

CPR-GEORGETOWN COMMISSION  
ON ETHICS AND STANDARDS  
OF PRACTICE IN ADR

# **Principles for ADR Provider Organizations**

May 1, 2002

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## Principles for ADR Provider Organizations<sup>1</sup>

The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed the following Principles for ADR Provider Organizations to provide guidance to entities that provide ADR services, consumers of their services, the public, and policy makers. The Commission is a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, which is chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, has also developed the CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.<sup>2</sup>

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<sup>1</sup> The Principles for ADR Provider Organizations were prepared under the auspices of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. CPR-Georgetown Commission members are noted on the final page of this document.

The Principles were drafted by a Commission committee co-chaired by Margaret L. Shaw and former staff director Elizabeth Plapinger, who also served as reporter. The Drafting Committee also included: Prof. Marjorie Corman Aaron, Howard S. Bellman, Christopher Honeyman, Prof. Carrie Menkel-Meadow, William K. Slate II (*see note 5 infra*), Thomas J. Stipanowich, Hon. John L. Wagner, and Michael D. Young. Eric Van Loon and Vivian Shelansky also provided invaluable assistance in the drafting effort.

A second committee of the Commission, chaired by Charles Pou, developed the definition of ADR Provider Organization used in these Principles, as well as a taxonomy of ADR Provider Organizations which helped guide this effort. *See Taxonomy of ADR Provider Organizations*, Appendix A.

<sup>2</sup> The final version of the Ethics 2000 proposal specifically addresses the lawyer's expanded role as ADR neutral and problem solver for the first time. It does so in four ways. *First*, the Ethics 2000 proposal recognizes the lawyer's neutral, nonrepresentational roles in the proposed Preamble to the Model Rules of Professional Conduct. *See* Ethics 2000 Proposal at Preamble para. [3] ("In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals.") *Second*, the proposal indicates that a lawyer may have a duty to advise a client of ADR options. The proposed language to Comment 5 of Rule 2.1 states: "...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute alternatives to litigation." *Third*, the Ethics 2000 proposal defines the various third-party roles a lawyer may play, including that of an arbitrator or mediator. *See* Proposed Rule 2.4. ("A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.") *Fourth*, the proposal addresses the unique conflicts of interest issues raised when lawyers and law firms provide both representational and neutral services. *See* Proposed Rule 1.12 (conflicts of interest proposal including screening procedures for former judges, arbitrators, mediators or other third-party neutrals.) For a complete version of the Ethics 2000 report and status, *see* <http://www.abanet.org/cpr/ethics2k.html>.

The Principles for ADR Provider Organizations were developed by a committee of the CPR-Georgetown Commission, co-chaired by Commission member Margaret L. Shaw and former Commission staff director Elizabeth Plapinger, who also served as reporter.<sup>3</sup> The Principles were released for public comment from June 1, 2000 through October 15, 2001.<sup>4</sup> The final version reflects many of the substantive recommendations the Commission received during the comment period.<sup>5</sup>

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<sup>3</sup> Ms. Plapinger is currently a CPR Fellow and Senior Consultant to the CPR Public Policy Projects, and a lecturer in law at Columbia Law School where she teaches ADR policy and process.

<sup>4</sup> The CPR-Georgetown Principles for ADR Provider Organizations have been the subject of several articles and public discussions during the comment period. *See, e.g., Special Feature: The CPR-Georgetown Ethical Principles for ADR Providers*, *Disp. Resol. Mag.* (ABA Dispute Resolution Section, Spring 2001), including Margaret Shaw and Elizabeth Plapinger, *The CPR-Georgetown Ethical Principles for Providers Set the Bar* at 14; Michael D. Young, *Pro: Principles Mitigate Potential Dangers of Mandatory Arbitration* at 18; Cliff Palesfsky, *Con: Proposed CPR Provider Ethics Rules Don't Go Far Enough* at 18. *See also* Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 *Fordham Urban Law J.*, 979, 987-990 (April 2001); Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration*, *The San Francisco Chronicle* *Francisco Chronicle*, at A15 (October 8, 2001).

During the comment period, the CPR-Georgetown Provider Principles have also been used as guidelines for consideration of measurement of quality standards of dispute resolution programs in a variety of settings. For example, at the 2000 Annual Meeting of State Programs of Dispute Resolution sponsored by the Policy Consensus Institute in New Mexico, it was noted that a number of states have used the Principles for framing discussions and establishing standards and other evaluative criteria for assessing the quality of dispute resolution development. Additionally, it was suggested that the Provider Principles should serve broadly as templates for development and evaluation of state-sponsored dispute resolution programs. Internationally, during the comment period, the Provider Principles were translated into Italian and Spanish to provide guidance to relevant groups in Italy and South America.

<sup>5</sup> Drafting committee member and President of the American Arbitration Association William K. Slate II has declined to fully endorse the CPR-Georgetown Principles for ADR Provider Organizations, stating that he does not believe the Principles are fully applicable to the American Arbitration Association (AAA) because of its "unique size and complexity." While "endors[ing] the basic premises of the Principles which encourage transparency and disclosure" Mr. Slate explained his position in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member. In the correspondence, which is on file at CPR, Mr. Slate stated, "I believe the [CPR-Georgetown] Principles will prove to be invaluable and [provide] appropriate guidelines for small provider organizations and for providers who serve in dual roles, by assisting in drafting agreements and then serving as neutrals. Although the AAA does not fall into either of these categories, the AAA endorses the basis premises of the Principles which encourage transparency and disclosure. As a result of my work with CPR on these Principles, the AAA has already developed an organizational ethical statement which has been posted for the past few months on the AAA website that we believe recognizes the unique size and complexity of the AAA in the ADR marketplace, while acknowledging and respecting the basic concerns that guided the CPR Principles." Mr. Slate also thanked the CPR-Georgetown Commission, and its sponsoring institutions, for providing "a true service to the advancement and credibility of alternative dispute resolution by recognizing the serious issues of ADR providers with actual or apparent conflicts of interest and convening a group to address these issues. I was pleased to be a part of this group and appreciate the consideration given to my opinions and perspective." Letter of 2/4/02 from William K. Slate to Thomas J. Stipanowich, on file at CPR.

