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I. INTRODUCTION

Formal dispute resolution, long thought to be the province of the state, seems to have piqued the interest of the private sector in recent years as a possible sphere of activity. In settings where courts are clogged and criminal cases are forcing civil cases off the calendar, where public juries are perceived as "out of control," and where many individuals are disillusioned with incremental tort reform; a growing number of private individuals are selling their services as neutrals to facilitate dispute resolution. For-profit firms, both independent and national networks, are springing up and positioning themselves in major metropolitan areas. Nonprofit organizations, both new and well-established, are actively marketing an expanding array of alternative dispute resolution (ADR) services to an increasingly diverse audience of potential consumers.

This flurry of activity does not spring from a conscious public decision to privatize the provision of judicial services. Instead, it stems from an entrepreneurial intuition that privately developed portfolios of dispute resolution services can be competitive despite subsidies to the public sector. Since formal provision of dispute resolution has traditionally been an exclusively public function, the following questions arise: Is there a public interest that should govern in the evolution of this private dispute resolution market? Should this market be encouraged? Should it be regulated? Should it simply be left alone? Shaping sound answers to these difficult questions must reasonably depend first

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upon developing a clear understanding of the nature of the newly emerging private marketplace.

A. What Is Private Alternative Dispute Resolution?

Terminology in this field is new and often inconsistently applied because there has been both a growing awareness of the private dispute marketplace and a recent proliferation of services. For example, "private judging" is used by some to refer to all disputes taken to third-party neutrals for some form of counsel or disposition. To others, however, "private judging" refers only to that very small subset of cases referred through the courts to a third-party neutral.

For the purposes of this inquiry, we define **private ADR** as *any dispute resolution service provided for a fee by a third-party neutral outside the court system.*

Any party that might normally be a party to a dispute may be a disputant in private ADR. Such parties may be businesses, individuals, government entities or insurance companies representing principals.

Disputants can come to a private setting by any one of several roads. The dispute can arise in the course of a contractual relationship in which the parties have agreed before the dispute arose to settle any differences through private ADR. Such predispute agreements are increasingly a condition of receiving service in the banking industry and the health care industry.[1] Such agreements are also commonly found in employment contracts, construction contracts, and uninsured motorist coverage insurance contracts. Disputants may also agree to take disputes to private ADR after the disputes have arisen, believing that they will get a speedier, less-expensive process and a better-reasoned decision. In some states, disputants may move into private ADR while remaining under the court's jurisdiction. That is, with their case still active in the court, they may choose or the judge may direct them to take the dispute or some phase of its processing, such as discovery, to a private neutral for resolution. Disputants in these "court referenced" cases must pay private fees, but usually retain their right to appeal.

When disputants take their dispute to a third-party neutral, either in accordance with the terms of the predispute agreement or by mutual agreement it may mean that they take their dispute to a firm that provides private ADR services. These ADR services usually include both administering the disputing process and providing a select panel of neutrals from which the disputants can choose. Such firms include the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS). It may also mean that the disputants take their dispute to an independent neutral with no firm affiliation.

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1. *See* DISPUTE RESOLUTION CLAUSES: A GUIDE FOR DRAFTERS OF BUSINESS AGREEMENTS (1994), and Erik Moller and Elizabeth Rolph, PRIVATE DISPUTE RESOLUTION IN THE BANKING INDUSTRY (1993).

Because private ADR is usually a matter of choice or private contract, no restrictions or requirements apply to the neutrals. In all instances, fees are privately agreed upon by the parties.

Because private ADR is typically the product of a contract or an agreement, no rules other than the terms of the agreement govern the nature of the dispute resolution procedure or whether it is binding. As a result, firms and providers are free to offer a full menu of conventional procedures such as arbitration, mediation, summary jury trials, or fact-finding. They may also create new options that better meet the demands of their clients.

B. The Policy Issues

Whether or not private ADR should even enter the realm of public scrutiny is the subject of considerable controversy. On the one hand, private ADR is based on a private contractual agreement between parties which normally does not command public interest. On the other hand, the provision of dispute resolution through our public system of justice is a central function of the state and is closely linked with such important public responsibilities as maintaining order and establishing norms of behavior. Thus, good arguments can be made to support and to oppose investigation and perhaps ultimate regulation of this new market.

This debate over the private provision of a public service is a recurring theme in public policy.[2] Those in favor of privatization argue that government is too big and that the private market is more efficient than government for allocating resources. Those disfavoring privatization counter with the argument that equity and distributional concerns require some services to be provided by a public entity. The privatization of judicial services has been a part of this discussion and the subject of numerous papers.[3]

Setting these arguments aside, private ADR has already divided its ranks of observers. Supporters claim that growth in the private ADR marketplace will benefit both the public and the user communities. These supporters argue that diverting cases to the private sector will reduce the growing burdens on the public courts, which, in turn, will reduce public costs and allow the courts to offer better and faster service to the remaining disputants. At the same time, the supporters assert that private ADR can provide disputants with faster, less expensive processes that can be tailored to their particular needs and are managed by

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2. *See, e.g.*, CHARLES WOLF, JR., MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES (1993); E.S. SAVAS, PRIVATIZING THE PRIVATE SECTOR (1982); and RANDY ROSS, GOVERNMENT AND THE PRIVATE SECTOR: WHO SHOULD DO WHAT (1988).

3. *See, e.g.*, W. Landes & R. Posner, *Adjudication as a Private Good*, 8 JOURNAL OF LEGAL STUDIES, 235 -384 (1979); S. Shavell, *The Social versus Private Incentives to Bring Suit in a Costly Legal System*, 11 JOURNAL OF LEGAL STUDIES 333-40 (1982); L. Kaplow, *Private versus Social Costs of Bringing Suit*, 15 JOURNAL OF LEGAL STUDIES 371-86 (1986); and R. Cooter & D. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolutions*, 27 JOURNAL OF ECONOMIC LITERATURE 1067-97 (1989).

experienced neutrals. In addition, private ADR offers a private setting for dispute resolution which, supporters allege, is less stressful and more likely to facilitate resolution.[4]

Opponents of private ADR, on the other hand, argue that private ADR serves neither public nor private interests well. These opponents prophesy that movement of business and insurance disputes from the public into a private setting will lead to the further erosion of financial support for public judicial services and will create a system that offers two-tiered justice to the privileged few. Opponents also believe that private ADR will strip the bench of its best and most experienced judicial talent as good judges leave for the higher wages and better working conditions of the private sector. Moreover, because private ADR proceedings and decisions are not public, society will be deprived of cases that may be valuable vehicles for establishing precedent and articulating behavioral norms. Disputants in the private sector will be deprived of many of the procedural safeguards, such as the right to appeal, offered in the public sector. Opponents also argue that neutrals will have strong incentives to rule in favor of disputants who offer the best prospect of repeat business as the neutral may be anxious to please customers and "build a practice."[5]

At the moment, however, arguments on both sides of the question are speculative. The private ADR market is new, and we have very little empirical information to provide a sound basis for exploring the very complex questions raised in the arguments. The purpose of this study is to begin to bridge that gap.

C. Study Focus and Research Questions

As a first step in laying the groundwork for further explorations, we must equip ourselves with a basic descriptive understanding of the nature of the private ADR marketplace. The nature of the private ADR marketplace breaks into three important components:

- Consumers: disputants and their disputes;
- The Product: ADR services and price; and,
- Producers: neutrals supplying ADR services.

In this report, after summarizing the broad outlines of the market, we will examine the characteristics of consumers of private ADR. This examination will especially focus on caseload characteristics including volume, seriousness, and types of disputes. We will also examine the availability of ADR procedures, the

4. *See* M. Galanter & J. Lande, *Private Courts and Public Authority*, 14 STUDIES IN LAW, POLITICS, AND SOCIETY 393-415 (1992).

5. *See, e.g.*, R. Reuben, *The Dark Side of ADR*, CALIFORNIA LAWYER, February 1994, at 53-58; Galanter & Lande, *supra* note 4.

frequency with which they may be used, and the market's fee structure. Finally, we will look more closely at the provider community and explore the relevant characteristics of third-party neutrals, including independent neutrals and neutrals serving on firm panels.

D. Methods and Data Sources

To allow us to explore these questions in some depth, we narrowed our focus of attention to a well-defined population of cases and to a single geographical area.

We have chosen Los Angeles as the study site for many reasons. Los Angeles is a major metropolitan area with a large and diverse court caseload.[6] The Los Angeles Superior Court is also a court which the Institute for Civil Justice has studied extensively, thus giving us valuable data for comparing public and private caseloads.[7] At the same time, the anecdotal evidence suggests that Los Angeles has an active and rapidly growing private ADR marketplace. Because Los Angeles is on the "cutting edge," what we learn from this study could be predictive of what other regions will experience in the future.

We also limited our population of cases by type and time. Our analysis captures all civil money disputes but specifically excludes family law, probate, and other types of disputes falling outside of the definition of civil money disputes. The analysis is also cross-sectional, including only cases and service providers that were active in 1992 and 1993. Although a longitudinal study would have permitted us to identify direction and degree of change in the volatile marketplace, the data from both the providing firms and the independent neutrals unfortunately would not support this more ambitious format.

Our analysis is based primarily on data from four sources: open-ended interviews with firms providing private ADR services, case records from a subset of those firms, a survey of all third-party neutrals offering services in the Los Angeles area, and Los Angeles County Superior Court case records.[8]

1. Firm Interviews

In an initial screening survey, we contacted 22 firms offering private ADR services in the Los Angeles area.[9] Using information regarding size, caseload, and type of cases gathered; we selected the six most active firms, which between

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6. *See* J.S. Kakalik, M. Selvin, & N.M. Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, Santa Monica, Calif.: RAND, R-3762-ICJ (1990).

7. *Id.*

8. This information was supplemented by information provided in the Annual Data Reference publications of the Judicial Council of California.

