

California Dispute Resolution Institute
(A program of the Leo T. McCarthy Center, USF)
California Dispute Resolution Council
USF School of Law and Law Review

present

The 10th Annual ADR Policy Conference

**ADR in an Adversarial World:
Challenges and Opportunities**

November 14, 2003
University of San Francisco

Hon. Jeremy Fogel, U.S. District Judge
Keynote Speaker

including a national symposium on

- **Resolving Consumer and Employment Disputes:
An Assessment of Mandatory Pre-Dispute Arbitration Clauses**

and panel discussions on

- **The Future of Community Mediation Programs**
- **Mediation Confidentiality and Recent Cases**
- **The Latest Research on ADR Use in Corporations and Public Agencies**

also a report from Sacramento by

Donne Brownsey, CDRC's Lobbyist in Sacramento

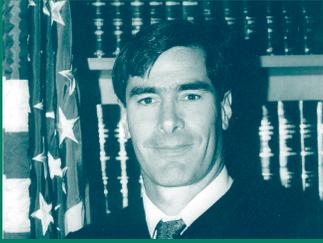
and a presentation about ADR use in state government by

Kathleen Hamilton, Director of the California Department of Consumer Affairs

PLENARY SESSIONS

KEYNOTE

Hon. Jeremy Fogel, Judge, U.S.D.J.,
Northern District of California
“*ADR in an Adversary System: Challenges and Opportunities*”



Judge Fogel has been a United States District Judge since 1998 and has had extensive experience with ADR. He was a supporter of innovative ADR and other programs in Santa Clara County to improve the administration of justice, where he served as a superior court and municipal court judge for 17 years before joining the federal bench. During the past year, he rendered an important decision involving arbitration and federal preemption, *Mayo v. Dean Witter Reynolds, Inc.* Judge Fogel has been a faculty member of the Federal Judicial Center conducting mediation workshops for federal judges and magistrate judges. Earlier in his career, he served as Executive Director of the Santa Clara County Bar Association Law Foundation in San Jose. Judge Fogel graduated from Harvard Law School (cum laude) and holds an A.B. from Stanford University with great distinction.

Donne Brownsey,

Lobbyist for the California Dispute Resolution Council
“*Capitol Report: ADR Actions by the Legislature and Governor’s Office*”

Donne will explain how ADR issues have fared given the heated political atmosphere in the state right now. She will present the highlights of this past legislative session relating to ADR and will describe future issues, offering insights about where CDRC should focus its energies to promote more accessible, effective dispute resolution services statewide.

Kathleen Hamilton

Director, Department of Consumer Affairs
“*ADR in State Government: Surviving Challenging Times*”

Kathleen Hamilton, Director of the California Department of Consumer Affairs, has logged more than 25 years of distinguished public service. She worked in local and county consumer affairs offices and co-founded the statewide California Consumer Affairs Association. She was the force behind the passage of California’s landmark “lemon law”, its “comparable worth” law, and its furniture flammability standards. She has served as the Senior Consultant to the first consumer protection legislative committee, and has successfully wrought numerous regulatory reforms in the many licensing boards and bureaus within the Department of Consumer Affairs. She has been a staunch supporter of ADR mechanisms within and outside the Department, and established the nation’s first “Office of Privacy Protection.”



