"CONS" OF ALTERNATIVE DISPUTE RESOLUTION

I. FORUMS AND PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION

A. FORUMS

1. Court – A case may be referred by the court to mediation or arbitration, which is usually before an attorney on the court's mediation/arbitration panel.

2. Contract – The parties to a contract may include a provision that disputes are to be resolved by binding or non-binding mediation and/or arbitration. The parties may specify a forum such as the American Arbitration Association ("AAA"), JAMS/Endispute, or other associations. If no forum is specified by the parties, the rules of Code of Civil Procedure ("CCP") §1280 et seq. apply.

B. PROCEDURES – ADR Path [see Exhibit "A"]

1. Mediation

Court – The rules for court-ordered mediation are set forth in CCP § 1775-1775.16, California Rules of Court ("CRC") 1630-1639, and in the local court rules.

Contract – The rules for "private" mediation (i.e., a mediator required by contract or voluntarily agreed to by the parties) will depend upon the forum specified by the parties, i.e., the AAA, JAMS/Endispute, or other associations and unassociated mediators.

2. Arbitration

Court – The procedures for Judicial Arbitration are found in CCP §1141.10 et seq., CRC Rules 1600 et seq., or local court rules.

Contract -- If a contract contains a provision requiring disputes to be submitted to arbitration, then the rules governing

arbitration are found in CCP §1280 et seq. However, the parties may provide in a contract that disputes are to be submitted to arbitration and then specify the rules applicable to the arbitration. For example, the parties could state that disputes shall be submitted to arbitration pursuant to the rules of the AAA or pursuant to the rules of JAMS/Endispute, or pursuant to any other rules specified by the parties to the contract.

Statutes -- There are statutes which require some disputes to proceed to non-binding arbitration. One example is PCC §20104, discussed below. However, because of due process requirements, statutes can only require non-binding arbitration except that compulsory binding arbitration is permitted for uninsured motorist claims which involve the highly regulated insurance industry. Insurance Code §11580.2(f). Arbitration can be made binding in other cases only by agreement of the parties.

The provisions of Public Contracts Code ("PCC") §20104 apply to all public works claims of $375,000 or less which arise between a contractor and a local agency unless the parties have an arbitration clause in the contract. (PCC §20104 (a).)

Pre-lawsuit procedures:

(1) Written claim by contractor must be filed with agency on or before the date of final payment.
(2) For claims less than $50,000 the agency must respond in writing within 45 days. If the agency requests additional information from contractor, then the written response is due 15 days after receipt of the further documentation. (PCC §20104.2(b).)
(3) For claims over $50,000 and up to $375,000, the written response by the agency is due within 60 days of the receipt of the claim or within 30 days after receipt of further documentation. (PCC §20104.2(c).)
(4) After receipt of the response by the agency, or the expiration of the deadline to respond, the

contractor may demand an informal conference to meet and confer for settlement of the issues in dispute which must be set within 30 days. (PCC §20104.2(d).)

(5) Following the meet and confer conference, a contractor may file a claim pursuant to Government Code §900 et seq. for which time is tolled until after the meet and confer process. (PCC §20104.2(e).)

Civil action, mediation and arbitration process:

(1) Complaint is filed by contractor.
(2) Responsive pleadings are filed by defendant(s).
(3) Mediation - Within 30 to 60 days of filing responsive pleadings, the court must submit the matter to non-binding mediation unless waived by stipulation of both parties. (PCC §20104.4(a).)
(4) Arbitration - If mediation is unsuccessful, the case is submitted to judicial arbitration. The arbitrators must be experienced in construction law and, upon stipulation of the parties, mediators and arbitrators shall receive their customary fee paid equally by the parties. (PCC §20104.4(b).)
(5) Trial - Any party who, after receiving an arbitration award, requests a trial de novo but does not obtain a more favorable judgment shall pay costs and pay the attorney fees of the other party arising out of the trial de novo. (PCC §20104.4(b)(3).)

II. DISADVANTAGES OF ADR

A. MEDIATION

Mediation may be voluntary or involuntary. Voluntary mediation occurs where the parties to a dispute, either before or after initiation of a lawsuit or arbitration proceeding, mutually decide to go to a mediator. Involuntary mediation occurs where the parties are compelled to attend a mediation either by the court or the provisions of a contract or statute. The likelihood of success of a mediation is obviously greater where the parties are attending the mediation on a voluntary basis since the parties are more likely to be motivated to negotiate a reasonable settlement. However, in the case of "involuntary" mediation, the parties may not be as willing to negotiate a successful settlement. Of course, there are many cases have proceeded to "involuntary" mediation which have been settled either as a result of the efforts of the mediator or the willingness of the parties to negotiate or a combination of both.