9. The ADR firms offering services in the Los Angeles area were originally identified and contacted in 1992. We updated the 1992 list and contacted the firms again in 1993, eliminating those that did not provide services that conform with our definition of private ADR and adding new firms that had entered the market during the intervening year.

them handle approximately 60 percent of the private civil caseload, and returned to them for complete interviews. These six firms supplied both descriptive interview information and marketing materials on their histories, services, and practices.

2. Firm Case Records

Of these six firms, three agreed to provide access to case-level data files for the year 1992, and a fourth agreed to provide aggregate caseload information which we specified.[10]

3. Survey of Neutrals

In addition to collecting information from firms providing private ADR, we conducted a mail and telephone survey of the neutrals who provide services in the Los Angeles area. In these mail and telephone surveys, we gathered information regarding the neutrals' patterns of practice and the characteristics of disputes that came directly to them. The timing of the mail survey was such that we asked for information about each of the disputes that came to them during the first seven months of 1993, assuming that this information would be comparable to firm case-level data collected in 1992.[11] We mailed questionnaires to all those persons who were identified by the firms we contacted as members of their provider panels. In one case, the firm's panel list included almost 1,200 names, so we randomly sampled from this list.[12] Otherwise, all panel members were surveyed. In addition, we sent questionnaires to all individuals not already identified as panel members and who were listed in the 1992 Directory of California Lawyers as "Private Judges" and "Arbitrators and Mediators" serving the Los Angeles area, and in the local telephone directory or in advertisements providing ADR services for civil cases. There was substantial overlap among the various lists; ultimately, we sent questionnaires to 715 potential respondents. One hundred and seventy-four were categorized as "ineligible"; that is, they either had not served as a neutral sometime during the previous five years or were deceased. Of the remaining 541 individuals, 48 percent of the eligible population responded through the mail questionnaire. That response rate was increased to 76 percent through

10. One of the largest companies supplied us with five years of data, hoping that we could ultimately conduct a longitudinal analysis. The others either were newly launched or did not have computerized records predating 1991.

11. Respondents were likely to be referring to their daily calendars for information on cases. To ensure high-quality data and a good response rate, we asked only about disputes respondents heard in 1993— the year they received the questionnaire.

12. In this case, the firm lists its entire membership as potential neutrals, despite the fact that many do not provide neutral services.

follow-up telephone interviews.[13] All completed surveys were weighted for the analysis. Our results indicate that there are approximately 1,200 neutrals serving the Los Angeles area.

To determine whether or not the respondent populations for the mail and telephone surveys were different, we compared respondent characteristics and found no systematic bias. We also checked responses to selected questions for internal consistency, which we found to be high.

4. Superior Court Case Records

Finally, to compare characteristics of the public and private case-loads, we obtained Los Angeles Superior Court case records for all civil matters opened between 1988 and 1992. This data set includes information on the parties, the type of action, the filing and disposition dates, and the type of disposition.

E. Organization

We organized this report according to the research areas listed above. In Section II, we present information on the characteristics of the ADR caseload and the disputants. In Section III, we describe both the ADR services offered and used by disputants and examine the pricing structures of the firms and independent neutrals. In Section IV, we develop a profile of the third-party neutral population, and, in the final section, we review our findings and conclusions based on some of the policy issues raised previously.

II. THE DEMAND SIDE: DISPUTES AND DISPUTANTS

Renewed interest in private ADR has been the direct result of perceptions that it is a growing phenomenon and that, in some reasonable period of time, it will account for a significant share of the dispute resolution delivered. Only as it achieves some presence in the market can private ADR have any meaningful effect, for better or worse, on the public judicial system or on disputants collectively. It must be stressed, however, that the growing interest is based on "perceptions." Because this is a private market, there are no public records to document changes in use. The decentralized and often sketchy information that does exists in the private sector is generally very tightly controlled.

In this chapter, we draw on information collected from private ADR service firms, neutrals, and the Los Angeles courts to profile the caseload and disputants using private ADR services and to compare private-sector with public-sector use.

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13. A few questions were omitted from the telephone survey to shorten the response time required. Otherwise, the questions were the same.

A number of characteristics are of particular interest since they bear most directly on current policy debates. They include the following:

- **Volume**—The size of the private caseload is important because it suggests the limits of costs and/or benefits that currently result from private ADR. If, contrary to popular belief, very few cases are going to private resolution, then there may be less likelihood that private activity is affecting the public sector. There would also be less concern with the costs and benefits it may bestow on users.

- **Growth rate**—Like volume, growth rate is an important measure of the likelihood that the private sector is or will be a significant component of the dispute resolution marketplace. It is particularly important as a window of the future role of the private sector.

- **Value of disputes**—Case value is one measure of the importance of a case and of the likelihood that the case will occupy some court time. ADR is sometimes associated with "little cases"—cases that would not be pursued without the simpler, less expensive ADR option. If private ADR is composed principally of these "little cases," it may not be absorbing the cases that actually consume public court time and resources.

- **Durability of disputes**—Durability of disputes refers to the likelihood that a case will proceed to some kind of third-party intervention. It is used as a second indicator of the seriousness of a dispute and the likelihood that it will consume court time.

- **Types of cases**—Case type refers to the class of civil dispute being pursued, e.g., personal injury, employment, or medical malpractice. Knowing the proportions of different types of cases that go to private ADR not only gives us further insight into the importance of various classes of disputes to the overall caseload, it also may help identify ADR's particular appeal and bound our projections of future growth.

- **Types of disputants**—For this analysis, we classify disputants as individuals or businesses based on their listed names in the case record. A corollary of the argument that ADR attracts small cases is that it attracts novice disputants, those who would not be pursuing their disputes but for the availability of a less expensive, and less imposing process. If this is true, then a disproportionate number of disputants are likely to be individuals. On the other hand, some argue that private ADR offers experienced disputants an efficient, friendly environment in which to pursue their disputes and, perhaps, even an environment so eager to see their return that heavy users receive favored treatment. If the latter scenario

is more the measure of reality, we might expect to see disproportionate numbers of businesses, especially larger businesses.

We characterize the private ADR disputes and disputants on these dimensions and conclude with a brief discussion of the various routes available to private ADR.

A. Volume

Volume is, perhaps, the most obvious measure of the importance of the private ADR caseload. Speculation and anecdotes aside, how many disputes is this alternative system of justice actually handling, and what fraction of Los Angeles' total dispute caseload does that encompass?

To address these questions, we constructed a measure of the total ADR caseload by adding all disputes that neutrals reported handling both through firms and independent of firms[14] and compared that number with caseload reports for Los Angeles Superior, Municipal, and Small Claims Courts published by the California Judicial Council. Table 1 shows that of the total 465,578 disputes filed in Los Angeles during 1993, an overwhelming 95 percent were resolved in the public sector (small claims, municipal, and superior courts). The remainder were split between firms and independent neutrals handling cases that come directly to them. In reality, our analysis slightly underestimates the proportion of disputes that are being disposed of by the private sector because a substantial number of those disputes were previously filed in the public sector. Because firms and independent neutrals often do not know the status of disputes that they handle, our respondents were only able to identify the status of 71 percent of their caseload. Of these disputes, respondents report that 72 percent had been filed previously in the public courts. If we apply this same percentage to the total private caseload, it suggests that the private sector may account for 5.3 percent of the total dispute caseload which is not a meaningful difference.

14. To confirm the accuracy of this reported data, we compared the neutrals' estimates with data from cooperating firms and found that the two were consistent.

Table 1
Distribution of Disputes Between the Public and Private Sectors in 1993

	Number of Claims Filed	Percentage of Total
Courts (superior, municipal, and small claims)[a]	441,906	94.9
Private ADR		
Firms	12,941	2.8
Independent neutrals	10,731	2.3
Total	23,672	5.1
Total disputes	465,578	100.0

[a]Data from Judicial Council of California (1994).

If one looks only at volume, it is hard to describe private ADR as a major player in dispute resolution. Volume, however, is not determinative and should not be the only measure of importance.

B. Growth in the Private Sector

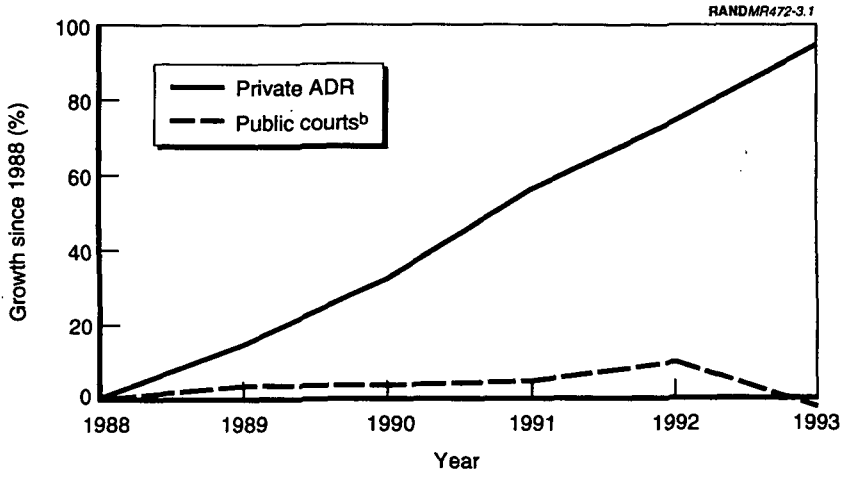
A second measure of the role private ADR can be expected to play in delivering justice is its growth rate. To determine the growth rate, we asked neutrals in our survey how many private civil disputes they had handled in each of the years from 1988 to 1993. Simply determining the rate of growth in the private sector, however, does not tell us whether private ADR is increasing its share of the total caseload, maintaining a stable share or, perhaps, receiving a declining market share in the context of a very rapid general increase in disputing. To provide a baseline against which to measure changes in reported private ADR activity,[15] we also compared the experience in the private sector with changes in the number of cases filed in the Los Angeles courts over that same period.