The 10th Annual ADR Conference

ADR in an Adversarial World: Challenges and Opportunities

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CONFERENCE SCHEDULE



8:30 am	Registration		
9:00 am	Welcome – Michelle Katz (CDRC President), Robert Barrett (CDRI Director), and Richard Spohn (McCarthy Center Director)		
9:15 am	Keynote: “ADR in an Adversary System: Challenges and Opportunities” Hon. Jeremy Fogel , U.S.D.J., Northern District of California		
	“Capitol Report: ADR Actions by the Legislature and Governor’s Office” Donne Brownsey , Lobbyist for the California Dispute Resolution Council		
	“ADR Use in State Government: Surviving Challenging Times” Kathleen Hamilton , Director of the California Department of Consumer Affairs		
10:45	Break		
11:00 am	Session One		
	Track 1: Arbitration Symposium	Track 2: Mediation	
	<i>Symposium on Resolving Consumer Disputes: Policy Issues</i>	<i>Community-Based ADR Programs: What Does the Future Hold?</i>	<i>ADR in the work place What Recent Research Reveals?</i>
12:15 pm	Break		
12:30 pm	Lunch • Michelle Katz , President of the California Dispute Resolution Council, will present the Robert C. Barrett Award and will talk about CDRC’s past and future activities. • Thomas Reese , President-elect of the CDRC will talk about plans for 2004.		
1:45 pm	Break		
2:00 pm	Session Two		
	Track 1: Arbitration Symposium	Track 2: Mediation	Track 3: System Design
	<i>Continuation of the Symposium: Resolving Consumer Disputes</i>	<i>Mediation Confidentiality: Status and Policy Choices</i>	<i>An ADR Initiative in a Public Agency: The Bureau of Reclamation</i>
3:30 pm	Break		
3:45 pm	Session Three		
	Track 1: Arbitration Symposium	Track 2: Mediation	Track 3: System Design
	<i>Continuation of the Symposium: Resolving Consumer Disputes Panel Discussion</i>	<i>Continuation of the Mediation Confidentiality Panel: Status and Policy Choices</i>	<i>Corporate Use of ADR: Improving Outcomes and Managing Costs of Conflict</i>
5:30 pm	Reception		
6:30 pm	Close		

Resolving Consumer and Employment Disputes: An Assessment of Mandatory Pre-Dispute Arbitration Clauses

Moderated by Professors Joshua Davis and Jay Folberg, USF Law School & Co-sponsored by the USF Law Review: Priya Sreenivasan, Symposium Editor; Molly Brizgys, Editor-in-Chief

Mandatory pre-dispute arbitration clauses have become a common feature in the legal landscape. They involve an agreement in advance between potential disputants to resolve any legal controversies through arbitration, rather than trial. Disputes that are frequently subject to these clauses include those between employers and employees, purchasers of consumer goods and services and the manufacturers or providers of such services, including banks, mortgage lenders, broker/dealers, health care providers, and credit card companies.

Proponents of mandatory pre-dispute arbitration see it as a practical and cost-effective means to adjudicate small and medium-sized claims. After all, while Americans are accustomed to the idea that they can seek redress for violations of their legal rights, however small their damages, many individuals have confronted practical barriers to obtaining effective redress of their complaints. The cost of legal services tends to render professional assistance in many matters impractical. At the same time, proponents note, many companies providing goods and services to consumers have become fearful of extended litigation, excessive verdicts (particularly in class actions), and unfavorable court precedents and have resorted to devising private, contract-based alternative dispute resolution

vehicles, such as mandatory pre-dispute provisions, to submit all claims to arbitration.

Critics of mandatory pre-dispute arbitration see it as a way for large corporations to prevent individuals, particularly consumers and employees, from pursuing their legal rights in court. These critics claim that the clauses are usually found in adhesion contracts, which individuals are in no position to revise or reject. The critics also question whether arbitration actually provides many individuals with small or medium-sized claims any more meaningful opportunity for recovery than trial.

Thus far, the numerous public and private efforts to address the problem have spawned debate, litigation (including a series of Supreme Court cases), and very little consensus on what constitutes fair and effective process. This Symposium is an effort to assess the myriad issues to which mandatory pre-dispute arbitration gives rise. Are the proponents right, are the critics right, or does the truth lie somewhere in between? Are there identifiable circumstances in which arbitration clauses should be enforced and identifiable circumstances when they should not be? Where would additional information be helpful to designing better public policy in this area?

Session 1: Setting the Stage

Professors Josh Davis & Jay Folberg will moderate a panel discussion of these policy issues with a distinguished group of experts and practitioners, all with extensive arbitration experience:

- Thomas J. Stipanowich, President and CEO of the CPR Institute, is the author of numerous books and articles on arbitration, including the often-cited 5-volume *Federal Arbitration Law: Agreements, Awards & Remedies (1994)*
- William J. Cahill, Retired Superior Court Judge now affiliated with JAMS, has been involved in a wide range of disputes, including cases involving class actions, business matters, employment, real estate, toxic tort, and insurance coverage issues.
- James C. Sturdevant, Founder and Principal of the Sturdevant Law Firm, San Francisco, has specialized in complex and class action litigation for plaintiffs in business matters and consumer protection.
- Richard C. Reuben, Associate Professor of Law at the University of Missouri-Columbia School of Law, is the author of numerous papers and articles on arbitration and mediation.

