

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

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588

WHAT IS MEDIATION? - continued

WHAT HAPPENS IN MEDIATION?

A mediator usually begins by describing the mediation process. The mediator then gives each person an opportunity to tell his or her side of the story. The mediator helps determine the issues, suggests a negotiation process and helps the parties look at all possible options for agreement. When a final agreement has been reached, the mediator helps the parties put it in writing. Some mediators require that clients sign an agreement that the mediator will not be called to testify in court and that what occurs in mediation will not be used as evidence in a trial.

WHO PAYS FOR MEDIATION?

The parties are responsible for payment and must agree between themselves how to handle the cost of mediation.

IS IT NECESSARY TO HAVE A LAWYER?

Lawyers do not participate in mediation. The parties determine their own agreement. That agreement may not be what a court would decide. Since it is important for each party to know what his or her legal rights are, each party may want to consult an attorney to discuss the merits of mediation in his or her situation.

WHAT HAPPENS IF MEDIATION DOES NOT WORK?

If mediation is unsuccessful, the parties can still take the matter to court.

HOW DO I LOCATE A MEDIATOR?

In some communities, mediators are listed in the Yellow Pages under the heading "Mediation" or "Mediation Services."

The Better Business Bureau has mediators available to mediate trade disputes between a consumer and a business or between two businesses.

In Anchorage and Fairbanks the Custody Investigator's office keeps a current listing of people available to do mediation in their areas. This information is available to the public upon request.

**District
Court
(lower
volume)**



**District Courts - Lower Volume
Summary of Case Filings
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	54	26	26	27	-50%	4%
Angoon	29	85	30	38	31%	27%
Aniak	260	313	227	185	-29%	-19%
Chevak / Hooper Bay	249	153	241	347	39%	44%
Emmonak	596	633	623	533	-11%	-14%
Fort Yukon	143	106	134	129	-10%	-4%
Galena	171	292	141	173	1%	23%
Gambell / Savoonga	19	9	5			
Hoonah	342	361	491	395	15%	-20%
Kake	87	171	247	210	141%	-15%
Kiana / Noorvik / Selawik	127	94	94	135	6%	44%
McGrath	42	29	32	38	-10%	19%
Pelican	19	14	12	7		
Point Hope			31	41		32%
Quinhagak						
Sand Point	225	209	135	132	-41%	-2%
Skagway	182	207	156	97	-47%	-38%
St. Marys	362	517	417	411	14%	-1%
St. Paul Island	111	63	183	117	5%	-36%
Tanana		80	78	19		-76%
Unalakleet			81	32		-60%
Whittier	35	75	40	26	-26%	-35%
Yakutat	147	209	201	232	58%	15%
Total	3,200	3,646	3,625	3,324	4%	-8%
1st District	806	1,047	1,137	979	21%	-14%
2nd District	200	129	237	235	18%	-1%
3rd District	371	347	358	275	-26%	-23%
4th District	1,823	2,123	1,893	1,835	1%	-3%

Fiscal Year July 1 - June 30

Traffic / Minor Offense dispositions used as filings

**District Courts - Lower Volume
Composition of Case Filings
FY 98**

Court	Misde- meanor	Other		Civil		Total
		Traffic / Minor Offense @	Children's Matters *	Small Claims	Other Civil	
Ambler / Kobuk / Shungnak	27					27
Angoon	24				14	38
Aniak	138	18			29	185
Chevak / Hooper Bay	260	64			23	347
Emmonak	267	259			7	533
Fort Yukon	76	28	1		24	129
Galena	130	23	13		7	173
Gambell / Savoonga						
Hoonah	158	195			42	395
Kake	178	21			11	210
Kiana / Noorvik / Selawik	132				3	135
McGrath	29	4			5	38
Pelican	1	5			1	7
Point Hope	39				2	41
Quinhagak						
Sand Point	115		2		15	132
Skagway	42	41			14	97
St. Marys	203	167			41	411
St. Paul Island	74	15	17		11	117
Tanana	7	10			2	19
Unalakleet	32					32
Whittier	16	9			1	26
Yakutat	137	71			24	232
Total	2,085	930	33		276	3,324
% of Total	62.7	28.0	1.0		8.3	100.0
1st District	540	333			106	979
2nd District	230				5	235
3rd District	205	24	19		27	275
4th District	1,110	573	14		138	1,835

Fiscal Year July 1 - June 30

@ Traffic / Minor Offense dispositions used as filings.

* Children's Matters not reported in Superior Court.