Figure 1 shows that the private ADR caseload in Los Angeles grew steadily at an average rate of about 15 percent per year between 1988 and 1993.[16] This is in sharp contrast to the public caseload, which actually decreased an average of about 0.5 percent between 1988 and 1993. Even in 1993, when the public

15. We specifically asked respondents to report only private disputes and exclude any court-annexed cases that they might have handled.

16. We recognize that our numbers probably overestimate the growth somewhat, but not a great deal. Some who provided services in earlier years are no longer available to answer our survey. Our estimate for the private caseload in 1988, for example, is, in all likelihood, lower than the actual private caseload. Also, because we asked respondents about cases that they had "handled" in a given year, there is some small possibility that a few disputes straddled two years and were counted twice. We do not think this very likely, both because disputes that go to the private sector do not remain active for long periods and because respondents understood that we were interested in numbers of cases.

caseload shrank by over 50,000 cases, private ADR continued to account for a growing number of disputes resolved. These results attest to the fact that the Los Angeles market for private ADR, although certainly small, young, and vulnerable, has experienced strong and steady growth over the last several years. Since no current evidence suggests a substantial change in relative growth rates of the courts and the private sector, private ADR may well become a significant feature in the judicial landscape. If one extrapolates current ADR growth trends against a stable population of disputes, private ADR could resolve as many as 13 percent of the area's disputes by the year 2000.



[b]Judicial Council of California (1989–1994).

Figure 1
Percentage of Growth Since 1988

C. *Value of Disputes*

Alternative dispute resolution is frequently believed to be a good way to dispose of small cases—cases that deserve a hearing but do not warrant the court's time.[17] Consistent with that view, research into the effects of judicial arbitration suggests that the availability of court programs may increase the number of small cases filed because litigants see the opportunity for a less formal and less expensive hearing.[18]

We might expect that private ADR provides a similar opportunity in the private sector. Rather than resolving more substantial cases that would otherwise be consuming court time and resources, private ADR would generate its own demand

17. *See* NATIONAL CENTER FOR STATE COURTS/STATE JUSTICE INSTITUTE (1994).
18. *Id.*

in the community of small-stakes claimants who would not have pursued their claims in the courts. Surprisingly, both our claim and award data provide evidence to the contrary.

We combined individual claims data from one large firm with similar data from our survey of neutrals.[19] As Table 2 shows, the amount in question was greater than $25,000 in 60 percent of these disputes as compared with 14 percent in the public court caseload ($p < 0.01$).[20] Although our estimate may be somewhat high because the firm that supplied claims data handled a higher-stakes caseload than most other firms. Any reasonable adjustment, however, would still show a substantial difference between public and private claim amounts.

Furthermore, of the private caseload, the cases that do not go to firms but, rather, go directly to neutrals are by far the highest-stakes group of all, with claim amounts of $25,000 or more reported for 69 percent of the cases. Figure 2 shows how disputes going directly to independent neutrals are distributed across the range of values.

Table 2
Distribution of Disputes ≥ $25,000

	Total Number of Cases	Number of Cases ≥ $25,000	Percentage of Cases
Private caseload	11,340	6,783	60
Firm [a]	—	—	31
Independent neutrals	—	—	69
All Los Angeles courts[b]	441,906	61,438	14

[a]Case-level data from one firm for 1992. Numbers of cases not presented to protect identity of firm.
[b]Superior Court caseload (1993); Judicial Council (1993).

The conclusion that serious disputes account for a substantial share of the private caseload was generally affirmed by our examination of awards. We did, however, find marked differences in the award distribution both among the firms and between the firms and the independent neutrals. Figure 3 shows that cases resolved through firms have substantially lower award amounts than cases that go directly to neutrals. The fact that 66 percent of the cases handled through firms receive a defense verdict, in contrast to only 16 percent of those handled directly by neutrals ($p < 0.01$), suggests that liability is generally less clear in disputes

19. Firms often do not keep claim information, and only one firm in our group could supply it.

20. This percentage constitutes the proportion of the total Los Angeles caseload that is filed in Superior Court. The Superior Court requires as one of its sources of jurisdiction that the amount in contest be $25,000 or more.

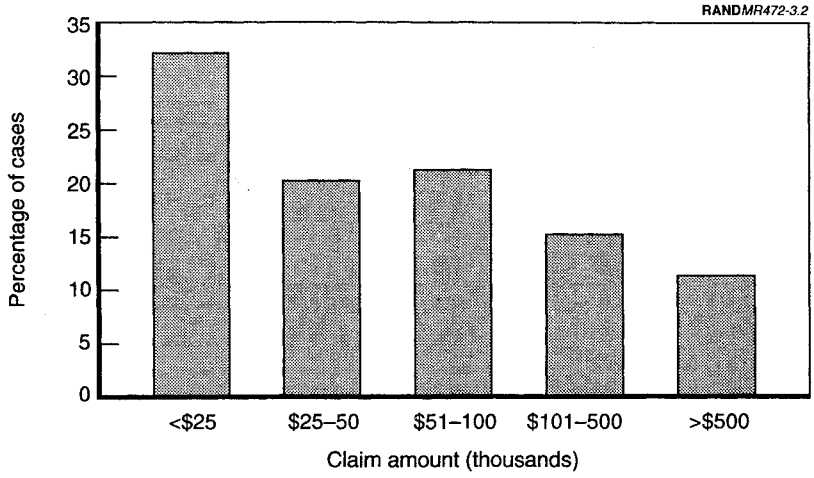


Figure 2
Claim Amounts for Non-Firm Disputes

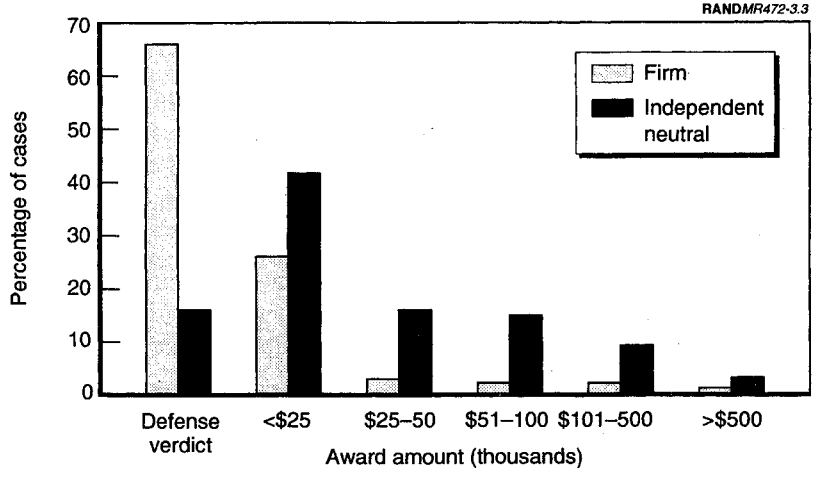


Figure 3
Size of Awards for Firms and Independent Neutrals

resolved through firms.[21]

Survey results suggest that the value of private ADR disputes is increasing. Slightly less than half of the neutrals who responded to our survey thought the values of their caseloads had increased over the last five years, while a similar number thought it had remained the same, and only 9 percent thought it had declined.[22]

D. Durability of Disputes

Disputes going to private ADR are not only comparatively high-value disputes, they also appear to be durable disputes. This means that they are disputes that ultimately require third-party intervention. Table 3 shows that 73 percent of all private ADR disputes continue to some form of third-party intervention (an arbitration hearing, a mediation, a mini-trial, etc.). This is in sharp contrast to the 14 percent of all Superior Court filings that ever reach a settlement conference. Perhaps many disputants only seek private ADR when they conclude that they cannot reach a bilateral settlement. Table 3 also shows the substantial variation among firms of cases with third party intervention. This

Table 3
Percentage of Cases That Go to Third-Party Intervention

Private ADR		
Firms		
Firm 1	68	
Firm 2	90	
Firm 3	46	
Total[a]	78	
Independent neutrals	70	
Total private ADR		73
Superior Court[b]		14

[a]Firm case-level data.

[b]Kakalik (1990). This is the percentage of Superior Court cases that remained in the system long enough to reach the mandatory settlement conference procedure, which involves considerable judicial intervention with the parties.

21. In addition to variation between cases that go to firms and those that go directly to neutrals, there is also substantial variation across firms in the percentage of disputes that receive a defense verdict.

22. This question was on the mailed questionnaire, but it was not part of the telephone interview. Therefore, respondents who answered questions in the phone interview are not part of this summary.

substantial variation may be, at least in part, attributable to differences in firm filing or administrative fees which are levied when a dispute is brought to a firm and can be quite substantial (See Section Three).

E. Types of Disputes

Although we are unable to make exact comparisons of the mix of public and private sector disputes because we do not have precisely comparable data, our data suggest that their respective caseloads differ significantly.[23] Using the Judicial Council case type categories, Table 4 shows that the private sector has a substantially higher proportion of auto personal injury cases than the Superior Court (43 percent versus 29 percent) but has a somewhat lower proportion of other personal injury and civil complaints ($p < 0.01$). It seems unlikely, although possible, that these differences would disappear if we were to incorporate the Municipal and Small Claims cases.

The difference in caseload composition can, at least in part, be explained by the private ADR firms' aggressive targeting of auto insurance companies in their marketing. Our interviews of private ADR firms suggest that these companies seek the opportunity to develop relationships with identified sources for continuing streams of future cases. Persuading corporate disputants to name a particular firm or a firm's procedural rules in the disputants' predispute contracts can accomplish similar results. AAA and JAMS, for example, use this tool aggressively in their marketing.