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## Preamble

As the use of ADR expands into almost every sphere of activity,<sup>6</sup> the public and private organizations that provide ADR services are coming under greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers.<sup>7</sup> The growth and increasing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel this effort by the CPR-Georgetown Commission to develop the following Principles for ADR Provider Organizations.<sup>8</sup>

The Principles build upon the significant policy directives of the past decade which recognize the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services.<sup>9</sup> Several core ideas guide the Commission's effort, namely that:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR Provider Organizations and to inform consumers, policy makers and the public generally.
- The most effective architecture for maximizing the fairness, impartiality and quality of dispute resolution services is the meaningful *disclosure* of key information.
- Consumers of dispute resolution services are entitled to sufficient information about ADR Provider Organizations, their services and affiliated neutrals to make well-informed decisions about their dispute resolution options.

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<sup>6</sup> Today, ADR processes or techniques are used in almost every kind of legal and nonlegal dispute and in all almost all sectors, including family, school, commercial, employment, environmental, banking, product liability, construction, farmer-lender, professional malpractice, etc. In the past decade, ADR has become a familiar part of federal and state courts, administrative practice, and regulatory and public policy development. The development of ADR systems for public and private institutions, as well as the use of ADR to arrange transactions are also well established. See generally Stephen D. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Process* (Aspen Law and Business, 3rd ed., 1999).

<sup>7</sup> To date, much of the policy and case law development has focused on the fairness and integrity of ADR processes and forums that provide arbitration pursuant to contract in the areas of consumer services, health care and employment. See, e.g., *Circuit City Stores, Inc. v. Saint Clair Adams*, 279 F.3d 889 (9th Cir. 2002) (employment); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (employment); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (employment); *Engalla v. Kaiser Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr.2d 843 (1997) (health care); *Ting v. AT&T*, 182 F. Supp.2d 902 (N.D. Cal. 2002) (consumer). See also *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513 (2000) (Truth in Lending Act claim).

Recent policy directives have recognized the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services. See, e.g., *Task Force on Alternative Dispute Resolution in Employment, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (1995) (hereafter cited as *Employment Due Process Protocol*); Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, *Ensuring Competence and Quality in Dispute Resolution Practice* (Draft Report 1994) (hereafter cited as *SPIDR Report on Qualifications*); American Arbitration Association, *Consumer Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Consumer Disputes* (May 1998) (hereinafter cited as *Consumer Due Process Protocol*); American Arbitration Association, American Bar Association, and American Medical Association, *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes* (June 1998) (hereafter cited as *Health Care Due Process Protocol*); Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation* (1992); and JAMS Minimum Standards of Fairness for Employment Arbitrations (1995, 1998).

Commentators also have begun to consider the role of ADR provider organizations in the delivery of private justice and the procedural fairness of ADR forums. See generally *Carrie Menkel-Meadow, Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect*, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, Currents 1 (AAA, December 1998) ("All providers, whether for-profit or non-profit, facilitate and implement ADR in one or more forms and for good or ill, they all compete in the marketplace without significant outside regulation."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33.

<sup>8</sup> In publishing these standards, the drafters also note the increasing recognition of entity or organizational ethical responsibility or liability. See generally Ted Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. 1 (Nov. 1992); New York Bar Disciplinary Rules governing law firm conduct, adopted May 1996.

<sup>9</sup> See *supra* 7.

- ADR Provider Organizations should foster and meet the expectations of consumers, policy makers and the public generally for fair, impartial and quality dispute resolution services and processes.

In addition to establishing a benchmark for responsible practice, the CPR-Georgetown Commission hopes that the Principles will enhance understanding of the ADR field's special responsibilities, as justice providers, to provide fair, impartial and quality process. This document hopes also to contribute to the ADR field's commitment to self-regulation and high standards of practice.

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## Scope of Principles

The following Principles were developed to offer a framework for responsible practice by entities that provide ADR services. In framing the nine Principles that comprise this document, the drafters tried to balance the need for clear and high standards of practice against the risks of over-regulating a new, diverse and dynamic field.

The Principles are drafted to apply to the full variety of public, private and hybrid ADR provider organizations in our increasingly intertwined private and public systems of justice.<sup>10</sup> A single set of standards was preferred because the Principles address core duties of responsible practice that apply to most organizations in most settings. The single set of Principles may also help alert the many kinds of entities providing ADR services of their essential, common responsibilities. Additional sector-specific obligations will likely continue to develop for particular kinds of ADR provider organizations, depending on their sector, nature of services and operations, and representations to the public. The proposed Principles were developed to guide responsible practice and, like ethical rules, are not intended to create grounds for liability.

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## Definition

The proposed Principles are intended to apply to entities and individuals which fall within the following definition:

**An ADR Provider Organization includes any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services.**

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<sup>10</sup> For an overview of the array of organizations that offer dispute resolution services, see *Taxonomy of ADR Provider Organizations, infra* at Appendix A ("ADR provider organizations' come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals, and in their resources and management philosophies."). See also Thomas J. Stipanowich, *Behind the Neutrals: A Look at Provider Issues*, Currents 1 (AAA, December 1998) (Noting that "[t]he contemporary landscape of ADR ranges from complex, multi-faceted organizations of national and international scope to ad hoc arrangements among individuals" and includes "more specialized services marketing particular procedures, groups that have evolved to serve the special needs of a community, industry, or business sector; and mom-and-pop mediation services.")

*The Taxonomy of ADR Provider Organizations*, included as Appendix A, analyzes these diverse organizations along three major continua: the organization's structure, the organization's services and relationships with neutrals, and the organization's relationships with users or consumers.

### **Comment**

This definition of an ADR Provider Organization includes entities or individuals that manage or administer ADR services, *i.e.*, entities or individuals who serve as ADR “middlemen.”<sup>11</sup> The definition intends to cover all private and public entities, including courts and public agencies, that provide conflict management services, including roster creation, referral to neutrals, administration and management of processes, and similar activities. It is not intended to govern the individuals who provide direct services as neutrals;<sup>12</sup> rather this definition addresses the entities (either organizations or individuals) that administer or manage dispute resolution services.