There are two disadvantages to mediation:

1. Expense -- The parties incur the expense of mediation which can be substantial depending upon the mediator. In the event that mediation is by court order and the parties have selected a mediator from the court panel, then the parties do not incur the expense of paying for the mediator but the parties do incur expenses in the form of attorney's fees.

   If the mediation is pursuant to contract or by agreement of the parties, then the mediation expenses can be very significant especially for mediations which last several hours or days. The cost of a mediator can be $300 to $400 per hour, or more, for the mediator as well as an "administrative" fee of $150 or more per party. In such cases, the parties incur both the expense of the mediator as well as their own attorney fees. Such expenses can make mediation of smaller exposure cases less desirable.

2. Loss of Time -- The second disadvantage, which applies only to an unsuccessful mediation, is the loss of time that could have been devoted to discovery or preparing the case for trial or arbitration. Parties may be reluctant to incur the legal expenses of preparing and appearing at a mediation and, at the same time, incurring the expenses

of discovery and preparation for trial or arbitration. Parties attending the mediation may hope that the mediation is successful so they can avoid incurring additional legal expenses for discovery and/or preparation for trial or arbitration. However, if the mediation is unsuccessful, and there is a trial date or arbitration hearing already set, then the parties have less time to do discovery and pre-trial or pre-arbitration preparation.

B. ARBITRATION -- There are several disadvantages to arbitration including, but not limited to, the following:

1. Loss of pleading challenges

In state court, there are several pleading challenges available to a defendant including: Demurrers – [CCP § 430.10.] Judicial notice is permitted [CCP §430.70]. Allegations of a pleading which are inconsistent with, or contradicted by, judicially noticed facts, must be rejected. See *Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 642, 647. Motions to strike – [CCP § 435-437/Judicial notice permitted]; motions for judgment on pleadings [CCP § 438/Judicial notice permitted].

In federal court, there are also pleading challenges as provided by Rule 12 Federal Rules of Civil Procedure ("FRCP"). For example, motions to dismiss for failure to state a claim [FRCP 12(b)(6)], motions for judgment on the pleadings [FRCP 12(c)] and motions to strike [FRCP 12(f)].

The benefit of a pleading challenge is that, if successful, a defendant or cross-defendant may either terminate its involvement in the lawsuit at an early stage or at least limit the scope of the claims. The obvious advantage to a successful pleading challenge is both a reduction or elimination of potential exposure at trial and a savings in defense costs.

In contrast, with arbitration unless the parties have agreed to the use of pleading challenges, no such pleading challenges are available. As a result, parties to an arbitration proceeding do not enjoy the potential benefits that can be provided by a successful pleading challenge. However, it is possible an arbitrator might allow pleading

challenges—refer to discussion below under motions for summary judgment/ adjudication.

2. Limited ability to join third parties

General rule -- In the case of private arbitration, as compared to "judicial arbitration," the case is proceeding to arbitration because of a written contract by the parties that includes an arbitration clause. If a person or entity is not a party to the contract containing the arbitration clause, then normally that person or entity cannot be compelled to arbitrate. See *Grundstad v. Ritt*, (7th Cir. 1997) 106 F.3d 201, 204.

Exceptions to general rule -- Under certain circumstances, a person or entity who did not sign the contract containing the arbitration clause may nonetheless be compelled to proceed to arbitration upon theories of agency and/or contract law. See *Letizia v. Prudential Bache Securities, Inc.* (9th Cir. 1986) 802 F.2d 1185, 1187. Examples include: agents of parties, third party beneficiaries, assignees and sublessees, spouses, heirs, persons who voluntarily join the arbitration, persons who are parties to a contract that incorporates the contract containing the arbitration clause.

Disadvantage -- In an ordinary civil action, a defendant may file a cross-complaint or a cross-claim against third parties seeking indemnification or other affirmative relief. However, with arbitration, a party is unable to join a third party to the arbitration proceedings if that third party is not a signatory to the contract containing the arbitration clause unless one of the exceptions described above applies. In such event, the party to the contract containing the arbitration clause must pursue third parties through the courts which defeats the intended purpose of arbitration which is to provide an expedited forum for resolving disputes and save litigation expenses.