Table 4
Case Type by Sector (percent)

	Private[a]	Courts[b]
Civil complaints	41	46
Auto personal injury	43	29
Other personal injury	16	26

[a]Firm case-level data.
[b]Superior Court Caseload (1993); Judicial Council (1994).

The private ADR caseload has several interesting characteristics that suggest that private ADR attracts particular types of disputes and that firms and independent providers play somewhat different roles in the marketplace.

Table 5, column 3, shows that the rates for the types of disputes which are brought into the private sector vary. It also confirms the predominance of auto personal injury, which accounts for 42 percent of all cases brought to private

23. There is no publicly available information on the types of disputes that make up the total caseload of the Los Angeles courts. The California Judicial Council, however, does report the Los Angeles County Superior Court's caseload broken into three major types of disputes.

ADR. There are several explanations for this distribution. While it may simply reflect the underlying case-type population, ADR may be considered more appropriate for some types of cases than for others. Variations may also be explained by the preferences of attorneys or insurers who, acting as procedural gatekeepers, are likely to play a major role in directing disputes to ADR. For example, those persons handling auto personal injury might take their cases to ADR more frequently because they may be more familiar and more comfortable with ADR procedures than those who handle other types of cases.

Case mixes vary not only between firms and independents ($p < 0.01$) but also among firms. For example, Table 5, columns 1 and 2 show that auto personal injury, malpractice, and employment disputes play a more prominent role in the caseload of independent neutrals than in the caseload of firms. Independent neutrals also seem more likely to attract the types of disputes that are typically of higher value (see Table 3). Variations among firms can also be substantial. For example, construction cases make up 23 percent of one large firm's caseload, while only one other firm handles any (1 percent of its caseload) construction cases.[24] These differences probably reflect the targeted marketing strategies of firms which are each seeking a profitable market niche. Independent neutrals as a group, on the other hand, handle a broader caseload.

Table 5
Comparison of Firm and Independent Case Mix[a] (percent)

	Firm[b]	Independent	Total Private
Auto personal injury [c]	36	46	42
Employment	8	16	12
Other contract	20	9	13
Non-auto personal injury	13	6	9
Construction	10	4	7
Real property	7	5	6
Malpractice	2	5	4

[a]Case categories with fewer than 3 percent of the caseload omitted.
[b]Firm case-level data.
[c]Private auto personal injury differs between Table 4 and Table 5 because of rounding.

To determine whether or not the case mix is changing, we asked the providers, both firms and independent neutrals, if they have observed any changes in the mix over the past few years. Respondents generally agree that little change has occurred. Firms report no changes, and only a few neutrals observed change and noted a relatively greater number of auto personal injury and employment cases in the mix than any other type of case.

24. To preserve confidentiality, we cannot report the breakdown of case types by individual firms.

Only three of the cooperating firms provided us with data on the awards for all cases within each category of disputes. Not surprisingly, we found that the amount of the case award varied with the type of dispute. Table 6a shows that a defense verdict is rendered in 95 percent of the employment disputes, while a defense verdict is rendered in only 23 percent of the consumer disputes. At the

Table 6a
Distribution of Award Amounts
Within Case-Type Categories for Three Firms (percent)

	Award Amounts					
Case Types	Defense Verdict	0–$25K	$25–50K	$50–100K	$100–500K	>$500K
Construction	51	35	6	3	3	1
Auto personal injury	53	43	3	1	0	0
Employment	95	4	0	0	0	0
Real property	55	37	4	3	1	1
Other contract	62	22	6	5	3	2
Other personal injury	71	23	3	2	1	0
Unknown	66	22	4	2	5	1
Other	88	8	3	1	1	0
Consumer	23	77	0	0	0	0
Product liability	50	50	0	0	0	0
Other tort	67	33	0	0	0	0
Total distribution of award amounts	63	29	4	2	2	1

NOTE: Percentages may not sum to 100 because of rounding.

Table 6b
Distribution of Case Types
Within Award-Amount Categories for Three Firms (percent)

	Award Amounts						Total
Case Types	Defense Verdict	0–$25K	$25–50K	$50–100K	$100–500K	>$500K	Distribution of Case Types
Construction	15	23	30	29	31	35	19
Auto personal injury	14	24	14	4	4	0	16
Employment	20	2	2	3	0	6	13
Real property	11	17	13	17	9	12	13
Other contract	11	9	20	26	20	35	11
Other personal injury	13	9	9	11	9	0	11
Unknown	9	7	9	8	26	12	8
Other	6	1	3	1	2	0	4
Consumer	1	8	0	0	0	0	3
Product liability	0	0	0	0	0	0	0
Other tort	0	0	0	0	0	0	0

NOTE: Percentages may not sum to 100 because of rounding.

same time, Table 6b shows that auto personal injury disputes account for almost a quarter (24 percent) of disputes in which awards are less than $25,000, and employment disputes account for the greatest share of defense verdicts (20 percent).

F. Disputant Characteristics

The available measures of disputant characteristics are extremely imperfect indicators of either the sophistication of the disputant as a consumer of ADR services or of the compelling factors bringing the disputant to private ADR. The relative proportions of businesses and individuals in the disputing population, however, may at least indicate whether private ADR is becoming the exclusive domain of businesses attempting to cut litigation costs and circumvent juries or, alternatively, of individual disputants anxious to pursue disputes in what they may believe is a less expensive, friendlier setting.

To determine how often individuals and businesses dispute in public and private forums, we identified the principal plaintiffs and defendants as either individuals or businesses based on a random sample of Superior Court cases[25] and a census of private ADR cases. Table 7 shows that both businesses and individuals are well represented in the private and public forums. The significantly ($p < 0.01$) larger percentage of business-versus-business disputes in the private sector suggests that private ADR is particularly attractive to business disputants.

Businesses may force individuals into private ADR through predispute contract clauses when the business is either the plaintiff/claimant or the defendant/respondent in a dispute. For this reason, we aggregated into one category all disputes in which a disputant on one side of the dispute is an individual and a disputant on the other side of the dispute is a business entity.

Table 7
Disputant Types: Public and Private Sectors(percent)

	Courts[a]	Private ADR[b]
Individual vs. individual	38	43
Mixed	45	29
Business vs. business	17	29

NOTE: Percentages may not sum to 100 because of rounding.
[a]Los Angeles County Superior Court case-level data.
[b]Firm case-level data.

25. We selected a random sample of 4,335 (from a total of 26,507), 1992 Los Angeles Superior Court cases from which to identify disputants.

Obscured by the identification of disputants is the fact that insurance companies also play a substantial role in disputes that are normally between individuals. Some portion of the disputes between "individuals" in the private sector may well reflect business (e.g., insurer) rather than individual preferences. Our survey respondents report that insurance companies represented one or more of the parties in 69 percent of the disputes that came to them directly. They also report, as we noted in Table 5, that almost half of these cases were automobile personal injury disputes in which it is common practice for the individual represented by an insurance company to be the named party. Given this practice, it is likely that Table 7 substantially fails to report business involvement.

In sum, our survey indicates the following attributes of private ADR: The private market for dispute resolution serves a small but growing percentage of Los Angeles' formal disputes; formal disputes are reasonably high-value and durable disputes; auto personal injury cases represent a high proportion of formal disputes; and businesses and insurers are heavy users of private ADR.

III. THE PRODUCT: PRIVATE ADR PROCEDURES

The second major component of the private ADR marketplace is the product. In this context, the product consists of the dispute resolution procedures. Private ADR's proponents argue that private ADR procedures are more flexible, quick, inexpensive, and private than the public court option. Private ADR's opponents reply that these benefits are undocumented and are outweighed by the associated costs of growth in the new system which may have grave public consequences.

In this chapter, we first describe the common types of ADR procedures available to consumers. Then, drawing on our firm interviews, firm caseload data, and independent neutral survey responses, we determine the following relative to the Los Angeles marketplace: The types of procedures actually being offered, the types of procedures used, and the fee structures applied.[26] In this analysis, we consider the private ADR market as a whole and its components separately. The measures we use include:

- **Procedures offered**—The range of procedures offered by the private ADR providers is an important measure of the variety of private ADR available to meet the needs of disputants in the marketplace. If the range is broad, it indicates that variety is available in the market. If the range is narrow, this alleged benefit of the private marketplace may not exist.

- **Procedures provided**—The mix of procedures actually provided by the ADR providers is a measure of the extent to which the disputants are taking advantage of the available variety of private ADR. If a wide mix of procedures is actually being provided, disputants are taking advantage of the available variety. If a

26. Unfortunately, our data do not allow us to measure time to disposition.

narrow mix of procedures is being provided, however, then variety is not an important benefit of private ADR.

- **Fees**—The fee structure of the industry provides an imperfect proxy of the costs of private ADR procedures. A high fee structure would suggest that the claim that private ADR is less expensive than litigation in the public courts bears further examination. This measure, however, is only a partial proxy for the costs of private ADR procedures. Since attorneys' fees and costs account for most of the costs of dispute resolution in the public courts, this measure is not conclusive.

Proponents often cite privacy as another benefit of private ADR. We do not discuss privacy beyond noting that it is fairly clear that private ADR offers more procedural privacy than dispute resolution in the public sector and leads to more private outcomes. There is no public exposure of the information that is presented at the proceedings, and the decision has no precedential value. Of course, considerable debate exists over whether or not the privacy feature is a cost or benefit of private ADR.

