between the parties about their claims and supporting evidence
- provide an assessment of the merits of the case by a neutral expert
- provide a "reality check" for clients and lawyers
- identify and clarify the central issues in dispute
- assist with discovery and motion planning or with an informal exchange of key information
- facilitate settlement discussions, when requested by the parties
- give the parties and counsel guidance as to how to litigate the case, when requested by the parties.

Neutral evaluation aims to position the case for resolution by settlement, dispositive motion or trial. It may serve as a cost-effective substitute for formal discovery and pretrial motions. Although settlement is not the major goal of neutral evaluation, the process often leads to settlement.

Process:

The evaluator, an experienced attorney with expertise in the case's subject matter, hosts an informal meeting of clients and counsel at which the following occurs:

- each side—through counsel, clients or witnesses—presents the evidence and arguments supporting its case (without regard to Rules of Evidence and without direct or cross-examination of witnesses)

- the evaluator identifies areas of agreement, clarifies and focuses the issues, and encourages the parties to enter procedural and substantive stipulations

- the evaluator writes an evaluation in private that may include:
  - an estimate, where feasible, of the likelihood of liability and the dollar range of damages
  - an assessment of the relative strengths and weaknesses of each party's case
  - the reasoning that supports these assessments

- the evaluator offers to present the evaluation to the parties, who may then ask either to:

- hear the evaluation (which must be presented if *any* party requests it), *or*
- postpone hearing the evaluation to:
  - engage in settlement discussions facilitated by the evaluator, often in separate meetings with each side *or*
  - conduct focused discovery or make additional disclosures

- if settlement discussions do not occur or do not resolve the case, the evaluator may:
  - help the parties devise a plan for sharing additional information and/or conducting the key discovery that will expeditiously equip them to enter meaningful settlement discussions or position the case for disposition by motion or trial
  - help the parties realistically assess litigation costs
  - determine whether some form of follow-up to the session would contribute to case development or settlement

Preservation of right to trial:

The evaluator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties' formal discovery, disclosure and motion practice rights are fully preserved. The confidential evaluation is non-binding and is not shared with the trial judge. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the ordinary litigation track.

The neutral:

The parties choose a neutral evaluator with expertise in the substantive legal area of the lawsuit who is available and has no apparent conflict of interest.

The neutral(s):

All evaluators on the court's panel have the following qualifications:

- admitted to the practice of law for at least 10 years
- experience with civil litigation
- expertise in the substantive law of the case
- trained by the court

Many evaluators also have received mediation training.

Attendance:

Insurers of parties are strongly encouraged to attend. The following individuals are required by MAP guidelines to attend:

- client(s) with settlement authority and knowledge of the facts
- the lead trial attorney for each party

Clients are strongly encouraged to participate actively in the neutral evaluation session. However, Neutral Evaluation is not suited to unrepresented, pro per parties.

Confidentiality:

Communications made in connection with a neutral evaluation session may not be disclosed to the assigned judge or to anyone else not involved in the session, unless otherwise agreed.

Timing:

A neutral evaluation session may be requested at any time.

The evaluator contacts counsel to schedule an initial telephone conference to set the date, time and location of the neutral evaluation session and to discuss the procedures to be followed, and how to maximize the benefit of engaging in neutral evaluation.

Written submissions:

Counsel exchange and submit written statements to the evaluator no later than 5 court days prior to the neutral evaluation session. The statements are not filed with the court.

Appropriate cases/circumstances:

All civil cases in which the parties are represented by counsel are eligible if MAP has an evaluator with the appropriate subject matter expertise. Cases with the following characteristics may be particularly appropriate:

- counsel or the parties are far apart on their view of the law and/or value of the case
- the case involves technical or specialized subject matter—and it is important to have a neutral with expertise in that subject
- case planning assistance would be useful
- communication across party lines (about merits or procedure) could be improved
- equitable relief is sought—if parties, with the aid of a neutral expert, might agree on the terms of an injunction or consent decree
- the parties wish to communicate with each other about the case, but are not ready to specifically discuss settlement.

Governing rule:

The court requires parties choosing Neutral Evaluation to so stipulate and have the court order it. Once ordered, the parties are strongly encouraged to follow the MAP Neutral Evaluation Guidelines. These are available from the ADR staff and in the Clerk's office.

Binding Arbitration

Goal:

The goal of arbitration is to provide parties with an adjudication that is earlier, faster, less formal and less expensive than trial.