**District Courts - Lower Volume
Summary of Case Dispositions
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	17	13	22			
Angoon	24	84	34	25	4%	-26%
Aniak	332	284	162	187	-44%	15%
Chevak / Hooper Bay	135	90	156	220	63%	41%
Emmonak	592	626	605	539	-9%	-11%
Fort Yukon	124	72	90	135	9%	50%
Galena	9	7	3			
Gambell / Savoonga	173	299	77	162	-6%	110%
Hoonah	350	350	486	387	11%	-20%
Kake	83	171	237	151	82%	-36%
Kiana / Noorvik / Seiawik	100		75	125	25%	67%
McGrath	35	31	12	46	31%	283%
Pelican	22	14	10	11	-50%	
Point Hope			23			
Quinhagak						
Sand Point	215	218	139	114	-47%	-18%
Skagway	178	203	143	94	-47%	-34%
St. Marys	377	447	196	315	-16%	61%
St. Paul Island	90	76	148	100	11%	-32%
Tanana		31	46	10		
Unalakleet			64	31		-52%
Whittier	34	76	41	19	-44%	-54%
Yakutat	111	227	187	227	105%	21%
Total	3,001	3,319	2,956	2,898	-3%	-2%
1st District	768	1,049	1,097	895	17%	-18%
2nd District	290	312	261	318	10%	22%
3rd District	339	370	328	233	-31%	-29%
4th District	1,604	1,588	1,270	1,452	-9%	14%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Composition of Case Dispositions
FY 98**

Court	Misde- meanor	Other		Civil		Total
		Traffic / Mi- nor Offense	Children's Matters *	Small Claims	Other	
Ambler / Kobuk / Shungnak						
Angoon	21			4		25
Aniak	148	18		21		187
Chevak / Hooper Bay	155	64		1		220
Emmonak	262	259		18		539
Fort Yukon	80	28	1	26		135
Galena						
Gambell / Savoonga	115	23	12	12		162
Hoonah	155	195		37		387
Kake	124	21		6		151
Kiana / Noorvik / Selawik	122			3		125
McGrath	29	4		13		46
Pelican	6	5				11
Point Hope						
Quinhagak						
Sand Point	103		4	7		114
Skagway	39	41		14		94
St. Marys	126	167		22		315
St. Paul Island	65	15	10	10		100
Tanana		10				10
Unalakleet	31					31
Whittier	9	9		1		19
Yakutat	132	71		24		227
Total	1,722	930	27	219		2,898
% of Total	59.4	32.1	0.9	7.6	-	100.0
1st District	477	333		85		895
2nd District	268	23	12	15		318
3rd District	177	24	14	18		233
4th District	800	550	1	101		1,452

Fiscal Year July 1 - June 30

* Children's Matters not reported in Superior Court.