A. Forms of ADR Procedure

It is helpful to begin with definitions of the various dispute resolution formats or procedures that might be offered by private providers. The taxonomy in private ADR is particularly confusing since firms, neutrals, and disputants may use different terms to refer to the same procedure or concept. To clarify our use of these terms, we offer the following definitions:

- **Arbitration**—Arbitration is any adjudicatory procedure in which a neutral third party (or panel) hears arguments and reviews evidence provided by the disputants regarding the dispute between them. The neutral (or panel) then renders a final, binding decision which is not subject to court approval or appeal.[27]

- **Mediation**—In mediation, disputants engage in discussions with each other through a third party in an attempt to reach a mutually agreed upon settlement. This procedure operates under an entirely different paradigm from arbitration. Arbitration is based on the adjudicatory model of the public courts with passive fact-finding and binding procedure. Mediation, in contrast, is a nonbinding

27. This study specifically excludes court-annexed arbitration. Court-annexed arbitration is not a choice for disputants, because in California it is mandatory for all superior court cases in which the amount at issue is under $50,000. Decisions are also not binding. In addition, court-annexed procedures have been studied reasonably extensively. For a summary of these studies, see National Center for State Courts/State Justice Institute (1994).

procedure in which the third-party neutral plays an active role in reaching a settlement.

- **Private Judging**-"Private judging" refers to any procedure under Cal. Civ. Proc. Code §§ 638, 639 or Cal. Const., art. VI, § 21 in which the parties compensate the third-party neutral. Under this definition, a case must first be filed in court. After it is filed, then the entire action or particular aspect of the action may proceed to private ADR procedure for resolution, typically by agreement of the parties and by using arbitration. The decision reached in the private ADR procedure will be reported to the court and treated as the decision of the court, with all postjudgment remedies available including appeal.[28]

- **Summary Jury Trial**—A summary jury trial is a nonbinding procedure in which a private jury is empaneled from regular jury lists. The parties present short summaries of their cases, and the jury provides the parties with a realistic reaction of "real jurors." This nonbinding process provides parties with important information regarding the case for use in settlement proceedings.

- **Mini-Trial**—The mini-trial is another hybrid dispute resolution process which promotes negotiation and settlement. The attorneys make short presentations to a third-party neutral who sits with high-level agents of the parties. After the presentations, the neutral offers his or her opinion to the parties. In addition, the parties' agents can ask questions of the neutral. Again, the purpose of this exercise is to provide the parties with information and an independent, nonbinding opinion of the dispute in order to promote settlement.

- **Voluntary Settlement Conference**—A voluntary settlement conference is very similar to a mediation or a court-mandated judicial settlement conference. The neutrals in mediation, however, are expected to be much more assertive than neutrals in a voluntary settlement conference. In mediation, neutrals may offer opinions about the strengths and weaknesses of the various disputants' arguments and propose creative solutions. In voluntary settlement conferences, neutrals allow the disputants to direct the negotiation.[29]

- **Neutral Expert Fact-Finding**—Neutral expert fact-finding is a procedure in which certain substantively difficult or technical issues within a dispute are referred to an expert for a determination. This procedure can be used by voluntary agreement of the parties or at the direction of a court. The determination made by the expert may be adopted by the court hearing the dispute.

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28. For a detailed study of this form of private ADR, *see* J. Roehl, R.E. Huitt, & H. Wong, *Private Judging: A Study of Its Volume, Nature, and Impact on State Courts*, Pacific Grove, Calif.: INSTITUTE FOR SOCIAL ANALYSIS (1993).

29. *See* R. MacCoun, E. Lind, & T. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, Santa Monica, Calif.: RAND, RP-117, (1992).

B. *Procedures Offered*

Variety in ADR procedures offered by providers is an important measure of the flexibility available to consumers. Variety comes in three forms. First, providers may offer a number of different ADR procedures. Second, for each procedure, considerable variation exists between the firms. Finally, the firms may also offer customers the opportunity to vary the rules applied within each procedure. This variation and the opportunity to tailor procedures are important measures of flexibility.

1. Procedural Options Among Firms

All the firms in our group advertise themselves as offering virtually all of the services described above.[30] Table 8 shows the availability of the various procedures offered by each ADR firm. Within each type of procedure, variation is typical. For example, firms report offering several varieties of arbitration, such as high-low arbitration and mediation-arbitration.[31]

Procedural rules can also vary. The arbitration rules of some firms make only rare reference to the Rules of Evidence, while others claim to apply the rules to their full extent. Similarly, the amount of pre-arbitration procedure varies considerably. Some rules allow parties the opportunity to obtain discovery and to have pre-arbitration procedures and motions heard. Under other rules, the parties cannot do either. The rules of mediation are as varied as the individuals who provide the service. Each has his or her own style and procedures. Some mediators only meet with disputants separately. Others also meet with the disputants together as they try to reach settlement. Some mediators want to know the substance of the dispute prior to the mediation session; others do not.

If formal options do not meet their needs, parties usually create their own procedural flexibility by agreeing to alternative rules. The new rules may reflect an agreement regarding discovery or limiting the scope of the dispute, or they may address more substantive aspects of the dispute.

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30. These claims of broad capability may be somewhat exaggerated in the interest of broad marketing.

31. In high-low, the parties initially agree to low and high bounds for the value of the dispute. The arbitrator is then limited to this range in deciding the amount of the award. In mediation-arbitration, the dispute is mediated, and any unresolved issues are then handled in an arbitration proceeding.

Table 8
Private ADR Firm Services

	Arbitration	Mediation	Private Judging	Mini-Trial	Summary Jury Trial	Expert Neutral Fact-Finding	Voluntary Settlement Conference	Mediation and Arbitration	Other
Alternative Resolution Centers	yes	yes	yes	yes	no	yes	yes[a]	no	no
American Arbitration Association	yes	yes	yes	yes	yes	yes	yes	no	no
Arbitration Forums, Inc.	yes	yes	yes	yes	yes	no	yes	no	no
Arts Arbitration & Mediation Service	yes	yes	no	no	no	no	yes[a]	no	no
First Mediation Corp.	yes	yes	yes	no	no	no	yes	yes	no
J.A.M.S., Inc.	yes	yes	yes	yes	yes	no	no	yes	no
Judicate, Inc.	yes	yes	yes	yes	yes	no	yes	yes	yes
Real Estate Mediation & Arbitration	yes	yes	no	yes	no	yes	yes	no	yes
United States Arbitration & Mediation	yes	yes	yes	yes	no	yes	no	no	no

SOURCE: Publicly available marketing information; firm interviews.

[a]Firm considers VSC to be mediation.

2. Procedural Options Among Independent Neutrals

Table 9 shows the percentage of independent neutrals who offer particular services. Comparing Table 9 to Table 8 indicates that independent neutrals are less likely than firms to offer a broad range of procedural options to their clients. Ninety-eight percent of neutrals in our survey report offering arbitration, but only

Table 9
Services Offered by Independent Neutrals(percent)

Service	Percent
Arbitration	98
Mediation	55
Voluntary settlement conference	41
Expert neutral fact-finding	31
Private judging	28
Mini-trial	24
Discovery management	24
Summary jury trial	11
Other	8

55 percent of the neutrals report offering mediation. Independent neutrals do offer other procedures, but less frequently than firms do. For example, seven of the nine firms in our survey offer mini-trials, while only 24 percent of the neutrals report that they offer this service. Although our survey did not address the question of flexibility within the different types of procedures, it is our impression that independent neutrals are less likely to formally codify or publish the rules they may use, and they are just as agreeable to variants that parties may agree to.

In sum, flexibility in the type of procedures offered and the rules to be applied is clearly available in the private marketplace.

C. Procedures Provided

The mix of services actually *provided* as opposed to the mix of procedures *offered* indicates the extent to which the flexibility of the private ADR market is being utilized by disputants. If the disputants are not taking advantage of this flexibility, procedural variety may not be as valuable as many proponents argue. In this analysis, we categorize procedures provided as arbitration, mediation, private judging, voluntary settlement conferences, and others. The category "other" includes summary jury trials, med-arb, expert-neutral fact-finding, and mini-trials.

1. Procedures Provided by Firms

The mix of services actually provided by firms is dominated by arbitration and mediation. Table 10 shows that arbitration accounts for 65 percent and mediation for 24 percent of the services actually provided. All other services collectively account for only 11 percent of the disputes brought to private ADR firms.

2. Procedures Provided by Independent Neutrals

The independent neutrals provide a different mix of procedures to their clients (clients who come directly to them without going first to a firm), with arbitration and mediation playing a dominant but lesser role than in firms ($p < 0.01$). While arbitration accounts for 53 percent and mediation 21 percent of this caseload, voluntary settlement conferences account for 12 percent and private judging accounts for 7 percent of the procedures actually used. These latter figures compare with firm usage rates of 0.1 percent and 3 percent for voluntary settlement conferences and private judging, respectively.

Table 10
Mix of Services Actually Provided (percentage of disputes)

Service	Firms[a]	Independent Neutrals[b]	Total Private ADR
Arbitration	65	53	58
Mediation	24	21	22
Private judging	3	7	5
Voluntary settlement conference	0[c]	12	7
Other	8	7	7

SOURCE: Firm data.
NOTE: Percentages may not sum to 100 because of rounding.
[a]The firm data represent 1992 disputes.
[b]The independent neutral data represent 1993 disputes.
[c]The actual figure is 0.1 percent.

3. Total Private ADR Procedural Case Mix

Table 10 indicates that the private ADR market is dominated by arbitration (58 percent) and mediation (22 percent).[32] Seven percent were handled in voluntary settlement conferences and 5 percent in private judging. The remaining 7 percent involve other mechanisms, including mini-trials, summary jury trials, and

32. One large firm provider has recently added mediation to its available services and has not yet had significant usage of mediation. If this provider is eliminated from the market, the remaining firms show a mix of arbitration to mediation of 50 percent to 32 percent.

med-arb, which do not yet appear to be an important part of the private marketplace.[33]

Our findings demonstrate that despite the opportunity that disputants may have to turn to new procedures for the resolution of their disputes, they tend to rely on the format that is most like the adjudicatory procedure of the courts: arbitration. At the same time, it is fair to characterize the procedural environment as one over which disputants have substantial control, if they choose to seek true alternatives to adjudication.