Process:

There are two types of arbitration — non-binding **judicial arbitration** which can be ordered by the judge and is paid for by the court and binding **private arbitration**. For information on judicial arbitration, see page 18.

By agreement of the parties, an arbitrator, or panel of arbitrators, presides at a hearing where the parties present evidence through documents, other exhibits and testimony. The application of the rules of evidence is relaxed somewhat in order to save time and money.

The process includes important, trial-like sources of discipline and creates good opportunities to assess the impact and credibility of key witnesses:

- parties may use subpoenas to compel witnesses to attend or present documents
- witnesses testify under oath, through direct and cross-examination
- the proceedings can be transcribed - and testimony could, in some circumstances, be used later at trial for impeachment.

Arbitrators apply the law to the facts of the case and issue an award. Arbitrators do not split the difference between the parties and do not conduct mediations or settlement negotiations.

Preservation of right to trial:

If parties agree that their private arbitration will be **non-binding** then they do not give up their rights to a subsequent trial. Parties very rarely agree that their private arbitration will be non-binding.

If the parties make the arbitration **binding** the arbitrator's award can become the final judgment of the court. An arbitration award is subject to appellate review only in very limited circumstances.

The neutral(s):

All arbitrators on MAP's panel have the following qualifications:

- admitted to the practice of law for at least ten years
- five private or fifteen judicial arbitrations

Attendance:

Insurers of parties are strongly encouraged to attend the arbitration. The following are generally required to attend:

- client with knowledge of the facts
- the lead trial attorney for each party
- any witnesses compelled by subpoena

Confidentiality:

Arbitration proceedings are generally not made a part of the public record.

Timing and Written submissions:

The parties arrange with the arbitrator(s) a timetable for exchanging and submitting to the arbitrator(s) written statements. The statements are not filed with the court.

Appropriate cases/circumstances:

All civil cases in which the parties are represented by counsel and cases with any of the following characteristics may be particularly appropriate for arbitration:

- only monetary (and not injunctive) relief is sought
- the complaint alleges personal injury, property damage or breach of contract
- the case turns on credibility of witnesses
- the case does not present complex or unusual legal issues
- the parties are not concerned with setting legal precedent

Private Settlement Conferences

Goal:

The goal of a settlement conference is to facilitate the parties efforts to negotiate a settlement of all or part of the dispute.

Process:

A private settlement conference neutral helps the parties negotiate. Some settlement neutrals also use mediation techniques to improve communication among the parties, probe barriers to settlement and assist in formulating resolutions. Settlement neutrals might articulate views about the merits of the case or the relative strengths and weaknesses of the parties' legal positions. Often settlement neutrals meet with one side at a time, and some settlement neutrals rely primarily on meetings with counsel.

Preservation of right to trial:

The settlement neutral has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the ordinary litigation track. The parties formal discovery, disclosure and motion practice rights are fully preserved.

Qualifications:

- 10 years legal experience and
- at least five settlement conferences as a pro tem or otherwise, or ten or more judicial arbitrations

In addition to the private settlement conferences MAP offers, there are also voluntary and mandatory settlement conferences provided by the court. See page 20-21.

Attendance:

Most private settlement conference neutrals strongly encourage the attendance of the parties unless they reside more than fifty miles from the settlement conference site, in which case they are required to be available by telephone. Counsel who attend the settlement conference are expected to be thoroughly familiar with the case and to have authority to negotiate a settlement. Insurance representatives are expected to attend.

Confidentiality:

Confidentiality is maintained at the conference, which fosters frank, open discussions. The settlement neutral may not disclose to the trial judge any communications from the settlement conference, the settlement neutral's views of the merits of the case, or any party's settlement position, unless the parties stipulate otherwise.

Timing:

A private settlement conference may be requested any time prior to the court mandated settlement conference.

Written submissions:

Written settlement conference statements, when required, are submitted directly to the private settlement judge. The statements are not filed with the court.

Appropriate cases/circumstances:

All civil cases are eligible. Cases with the following characteristics may be particularly appropriate:

- a client or attorney prefers to appear before a judicial officer
- issues of procedural law are especially important
- a party is not represented by counsel

Judicial Non-Binding Arbitration

Goal:

The goal of judicial arbitration is to provide parties with an efficient way to resolve the case and, if possible, to avoid trial. The proposed judgment in a non-binding arbitration may either:

- become the judgment in the case if all parties accept it *or*
- serve as a starting point for settlement discussions

The process includes important, trial-like sources of discipline and creates good opportunities to assess the impact and credibility of key witnesses:

- parties may use subpoenas to compel witnesses to attend or present documents
- witnesses testify under oath, through direct and cross-examination

A Judge may order your case to judicial arbitration, you may stipulate to it or a plaintiff may elect to go to arbitration. An arbitrator presides at a hearing where the parties present evidence through documents, other exhibits and testimony. The application of the rules of evidence is relaxed somewhat in order to save time and money.