The definition excludes persons or organizations who do not hold themselves out as offering conflict management services, although their services may incidentally serve to reduce conflict. These may include persons or organizations whose primary activities involve representing parties in disputes, providing counseling, therapy or similar assistance, or offering other services that may incidentally serve to reduce conflict. Importantly, however, if a law firm, accounting or management firm, or psychological services organization holds itself out as offering conflict management services as defined herein, it would be considered an ADR Provider Organization and fall within the ambit of these Principles.

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<sup>11</sup> See also Consumer Due Process Protocol, *supra* note 7 (“An Independent ADR Institution is an organization that provides independent and impartial administration of ADR Programs for Consumers and Providers, including, but not limited to, development and administration of ADR policies and procedures and the training and appointment of Neutrals.”)

<sup>12</sup> There are a number of ethics codes for ADR neutrals promulgated by national ADR professional organizations (*e.g.*, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1977, under revision); the CPR-Georgetown Commission’s Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); and the transdisciplinary ABA/AAA/SPIDR Model Standards of Conduct for Mediators (1995)), by state-wide regulatory or judicial bodies (*e.g.*, Florida Rules for Certified and Court-Appointed Mediators (Amended Feb. 3, 2000); Minnesota Rule 114; Virginia Code of Professional Conduct), as well as by individual court or community ADR programs (*e.g.*, D. Utah Code of Conduct for Court-Appointed Mediators and Arbitrators) and individual ADR provider organizations (*e.g.*, JAMS Ethics Guidelines for Mediators and Arbitrators).

# Principles for ADR Provider Organizations

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## I. Quality and Competence of Services

The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.

- a. Absent a clear and prominent disclaimer to the contrary, the ADR Provider Organization should take all reasonable steps to maximize the likelihood that (i) the neutrals who provide services under its auspices are qualified and competent to conduct the processes and handle the kind of cases which the Organization will generally refer to them; and (ii) the neutral to whom a case is referred is competent to handle the specific matter referred.
- b. The ADR Provider Organization's responsibilities under Principles I and I.a decrease as the ADR parties' knowing involvement in screening and selecting the particular neutral increases.
- c. The ADR Provider Organization's responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.

### **Comment**

[1] With the growth of voluntary and mandatory ADR use in all kinds of private and public disputes, the Drafting Committee believes it is essential to hold the ADR Provider Organizations, which manage these forums and processes, to the highest standards of quality and competence. This Principle thus establishes that ADR Provider Organizations are responsible, absent specific disclaimer, for taking all reasonable steps to maximize the quality and competence of the services they offer.

The Principle holds ADR Provider Organizations responsible for the quality and competence of the services they render, but articulates a rule of reason in determining the precise contours of that responsibility for each Organization. The nature of this obligation will vary with the circumstances and representations of the organization. The Drafting Committee adopts this approach over a more prescriptive rule because of the vastly different organizations that currently provide ADR management services.<sup>13</sup>

Understanding that ADR Provider Organizations come in a variety of forms and hold themselves out as offering different levels of quality assurance, this Principle permits the Organization to limit its quality and competence obligation by a clear and prominent communication to that effect to the parties and the public. Specifically, the Principle provides that the ADR Provider Organization can diminish these obligations by a clear and prominent representation that the Organization intends a minimal or no warranty of quality or competence. Such a disclaimer may be appropriate, for example, where a bar association assembles a roster of available neutrals as a public service, but establishes only minimal criteria for inclusion and engages in no screening or assessment of the listed neutrals.

[2] Maximum quality and competence in the provision of neutral services has two main components under this Principle. The Organization is required to take all reasonable steps to maximize the likelihood that neutrals affiliated with the organization are qualified and competent (1) to conduct the

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<sup>13</sup> See *supra* note 10 for a discussion of the varied landscape of ADR provider organizations; see also *Taxonomy of ADR Provider Organizations*, *infra* at Appendix A; Stipanowich, *supra* note 7, at 14 ("The provider's 'administrative' role varies greatly; in NASD arbitrations, case managers routinely sit in on hearings; at the AAA, case managers facilitate many aspects of the ADR process, while the CPR Institute for Dispute Resolution offers 'non-administered' procedures with minimal involvement by its employees.")

processes and handle the kind of cases which the organization will generally refer to them;<sup>14</sup> and (2) to handle the specific matter referred.<sup>15</sup>

[3] This Principle advisedly uses the related concepts of both qualification and competency. In the multidisciplinary field of conflict resolution, where neutrals come from a variety of professions of origin, there is no bright line between the concept of qualifications and competence. Unlike single disciplinary fields, where there are specific entry qualifications and examinations that certify that a practitioner is generally qualified to work in the field, no such universal entry standard exists in the conflict resolution field. Accordingly, the Principle uses the twin concepts of qualification and competency, as they are generally understood in the field today, as including a combination of process training and experience, and substantive education and experience.<sup>16</sup>

[4] Principle I.b reflects, and is consistent with ADR standards honoring party autonomy and knowing choice.<sup>17</sup> It provides that when knowledgeable parties have meaningful choice in the identification and selection of individual neutrals, the duty for assuring the quality or competence of the neutral chosen transfers in part from the administering Organization to the parties themselves. Where party choice is limited by contract, statute or court rules, the ADR Provider Organization retains responsibility for maximizing the likelihood of individual neutral competence and quality.