**District Courts - Lower Volume
Non-Traffic Case Filings
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	54	26	26	27	-50%	4%
Angoon	29	79	28	38	31%	36%
Aniak	246	254	198	167	-32%	-16%
Chevak / Hooper Bay	249	153	241	283	14%	17%
Emmonak	345	267	278	274	-21%	-1%
Fort Yukon	81	69	103	101	25%	-2%
Galena	156	177	110	150	-4%	36%
Gambell / Savoonga	19	9	5			
Hoonah	202	169	209	200	-1%	-4%
Kake	84	148	183	189	125%	3%
Kiana / Noorvik / Selawik	127	94	94	135	6%	44%
McGrath	39	26	30	34	-13%	13%
Pelican	19	14	11	2		
Point Hope			31	41		32%
Quinhagak						
Sand Point	166	195	126	132	-20%	5%
Skagway	55	50	48	56	2%	17%
St. Marys	315	439	309	244	-23%	-21%
St. Paul Island	101	63	165	102	1%	-38%
Tanana		58	32	9		
Unalakleet			81	32		-60%
Whittier	35	60	32	17	-51%	-47%
Yakutat	137	135	146	161	18%	10%
Total	2,459	2,485	2,486	2,394	-3%	-4%
1st District	526	595	625	646	23%	3%
2nd District	200	129	237	235	18%	-1%
3rd District	302	318	323	251	-17%	-22%
4th District	1,431	1,443	1,301	1,262	-12%	-3%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Non-Traffic Case Dispositions
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	17	13	22			
Angoon	24	78	32	25	4%	-22%
Aniak	318	225	133	169	-47%	27%
Chevak / Hooper Bay	135	90	156	156	16%	
Emmonak	341	260	260	280	-18%	8%
Fort Yukon	62	35	59	107	73%	81%
Galena	9	7	3			
Gambell / Savoonga	158	184	46	139	-12%	202%
Hoonah	210	158	204	192	-9%	-6%
Kake	80	148	173	130	63%	-25%
Kiana / Noorvik / Selawik	100		75	125	25%	67%
McGrath	32	28	10	42	31%	
Pelican	22	14	9	6		
Point Hope			23			
Quinhagak						
Sand Point	156	204	130	114	-27%	-12%
Skagway	51	46	35	53	4%	51%
St. Marys	330	369	88	148	-55%	68%
St. Paul Island	80	76	130	85	6%	-35%
Tanana		9				
Unalakleet			64	31		-52%
Whittier	34	61	33	10		
Yakutat	101	153	132	156	54%	18%
Total	2,260	2,158	1,817	1,968	-13%	8%
1st District	488	597	585	562	15%	-4%
2nd District	275	197	230	295	7%	28%
3rd District	270	341	293	209	-23%	-29%
4th District	1,227	1,023	709	902	-26%	27%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Misdemeanor Case Filings
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	47	23	24	27	-43%	13%
Angoon	23	71	23	24	4%	4%
Aniak	175	169	168	138	-21%	-18%
Chevak / Hooper Bay	243	126	213	260	7%	22%
Emmonak	315	224	247	267	-15%	8%
Fort Yukon	34	45	67	76	124%	13%
Galena	148	144	91	130	-12%	43%
Gambell / Savoonga	19	9	5			
Hoonah	176	151	179	158	-10%	-12%
Kake	76	139	156	178	134%	14%
Kiana / Noorvik / Selawik	114	93	94	132	16%	40%
McGrath	35	23	19	29	-17%	53%
Pelican	8	10	5	1		
Point Hope			31	39		26%
Quinhagak						
Sand Point	154	168	108	115	-25%	6%
Skagway	46	39	41	42	-9%	2%
St. Marys	289	381	217	203	-30%	-6%
St. Paul Island	84	52	148	74	-12%	-50%
Tanana		38	32	7		
Unalakleet			81	32		-60%
Whittier	35	60	32	16	-54%	-50%
Yakutat	117	93	123	137	17%	11%
Total	2,138	2,058	2,104	2,085	-2%	-1%
1st District	446	503	527	540	21%	2%
2nd District	180	125	235	230	28%	-2%
3rd District	273	280	288	205	-25%	-29%
4th District	1,239	1,150	1,054	1,110	-10%	5%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Misdemeanor Case Dispositions
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	16	12	22			
Angeon	19	66	26	21	11%	-19%
Aniak	174	171	86	148	-15%	72%
Chevak / Hooper Bay	135	72	153	155	15%	1%
Emmonak	303	223	235	262	-14%	11%
Fort Yukon	26	19	37	80	208%	116%
Galena	9	7	3			
Gambell / Savoonga	135	154	36	115	-15%	219%
Hoonah	187	145	178	155	-17%	-13%
Kake	72	139	150	124	72%	-17%
Kiana / Noorvik / Selawik	94		75	122	30%	63%
McGrath	30	24	9	29	-3%	
Pelican	12	10	4	6		
Point Hope			23			
Quinhagak						
Sand Point	140	193	114	103	-31%	-10%
Skagway	46	33	32	39	-15%	22%
St. Marys	266	331	59	126	-53%	114%
St. Paul Island	65	63	116	65		-44%
Tanana		8				
Unalakleet			64	31		-52%
Whittier	33	60	33	9		
Yakutat	88	129	116	132	50%	14%
Total	1,859	1,859	1,571	1,722	-7%	10%
1st District	424	522	506	477	13%	-6%
2nd District	245	166	220	268	9%	22%
3rd District	247	316	263	177	-28%	-33%
4th District	943	855	582	800	-15%	37%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Civil Case Filings
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	7	3	2			
Angoon	6	8	5	14		
Aniak	71	85	30	29	-59%	-3%
Chevak / Hooper Bay	6	27	28	23		-18%
Emmonak	30	43	31	7		
Fort Yukon	46	24	33	24	-48%	-27%
Galena	8	33	19	7		
Gambell / Savoonga						
Hoonah	26	18	30	42	62%	40%
Kake	8	9	27	11		-59%
Kiana / Noorvik / Selawik	13	1		3		
McGrath	4	3	11	5		
Pelican	11	4	6	1		
Point Hope				2		
Quinhagak						
Sand Point	11	16	15	15	36%	
Skagway	9	11	6	14		
St. Marys	26	58	92	41	58%	-55%
St. Paul Island	13	7	16	11	-15%	-31%
Tanana		20		2		
Unalakleet						
Whittier				1		
Yakutat	19	37	23	24	26%	4%
Total	314	407	374	276	-12%	-26%
1st District	79	87	97	106	34%	9%
2nd District	20	4	2	5		
3rd District	24	23	31	27	13%	-13%
4th District	191	293	244	138	-28%	-43%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Civil Case Dispositions
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak	1	1				
Angeon	5	12	6	4		
Aniak	144	54	47	21	-85%	-55%
Chevak / Hooper Bay		18	3	1		
Emmonak	38	37	25	18	-53%	-28%
Fort Yukon	36	16	22	26	-28%	18%
Galena						
Gambell / Savoonga	23	30	10	12	-48%	
Hoonah	23	13	26	37	61%	42%
Kake	8	9	23	6		
Kiana / Noorvik / Selawik	6			3		
McGrath	2	4	1	13		
Pelican	10	4	5			
Point Hope						
Quinhagak						
Sand Point	7	9	14	7		
Skagway	5	13	3	14		
St. Marys	64	38	29	22	-66%	-24%
St. Paul Island	8	5	14	10		
Tanana		1				
Unalakleet						
Whittier	1	1		1		
Yakutat	13	21	16	24	85%	50%
Total	394	286	244	219	-44%	-10%
1st District	64	72	79	85	33%	8%
2nd District	30	31	10	15	-50%	
3rd District	16	15	28	18	13%	-36%
4th District	284	168	127	101	-64%	-20%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Traffic / Minor Offense Case Dispositions
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak						
Angoon		6	2			
Aniak	14	59	29	18	29%	-38%
Chevak / Hooper Bay				64		
Emmonak	251	366	345	259	3%	-25%
Fort Yukon	62	37	31	28	-55%	-10%
Galena						
Gambell / Savoonga	15	115	31	23	53%	-26%
Hoonah	140	192	282	195	39%	-31%
Kake	3	23	64	21		-67%
Kiana / Noorvik / Selawik						
McGrath	3	3	2	4		
Pelican			1	5		
Point Hope						
Quinhagak						
Sand Point	59	14	9			
Skagway	127	157	108	41	-68%	-62%
St. Marys	47	78	108	167	255%	55%
St. Paul Island	10		18	15		-17%
Tanana		22	46	10		
Unalakleet						
Whittier		15	8	9		
Yakutat	10	74	55	71		29%
Total	741	1,161	1,139	930	26%	-18%
1st District	280	452	512	333	19%	-35%
2nd District	15	115	31	23	53%	-26%
3rd District	69	29	35	24	-65%	-31%
4th District	377	565	561	550	46%	-2%