Session 2 & 3

A panel of academics and practitioners will discuss:

- The effect of the right to jury trial on pre-dispute mandatory arbitration clauses: When should that right preclude enforcement of an arbitration clause?

- The preclusive effect of arbitration on the parties' right to pursue relief in court: May parties seek relief in court that they were unable to pursue in arbitration of the same claim?
- The latest empirical data on arbitration in consumer cases. Do pre-dispute arbitration clauses alter the only meaningful opportunity for people with small claims to receive compensation? Is arbitration second class justice? How do employment arbitration results compare with litigation?
- Recent legislative efforts in California to regulate the practice of consumer arbitration. What have been the most common approaches to regulation and will there be unintended consequences?

Panelists

Jean Sternlight
Professor of Law, Boyd School of Law
University of Nevada, Las Vegas

David Schwartz
Assistant Professor of Law
University of Wisconsin Law School

Lewis Maltby
President
National Workrights Institute, New York

Ruth Glick,
Adjunct Assistant Professor of Arbitration Law
University of California, Hastings College of the Law, San Francisco
Immediate Past President and Board Member of the California
Dispute Resolution Council

Session 1 - Community-Based ADR Programs: What Does the Future Hold?

Since 1986 when the Dispute Resolution Programs Act was passed, California has had an expanding group of local community-based groups in some thirty counties providing a wide range of mediation and other dispute resolution services to citizens, generally free of charge. Dedicated trained volunteers typically provide the dispute resolution services, including developing cases, sitting as mediators and conciliators, training, facilitating large-group problem-solving meetings, and providing useful counseling services.

With the state's current budget crises, the future for these centers is uncertain. This panel will address such issues as:

- How extensive and important are the dispute resolution services provided to communities? Are communities getting their moneys' worth?
- How much support do community centers have within their communities and how might such support be strengthened?
- How well do the community centers work with the courts and how could these relationships be improved?
- How will the state budget problems affect community centers?
- Can community mediation programs be strengthened, and if so, how?

Panelists:

- Moderator: Sheila Purcell, ADR Director, Multi-Option ADR Project, San Mateo County Superior Court
- Albert Balingit, DRPA Coordinator, California State Department of Consumer Affairs
- Charles Regal, Director of ADR Services, Community Board Program, San Francisco
- Cynthia Spears, Program Administrator, Placer Dispute Resolution Service

Sessions 2 and 3 -- Mediation Confidentiality:

What's the Status in the Light of Recent Court Cases? What About the Uniform Mediation Act? What New Policy Choices, if Any, Should California Consider in this Area?

In July 2001 the California Supreme Court's *Foxgate* opinion strongly supported protection for confidentiality, as set forth in sections 1115-1128 of the California Evidence Code. Nevertheless, two cases decided since July 2001--*Rojas* and *Eisendath*--have raised questions whether confidentiality is becoming less secure and the statute's protection less clear.

A panel of highly experienced practitioners and one of the reporters for the committee that developed the UMA will discuss the California confidentiality statute, the recent cases, and the kinds of issues that have been arising, such as:

- How does confidentiality apply in hybrid or sequential processes in which a mediator may also be appointed as a special master, referee, or neutral evaluator?
- How can the inherent tension between full and informal discussion in a mediation on the one hand and assuring access to all available evidence in an adversarial proceeding on the other hand best be managed?
- What role, if any, should the mediator play in counseling participants on confidentiality?
- Is confidentiality to be considered a privilege subject to exceptions like other privileges, or is it absolute?
- And how does the existence of the Uniform Mediation Act--although not adopted nor introduced in California--affect how these questions are addressed in California since UMA provisions continue to be discussed in legal and ADR circles around the country?

Moderator:

Michael P. Carbone, Mediator
San Francisco

Robert C. Risbrough, Attorney at Law
Watten, Disco, Bassett & McMains
Santa Ana

Robert S. Span, Attorney at Law
Paul, Hastings, Janofsky & Walker LLP
Los Angeles

Andrew N. Chang, Esner & Chang
Oakland

Jeff Kichaven, Mediator
Los Angeles

Richard C. Reuben, Associate Professor
University of Missouri School of Law
Columbia, Missouri

Session 1 -- ADR in the Workplace: What Recent Research Reveals?