[5] Under Principle I.c, the ADR Provider Organization has a continuing duty to take all reasonable steps to oversee, monitor and evaluate the quality and competence of affiliated neutrals.<sup>18</sup> Determination of the specific monitoring and evaluation measures needed to fulfill this obligation will turn on the circumstances of each ADR Provider Organization. Currently, a spectrum of organizational oversight practice exists from extensive to modest monitoring of neutral performance. Some oversight measures used by Organizations include user evaluations, feedback forms, debriefings, follow-up calls, and periodic performance reviews.<sup>19</sup>

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<sup>14</sup> As the dispute resolution field grows and becomes more specialized, ADR provider organizations are developing specialized panels or groups to handle disputes in particular subject areas, such as insurance or employment conflicts, or specific kind of processes, such as multiparty mediation. This Principle provides that neutrals be competent and qualified in their areas of general substantive and process expertise, as well being competent and qualified to serve in the specific matter referred. It does not suggest that all neutrals affiliated with an organization must be competent and qualified in all substantive areas and processes covered by the ADR provider organization.

<sup>15</sup> While there continues to be limited understanding about the mix and types of training, personal attributes and experience that predict effective performance, there is a growing willingness in the field to contemplate some objective criteria for judging competence. See Howard S. Bellman, *Some Reflections on the Practice of Mediation*, Negotiation J. 205 (July 1998). The current best practices standard for promoting competence relies on "some combination of training, experience, skills-based education, apprenticeships, internships, mentoring and supervised experience" and that "the appropriate combinations must be linked to the practice context." SPIDR Report on Qualifications, *supra* note 7, at 11-12. See also Margaret Shaw, *Selection, Training, and Qualifications of Neutrals*, National Symposium on Court-Connected Dispute Resolution Research (1994); Christopher Honeyman, *The Test Design Project: Performance-Based Assessment: A Methodology for Use in Selecting, Training, and Evaluating Mediators* (NIDR, 1995); Consumer Due Process Protocol, *supra* note 7, ("Elements of effective quality control include the establishment of standards for neutrals, the development of a training program, and a program of ongoing performance evaluation and feedback.")

<sup>16</sup> See, e.g., SPIDR Report on Qualifications, *supra* note 7 and note 15 generally. For an example of how these combined concepts are used in the development of a roster of neutrals, see the roster entry criteria established by the U.S. Institute for Environmental Conflict Resolution for environmental mediators, at [www.ecr.gov/r\\_entry.htm](http://www.ecr.gov/r_entry.htm).

<sup>17</sup> See, e.g., SPIDR Law and Public Policy Committee, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991).

<sup>18</sup> See, e.g., National Standards for Court-Connected Mediation Programs, Standard 16, Evaluation ("Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.")

<sup>19</sup> See SPIDR Report on Qualifications, *supra* note 7, at 12 (ADR Provider Organization should "be assessed on a regular basis," through such means as "consumer input, review of complaints, self-assessment, trouble-shooting, regular audits, peer review and visiting committees from other programs.")

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## II. Information Regarding Services and Operations

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

- a. The nature of the ADR Provider Organization's services, operations, and fees;
- b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;
- c. The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;
- d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and
- e. The method by which neutrals are selected for service.

### **Comment**

[1] Reasonable and meaningful disclosure of key information about the ADR Provider Organization is the cornerstone of this document. In conformity with established ADR standards,<sup>20</sup> this Principle underscores the importance of clear, accurate and understandable information to informed decision-making by consumers of dispute resolution services and the public generally.

[2] This Principle, like this document generally, applies the rule of reason to the extent and form of the required disclosure. While some may prefer an absolute rule, the drafters believe that requiring reasonable disclosure consistent with the nature, structure and services of the organization and the knowledge base of the individual user, is more appropriate in this evolving field. Currently, ADR Provider Organizations come in a wide variety of organizational forms, provide a variety of services, and operate in an array of disparate settings.<sup>21</sup> These entities can differ considerably in their services, policies, relationships with the affiliated neutrals, affiliation criteria, markets, and their approaches to listing and referring cases to affiliated neutrals. A principle establishing an affirmative obligation to provide key information should recognize these differences, as well as differences in effective means of disclosure.<sup>22</sup>

[3] This Principle calls for reasonable disclosure of information about relevant financial relationships between the affiliated neutrals and the ADR Provider Organization. Information about specific compensation arrangements is not contemplated under this section. Rather, general statements of the existence or absence of consequential financial links, either direct or indirect, between the affiliated neutral and the ADR Provider Organization that may have an impact on the conduct of the Organization or the neutral, or may be reasonably perceived as having such an effect, are expected.<sup>23</sup>

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<sup>20</sup> See, e.g., SPIDR Report on Qualifications, *supra* note 7, at 6 ("It is the responsibility of . . . programs offering dispute resolution services to define clearly the services they provide . . . and provide information about the program and neutrals to the parties."); National Standards for Court-Connected Mediation, *supra* note 7, Standards 3.1-3.2.

<sup>21</sup> See *Taxonomy of ADR Provider Organizations*, *infra* at Appendix A; see also *supra* note 10 and accompanying text.

<sup>22</sup> We recognize that the kinds of disclosures advocated by this Principle will be different, for example, for a large international organization, like the American Arbitration Association, and a small mediation firm.

<sup>23</sup> In some organizations, there is no financial relationship with affiliated neutrals other than their inclusion on a roster. In other entities, affiliated neutrals are owners, employees, contributors, franchisees, independent contractors or stand in other consequential economic relationship to the ADR organization. See *Taxonomy of ADR Provider Organizations*, *infra* at Appendix A.

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### III. Fairness and Impartiality

The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.

#### **Comment**

ADR parties and the public are entitled to fair processes and impartial forums. As justice providers, ADR Provider Organizations have an obligation to take all reasonable steps to ensure the impartiality and fundamental process fairness of their services. This mandate may have particular importance when the ADR Provider Organization undertakes to administer an in-house dispute resolution program, another organization's process or policy, or processes designed or requested by one party to a dispute. Recent ADR policy directives and case law provide the field, courts and regulators with important baselines of fundamental fairness and impartiality.<sup>24</sup> To date, key indicia of fair and impartial processes and forums include: competent, qualified, and impartial neutrals; rosters of neutrals that are representative of the community of users; joint party selection of neutrals; adequate representation; access to information; reasonable cost allocation; reasonable time limits; and fair hearing procedures.<sup>25</sup> Building on these standards, this Principle establishes an across-the-board obligation on the part of the ADR Provider Organization to ensure the impartiality and fundamental process fairness of its services.