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Children's Matters Filings
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak						
Angoon						
Aniak						
Chevak / Hooper Bay						
Emmonak						
Fort Yukon	1		3	1		
Galena				13		
Gambell / Savoonga						
Hoonah						
Kake						
Kiana / Noorvik / Selawik						
McGrath						
Pelican						
Point Hope						
Quinhagak						
Sand Point	1	11	3	2		
Skagway			1			
St. Marys						
St. Paul Island	4	4	1	17		
Tanana						
Unalakleet						
Whittier						
Yakutat	1	5				
Total	7	20	8	33		
1st District	1	5	1			
2nd District						
3rd District	5	15	4	19		
4th District	1		3	14		

Fiscal Year July 1 - June 30

**District Courts - Lower Volume
Children's Matters Dispositions
FY 95 - FY 98**

Court	FY 95	FY 96	FY 97	FY 98	Change	
					FY 95 to FY 98	FY 97 to FY 98
Ambler / Kobuk / Shungnak						
Angoon						
Aniak						
Chevak / Hooper Bay						
Emmonak						
Fort Yukon				1		
Galena						
Gambell / Savoonga				12		
Hoonah						
Kake						
Kiana / Noorvik / Selawik						
McGrath						
Pelican						
Point Hope						
Quinhagak						
Sand Point		2	2	4		
Skagway						
St. Marys						
St. Paul Island	7	8		10		
Tanana						
Unalakleet						
Whittier						
Yakutat		3				
Total	7	13	2	27		
1st District		3				
2nd District				12		
3rd District	7	10	2	14		
4th District				1		

Fiscal Year July 1 - June 30

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Alaska Court System
Office of the Administrative Director
303 K Street
Anchorage, Alaska 99501

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

December 1997

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Appendix B: Definitions: Arbitration, Early Neutral Evaluation, and Mediation

Appendix C: Revisions to Civil Rules 100, 26 and 16

Appendix D: Early Neutral Evaluation Pilot Project

Appendix E: Judicial Council FY99 ADR

Appendix F: Model Standards of Conduct for Mediators

Alternative Dispute Resolution in the Alaska Court System

Introduction and Structure of Report

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

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

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

Part 1:

Survey of Programs in Other Jurisdictions

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

I. Definitions & Summary of Research Findings

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

A. Arbitration

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

Federal arbitration programs typically include minor civil cases seeking no more than a specified upper dollar limit. Although the trend over time has been to increase the dollar limits, arbitration-eligible cases in the federal courts typically range from

\$75,000 - \$150,000 in damages. In the state courts, arbitration-eligible cases typically have lower ceilings, usually around \$50,000 (although Hawaii's arbitration program has a \$150,000 ceiling). Most arbitration programs focus on routine contract, personal injury and property damage cases.

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

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

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

¹ *An Alternative View*, *supra* note 36, at 406.

² *Id.* at 406-07.

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

⁴ *An Alternative View*, *supra* note 36, at 408.

⁵ *Id.*

⁶ *Id.* at 415.

B. Early Neutral Evaluation

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

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

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

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

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

C. Mediation

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

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

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

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

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

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

A limited amount of research has addressed non-family civil mediation's effects on pace, litigation costs, court workload, trial rates, settlement rates and participant satisfaction.¹⁴ Studies on litigation pace are mixed but suggest that many mediation programs cause cases to be resolved faster than traditional adjudication. For example, two studies of state court programs showed that mediation cases were resolved more quickly than adjudicated cases, while another state court study found that cases referred to mediation had longer disposition times than cases that were adjudicated.¹⁵ The recent RAND study of four federal court mediation programs¹⁶ found significantly

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

¹² *Id.* at 64.