3. Limitations on written discovery

State Court -- Discovery in a standard case as well as in judicial arbitration to which the parties may be referred during the standard case, includes: interrogatories [CCP § 2030]; request for production of documents [CCP §2031]; request for admissions [CCP § 2033].

Arbitration (contract) -- As a general rule, there is no right to discovery in arbitration proceedings under either state or federal law unless the contract provides for discovery. However, there are exceptions to this general rule in three types of cases. First, in arbitration injury or death claims – California Discovery Act applies except that depositions may not be taken without permission of arbitrator [CCP §1283.1]. Second, discovery is permitted in uninsured motorist arbitrations – [Insurance Code § 11580.2(f)]. Third, if controversy exceeds $50,000, then a party may send a demand to exchange list of witnesses and documents which must be exchanged within 15 days of the demand [CCP §1282.2(a)(2)].

AAA Commercial Rule R-23 provides that, at the request of any party or at the discretion of the arbitrator, an arbitrator may require the production of documents and the identification of witnesses. Five days prior to the hearing, the parties are to exchange copies of exhibits. The arbitrator is authorized to resolve disputes regarding the exchange of information.

In construction disputes, AAA Rule R-10 authorizes the arbitrator to direct the production of documents and require the identification of witnesses to be called. At least two business days prior to the hearing, the parties are required to exchange copies of all exhibits. The arbitrator is authorized to resolve any disputes concerning the exchange of information. No other discovery is permitted except as ordered by the arbitrator "in extraordinary cases when the demands of justice require it."

JAMS/Endispute "Comprehensive" Rules (claims over $250,000) include Rule 15 which provides the parties will exchange documents, names of witnesses, and names of experts who will testify at the arbitration hearing. Each party may take one deposition of an opposing party or an individual under control of the opposing party. A party may depose its own witnesses which may be used as evidence

at the hearing. Arbitrator may schedule a conference to establish an information exchange schedule. There is a continuing obligation to produce documents and identify witnesses. Discovery disputes are handled by a "case administrator" or by the arbitrator or a Special Master. JAMS/Endispute "Steamlined" Arbitration Rules and Procedures (claims not exceeding $250,000) includes Rule 16, which provides for an exchange of information. Documents and the names of witnesses and experts are to be exchanged within 14 days after all pleadings have been received. Arbitrator may conduct a conference to determine whether additional information should be exchanged. There is a continuing obligation to produce documents and identify witnesses. Discovery disputes are decided by arbitrator.

For other arbitration associations or organizations and unassociated arbitrators, CCP §1280, et seq. governs unless modified by agreement or the rules of the association.

4. Limitations on depositions

State court -- depositions in standard lawsuit [CCP § 2025].

Arbitration -- In cases governed by CCP § 1280, et seq., the general rule is no depositions. However, there are three exceptions. First, injury or death claims [CCP §1283.1]. Second, uninsured motorist arbitrations [Insurance Code §11580.2(f)]. Third, depositions are permitted for as evidence (not for discovery) if the witness cannot be compelled to attend the hearing or if exceptional circumstances exist [CCP § 1283].

There are no provisions in the rules of the AAA and JAMS/Endispute authorizing depositions. Therefore, the only depositions permitted would be those agreed upon by the parties. With other associations and unassociated arbitrators, CCP §1280, et seq., will apply unless modified by agreement or the rules of the association.

5. Limitations on discovery motions

State court – There are two valuable discovery motions authorized in state court. First, motions for protective order which are designed to prevent annoyance, embarrassment, oppression, burden and expense. The parties must make a good faith attempt at informal resolution of

each issue before filing such a motion. See CCP § 2025(i) [depositions]; CCP § 2030(e) [interrogatories]; CCP § 2031(e) [request for documents]; and CCP § 2033(e) [request for admissions]. Second, motions to compel are brought when the response to discovery either was not provided or was incomplete or evasive. Before filing such a motion, the parties must make a good faith effort at informal resolution of the dispute. See CCP § 2025(o) [depositions]; CCP § 2030(l) [interrogatories]; CCP § 2031(l) [request for documents]; CCP § 2033(l) [request for admissions].