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### IV. Accessibility of Services

ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.

#### **Comment**

As the profession and business of dispute resolution grows, ADR Provider Organizations have a responsibility to provide services to low-income parties at reasonable or no costs. This access-to-services obligation can be satisfied in various ways, depending on the circumstances of the ADR Provider Organization. For example, the Provider Organization can offer *pro bono* neutral services or sliding scale fees. The entity could also require its affiliated neutrals to participate as neutrals in dispute resolution programs offered by the courts, government, nonprofit groups or other institutions at below market rates or as volunteers.

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### V. Disclosure of Organizational Conflicts of Interest

- a. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a *de facto* stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

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<sup>24</sup> See *supra* note 7.

<sup>25</sup> See, e.g., Employment Due Process Protocol, *supra* note 7; Consumer Due Process Protocol, *supra* note 7; and the Health Care Due Process Protocol, *supra* note 7. See also *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Engalla v. Kaiser Permanente Medical Group*, 15 Cal. 4th 951, 938 P. 2d 903, 64 Cal. Rptr. 2d 843 (1997).

- b. The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.

### **Comment**

Reflecting the field's longstanding reliance on reasonable disclosure to address the existence of interests or relationships which may effect fairness and impartiality,<sup>26</sup> this Principle imposes an independent duty of disclosure on the Organization to provide information about significant organizational relationships with a party or other participant to an ADR process. As with these Principles generally, the rule of reason is intended to apply to this provision.<sup>27</sup>

At issue is the potential for actual or perceived conflicts of interest involving ADR participants (such as, businesses, public institutions, and law firms) that have continuing professional, business or other relationships with the ADR Provider Organization. For example, an ADR Provider Organization may be under contract to an institutional party to provide a volume of ADR services; or a law firm may regularly choose a particular ADR Provider Organization to resolve disputes repeatedly, or represent a client or clients that does so; or a public institution may send most or all its employment disputes to a particular ADR Provider Organization by contract or *de facto* business relationship. Under this Principle, disclosure of such relationships between the Organization and repeat player parties or other repeat players to the other parties to the dispute would be required.

This Principle reflects the evolving concept of "organizational conflict and relationship."<sup>28</sup> Since ADR Provider Organizations perform functions which may have a direct or indirect impact on the dispute resolution process (in the creation of lists of neutrals for selection, scheduling or other administrative functions), concerns about organizational impartiality have begun to be raised by courts, policy makers and commentators.<sup>29</sup> While the drafters understand that this disclosure obligation may impose some additional costs, particularly for large ADR Provider Organizations, we believe that disclosure of organizational relationships and interests is critical to preserving user and public confidence in the independence and impartiality of ADR Provider Organizations and services.

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<sup>26</sup> See *ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes* (1977, under revision); *Commonwealth Coatings Corp. v. Continental Co.*, 393 U.S. 145, 151-52 (1968)(concurring opinion); Christopher Honeyman, *Patterns of Bias in Mediation*, J. of Dispute Resolution 141 (1985); CPR-Georgetown Commission on Ethics and Standards in ADR, *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral* (Final, 2002).

<sup>27</sup> As with Principle II, we recognize that the extent and form of disclosures advocated by this Principle will be different depending on the nature of the ADR Provider Organization and is subject to the rule of reason. See generally Principle II, Comment [2].

<sup>28</sup> For an analysis of recent case law and repeat player issues in ADR, see generally *Carrie Menkel-Meadow, Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect*, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, Currents 1, 15 (AAA, December 1988)("providers should recognize that an ongoing, close connection between a provider and regular user may be a source of concern to the incidental user who is drawn into an ADR process by a pre-dispute ADR clause in a contract of the other party's devising.") See also JAMS Conflicts Policy, addressing both organizational conflicts and individual conflicts.

<sup>29</sup> See, e.g., Consumer Due Process Protocol, *supra* note 7, at 18 ("The consensus of the Advisory Committee was that the reality and perception of impartiality and fairness was as essential in the case of Independent ADR Institutions as it was in the case of individual Neutrals. . . . In the long term, . . . the independence of administering institutions may be the greatest challenge of Consumer ADR.") In *Engalla v. Kaiser Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 938 P 2d 903, 64 Cal. Rptr. 2d 843 (1997), the California Supreme Court strongly criticized the fairness and enforceability of Kaiser Permanente's mandatory malpractice self-administered arbitration program, and remanded the case for further factual consideration of claims of fraud. For an analysis of *Engalla*, see Carrie Menkel-Meadow, *California Court Limits Mandatory Arbitration*, 15 Alternatives 109 (September, 1997). While the suit filed by the family of the deceased lung cancer patient has since settled, the *Engalla* case has led to a comprehensive assessment and restructuring of the Kaiser arbitration process. See The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration, *The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement* (January 5, 1998). Kaiser has since hired an independent ADR provider organization to administer its formerly in-house program. See Justin Kelly, *Case Study Shows Consumer Confidence in Kaiser Arbitration Program*, *adrworld.com*, April 22, 2002; Davan Maharaj, *Kaiser Hires Outside to Oversee Arbitrations*, Los Angeles Times, November 11, 1998, at C11.

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## VI. Complaint and Grievance Mechanisms

ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

### **Comment**

This Principle requires ADR Provider Organizations to establish and provide information about mechanisms for addressing grievances or problems with the Organization or individual neutral. Organizations should develop policies and procedures appropriate to their circumstances to provide this complaint review function.<sup>30</sup> The organizational oversight provided through these mechanisms is concerned primarily with complaints about the conduct of the neutral, or deficiencies in process and procedures used. The complaint and grievance mechanisms are not intended to provide an appeals process about the results or outcome of the ADR proceeding.

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## VII. Ethical Guidelines

- a. ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.
- b. ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.