Recent research has shown the use of ADR techniques to manage internal conflicts in large corporations to be both widespread and growing. Richard Fincher, one of the authors of *Emerging Systems of Managing Workplace Conflict* (with David Lipsky and Ron Seeber--Jossey Bass 2003) will report on this research and summarize some of the most useful insights for human resources professionals and corporate managers, discussing implications for future ADR use. Ellen Waxman will discuss the role of the ombudsman within an integrated conflict resolution system.

Panelists:

- Richard Fincher, Workplace Resolutions, Phoenix, Arizona
- Ellen Waxman, Director of Faculty Relations, Stanford University School of Medicine, formerly Ombudsman and Mediation Coordinator, Stanford University

Session 2 -- An ADR Initiative in a Public Agency:

Preventing, Managing, and Handling Conflict More Effectively at the Bureau of Reclamation

In recent years, public agencies have struggled to accommodate desires for more public participation in decision-making about natural resources while trying to balance the interests of all stakeholders fairly, to reach wise and stable outcomes, and to operate efficiently. The federal Bureau of Reclamation, which manages federal water projects, has undertaken a path-breaking initiative to apply the skills and insights from the ADR field comprehensively to help achieve these goals. The initiative aims to improve how conflict is dealt with both internally and externally. Zell Steever, the initiative's director, will report on how the effort is going, particularly highlighting lessons for other public agency managers. Mike Harty will describe the training that CDR Associates has provided in support of the initiative.

Panelists:

- Zell Steever, Bureau of Reclamation, U.S. Department of the Interior
- Michael Harty, California office, CDR Associates

Session 3 -- Corporate Use of ADR to Improve Outcomes and Manage the Costs of Conflict.

The CPR Institute has been a long-time proponent of ADR use by major law firms and corporations, originating an ADR Pledge program, whereby corporations committed to using ADR in any dispute with another signer of the pledge before resorting to litigation. The CPR Institute has also conducted research and promoted the effective use of appropriate dispute resolution techniques to cut costly conflict and improve satisfaction with outcomes through publishing a wide range of helpful tools and practical guides. Tom Stipanowich, President of CPR Institute, will discuss recent projects and highlight some of the most useful conclusions for corporate managers wishing to improve how their organizations deal with conflict, both internally and externally.

Presenter:

Thomas J. Stipanowich, President, CPR Institute

ABOUT THE CONFERENCE HOSTS



Every November since 1994, CDRC has hosted a fall conference to provide a venue for neutrals, program administrators, and policy-makers to discuss key ADR topics, such as confidentiality, disclosure of conflicts of interest, compensation of neutrals, fairness of mandatory processes, and standards and ethics. CDRI began to help plan and support the conference in 1998, which has since been expanded to a full day. Now with CDRI's move to the University of San Francisco, the conference is being expanded again, to more than double the number of sessions devoted to arbitration, mediation, and the use of ADR by corporations and public agencies. This has been made possible by two USF organizations, the Leo T. McCarthy Center for Public Service and the Common Good and the USF Law Review. Here are brief descriptions about each of these organizations.

CDRC

The California Dispute Resolution Council (CDRC) was organized in 1994 to provide a unified voice for those in the conflict resolution field in policymaking settings throughout the state. Through the expertise of its diverse membership and a registered lobbyist, CDRC provides informed opinions on proposed legislation and develops principles and standards that shape dispute resolution policy in the state.

CDRI

The California Dispute Resolution Institute (CDRI) is a nonprofit organization dedicated to understanding and improving alternative or appropriate dispute resolution (ADR) processes through research, educational programs, and information dissemination for the benefit of policymakers, administrators, providers, and consumers of ADR services. CDRI was founded in 1996 and joined the Leo T. McCarthy Center for Public Service and the Common Good at the University of San Francisco in April of 2003 as a distinct program within the Center.

USF Law Review

The School of Law publishes the University of San Francisco Law Review, which has an extensive circulation among attorneys and libraries throughout the nation. Student members conduct independent research, prepare notes and comments for publication, and edit both the work of their fellow students and articles and book reviews submitted by faculty members, other scholars and attorneys. Members are elected by the student Board of Editors on the basis of academic achievement and a writing competition conducted by the Review.