Arbitration -- There are no express provisions for motions for protective order or motions to compel except for CCP §1283.05 to enforce discovery permitted under CCP §1283.1 (cases of injury or death). Under Commercial Rule R-23, of the AAA, the arbitrator may require production of documents and identification of witnesses. Construction Rule R-10 of the AAA authorizes the arbitrator to resolve disputes regarding exchange of information. With JAMS/ Endispute, Comprehensive Rule 15 provides that discovery disputes are "handled" by case administrator, arbitrator or Special Master. Streamlined Rule 16 allows discovery disputes to be resolved by arbitrator. As for other associations and unassociated arbitrators, CCP §1280, et seq. will apply unless modified by agreement or rules of the association.

6. Limitations on motions for summary judgment/adjudication.

State courts -- Motions for summary judgment and/or summary adjudication are governed by CCP § 437c which includes many provisions regarding the format and procedures.

Arbitration – There is no express provision for motions for summary judgment or summary adjudication in CCP §1280 or the AAA rules. However, *Schlessinger v. Rosenfeld, Meyer and Susman* (1995) 40 Cal.App.4th 1096, the Court held that an arbitrator could entertain summary adjudication motions, but is not required to do so. The Court further held that the propriety of summary adjudication motions depends upon many factors including the claims, defenses, arbitration agreement, discovery, and a fair opportunity by the opposing party to present its position.

With JAMS/Endispute Comprehensive Rule 16 (over $250,000) authorizes arbitrator to hear and determine a "motion for summary disposition" of a particular claim or issue, either by agreement of all interested parties or at the request of one party, provided other interested parties have reasonable notice to respond to the request. The case administrator sets the briefing schedule. No oral argument is allowed unless all of the parties or the arbitrator so request. The arbitrator is to apply the same burdens as in a court of jurisdiction. On substantive issues, the arbitrator applies the same standard as applies to an arbitration award.

However, the Streamlined Rules of JAMS/Endispute (claims not exceeding $250,000) do not provide for summary motions.

In the case of other associations and unassociated arbitrators, motions for summary disposition pursuant to CCP § 1280 are permitted if allowed by the arbitrator (*Schlessinger v. Rosenfeld, supra)* or by agreement or rules of the association.

7. Loss of benefit of Civil Code §1717.

Parties to a contract will sometimes include an "attorney's fees clause" which authorizes the recovery of attorney's fees by the prevailing party in any litigation. Code of Civil Procedure §1021.

The term "prevailing party" is defined as: (1) the party with a net monetary recovery; (2) a defendant in whose favor a dismissal is entered; (3) a defendant where neither defendant no defendant obtains any relief; and (4) a defendant as against those plaintiffs who do not recover any relief against that defendant. Code of Civil Procedure §1032(a)(4). Except as provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. Code of Civil Procedure §1032(b).

One problem with an attorney's fees clause is that a plaintiff can recover attorney's fees from a defendant when the plaintiff has a "net monetary recovery." Thus, a plaintiff can sue a defendant, including a public entity, for $100,000 and recovery $50 and the plaintiff is considered the prevailing party, because the plaintiff had a "net monetary recovery." There is a qualification that permits a court to deny costs to a prevailing party if the judgment obtained is below the

maximum jurisdiction of a lower court. Code of Civil Procedure §1033.

Where the defendant alleges in the answer tender to the plaintiff of the full amount to which plaintiff is entitled and thereupon deposits in court for the plaintiff the amount so tendered and the allegation is found to be true, then the defendant is deemed to be a prevailing party on the contract and would be entitled to recover attorney's fees if the contract included an attorney's fees clause. See Civil Code §1717.

For example, if a plaintiff sues a defendant for $100,000 and the defendant makes an offer to plaintiff for $25,000 which is rejected by plaintiff, the defendant can deposit the $25,000 with the court. If, after trial, the plaintiff obtains a judgment of $25,000 or less, then the defendant would be the prevailing party and would be entitled to recover attorney's fees if the contract included an attorney's fees clause.

The advantage of the deposit by a defendant as authorized by Civil Code §1717 applies only to "actions" which are defined as a proceeding in a court of justice. CCP §22. Therefore, a defendant in an arbitration proceeding, other than judicial arbitration, would not have the option of making a deposit with the court pursuant to Civil Code §1717.

8. Loss of right to jury trial.

Parties in a civil action are entitled to a jury trial unless only equitable relief is at issue. In contrast, there is no jury in arbitration proceedings.