4. Trends

Although arbitration may currently dominate the marketplace, anecdotal information suggests that mediation and other ADR procedures are growing in popularity. Firms interviewed report that disputants are becoming more sophisticated in their understanding and use of ADR and are increasingly turning to mediation. This may be a reflection of the increasing sophistication of disputants, or it may be a consequence of the growing familiarity with mediation as an alternative. In either case, the firms are marketing mediation services with growing energy.

Respondents to the survey of neutrals confirm that mediation is receiving a growing share of the private ADR market. When asked if they noticed a change in the mix of procedures they were providing, 60 percent of those who responded stated that they were mediating an increasing number of disputes; 13 percent stated that both mediation and arbitration were increasing; and 13 percent stated that other forms of private ADR were growing in popularity.

D. Private ADR Fees

One indicator of the comparative cost of private ADR is the fees charged for private ADR services. This measure is of limited value because it omits attorneys' fees and costs, which is a large, and in some cases overwhelming, part of the costs of dispute resolution.[34] Nonetheless, since the fees charged for private ADR services can be large and are costs that are not associated with dispute resolution in the public courts, it is important to understand them.

Fee structures vary depending upon whether disputes are being resolved through a firm or an independent neutral. Firms typically charge administrative fees, hearing fees for their neutrals, and additional charges. On the other hand, independent neutrals typically charge only an hourly rate for their services. In

33. The information provided by the individual providers regarding how frequently private judging is used conflicts with previous data; see Roehl, Huitt, and Wong, *supra* note 28. This discrepancy warrants further research.

34. This very important information should be the subject of future research.

some instances, a small number of firms and individuals charge by the dispute, but this is rare.

1. Fee Structures for Firms

Administrative Fees. Table 11 shows that most private ADR firms charge administrative fees that cover their management and other business costs. It also shows that these fees vary significantly across firms. The typical fee is $100 to $150 per party for for-profit firms and from zero to a few thousand dollars for non-profit firms.[35] This table reflects the fee structure for these firms as of 1993.

Administrative fees can be compared to filing fees in public courts. In fact, they mirror court fees in that they generally take into account the value of the action and the number of parties. In the last row of Table 11, we have included the filing fees for the California state courts. Ranging between $15.00 and $182.00, these fees are substantially below the fees charged by private ADR firms.

The biggest variation in administrative fees across firms is between the non-profit and the for-profit firms. Non-profit firms generally charge a fee based on either the size of the dispute or the income of the disputant. Administrative fees for the American Arbitration Association, for example, can be quite high if the amount at issue in the dispute is large. For-profit firms have slightly lower rates. Since the costs of pursuing cases through for-profit firms generally entail higher hearing fees for the neutral's time, differences in administrative costs may be overwhelmed by differences in hearing costs.[36]

Hearing Fees. Firms usually charge additional fees to cover the costs of the third-party neutral. These fees vary substantially from firm to firm and within firms, depending on which neutral provides services. Table 11 reports the rates charged by the firms for which we have information. Fees fall in the range of $500/day-$450/hour. The non-profit firms in the group charge little or no hearing fees to cover the costs of neutrals because neutrals usually serve on a voluntary or quasi-voluntary basis. The for-profit firms range from $75/hour/party to $450/hour/party. In some cases, firms will also vary their hearing fees according to the amount at issue, the procedure used, and the number of parties involved. Rates typically do not vary between case types or disputant types.[37]

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35. The table and subsequent discussion rely on public information for the nine firms serving the Los Angeles area. Several of these firms were not included in our data collection, because they were very small or handled a caseload that did not fall within the scope of this study. Therefore, other parts of this report will refer to fewer firms than we do here.

36. We did not systematically collect information on the lengths of hearings, but we understand that these lengths may vary substantially, with some approximating the time required by jury trials.

37. Some firms note that they will work out fee arrangements that may vary from the scheduled rates for certain clients with a high amount of business.

Table 11
Private ADR Firm Fees

Firm	Administrative Fee	Hourly Fee
Alternative Resolution Centers	$50/party	$250/hr (total for all parties)
American Arbitration Association	**Arbitration**—Sliding scale filing fee of $300 for cases under $25K, up to $4K for cases over $5M payable by filing party; plus an administrative fee of $100/day/party for 1 arbitrator, or $150/day/party for >1 arbitrator **Mediation**—$200 (cases under $100,000) or $300 (cases over $100,000) (total for all parties)	**Arbitration**—Based on arbitrator's fee, typically approximately $500/day/arbitrator **Mediation**—Based on mediator's fee
Arbitration Forums, Inc.	$150/party	Hourly, based on judge or attorney rate
Arts Arbitration & Mediation Service	**Arbitration**—Sliding scale based on income of party up to 4% of amount in controversy or $45/party **Mediation**—Small amount based on income of party	None
First Mediation Corp.	$100/party	2 parties $135/party/hr 3 parties $100/party/hr 4 parties $75/party/hr
J.A.M.S., Inc.	$100/party for 2-party dispute $125/party for 3 or more parties Some flat fee programs for cases under $50K $200–$450 (No hourly fee)	$150/hr/party if 2-party dispute; <$150/hr/party if more than 2 parties, determined by number of parties

Table 11-continued

Firm	Administrative Fee	Hourly Fee
Judicate, Inc.	**Business & Commercial-Arbitration & Mediation:** $300/party **Regular Mediation:** $150/party	**Business & Commercial-Arbitration & Mediation:** $150/party/hr **Regular-Arbitration:** $300/party 1st hr, $150/party sub hrs **Mediation:** $450/party 1st hr, $150/party sub hrs
Real Estate Mediation & Arbitration	Arbitration & Mediation—$150/party	Hourly based on judge/attorney rate
United States Arbitration & Mediation	$150/party if two-party dispute $100/party if more than two party dispute	**Arbitration**—$250–300/hr **Mediation**—$250/hr
Public Court[a]	$15.00 small claims $80.00 municipal court $182.00 superior court	None

SOURCE: Publicly available information.
[a]Court data based on 1994 filing fees.

Other Fees. Parties may also be subject to additional fees, including transcript fees, reporters' costs, travel expenses, and conference room costs if such services are requested or necessary. In addition, most of the firms may impose cancellation fees. If the procedure is not canceled prior to a certain date, these fees can equal the cost of the neutral's time. Because these fees are rarely imposed, the total cost of the ADR service is usually represented by the administrative and hearing fees.

2. Fee Structure for Independent Neutrals

Independent neutrals typically charge only for the time they actually spend on the dispute, including research, travel time, and actual hearing time. In addition, disputants will typically be required to pay for any other additional costs.

Hourly fees vary considerably among independent neutrals. Two characteristics explain much of the variation: their professional background and whether or not they are affiliated with a firm panel.

Table 12 shows the hourly fees for third-party neutrals reported by our survey respondents. The mean for the group is $208.96 per hour, while the median fee for all neutrals is $200.00 per hour. This difference reflects the skewed

distribution of fees, with a few neutrals charging high fees. Looking at the fees by professional background (former judges, attorneys, and all others), we find that judges command the highest fee (median of $250.00 per hour) and those without formal legal training command the lowest fee (median of $150.00 per hour).

Table 12
Median Hourly Fee by Background and Firm Affiliation(dollars)

	Firm Affiliated	Non-Firm Affiliated	All Affiliations
Former judges	250	287	250
Attorneys	200	200	200
Non-attorneys	150	225	150
All providers	200	250	200

There is additional variation in rates between those neutrals who offer their services through firms and those who are not listed on the panels of any firms. Judges and "others" who provide services through the private ADR firms typically charge lower hourly fees than the independent neutrals. For example, the median rate for judges affiliated with firm panels is $250 per hour, while the median rate for judges who provide their services independent of firms is $287. The median rate is the same for attorneys regardless whether or not they have firm affiliations.

The data show that fees do not systematically vary with other characteristics. While fees do increase somewhat with ADR experience, this increase is not systematic and may be less a reflection of growing expertise in ADR than an age bias, such as judges and attorneys who have had long histories of jurisprudence commanding high fees regardless of the length of time they have been providing private ADR. Likewise, there is no systematic relationship between the number of disputes heard and the fees commanded by a neutral.

In summary, our survey indicates that flexibility is available to the consumers of private ADR services. Currently, disputants opt for the private ADR procedure most like that offered by the courts: arbitration. Anecdotal information indicates that other forms of private ADR procedure, particularly mediation, are increasingly becoming popular. Costs are difficult to compare because many of the costs associated with resolving a dispute are attorneys' fees, the costs which are not captured in our survey. Nonetheless, we observe that the fees for private ADR services do vary and usually greatly exceed those levied by the courts.

IV. SERVICE PROVIDERS: THIRD-PARTY NEUTRALS

The source and quality of third-party neutrals figure prominently in the debate over the potential costs and benefits of private ADR. Many engaged in the debate raise concerns that the private sector, with its opportunity for higher

incomes and more hospitable working conditions, may lure good judicial talent from the public bench.[38]

Critics also worry that disputants in private ADR may be receiving seriously flawed justice.[39] Third-party neutrals who provide private ADR services are completely unregulated. Neither the state nor any broadly recognized professional group has developed a set of agreed-upon qualifications or licensing requirements to apply to this group.[40] Thus, the question of quality in private ADR remains. The issue is particularly compelling because a number of state courts and the United States Supreme Court have strengthened the binding nature of arbitration and substantially narrowed the grounds for appeal. Furthermore, many people are of the opinion that predispute contract agreements cast the "voluntary" nature of private ADR into question. Particularly in disputes brought to private ADR because of a predispute contract, parties may be quite unequal in their ability to protect their own interests within private ADR's confines.