¹³ *Id.* at 71.

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

¹⁵ *Id.* at 7-8.

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

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

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

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

sample of cases studied." *Id.* at xxxiv.

¹⁷ *Id.* at 34-35.

¹⁸ *Id.* at 47, Table 4.21.

¹⁹ NATIONAL ADR RESEARCH SYMPOSIUM, *supra* note 19, at 8.

²⁰ *Id.* at 8.

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

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

attorney work hours found "no strong statistical evidence that lawyer work hours are significantly affected by ADR, either up or down...."²³

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

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

II. ADR in State Courts

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

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

²⁴ *Id.* at 49.

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

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

²⁷ RAND, *supra* note 21, at 51.

²⁸ *Id.*

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

A. Program Models in the State Courts

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

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

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

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

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

³¹ *Court-Connected ADR*, *supra* note 2, at 5.

with the process, decreasing relitigation, improving the relationship between the disputing parties, or responding to political or legislative directives.³² The most successful ADR programs are adopted in response to a specific need or goal. Carefully designed programs have proven effective at meeting these and other goals; however, poorly designed programs have proven less effective.

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

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

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

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

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

³⁵ *Court-Connected ADR*, *supra* note 2, at 6.

"certification fees." Some of the most effective programs rely on a combination of funding sources, along with reliance on volunteers.³⁶

B. ADR Programs In Other States

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

1. Mediation

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

³⁶ *Id.*

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

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

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

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

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

2. Arbitration

During the 1980s, the largest growth in ADR programs was in the creation of court-connected arbitration programs. As of 1990, twenty states (including the District

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

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

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

⁴³ *Id.* at 11.

of Columbia) had implemented mandatory, non-binding, court-ordered arbitration programs either statewide or in major metropolitan trial courts.⁴⁴ While a few programs applied to all civil damage suits, most had either an upper dollar limit, a substantive limitation or both.⁴⁵

3. Early Neutral Evaluation

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

C. Referring Cases to ADR

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

1. Voluntary Referrals

Relying completely on voluntary referrals is problematic, because purely voluntary programs typically are underused.⁴⁶ Researchers have cited a number of possible reasons for this fact, including the observation that attorneys often are reluctant to request ADR because the opponent may see it as a sign of weakness. Yet ADR research consistently has shown that the vast majority of lawyers and litigants surveyed approved of the court ADR programs that they participated in, found them helpful and wanted them continued.⁴⁷ Because lawyer enthusiasm for the ADR

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

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

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

⁴⁷ *Id.* at 51.

experience typically does not translate into voluntary use, many courts with ADR programs have developed procedures for actively encouraging parties voluntarily to choose ADR.⁴⁸

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

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

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

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

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

⁵⁰ See *id.* at 12(b)(7).

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

2. Mandatory Referrals

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

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

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

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

⁵² *Court-Connected ADR*, *supra* note 2, at 37.

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

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

One example of a longstanding arbitration program is Washington state's popular court-connected arbitration program. In effect since 1980, the program provides non-binding⁵⁵ arbitration for civil, non-domestic cases valued at \$35,000 or less per claim.

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

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

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

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

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

D. Qualifications and Ethics of Neutrals

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

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

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

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

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

An issue closely related to minimum qualifications concerns ethical standards of practice. Some states (Hawaii, Georgia and Florida among them) and national dispute resolution organizations (The Academy of Family Mediators, The Society of Professionals in Dispute Resolution, and the American Bar Association) have adopted

independent codes of professional conduct for mediators or for neutrals in general.⁶⁶ In 1995, the American Arbitration Association, SPIDR and the ABA Section on Dispute resolution adopted a joint code of professional conduct. In 1992, the Florida Supreme Court adopted a grievance procedure to accompany its code of conduct.⁶⁷ In 1995, the Center for Public Resources Institute for Dispute Resolution and Georgetown University Law Center established a comprehensive, multi-year project to encourage sound ADR ethics practices and rule-making.⁶⁸

1. Mediator Qualifications

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

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

⁶⁶ Press, *Getting to Excellence in Court System ADR*, *supra* note 12, at 8.

⁶⁷ *Id.*

⁶⁸ Plapinger, *CPR and Georgetown Collaborate on Ethics and Standards*, NIDR NEWS, Vol. 3, No. 2, at 6 (1996).

Commission on Continuing Legal Education. "Professional experience with families" includes counseling, casework, legal representation in family law matters or equivalent experience satisfactory to the court.

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

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

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

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

2. Arbitrator Qualifications

Most courts require arbitrators to be attorneys, although some courts permit non-lawyer arbitrators to serve at the parties' request. Attorney-arbitrators typically must be admitted to practice to the bar of the jurisdiction with five to fifteen years of experience as a practicing attorney, and certification from the court that the attorney is eligible to serve. Arizona requires arbitration applicants to identify three areas of legal expertise and limits their arbitration referrals to those areas. Classroom training for arbitrators is not widely required, although Florida and Georgia have required some classroom training (four to six hours).