McCarthy Center, University of San Francisco

The Leo T. McCarthy Center for Public Service and the Common Good (McCarthy Center) was founded at USF in September of 2002. The McCarthy Center's mission is to inspire and prepare USF students and citizens to pursue lives and careers of ethical public service through education, service and research in public policy-making and programs for the common good.

CDRC Board, 2003



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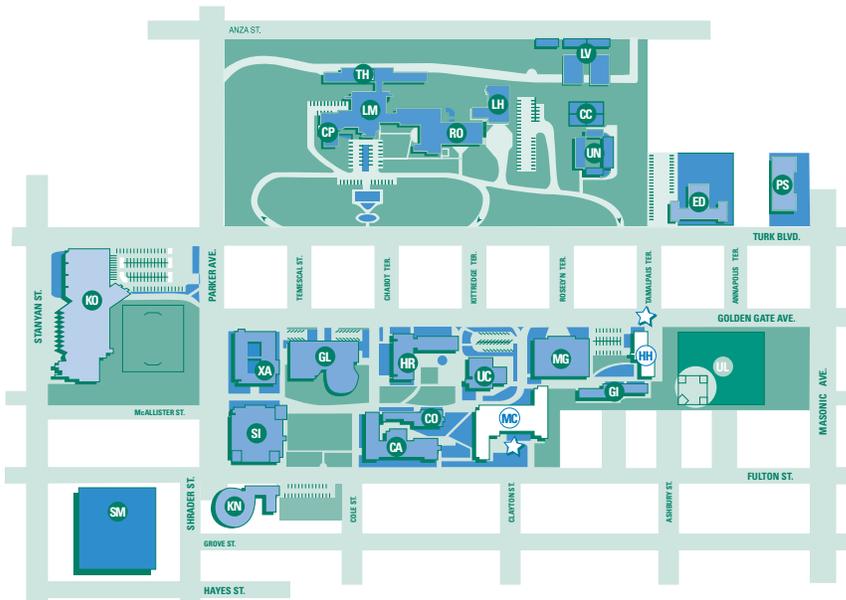
CDRC Staff
Maureen Newman

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 5.75 credit hours. The University of San Francisco School of Law is an approved provider of MCLE and certifies that this activity conforms to the standards for approved educational activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

To register for this event, please complete the separate registration form. For more information and hotel recommendations, please contact CDRI at (415) 422-2374.

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Conference Registration:
NW Corner of McLaren Center (MC)

From the Peninsula and South Bay:

Come north on I-280 through San Francisco on 19th Avenue. Just after crossing through Golden Gate Park, turn right on Fulton Street and proceed to Arguello. Turn left until you come to Turk Boulevard (about 4 blocks). Turn right and go up the hill (about 10 short blocks). Turn right on Tamalpais Terrace one block to Golden Gate Avenue. Turn right and immediately enter the Hayes-Healy Garage on the corner of Golden Gate Avenue and Tamalpais Terrace.

From the North Bay:

Come south on 101 across the Golden Gate Bridge, heading toward 19th Avenue. Proceed down 19th Avenue. When you come to Lake, turn right (just after the Presidio) and make an immediate left turn. One block later, turn left on California. Go east on California to Parker (about 10 blocks). Turn right on Parker and go up the hill to Golden Gate Avenue. Turn left about 5 blocks to the Hayes-Healy Garage, on the corner of Golden Gate Avenue and Tamalpais Terrace.

From the East Bay/Bay Bridge & from downtown San Francisco:

After crossing the Bay Bridge, take the 9th Street/Civic Center exit. Head westbound on Harrison Street for 1 block then turn right onto 9th Street. Once on 9th, stay in 2 left lanes and veer onto Hayes Street. Continue on Hayes for 8 blocks to Webster Street. Turn right onto Webster and proceed 2 blocks to Fulton Street. Turn left onto Fulton and continue approximately 1 mile to Parker Avenue (St. Ignatius Church will be on your right.) Turn right onto Parker and continue to Golden Gate Avenue. Turn right onto Golden Gate and proceed to the Hayes-Healy Garage on the corner of Golden Gate Avenue and Tamalpais Terrace.