9. Rules of evidence are not applicable.

State Court -- The California Code of Evidence sets forth the rules of evidence applicable to state court proceedings. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency and reason to prove or disprove any disputed fact that is of consequence to the determination of the action. Evidence Code §210. All relevant evidence is admissible except as otherwise provided by statute. Evidence Code §351.

The Evidence Code imposes several limitations on admissibility of relevant evidence. Consider three examples of such limitations. First, there are several privileges recognized in the Evidence Code including the privilege against self-incrimination and the privileges of lawyer-client, spousal, physician- patient, psychotherapist-patient, clergyman-penitent, and others. Evidence Code §§930-1060. There are several justifications for privileges. For example, the attorney-client privilege is based on grounds of public policy and is in furtherance of proper and orderly administration of justice. See *Nowell v. Superior Court* (1963) 223 Cal.App.2d 652. The policy underlying the marital privilege is to protect marital harmony. *People v. Godines* (1936) 17 Cal.App.2d 721.

Second, the rule excluding hearsay evidence. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible. Evidence Code §1200. Hearsay is generally excluded because "out-of-court declarant" is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, veracity, and because the trier of fact is unable to observe the declarant's demeanor. *People v. Cudjo* (1993) 6 Cal.4th 585. There are several recognized exceptions to the rule prohibiting hearsay, including admissions of a party, declarations against interest, spontaneous declarations, statements of

mental or physical state, business records, and several other exceptions. Evidence Code §1220-1350. There are different rationale for the various hearsay exceptions. For example, the theory underlying the "spontaneous statement" exception to the hearsay rule is that the declarant's lack of opportunity for reflection and deliberate fabrication supply an adequate assurance of statement's trustworthiness. *Box v. California Date Growers Assn.* (1976) 57 Cal. App.3d 266.

Third, the rule requiring authentication of a writing requires evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or the establishment of such facts by other means. Authentication of a writing is required before it may be received in evidence. Evidence Code §§1400 and 1401.

Arbitration -- In arbitration proceedings, the rules of evidence generally do not apply. The arbitrator has discretion regarding what evidence to admit depending upon the arbitration forum. First, in cases governed by CCP §1280, et seq., CCP §1282.2(d) provides that the parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of procedure need not be observed. Arbitrators possess considerable discretion in deciding what testimony to hear. *Schlessinger v. Rosenfeld, Meyer and Susman* (1995) 40 Cal.App.4th 1096. The presumption is that arbitrators are experienced and capable of weighing the evidence and giving due consideration to opposing inferences. *Pacific Vegetable Oil Corp. v. C.S.T. Limited* (1946) 29 Cal.2d 228.

Second, in the case of AAA, Commercial Rule 33(a) provides that conformity to legal rules of evidence shall not be necessary. The arbitrator shall "take into account" applicable principles of legal privilege such as those including the confidentiality of communications between a lawyer and client. Construction Rule 31 provides that conformity to legal rules of evidence shall not be necessary.

Third, JAMS/Endispute Comprehensive Rule 20(d) provides that strict conformity to the rules of evidence is not required except that the arbitrator will apply the law relating to privileges and work product. Streamlined Rule 17(c) provides that strict conformity to the

rules of evidence is not required, except that the arbitrator will apply the law relating to privileges and work product.

Fourth, with other associations and unassociated arbitrators, CCP §1282.2(d) discussed above applies unless modified by rules of the association or by agreement. Where the parties have agreed what evidence may be received, the arbitrator is required to respect and follow their agreement. See *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 811.

The basic rule is that arbitrators must provide a "fundamentally fair" hearing which includes the right to present relevant and material evidence and an argument before the decision maker. Fundamental fairness means adequate notice, hearing on evidence and impartial decision by arbitrator. See *Bowles Financial Group, Inc. v. Stifel Nicholaus and Co., Inc.* (10th Cir. 1994) 22 F.3d 1010, 1013 and *Carptenters 46 No. Calif. Counties Conference Board v. Zcon Builders* (9th. Cir. 1996) 96 F.3d 410, 413.

In one case, an attorney for one party told the arbitrator of settlement offers made by the opposing party. Such conduct is in direct violation of Evidence Code §1152 which prohibits the admission of settlement offers. However, in that case, the court found that the admission of the settlement offer was not enough by itself to render the arbitration hearing "fundamentally unfair" when the arbitrators said they would ignore it. *Bowles Financial Group, Inc. v. Stifel Nicholaus and Co., Inc., supra*, 22 F.3d at 1012, fn. 1, and 1013.