3. Early Neutral Evaluator Qualifications

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

E. Funding

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

1. Program Funding

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

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

⁵⁹ *Court-Connected ADR*, *supra* note 2, at 8.

New Jersey is an example of a state court ADR program funded by statutory appropriations. The Denver metropolitan courts have funded individual ADR programs out of their own operating funds. In California, the Los Angeles Bar Association and the Superior and Municipal Courts of Los Angeles County jointly sponsored dispute resolution services. Oklahoma, Oregon and Texas courts have funded court ADR programs by adding surcharges to general civil filing fees. The Middlesex County, Massachusetts Superior Court has imposed a \$50 administrative fee on ADR participants in the multi-door courthouse. Florida charges participating neutrals "certification fees" which help fund ADR services.

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

2. Compensation of Neutrals

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

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

⁶⁰ PLAPINGER & SHAW, *supra* note 5, at 49.

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

III. ADR in Federal Courts

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

A. ADR in Alaska's Local District Court

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

Recently, the federal court adopted a local rule on mediation. It is modeled after the state court's Civil Rule 100.⁶²

B. Program Models in Other Federal Courts

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

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

⁶² See D.Ak.L.R. 52.2 (Mediation).

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

Under the CJRA, Congress specifically designated three courts (the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia) as "demonstration districts."⁶⁴ Congress instructed these courts to experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution. Under another provision of the CJRA, ten other districts were selected by the Judicial Conference to serve as pilot courts for implementation of six case management principles considered promising by Congress, among them alternative dispute resolution.

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

C. Types of ADR Offered in Federal Courts

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

1. Mediation

By 1995, mediation had become the primary ADR process offered in the federal district courts, followed by arbitration. Forty-nine of the federal districts had established mediation programs by 1995.⁶⁶

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

⁶⁵ FEDERAL SOURCEBOOK, *supra* note 59, at 12.

⁶⁶ *Id.* at Table 3.

2. Arbitration

Twenty-two federal district courts had arbitration programs in 1995.⁶⁷ Those included eighteen courts in which arbitration was statutorily authorized,⁶⁸ and two others that offered arbitration as the second step of a combined mediation/arbitration procedure. Several other courts authorized use of arbitration but had not established court-annexed procedures.

3. Early Neutral Evaluation

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

4. Multi-Door

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

⁶⁷ *Id.* at Table 4.

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

⁶⁹ *Id.* at Table 5.

⁷⁰ *Id.* at 5.

⁷¹ See Section I(B) for details.

⁷² FEDERAL SOURCEBOOK, *supra* note 59, at 5.

The Northern District of California's multi-option ADR program is a demonstration program. California Northern offers attorneys their choice of ADR processes. Under that program, litigants in certain civil cases are presumptively required to participate in one non-binding ADR process offered by the court. Litigants may substitute a similar process offered by a private provider if they wish. If the parties cannot agree on an ADR procedure before the case management conference, the judge discusses the ADR options at that conference. The parties may seek by motion or at the case management conference to persuade the judge that ADR would be inappropriate.⁷³

D. Referring Cases to ADR

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

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

1. Mediation

Referrals to mediation programs seldom are made mandatorily and automatically by case type. Instead, most programs require the judge, often in consultation with counsel, to identify cases appropriate for ADR. In this way, judges

⁷³ *Id.* at 91-92.

educate attorneys and clients about ADR.⁷⁴ In some courts, mediation sessions are held shortly after the answer is filed. Across all courts, discovery planning often is linked to mediation, and mediation often occurs well before discovery is complete.⁷⁵

2. Arbitration

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

3. Early Neutral Evaluation

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

E. Qualifications and Ethics of Neutrals

Almost every district has created its own rosters of neutrals, rather than turning to outside organizations for ADR services.⁷⁷ Most courts set eligibility criteria for listing on the court roster. A significant number of courts include on the roster anyone

⁷⁴ *Id.* at 7.

⁷⁵ *Id.* at 8-9.

⁷⁶ *Id.*

⁷⁷ *Id.* at 9.

certified as an ADR neutral by a bar association or state court system.⁷⁸ Most federal courts require neutrals to be attorneys, although some permit non-lawyers to serve at the parties' request.⁷⁹

Courts take a number of different approaches to training the neutrals on their rosters. Some give no training, some accept as sufficient training from other court systems or organizations, and some courts conduct the training themselves.⁸⁰ A few federal courts have developed ethical guidelines or standards of practice for the neutrals on their rosters.

1. Mediator Qualifications

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

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

2. Arbitrator Qualifications

Like the state courts, most federal courts require arbitrators to be attorneys, although some permit non-attorneys to serve at the parties' request. Attorney-arbitrators typically must be admitted to practice to the bar of the jurisdiction with five to fifteen years of experience as a practicing attorney, and certification from the court

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

that the attorney is eligible to serve. Classroom training for arbitrators is not widely required, although some courts also require a recommendation from a judge or committee stating that the candidate is competent to perform the duties of an arbitrator.⁸¹ The Northern District of California requires that attorney-arbitrators spend at least 50% of their professional time in litigation, or have substantial neutral or negotiating experience.