While this research does not provide us with the information necessary for directly assessing the validity of these concerns, our survey of third-party neutrals provides data on important characteristics of this population. A number of these characteristics might well be linked with the ability of neutrals to provide appropriate and equitable services. These characteristics include:

- **Sociodemographic Characteristics.** While the sociodemographic characteristics (age, gender, and ethnicity) of a particular individual shed little light on that individual's ability as a neutral, diversity within the population of neutrals may be important in servicing a diverse set of disputants and disputes.

- **Training, Years in ADR, and Specialization.** In the absence of more direct measures of quality, a neutral's background—including legal training, experience on the bench, training in ADR techniques and procedures, ADR experience, and substantive expertise—is a useful proxy for his or her ability to perform a neutral's role.

In addition to determining these characteristics, our survey of neutrals allows us to link the neutrals with the number of cases handled in 1993, the type of case, the types of ADR services rendered, and claim and award ranges.

In this chapter, we use these measures to report on the characteristics of the neutral population serving the Los Angeles area. We examine the total population. We then turn our attention to the small proportion that handles 100 or more cases

38. *See supra* note 5.

39. *Id.*

40. The California Judicial Council has adopted a behavioral code to guide neutrals who hear court-referenced cases, but no code applies to all third-party neutrals *(California Adopts Rules Governing Private Judging* (1993)). The question of what qualification and licensing requirements might be appropriate is currently a topic of intense debate in the profession. *See, e.g.*, SPIDR COMMISSION ON QUALIFICATIONS (1993).

per year and accounts for 59 percent of the total private caseload. Finally, we examine the caseload characteristics of independent neutrals.

A. Characteristics of Third-Party Neutrals

1. Firm ADR Providers in Los Angeles

We identified 22 firms providing ADR services in Los Angeles County. After an initial screening process, we concluded that 13 of these firms are outside the scope of this study because the services they provide do not conform with our definition of private ADR. These excluded firms include a local bar association, the Better Business Bureau and national referral organizations. Table 13 lists the remaining nine firms that offer private services for the disposition of civil money disputes in Los Angeles County.[41] These firms differ in size, location, age, organizational structure, and marketing and business strategy.

The providers include five large[42] national companies and four local companies, all with varying market shares. Some firms have numerous offices in Los Angeles County and outside Southern California. In general, the firms based outside of Los Angeles County are larger than the local firms, although local firms are increasing their market shares. Some of the nine firms are well-established, and some are new firms. The first firm opened an office in Southern California in 1926. It was not until 1964, however, that the second organization appeared and others followed in the late 1980s and early 1990s. Three of the firms are non-profit and six are for-profit. Currently, only one of the firms is a publicly traded corporation.

Local staffing generally varies with the size of the firm. Firms usually employ only administrative staff and provide their dispute resolution services through nonexclusive independent contracts with retired judges, attorneys, and others. Only rarely will firms employ neutrals as members of their staffs. One large firm, however, uses only exclusive contracts in retaining its panel of neutrals, while others may selectively employ exclusive contracts.

41. As previously described, we subsequently returned to the six firms that are actually providing private ADR services in Los Angeles County for the data we describe in this report.

42. Our definition of size is based on number of cases, number of providers, and amount of revenue. To maintain the anonymity of our sources, we do not provide these data, but instead present an indicator of relative size based on these data.

Table 13
Los Angeles County Private ADR Firm Providers

Firm	Headquarters	Profit	Administrative Employees	Year Founded	Size	Local Market	Market
Alternative Resolution Centers	Los Angeles, CA	Profit	6	1987	Medium	Medium	General Business
American Arbitration Association	New York, NY	Non-Profit	45	1926 in LA	Large	Large	General Business
Arbitration Forums, Inc.	Tampa, FL	Non-Profit	4.5	1964 in LA	Large	Small	Insurance subrogation actions
Arts Arbitration and Mediation Service	San Francisco, CA	Non-Profit	1.5	1986 in LA	Small	Small	Limited to arts-related disputes
First Mediation Corporation	Los Angeles, CA	Profit	6	1991	Medium	Medium	Insurance/Tort
J.A.M.S., Inc.	Orange, CA	Profit	19	1979 in LA	Large	Large	General Business
Judicate, Inc.	Lake Success, NY	Profit	14	1992 in LA	Large	Medium	Insurance/Tort
Real Estate Mediation and Arbitration	Los Angeles, CA	Profit	1	1990	Small	Small	Limited to real estate related disputes
United States Arbitration and Mediation, Inc.	Seattle, WA	Profit	8	1992 in LA	Large	Small	Insurance/Tort

SOURCES: Publicly available information and confidential interview information.
NOTE: Our definition of size is based on number of cases, number of providers, and amount of revenue. To maintain the anonymity of our sources, we do not provide these data, but instead present an indicator of relative size based on these data.

Marketing strategies differ among the firms. In the past, firms did not narrowly prescribe their business specialties. Recently, they have begun specializing in particular types of disputes with tailored marketing efforts. For example, Real Estate Arbitration and Mediation, Inc., established in 1990, specializes in real estate–related disputes. Other recently established firms specialize in insurance and tort disputes. Traditional firm marketing tools include advertising, seminars, directory listings, and cold-calling prospective clients.

2. Independent Neutral Providers in Los Angeles

Independent neutral providers are an integral part of the Los Angeles private ADR marketplace, handling over half of the disputes brought to that area.[43] The number of independent neutrals providing private ADR services in Los Angeles County total about 1,200.[44] These neutrals have a broad range of backgrounds, market shares, ages, interests, and business and marketing strategies.[45] They often play a dual role, hearing both disputes that are brought to them directly and disputes that are brought to them through firms on whose panels they serve.[46] Eighty-eight percent of the neutrals list themselves as being on at least one panel.

The most prevalent form of marketing for neutrals is word of mouth (cited by 50 percent of the neutrals in our survey). Only 11 percent claim to advertise their services. Eighty-six percent of the neutrals state that they have additional employment besides ADR. This additional employment probably offers these respondents an additional venue for attracting business.

Neutrals claim to specialize in the types of disputes they handle and the types of procedures they offer to a greater extent than firms do. Forty-one percent of the neutrals claim to specialize in a particular form of private ADR service. In addition, 68 percent state that they specialize in a particular type of dispute. In contrast, only two of the nine firms stated a similar concentration.

B. Sociodemographic Characteristics

In addition to looking at sociodemographic characteristics of the neutral community as a whole, we analyzed various subpopulations, including those with

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43. *See* Section Three, Table 8.

44. This figure includes those individuals we identified through the procedures described in the Introduction. It is probable that there are a small number of individuals who live outside of the Los Angeles area and do not advertise or otherwise market themselves in Los Angeles, but who, nonetheless, serve the area.

45. *See* Section Four.

46. Some firms, however, require or negotiate exclusive agreements with the neutrals on their panels on a case-by-case basis.

Table 14
Sociodemographic Characteristics of Neutrals

	Percentage of Total	Age		Percentage Male	Ethnicity (percent)			
		Median	Mean		White	African-American	Latino	Other
All neutrals (N=1212)		60	58	94	95	2	2	2
By background[a]								
Lawyers (N=785)	67	54	55	95	95	2	2	2
Judges (N=91)	8	72	71	97	97	2	0	2
Other (N=301)	26	59	59	90	95	2	2	2
By panel[b]								
On firm panels (N=1013)	88	58	57	94	95	2	2	2
Not on firm panels (N=140)	12	62	60	94	97	1	1	1

[a]No answer for 35 neutrals.
[b]No answer for 59 neutrals.

different professional backgrounds and those with and without firm panel affiliations. Table 14 presents the results of this analysis and few surprises. Neutrals, as a group, come from the ranks of experienced professionals. Eight percent are former judges, 67 percent are attorneys, and the remaining 25 percent have a diverse set of other backgrounds. Their median age is 60 years, with some tendency toward clustering in the 40s and later 60s. Lawyers tend to be somewhat younger, while former judges tend to be somewhat older. The majority of neutrals are listed on one or more firm panels.

Very little diversity exists in the community of neutrals. Women are poorly represented, with fewer of them coming from the ranks of the judiciary and a relatively greater number from the category of "other." Representation from ethnic minorities is similarly low.

C. Characteristics Relating to Training and Experience

Table 15 shows that slightly greater than half of the neutral population has had some form of training or apprenticeship in ADR techniques, with neutrals who are former judges and neutrals who are not panel members substantially less likely to have had training. Much of this variation can be explained by firm practices. Most firms provide training sessions in ADR procedures and techniques for new panel members. The one large firm that does not provide training will empanel only former judges. Independent neutrals who have had judicial experience are probably less likely to believe that they are in need of training, while those with no legal background are more likely to want the additional training.

Table 15
Training and Experience of Neutrals

	Training		Years in ADR		Years on Bench (judges only)	
	Formal	Apprentice and Other	Median	Mean	Median	Mean
All neutrals (N=1212)	47	6	8	11	N/A	N/A
By background[a]						
Lawyers (N=785)	44	6	9	12	N/A	N/A
Judges (N=91)	21	10	6	7	20	19
Other (N=301)	63	8	7	9	N/A	N/A
By panel[b]						
On firm panels (N=1013)	49	7	8	11	20	18
Not on firm panels (N=140)	35	6	8	9	20	21

[a]No answer for 35 neutrals.
[b]No answer for 59 neutrals.

The population of neutrals in Los Angeles has substantial dispute resolution experience. Judges, on average, tend to have been rendering ADR services for fewer years than others because they tend to start later in their careers. While the median years in ADR for all neutrals is eight, a few have been in the business substantially longer. For example, several neutrals report over 30 years of experience. Although many judges enter the private sector with exactly 20 years of experience on the bench, there is a wide distribution above and below this number, with several neutrals reporting as little as four years and a few as many as 30 years. Twenty appears to be a marker year because judges become eligible for retirement benefits after twenty years of service.[47] Judges are somewhat more likely to leave the bench prior to retirement if they join a firm's panel—a work setting in which they are likely to have a secured stream of clients.