### **Comment**

[1] Absent a controlling statutory or professional code of ethics, this Principle directs the ADR Provider Organization to require its neutrals to adhere to a reputable code of conduct. The purpose of this Principle is to help ensure that neutrals affiliated with the ADR Provider Organization are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR. To this end, ADR Provider Organization should take reasonable steps on an ongoing basis to educate its neutrals about the controlling code and ethical issues in their practices. An ADR Provider Organization may elect to develop an internal code, which conforms to prevailing ethical norms, or to adopt one or more reputable external codes.<sup>31</sup>

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<sup>30</sup> For example, an Organization may provide a complaint form, and/or designate an individual within the entity to receive and follow up on complaints. Another Organization may develop a more formal procedure for filing, investigating and resolving complaints. *See, e.g.*, JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. In some states, disciplinary bodies have been established to review the conduct of state-certified ADR neutrals. For example, the Florida Mediator Qualifications Board was established by the Florida Supreme Court to govern the discipline of state-certified mediators in Florida. In the federal courts, the Northern District of California recently modified its local rules to provide that any complaint alleging a violation of ADR rules should be presented in writing and under seal directly to the U.S. Magistrate Judge who oversees the ADR programs in that court. (Local rule, effective May 2000).

<sup>31</sup> For examples of codes of conduct developed by an ADR provider organization, *see* JAMS's Ethical Guidelines for Mediators, Ethical Guidelines for Arbitrators, and the JAMS Conflicts Policy addressing both organizational and individual conflicts issues. *See* Principle V, Disclosure of Organizational Conflicts of Interest, *supra*. In addition, JAMS designated a senior executive as the organization's arbiter of service complaints, and has developed procedures for handling ethics-based complaints against panelists. *See* JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. *See also* Principle VI, Complaint and Grievance Mechanisms, *supra*.

[2] As the numbers of ADR Provider Organizations increase, it is particularly important that Organizations attend to issues of their own managerial, administrative and financial integrity. To this end, ADR Provider Organizations should consider adopting ethical guidelines for employees or other individuals associated with the Organizations who provide ADR management or administrative services, addressing such issues as impartiality and fair treatment in ADR administration, privacy and confidentiality, and limitations on gifts and financial interests or relationships.<sup>32</sup>

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### **VIII. False or Misleading Communications**

An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

#### ***Comment***

As providers of neutral dispute resolution services, ADR Provider Organizations should be vigilant in avoiding false or misleading statements about their services, processes or outcomes. With ADR Provider Organizations assuming greater prominence in the delivery of ADR, it is important that organizations take care not to foster unrealistic public expectations about their services, processes or results.

The reporting of settlement rates and other measures of reporting by ADR Provider Organizations and individual neutrals raises concern. Settlement rates can be calculated in various ways and reflect various factors (including the number of cases, the difficulty of cases, the time frame for inclusion, and the definition of settlement). This Principle calls for disclosure of how the settlement rates and other key reporting measures (such as “number of cases”) are determined when ADR Provider Organizations use these measures to market their services.

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### **IX. Confidentiality**

An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract.

- a. ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction.
- b. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization.
- c. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.

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<sup>32</sup> The American Arbitration Association recently adopted a Code of Ethics for Employees which addresses the ethical responsibilities of AAA employees in administering cases and other responsibilities. In the area of impartiality, for example, the Code provides, “[t]he appointment of neutrals to cases shall be based solely on the best interests of the parties.” In the areas of Financial Transactions, the Code provides, *inter alia*, “[e]mployees shall avoid any financial or proprietary interest in contracts which the employee negotiates, prepares, authorizes or approves for the Association and shall not contract with family members.” Additionally, the Code prohibits gifts to employees, stating: “Employees shall also observe the gift policy of the Association which prohibits the acceptance of gifts from neutrals, parties, advocates, vendors, or from firms providing services, regardless of the nature of the case or value of the intended gift.” *Code of Ethics for Employees of the American Arbitration Association* (1998).

### **Comment**

This Principle establishes the protection of confidentiality as a core obligation of the ADR Provider Organization. Given the varied sources of confidentiality protections, unsettled case law, and diverse regulatory efforts,<sup>33</sup> this Principle imposes a general obligation on the part of the ADR Provider Organization to establish, disclose and uphold governing confidentiality rules, whether set by party agreement, contract, policy or law. This Principle also makes it a core organizational obligation to communicate the Organization's confidentiality policies to neutrals and parties.<sup>34</sup>

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<sup>33</sup> See, e.g., Kathleen M. Scanlon, *Primer on Recent Developments in Mediation*, ADR Counsel In Box, No. 6, Alternatives (February 2001 and October 2001 Update)(overview of current ADR confidentiality policy, practice, case law and uncertainties)(October 2001 Update at [www.cpradr.org](http://www.cpradr.org), Members Only section); *Special Issue: Confidentiality in Mediation*, Disp. Resol. Mag., (Winter 1998) (for a review of policy issues and uncertainties, regulatory reforms, and case law); Christopher Honeyman, *Confidential, More or Less: The Reality, and Importance, of Confidentiality is Often Oversold by Mediators and the Profession*, Disp. Resol. Mag. 12, (Winter 1998); Proposed Model Rule 4.5.2 of the CPR-Georgetown Commission on Ethics and Standards in ADR's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); Uniform Mediation Act & Reporter's Notes (jointly drafted by National Conference of Commissioners on Uniform State Law and ABA Section of Dispute Resolution) (adopted and recommended for enactment in all states by NCCUSL at 2001 Annual Meeting on August 10-17, 2001; adopted by ABA House of Delegates in February 2002).

<sup>34</sup> For an example of a public ADR Provider Organization's statement of confidentiality policy and rules, see U.S. Institute for Environmental Conflict Resolution, Confidentiality Policy and Draft Rule (1999).

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# Appendix A: Taxonomy of ADR Provider Organizations<sup>35</sup>

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## I. Definition of “ADR Provider Organization”

See Definition and Comment in the Principles for ADR Provider Organizations, *supra* at 5-6.

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## II. Taxonomy of ADR Provider Organizations

ADR Provider Organizations come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve, and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals; and in their resources and management philosophies.