3. Early Neutral Evaluator Qualifications

Some federal courts use judges or magistrate judges to provide ENE services; however, most districts rely on nonjudicial neutrals. They generally seek lawyers who are experts in the substantive areas targeted for the ENE programs. The earlier programs seldom had other formal eligibility requirements, although some of the newer programs are more specific about years of practice. One federal court (the Eastern District of New York) required in addition "maturity and strong interpersonal skills." The Western District of Missouri established a sixteen-hour training requirement.

F. Funding

1. Program Funding

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

⁸¹ See e.g., District of New Jersey Rule 47.2.

⁸² PLAPINGER & SHAW, *supra* note 5, at 44.

⁸³ *Id.* at 44-45.

⁸⁴ *Id.* at 45.

2. Compensation of Neutrals

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

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

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

⁸⁵ FEDERAL SOURCEBOOK, *supra* note 59, at 10.

⁸⁶ *Id.*

⁸⁷ *Id.* at 11.

⁸⁸ *Id.*

⁸⁹ *See id.* at Table 3.

⁹⁰ *See id.*

Part 2:

ADR Program Proposals Recommended by the Alaska Judicial Council and the Alaska Supreme Court

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

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

I. Background Information

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

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

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

Before the standing mediation committee was established, the Alaska Supreme Court established a Mediation Task Force in response to legislative intent language included in the Alaska Court System's fiscal year 1989 budget appropriation document. The Alaska Supreme Court asked the task force to explore the "uses, availability and limits of mediation" and to issue a report. The report, completed in 1990, summarized the history of mediation in Alaska and made ten recommendations to the supreme court.⁹¹

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

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

The court system has provided judges with information on mediation at a judicial conference and in written materials describing Civil Rule 100. In addition, the

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

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

⁹³ Twenty-eight of the 50 judges responded.

Alternative Dispute Resolution Section of the Alaska Bar Association offers a continuing legal education program on ADR once a year.

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

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

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

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

chooses government publications which are outstanding for their content and presentation.

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

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

The Judicial Council and faculty from the University of Alaska at Anchorage (Justice Center and School of Social Work) helped design the program and are evaluating its effectiveness, including whether the program is meeting its internal goals and what effect the program has on juvenile offender recidivism. VOMP's internal goals relate to the needs of victims and offenders, juvenile justice system workers and the community as a whole. The goals include: increasing offenders' feelings of accountability; providing an additional referral option for Intake and other juvenile justice workers; providing an opportunity for conciliation (or reconciliation)

between victim and offender; creating and maintaining positive community investment in the problem of (and the solutions to) juvenile crime; providing an opportunity to create and implement a restitution agreement; providing an opportunity for "healing" or closure around the criminal incident for both the victim and the offender; and empowering the victim to exert some control over the process. In 1996, VOMP collected more than \$13,000 in restitution for victims that participated in its program.

B. Ongoing Alaska Court System Projects

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

1. Appellate Case Settlement Program

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

2. Mediation of Child In Need of Aid Cases

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

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

3. Child Custody Mediation Pilot Projects

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

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

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

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

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

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

successful in Anchorage and funds are available, the ACS may extend it to other court locations.

The Fairbanks court also is exploring how to make better use of mediation in child custody disputes. The Fairbanks custody investigators educate divorcing parents about mediation during a mandatory parent education program, and they discuss mediation with parents at their intake interview. Custody investigators recommend mediation referrals in cases in which the parents seem willing and able to settle their custody dispute in mediation. These practices are designed to encourage parents to resolve their custody disputes without an investigation. However, not all parents who are open to using mediation receive referrals, because of disincentives such as the cost of private mediation, and the fact that some judges do not follow through in ordering the recommended mediation. Thus, the Fairbanks court currently is considering ways to make mediation referrals more systematic. The supreme court currently is studying the use of custody investigators and whether their role should be expanded or changed to include mediation.

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

C. The Process for Developing Further Recommendations

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

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

In July, the Alaska Bar Association generously hosted a luncheon for all the heads of substantive sections, heads of local bar associations, and representatives from plaintiff and defense trial lawyers' associations. At the luncheon, AJC staff gave a brief overview of the legislation and explained some of the most important considerations in designing a court-connected ADR program. Attendees then gave suggestions about what program design might be most useful from the Bar's perspective.

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

D. Objectives of these Proposals

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

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

The Alaska Court System's program criteria focus mainly on resource issues. From the administrators' point of view, an ADR program should not require significant additional funding, should not require significant personnel resources to administer, should be narrowly drawn, should be a pilot project of limited duration, and the pilot project should contain an evaluation component. In addition, the court system lacks

adequate financial and personnel resources to immediately implement a large, multi-faceted program. Finally, the ACS and the AJC do not believe that the ACS should license or certify mediators or other neutrals.