Arbitrators apply the law to the facts of the case and issue an award within 10 days of the hearing. The award is not binding unless the parties agree in advance. Arbitrators do not split the difference between the parties and do not conduct mediations or settlement negotiations. Either party may reject the non-binding ruling and request a trial *de novo*. If no such demand is filed within thirty days, the award becomes the final judgment of the court and is not subject to appellate review.

Preservation of right to trial:

There is no penalty for demanding a trial *de novo* or for failing to obtain a judgment at trial that is more favorable than the arbitration award. Rejecting an arbitration award will not delay the trial date.

The arbitrator:

The court provides the parties with a list of three attorneys. Each side strikes a name, and the remaining person becomes the arbitrator. If both sides reject the same person, the court randomly assigns the neutral.

All arbitrators on the court's panel have the following qualifications:

- admitted to the practice of law for at least 5 years
- screened by a bar committee and the presiding judge

Attendance:

Insurers of parties are strongly encouraged to attend the arbitration. The following individuals are required to attend:

- client with knowledge of the facts
- the lead trial attorney for each party
- any witnesses compelled by subpoena

Confidentiality:

The arbitration award is not admissible at a subsequent trial *de novo*, unless the parties stipulate otherwise. The award itself is sealed upon filing and may not be disclosed to the assigned judge until the court has entered final judgment in the action or the action is otherwise terminated.

Timing:

Parties have ten days to strike names from the list and return their selection to the court. Arbitration will occur ninety days from the date of appointment, unless the court orders otherwise.

Written submissions:

The parties exchange and submit to the arbitrator(s) written statements at least 5 days before the arbitration. The statements are not filed with the court.

Appropriate cases/circumstances:

All civil cases in which the parties are represented by counsel are eligible. Cases with any of the following characteristics may be particularly appropriate for arbitration:

- only monetary (and not injunctive) relief is sought
- the complaint alleges personal injury, property damage or breach of contract
- the amount in controversy is less than $50,000 or parties agree to other limits
- the case turns on credibility of witnesses
- the case does not present complex or unusual legal issues

Cost:

Judicial arbitration is paid for by the courts (for the first three hours).

Governing rule:

— California Code of Civil Procedure 1141.11 and 1141.12

For further information, please contact the judicial arbitration office at 650/363-4896.

Voluntary/Mandatory Court Provided Settlement Conferences

Goal:

The goal of a settlement conference is to facilitate the parties' efforts to negotiate a settlement of all or part of the dispute.

Process:

A voluntary/mandatory settlement conference Judge helps the parties negotiate. Settlement judges might articulate views about the merits of the case or the relative strengths and weaknesses of the parties' legal positions. Often settlement Judges meet with one side at a time, and some settlement Judges rely primarily on meetings with counsel to give the Judge's view of the case.

The parties understand what it will take to settle the case, what the minimum is the plaintiff will demand and the maximum the defense will offer. Commonly used phrases such as "I don't want to bid against myself" are not useful in determining the real positions of the parties regarding settlement. A conference is a failure if the parties leave without an understanding of the other party's position.

Local Rules:

San Mateo County Rule 2.4 Settlement Conference. Some features include:

Attendance

- An attorney with full authority to negotiate a settlement.
- Any person who is required to consent to the settlement.
- Any defendant who does not have insurance coverage or who will have to personally contribute to the settlement.
- If an insurance carrier is involved, a representative of the insurance company with authority to settle. If there are any limits on that person's ability to settle, a representative of the insurance carrier who has full authority to settle must be available by telephone.

Written Submissions

- A settlement conference statement from all parties must be submitted to the court and served on all other parties no later than **five days** before the settlement conference date. See local rule for content.

Participation

- All parties must be prepared to make a good faith offer of settlement.

Special Circumstances

- Special arrangements to continue or excuse the personal attendance of any person required to be present at the settlement conference must be made to the Presiding Judge prior to the settlement conference date.

Questions about these issues should be directed to the Case Management Clerk at 650/363-4805.