10. Loss of right to appeal

Courts -- Following a judgment, a party may file an appeal to the Court of Appeals. The appeal will be decided based upon the record of the trial court and the appellate briefs filed by the parties to the appeal.

Arbitration -- Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. CCP §1285.

The grounds for vacating award are listed in CCP §1286.2:

(1) Award procured by corruption, fraud or undue means;
(2) Corruption of an arbitrator;
(3) Substantial prejudice by arbitrator misconduct;
(4) Arbitrators exceeded their powers;
(5) Prejudice due to failure to postpone hearing, refusal to hear material evidence or other conduct of arbitrator contrary to provisions of law;
(6) Arbitrator was subject to disqualification.

JAMS/Endispute Comprehensive Rule 23 does have an optional appeal procedure.

11. Limited value to so-called "speedy" adjudication because of development of the court "fast track" system.

In 1990, the Trial Court Delay Reduction Act was adopted and is found in Government Code §68600.

The Act eliminated many of the causes for delays in civil actions proceeding to trial. For example, a complaint must be served within 60 days after filing. Responsive pleadings must be served within 30 days after service of the complaint. Parties may not stipulate to an extension of time to respond to the complaint of more then 15 days without authorization by local rule. Government Code § 68616.

The Judicial Council was required to adopt standards of timely disposition for processing and disposition of civil and criminal actions. Government Code §68603. The rules adopted by the Judicial Council are found in Rule Appendix Div. I, Section 2.1 (Superior Court) and 2.3 (Municipal Court) providing a goal that there should be case disposition within 12 months of 90% of the cases; within 18 months disposition of 98%, and within 24 months, disposition of 100%.

The Judicial Council is required to collect and maintain statistics regarding the compliance of the Superior Courts of each county with the standards of timely disposition. Government Code §68604. Attached as Exhibit "B" is a copy of the Case Processing Time for General Civil Cases for 1993/1994 to 1997/1998. Although the performance of the courts varies by county, the overwhelming majority of courts are disposing of a substantial percentage of cases

and approaching the goals of 12 months, 18 months and 24 months. For example, in Los Angeles Superior Courts, 71% of all cases are brought to disposition within 18 months. Many other counties have an even higher disposition rate for the 18 month time frame, including Contra Costa (94%), Orange (80%), San Diego (93%), Tulare (93%), Ventura (87%). These percentages are based upon the 1996/1997 figures.

There has also been substantial success in reducing the number of pending cases. For example, in smaller counties such as the Ventura County Superior Court, the number of pending cases declined from 7,871 in 1993 to 2,152 in 1999 and has decreased such that the length of time for case disposition. In 1993, in Ventura County, only 30% of the cases were disposed of within 12 months; whereas in 1999, 89.4% of the cases were disposed of within 12 months. Even larger counties like Los Angeles County have made substantial progress in reducing the number of pending cases and the time to case disposition. For example, in 1998, there were 56,116 cases pending in Los Angeles County; whereas by 1999 that number was reduced to 51,515. As for case disposition, the median time for a case to get to trial in Los Angeles is down in 1999 to 21 months.

12. Limited value to cost savings.

Non-binding arbitration: Since the losing party can request trial de novo, you may end up trying the case twice—once in arbitration and again in trial. For binding arbitration, the parties must pay for arbitrator, which can be very expensive.

13. Lack of familiarity with arbitrator.

In judicial arbitration the courts usually provide the parties with a panel of attorneys who volunteer to act as arbitrators. The parties frequently will not both know an attorney on the list with whom they each have reasonable confidence in their ability and impartiality. The problem with lack of familiarity with the arbitrators on court panels is especially true in larger counties.

The same problem with lack of familiarity with the arbitrator occurs with the AAA which provides a panel of arbitrators to the parties and the arbitrator is selected from that list. However, as with judicial

arbitration, the parties frequently will not know the arbitrators and will be unable to evaluate their qualifications.

In the case of other arbitration forums, such as JAMS/Endispute or with unassociated arbitrators, the parties are more likely to be familiar with the selected arbitrator since these panels include either retired judges or attorneys who are well-known in the community or even statewide.

The obvious disadvantage of lack of familiarity with the arbitrator is that a party will not know the qualifications or background of the arbitrator.