To help organize our understanding of this diverse and dynamic field, we believe it is useful to categorize ADR Provider Organizations according to (i) their organizational structures, (ii) the nature of their services and relationships with neutrals, and (iii) the nature of their relationships with users or consumers. The following discussion looks closely at each of these three main categories and tries to identify the major distinguishing factors in each area. We hope this discussion helps to provide a framework for understanding and guiding the diverse entities which manage or administer dispute resolution and conflict management services.

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### A. ORGANIZATIONAL STRUCTURES

Nine distinguishing factors related to the organizational structure of ADR Provider Organizations were identified:

- Overall Organizational Status
- Overall Organizational Structure
- How Neutrals Are Listed
- How Neutrals Are Referred
- Organization’s Role in Quality Control
- Organization’s Stake in Dispute or Substantive Outcome
- Organization’s Size
- Organization’s Resources
- Organization’s Operational Transparency

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<sup>35</sup> CPR-Georgetown Commission member Charles Pou headed the Commission’s effort to develop a taxonomy of ADR Provider Organizations, see *Principles for ADR Provider Organizations, supra* at note 1 (hereinafter referred to as ADR Provider Principles). The Commission’s goal in developing the taxonomy was to describe, group and provide a framework for analysis of the many different kinds of entities that fall within the rubric of ADR Provider Organization. Mr. Pou is the primary author of the taxonomy. Commission members Bryant Garth and Michael Lewis also contributed to its development. The Taxonomy committee also played the lead role in formulating the definition of ADR Provider Organization included in the ADR Provider Principles.

### **1. Organizational Status:**

Court • Public regulatory agency • Public dispute resolution provider agency • Other public entity (State dispute resolution agency, University, Administrative support agency, Office of Administrative Law Judges, Shared neutrals program) • Quasi-public (*e.g.*, community dispute resolution programs) • Private not-for-profit • Self-regulatory entity • Private industry programs for intra-industry disputes, franchisee disputes, consumers, employees, clients • Private for-profit

A variety of different kinds of organizations currently provide dispute resolution services. In recent years, many public entities have been established, or extended their activities, to serve as ADR Provider Organizations. These include court-annexed systems individually or centrally managed by a judge or an administrator, programs run in-house by government agencies with regulatory duties, programs in government agencies that employ staff neutrals, shared neutrals programs, expedited government contracting vehicles, and activities at government, academic, or other public entities interested in conflict management. On the private side, Provider Organizations include private sector non-profit entities and for-profit entities. Some private groups also serve as contractors to assist public agencies or others wishing to employ ADR more effectively.

### **2. Organizational Structure:**

Corporation • Limited liability company • Partnership • Franchise • Law firm • Membership organization • Other entities

A variety of structures are used to arrange the business or other dealings of private provider organizations, including corporations, limited liability companies, partnerships, franchises, law firms, and membership organizations.

### **3. How Neutrals Are Listed:**

Pure clearinghouse • Selective listing (objective) • Selective listing (subjective)

The ADR Provider Organization may list all neutrals who provide required data and serve simply as a clearinghouse. Alternatively, it may employ objective criteria and list all who are found to comply; or it may selectively limit listed neutrals in explicitly or implicitly subjective ways.

### **4. How Neutrals Are Referred:**

Nonselective • Random panel selection • Subjective panel selection • Party-identified panels • Assignor of neutral • Mixture

The Organization may refer all of its listed neutrals to users requesting a panel of neutrals, or all who meet users' stated criteria, or a randomly selected subset of responsive neutrals; alternately, it may subjectively select a panel, or a single neutral, from among those that it (or the parties) deems appropriate for a given case. Some organizations employ a mix of these referral or selection techniques.

### **5. Organization's Role in Quality Control:**

Certification of listed neutrals • Qualifications and selection process • Conflicts check • Performance evaluation • Discipline • Training • No role

Some management entities certify or otherwise indicate that the neutrals to whom they refer cases or employ are qualified, or even superior. Others offer no warranties of qualifications beyond the general accuracy of the information they supply about potential neutrals. Whatever warranties or disclaimers are made, a variety of informal and formal approaches to quality control are used. These generally include one or more of the following: requiring affiliated neutrals to receive approved training courses; requiring neutrals to show that they have certain kinds of experience, training, or references; providing

ongoing in-service or other training and education to affiliated neutrals; offering informal, case-specific advice to neutrals; evaluating performance based on observation by the ADR Provider Organization's personnel or users' questionnaire responses; offering processes for receiving complaints, assessments, or other feedback from users; removing listed neutrals who, over time, are not selected by parties; and disciplining or removing neutrals who fail to meet ethical or other standards.

#### **6. Organization's Stake in Dispute or Substantive Outcome:**

None • Full party to dispute • Good will, future business • Membership organization • Non-profit mission • Administrative charge for matchmaking • Portion of neutral's fee • Other

Most ADR provider entities are explicitly independent and have no stake in the dispute. A few may be parties to cases for which they provide referrals, as in ADR programs that are managed internally by the private or public organization involved in the dispute (*e.g.*, an internally-managed corporate, university or governmental dispute resolution). Other ADR Provider Organizations may have some attenuated or perceived interest (programs using collateral duty or shared neutrals from the same, or another, agency). Some managing organizations provide ADR services as a public service, pursuant to a statutory mandate, as a means of improving or supplementing other services or activities, or as a way to fulfill other non-profit missions. Others provide services primarily in return for fees. Several other benefits may accrue to an ADR Provider Organization: service to members, good will that may influence other activities, or access to additional cases or clients.

#### **7. Organization's Size:**

Individual part-time solo • Individual full-time solo • Small entity • Large entity • Regional organization • National organization • International organization

ADR Provider Organizations may include a single individual for whom mediation, arbitration, or management or administrative services are a sideline, a full-time practitioner, a small specialized entity with several neutrals, a large entity that offers a diverse array of services and neutrals in several parts of the U.S., or a national or international organization with hundreds or thousands of available neutrals.