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

Goals mentioned by individual judicial officers included resolving divorce custody cases in a less adversarial forum, relieving court burdens by diverting cases from the trial track, and moving settlements earlier in the pretrial period to avoid calendaring unnecessary trials. Judicial officers also expressed interest in training to improve their own settlement skills.

Evaluations of programs in other jurisdictions suggest that realistic goals for well-designed ADR programs can include: increasing the parties' satisfaction with the process used to resolve their dispute, saving the parties money in the form of decreased attorneys' fees, and reducing judicial workloads.⁸⁶ Goals that might reasonably be achieved in Alaska include increasing litigant satisfaction, decreasing trial court workload (specifically bench time), and increasing efficiency by helping judges calendar only those cases most likely to go to trial, thus freeing the judges' calendars of cases likely to settle before trial.

⁸⁶ For example, an evaluation of the Western District of Oklahoma's voluntary mediation program showed that cases referred to mediation were more likely to terminate in dismissals than were similar cases that were not referred to mediation. Oklahoma cases not referred to mediation were more likely to receive a pretrial judgment or trial verdict (non-referred cases had almost twice as many trials). RAND, *supra* note 21, at 134-35. Also, cases not referred to mediation had more discovery motions. *Id.* In the Southern District of New York's mandatory mediation program, comparison group cases were nearly four times as likely to go to trial and more likely to have a dispositive motion made than were those in the ADR sample. *Id.* at 67. Rand's review of other mediation programs revealed varying settlement rates, impact on litigant costs, and disposition times. See discussion at pages 6-8, *supra*, for details.

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

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

A. Overview of the Proposals

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

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

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

B. Steps to Encourage More Voluntary Use of ADR

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

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

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

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

1. Amendments to Civil Rules and Court Forms

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

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

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

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

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

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

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

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

2. Educational Programs

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

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

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

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

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

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

C. Pilot Projects

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

1. Probate mediation

The probate section of the Alaska Bar Association has agreed to develop a court-connected probate and guardianship mediation pilot program. Section leaders are working with the court system's probate masters and the Probate Rules Committee on

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

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

2. Early neutral evaluation pilot project

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

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

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

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

D. Evaluation

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

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

E. Program Funding

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

III. Qualifications of Neutrals

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

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

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

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

A. Task Force to establish minimum qualifications for neutrals

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

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

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

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

the entity's training requirements and its criteria to achieve and maintain membership in good standing, among other things.¹⁰² Second, training alone may in some instances minimally qualify neutrals, depending on the quality and length of the training.¹⁰³ Finally, experience alone may minimally qualify mediators or arbitrators, depending on certain factors enumerated in the report.¹⁰⁴

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

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

B. Ethical Standards for Neutrals

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

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

¹⁰³ *Id.* at 5-6.

¹⁰⁴ *See id.* at 6-8.

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

copy of the ethical standards that the neutral has adopted and a statement of the neutral's philosophy and approach.

C. Mediator Qualifications

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

D. Early Neutral Evaluator Qualifications

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

E. Arbitrators

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

¹⁰⁶ If the task force wishes to consider qualifications for court-connected arbitrators, it might consider looking to certification from another body such as the American Arbitration Association or from another state or federal court. The emphasis for arbitrators should be on area of expertise. Some disputes might lend themselves to lawyer-arbitrators, while others might require expertise possessed

IV. Summary of Recommendations to the Legislature

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

In summary, the court system will request funding to:

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

The Judicial Council will request funding to:

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

Conclusion

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

by a non-lawyer. The parties should not be overly limited in their ability to select the arbitrator.

Appendix A

ADR Legislation

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

Appendix B

**Definitions: Arbitration
Early Neutral Evaluation
Mediation**

1. MEDIATION

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

1.01 DEFINITION

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

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

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

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

1.02 THE PROCESS

A typical mediation progresses through the following stages:

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

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

1.03 THE NEUTRALS

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

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

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

1.04 CLIENT ROLES

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

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

1.05 SELECTING CASES FOR MEDIATION

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

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

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

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

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

Often excluded from eligibility for mediation are:

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

1.06 TIMING OF MEDIATION USE

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

1.07 BENEFITS AND CONCERNS

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

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

Concerns voiced about court-based mediation programs include:

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

2. ARBITRATION

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

2.01 DEFINITION

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

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

2.02 THE PROCESS

Court-annexed arbitration programs generally work as follows:

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

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

2.03 SELECTING CASES FOR ARBITRATION

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

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

2.04 RESEARCH RESULTS

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

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

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

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

2.05 BENEFITS AND CONCERNS

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

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

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

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

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

Some concerns raised about court-annexed arbitration include:

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

3. EARLY NEUTRAL EVALUATION

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

3.01 DEFINITION

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

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

ENE is designed to enhance pretrial practice by:

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

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

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

3.02 THE PROCESS

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

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

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

3.03 SELECTING CASES FOR ENE

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

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

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

3.04 RESEARCH RESULTS

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

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

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