Attendance:

Attendance of the parties who have authority to settle the case is mandatory, unless permission is granted whereby the party with authority to settle is on telephone standby during the entire conference. If the case does not settle at the mandatory settlement conference that party must physically be present at the trial conference day. Counsel who attend the settlement conference are expected to be thoroughly familiar with the case and to have authority to negotiate a settlement. In addition, under San Mateo County Rule 2.4, the insurance carrier must have a representative present and any defendant required to financially contribute to the settlement must also be present. (See local rules for specific requirements.)

Confidentiality:

Confidentiality is maintained at the conference, which fosters frank, open discussions. The settlement judge may not disclose to the trial judge any communications from the settlement conference, the settlement judge's views of the merits of the case, or any party's settlement position, unless the parties stipulate otherwise.

Timing:

A voluntary court provided settlement conference may be requested at any time. Mandatory settlement conferences are usually scheduled 10-14 days before trial.

Written submissions:

The statements are not filed with the court. Under San Mateo County Rule 2.4, written settlement conference statements from all parties must be submitted to the court and served on all other parties no later than **five days** before the settlement conference date.

Appropriate cases/circumstances for voluntary settlement conference:

All civil cases are eligible. Cases with the following characteristics may be particularly appropriate:

- a client or attorney prefers to appear before a judicial officer
- issues of procedural law are especially important
- a party is not represented by counsel

OTHER ADR PROCESSES

Customized ADR Processes

The ADR Director will work with parties to customize an ADR process to meet the needs of their case or to design an ADR process for them. The ADR Director is available for a telephone conference with all counsel or a consultation with individual counsel to discuss ADR options. Clients are invited and encouraged to join such conferences.

Non-binding Summary Bench or Jury Trial

The ADR staff may help parties structure a non-binding summary bench or jury trial. A flexible, non-binding process, a summary bench or jury trial is designed to:

- promote settlement in complex, trial-ready cases headed for long trials
- provide an advisory verdict after an abbreviated presentation of evidence
- offer litigants a chance to ask questions and hear the reactions of the judge and/or jury
- trigger settlement negotiations based on the judge's or jury's non-binding verdict and reactions

Special Masters / Discovery Referees

The assigned judge may appoint a special master, whose fee is paid by the parties, to serve a wide variety of functions, including:

- discovery manager
- fact-finder
- host of settlement negotiations
- post-judgment administrator or monitor

Other Private ADR Providers

The court encourages parties to consider private sector ADR providers beyond those on the court's pre-screened list. Private providers may be lawyers, law professors, retired judges or other professionals with expertise in dispute resolution techniques.

Which is the most suitable ADR process for my case?

Carefully consider the needs of your particular case or situation and identify the goals you hope to achieve through ADR—then select the process that appears to maximize the potential for achieving these goals. The following chart summarizes the major benefits of ADR and notes the extent to which the court's four major ADR processes may accomplish them.

What if I would prefer a different ADR process other than judicial arbitration?

You may switch processes if the judge so orders, or submit a stipulation to another ADR process, for example a Stipulation to Mediation in Lieu of Judicial Arbitration. If the judge signs it, you may go forward. You must submit this request well before the judicial arbitration.

How likely is each ADR process to deliver the specific benefit?

● = very likely
◗ = somewhat likely
= unlikely

	Arbitration	NE	Mediation	Settlement Conference
ENHANCE PARTY SATISFACTION				
Help settle all or part of dispute		◗	●	●
Permit creative/business driven solution that court could not order		◗[2]	●	◗[3]
Preserve personal or business relationships		◗	●	◗[3]
Increase satisfaction and thus improve chance of lasting solution		◗	●	◗[3]
ALLOW FLEXIBILITY, CONTROL & PARTICIPATION				
Broaden the interests taken into consideration	N/A	◗[4]	●	◗[3]
Protect confidentiality	◗[5]	●	●	●
Provide trial like hearing	●	N/A	N/A	N/A
Provide opportunity to appear before judicial officer	N/A	N/A	N/A	●
IMPROVE UNDERSTANDING OF CASE				
Help get to core of case and sort out issues in dispute	◗	●	●	●
Provide neutral evaluation of case	●	●		◗
Provide expert in subject matter	◗[6]	●	◗[6]	◗[6]
Help parties see strengths and weaknesses of positions	●	●	●	●
Permit direct and informal communication of client's views		◗	●	
Provide opportunity to assess witness credibility and performance	●	◗	◗	
Help parties agree to an informal exchange of key information		●	◗	◗
IMPROVE CASE MANAGEMENT				
Help parties agree on further conduct of the case	N/A	●	◗	◗
Streamline discovery and motions	N/A	●	◗	◗
Narrow issues and identify areas of agreement	N/A	●	●	●
Reach stipulations	N/A	●	◗	●
REDUCE HOSTILITY				
Improve communications between parties/attorneys		●	●	◗
Decrease hostility		●	●	◗[7]