#### **8. Organization's Resources:**

Substantial paid staff and related resources devoted to program • Limited volunteer staff and few other resources

Staff and other resources available for operating a program vary dramatically and can have an impact on the nature and quality of services. A few providers devote no full-or part-time staff to their activities; they may, for example, use volunteers, simply provide a list of neutrals without more, or respond to requests on a "catch-as-catch can" basis. At the other extreme, some have substantial full-time staffs devoted to one or more provider roles (*e.g.*, setting standards for listing neutrals, admitting listed neutrals, furnishing panels, advising parties, assessing or disciplining listed neutrals).

#### **9. Organization's Operational Transparency:**

Opaque • Open decision making • Rules of procedure defining required competencies, disclosing standards and/or methods for selecting neutrals in individual cases

Some ADR Provider Organizations operate as black boxes, with little or no provision for oversight or openness; others are relatively more open and explicit about the processes by which neutrals are selected, assigned, and monitored; a few seek explicitly to assure openness and regularity via rules, standards, or methodologies.

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## **B. ORGANIZATION'S SERVICES AND RELATIONSHIPS WITH NEUTRALS**

Five key attributes of ADR Provider Organizations were identified in this area:

- Nature of Organization's Services
- Nature of Cases
- Nature of Process Assistance Furnished by Neutral
- Relation of Listed Neutrals to ADR Provider Organization
- Status of Neutral

### **1. Nature of Organization's Services:**

Neutral who assists disputants • Clearinghouse list of available neutrals • Management service • Full service administration • Assignor of neutrals • Advisor • System design • Other consultant • Mixture

Some ADR Provider Organizations offer only certain limited kinds of neutral services; others offer a menu of ADR options, which may include training and consulting. A few operate purely as clearinghouses that do little beyond offering a list of neutrals for users to review, perhaps accompanied by a short brochure or generalized advice. Some court programs, for instance, simply maintain a binder containing resumes sent in by local neutrals. Many ADR Provider Organizations, however, offer a range of administrative, management, and consulting services, including helping parties select or design appropriate processes, finding suitable neutrals, and managing the case during the ADR process. Some Provider Organizations offer set management choices, while others offer parties tailored management (from full-service to self-administration) depending on the users' request. A few offer all of these neutral and management services, sometimes in settings where the Organization both manages a roster and provides neutrals' services for the same client.

### **2. Nature of Cases:**

Number of parties (multiparty or two-party) • Complexity • Length • Subject matter (environmental/policy • civil enforcement • mass tort, insurance, product liability, or similar litigation • commercial/business conflicts • small claims litigation • workplace/employment • family • consumer • labor-management • neighborhood • other)

ADR Provider Organizations assist parties in cases that vary in size, complexity, length, and number of parties, as well as in their subject matter. A few Provider Organizations offer services for cases involving a wide array of settings or subjects. Other Provider Organizations tend to specialize by subject matter. For instance, some Organizations deal mainly with environmental matters; others tend to focus primarily on a broad range of business, commercial, employment and public disputes. Most public Provider Organizations—for example, entities managing court-annexed ADR programs, state-wide court management organizations, and user-specific entities (like the FDIC's roster of neutrals for litigation stemming from bank closings)—deal mostly, or exclusively, with the kinds of cases they were established to support, though this may encompass a broad array of subject areas.

### **3. Nature of Process Assistance Furnished by Neutral:**

System design • Other consulting • Training • Facilitation • Mediation • Case evaluation • Binding arbitration • Private judging • Specialized expertise in specific subject area • Hybrid ADR Processes • Mixture

The ADR Provider Organization may refer listed neutrals who offer a range of ADR processes and related services. The neutral's roles may also range from a brief consultations to extended conflict resolution interventions. Training and design consulting assignments may also include short or longer tenures.

#### **4. Relation of Listed Neutrals to Organization:**

Independent • Contractors • Franchisee • Staff • Other

Some management organizations have few, or no, dealings with neutrals beyond listing them. Other organizations work primarily, or exclusively, with neutrals who are contractors, subcontractors, employees, members or franchisees. Several provider organizations require most of their listed neutrals to pay a fee.

#### **5. Status of Neutral:**

Private full-time professional neutral • Private part-time • Public collateral duty • Public full-time • Judicial officer • Lawyer • Other professionals

An ADR Provider Organization may offer services from private full-time or part-time dispute resolution practitioners, public full-time practitioners, private individuals who serve occasionally as neutrals, public employees who offer neutral services on a collateral duty basis, or judicial officers whose activities as neutrals may be related to official duties. Apart from their employment status, neutrals referred by a Provider Organization may also come from a variety of professional or other backgrounds (*e.g.*, lawyer, judge, engineer, environmental scientist, social worker, therapist, among others).

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### **C. ORGANIZATION'S RELATIONSHIPS WITH USERS OR CONSUMERS**

Two key factors were identified in this area:

- Characteristics of Parties or Representatives
- Organization's Prior Relationship with a User or Representative

#### **1. Characteristics of Parties or Representatives:**

Unsophisticated/vulnerable/pro se/novice parties or representatives • Experienced/ fully represented parties or representatives • Individual v. Organization • Individual v. Individual • Other

ADR Provider Organizations deal with a variety of users. Organizations handling neighborhood, consumer, or family cases may often deal with cases involving exclusively first-time participants or similarly unsophisticated users. In many court programs and other settings, the Provider Organization may deal with some parties who are novices on one side and well-represented organizations, or ones that have great experience with ADR processes, on the other. These and other Provider Organizations—particularly in large commercial or labor disputes—deal largely with sophisticated repeat players (as parties and/or representatives) on one or all sides.

#### **2. Organization's Prior Relationship with a User or Representative:**

None • Repeat contractor • Long-term contractor • Financial dealings • Other (*e.g.*, board member)

An ADR Provider Organization may have had no dealings with any party or representative; may have worked one or more times with a party or with both parties, or their representatives; or may have a long-term service contract or other relationship with one party or law firm. A Provider Organization may also have certain types of prior, ongoing, or intermittent professional relations with parties or representatives, such as providing training, consulting, or systems design services. In some instances, a Provider Organization may have financial, business, professional or personal dealings with a party or representative.

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