NOTES

1. Arbitration may provide this benefit when the award triggers or contributes to settlement in a dispute.
2. NE may provide this benefit when the parties use it for settlement discussions. Some of the courts NE evaluators [illegible] been trained as mediators.
3. Depending on the settlement judges' particular styles, settlement conferences may or may not deliver this benefit.
4. The arbitration award may not be disclosed to the assigned trial judge until the action is terminated. Although the award is not admissible at a trial *de novo*, recorded communications made during the arbitration may be admissible for limited purposes.
5. Mediators may deliver this benefit, but they focus primarily on settlement.
6. Depending on the subject matter of the dispute, the neutral might have expertise.
7. This benefit may result if the parties participate actively in the pre-session.

WHAT ELSE DO I NEED TO KNOW?

When is the best time to use ADR and how much discovery should I first complete?

You should consider ADR early, whether you are seeking assistance with settlement or case management. Conducting full-blown discovery before an ADR session may negate potential cost-savings. Many parties find that major depositions provide a good backdrop for ADR. If you are using ADR for settlement purposes, you should know enough about your case to assess its value and identify its major strengths and weaknesses.

How might ADR be better than the parties meeting on their own?

Getting settlement discussions started

Sometimes advocates are reluctant to initiate settlement discussions. The availability of multiple ADR options and ADR unit staff allows a party to explore settlement potential without indicating any litigation weakness.

Saving time and money

For various reasons, direct settlement discussions often do not occur until late in the lawsuit after much time and money have been spent. A substantial amount of time and money can be saved if parties actively explore settlement early in the pretrial period. An ADR process can provide a safe and early opportunity to discuss settlement.

Providing momentum and a back up

Often parties successfully negotiate an early resolution to their dispute on their own. Even if you are negotiating a settlement without the assistance of a neutral, you should still consider having your case referred to an ADR process like mediation to use as a back up in the event the case does not settle. Meanwhile, knowing that you have a date for the ADR process may help provide momentum and a deadline for your direct settlement discussions.

Overcoming obstacles to settlement

The adversarial nature of litigation often makes it difficult for counsel and parties to negotiate a settlement effectively. An ADR neutral can help overcome barriers to settlement by selectively using information from each side to:

- help parties engage in productive dialog
- help each party understand the other side's views and interests

- communicate views or proposals in more palatable terms
- gauge the receptiveness of proposals
- help parties realistically assess their alternatives to settlement
- help generate creative solutions

Improving Case Management

Discovery is broad and expensive and sometimes fails to focus on the most important issues in the case. An early meeting with a neutral such as a neutral evaluator may help parties to agree to a focused, cost-effective discovery plan or may help them to agree to exchange information informally.

Will ADR affect my case's status on the trial track?

Assignment to an ADR process generally does not affect the status of your case in litigation. Judges sometimes postpone case management or status conferences until after the parties have had an ADR session. If your case does not settle through ADR, it remains on the ordinary litigation track.

How can I, as a client, prepare myself for ADR?

Discuss with your lawyer what your interests are and how you would like to see them met. Question and understand your ADR options. Consider how you will tell your story and be courteous and listen to the other parties in your case. Keep an open mind to a range of settlement opportunities.

Won't I risk giving away my trial strategy in ADR?

About 90-98 percent of civil cases in our court are resolved without a trial. If you don't raise your best arguments in settlement discussions, you risk failing to achieve the best result for your side. Although you need not reveal in an ADR session sensitive information related to trial strategy, you might find it useful to raise it in a confidential separate session with the neutral (available after the evaluator prepares the evaluation in a neutral evaluation, or at any time in mediation or a settlement conference). You can then hear the neutral's views of the significance of the information and whether or when sharing it with the other side may benefit you in the negotiations.

What if I don't have a lawyer?

If you are not represented by a lawyer, the court suggests that you select the ADR option of a voluntary settlement conference, where your questions and concerns can be addressed directly by a judge, or a mediation where you can actively participate.