D. Characteristics of "Heavy Hitters"

The above description characterizes the total population of neutrals available to consumers in the marketplace; but, is it a profile of the neutrals actually handling the private caseload? That is, how are disputes distributed across this population of neutrals, and if they are distributed unevenly, what are the characteristics of those neutrals providing the bulk of the services? Put yet another way, what characteristics do consumers seem to prefer? Figure 4 shows that more than half of all neutrals see fewer than 10 disputes annually, while less than 10 percent of the neutrals see more than half of the total disputes.

Since disputes are so highly concentrated in the hands of relatively few neutrals, we also looked at the characteristics of the 57 neutrals who each handled 100 or more disputes in 1993. Almost half of our group of neutrals (46 percent) came from the bench, while 49 percent came from private practice and only 5 percent came from other professional backgrounds. The "heavy hitters" are slightly older as a group (median age of 67 compared with a median age of 60 for the others), and a smaller percentage have had formal training in ADR (39 percent compared with 47 percent). In other respects, the "heavy hitters" similarly resemble the total population of neutrals.[48]

47. A judge qualifies to receive a pension equal to 65 or 75 percent of his or her salary at the time of retirement if the judge has satisfied age and term requirements. *See* Cal. Government Code §§ 75025, *et seq.* 1992).

48. This statement reflects comparisons between the two groups along many dimensions, including case type, service provided, claim amount, award amount, and hourly fees.

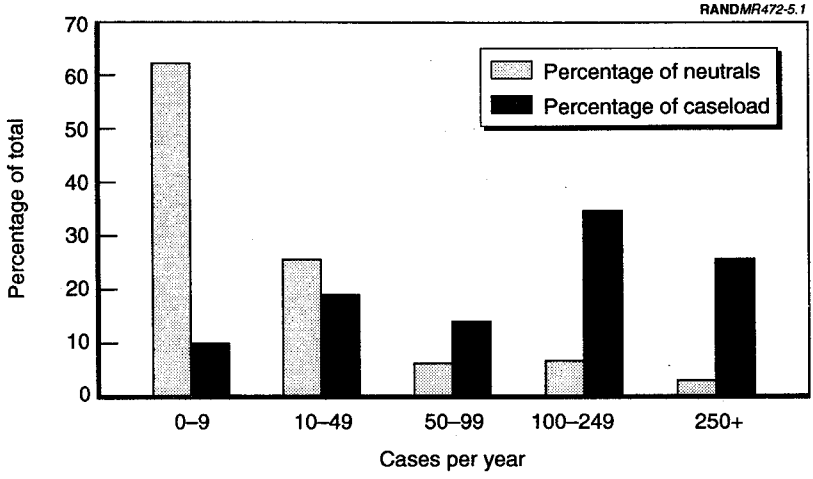

Figure 4
Distribution of Number of Cases Across the Neutral Population

E. Neutrals' Caseload Characteristics

In addition to determining what sociodemographic, training, and experience characteristics[49] typify the community of neutrals, we used information from the survey of neutrals to explore the relationship between the professional background of neutrals and the type of dispute, the size and value of their independent caseloads, and the types of procedures they typically use for these cases.[50] It should be noted that because these disputes come directly to the neutrals, our results will not be confounded by the influence of a neutral's affiliation with a particular firm.

The professional background of neutrals has a substantial effect on the mix of disputes they handle. Tables 16a and 16b show that there is a significant difference ($p < 0.01$) among the types of cases handled by neutrals with different backgrounds. The case mix of former judges is dominated by auto personal injury disputes. Attorneys, in contrast, handle a significant number of personal injury employment disputes.

49. In Section Four, we also examine the relationship between professional background and fees.
50. We have no comparable data for cases handled through firms.

Table 16a
Distribution of Case Types Within Provider Backgrounds (percent)

Case Types	Provider Background			Total Case Type Distribution
	Judge	Lawyer	Other	
Auto personal injury	47	46	42	46
Employment	2	26	20	16
Other contracts	8	10	7	9
Non-auto personal injury	10	3	9	6
Real property	8	4	3	5
Malpractice	9	1	2	5
Construction	5	4	4	4
Other tort	4	2	3	2
Other	3	2	5	2
Product liability	2	1	1	2
Consumer disputes	2	2	3	2
Environmental	1	0	0	1

NOTE: Percentages may not sum to 100 because of rounding.

Table 16b
Distribution of Provider Backgrounds Within Case Types(percent)

Case Types	Provider Background		
	Judge	Lawyer	Other
Auto personal injury	42	53	5
Employment	5	88	7
Other contracts	36	60	4
Non-auto personal injury	65	28	7
Real property	60	38	3
Malpractice	82	16	2
Construction	44	51	5
Other tort	59	34	6
Other	53	35	11
Product liability	62	34	3
Consumer disputes	45	48	8
Environmental	84	13	4
Total provider distribution	42	53	5

NOTE: Percentages may not sum to 100 because of rounding.

Table 17
Distribution of Certain Types of Cases
Coming to Neutrals by Professional Background[a]

Case Size ($ thousands)	Judge	Lawyer	Other	Percentage of Total Cases
<25	25	68	7	32
25–50	52	41	7	20
51–100	52	43	5	21
101–500	64	33	3	16
>500	63	32	5	11

NOTE: Percentages may not sum to 100 because of rounding.
[a]Data for independent caseload only.

Over half of all environmental, malpractice, non-auto personal injury, product liability, and real property cases are heard by former judges. Eighty-eight percent of all employment and 58 percent of "other contract" disputes are heard by attorneys. Interestingly, although former judges represent only 8 percent of all neutrals, they hear 42 percent of all disputes.

Similarly, in Table 17, we see significant differences ($p < 0.01$) in the value of the caseloads of former judges, attorneys, and other neutrals. While attorneys handle almost 70 percent of all cases claiming less than $25,000, former judges handle over half the cases in each of the higher claim categories. These results remain consistent with our previous observation that former judges handle a disproportionate share of certain types of cases that may be above average in value, such as malpractice. Since auto personal injury is such a large fraction of the total caseload, however, this data suggest that former judges are more likely than attorneys to handle the more valuable cases of a given type, as well.

Finally, a neutral's professional background is likely to affect the type of procedures provided. Table 18 shows significant differences in services provided. In particular, former judges provide voluntary settlement conferences and "private judging" much more often than do attorneys. On the other hand, attorneys provide arbitration to more than two-thirds of their clients. These results strongly suggest that neutrals render the services they are most familiar with and most knowledgeable about.

Table 18
Procedures Provided by Neutral's Professional Background[a](percent)

	Judges	Lawyers	Other	Total
Arbitration	38	69	34	53
Mediation	20	19	42	21
Voluntary settlement conference	22	4	11	12
Private Judging	14	2	1	7
Other	6	6	12	7

NOTE: Percentages may not sum to 100 because of rounding.
[a]Data for independent caseload only.

In sum, our analysis of neutrals' characteristics indicates that they are not particularly diverse with respect to their sociodemographic characteristics. They are experienced professionals with most having legal training and experience. Slightly more than 50 percent of the neutrals have had training in ADR practices and techniques, and the group as a whole has considerable experience delivering private ADR. Furthermore, disputes are not divided evenly across the neutral population. Almost half the neutrals who handle over 100 cases per year are former judges. Except for this heavy caseload, "heavy hitters" as a group generally resemble neutrals as a whole. Finally, we learned that the professional background of neutrals significantly influences their case mix and the procedures they are likely to provide.

V. FINDINGS, DISCUSSION, AND FUTURE RESEARCH

At the outset of this report, we identified the major claims and allegations central to the current debate over the growth of private ADR, noting that the information to resolve them did not exist. The goal of this study is to develop the basic descriptive profile of the private ADR marketplace in Los Angeles, so that it might serve as the basis for more focused inquiries into specific policy concerns. Some of our findings, however, do have direct or indirect bearing on these policy concerns. Therefore, in this chapter, we summarize our findings and discuss their implications in the current debate.

A. Findings

The findings of this study bear on several sectors of the marketplace, including the caseload, services provided within the private sector and characteristics of the service providers and third-party neutrals. Our principal findings are summarized as follows.

1. Findings Regarding Caseload Characteristics

- **Size.** Although the private caseload is a small fraction of all formal disputes in Los Angeles, it is a rapidly growing fraction.

- **Dispute Characteristics.** The disputes going to private ADR are relatively high-value and durable disputes. Almost half of the disputes are auto personal injury disputes.

- **Disputant Characteristics.** Both businesses and individuals are well represented in the disputant population in private ADR, and it appears that insurers play a very important role in bringing both types of disputants to the alternative forum.

2. Findings Regarding Private ADR Procedures

- **ADR Procedures Offered.** The private marketplace offers a full range of procedural options from which a consumer may choose. In addition, consumers usually may, by mutual agreement, tailor the rules of procedure used. Independent neutrals are less likely than firms to offer less-standard procedures, such as mini-trials or summary jury trials.

- **Use of Private ADR Procedures.** Although a wide variety of procedures are available, consumers strongly prefer the more traditional forms of ADR such as arbitration and, to a lesser degree, mediation. Some evidence, however, supports a growing interest in other forms.

- **Fees Associated with Private ADR.** The fee structure for private arbitration is complex and variable. Firms charge administrative fees, hearing fees, and fees to cover other costs. Independent neutrals typically charge only an hourly rate for their time. These fees typically exceed fees imposed by courts during litigation.

3. Findings Regarding Third-Party Neutrals

- **Sociodemographic Characteristics.** Neutrals cover a broad age range but are homogeneous with respect to gender and ethnicity.

- **Training and Experience.** Neutrals as a group have a broad base of legal training and ADR experience. Seventy-five percent have legal training, and 8 percent are former judges. In addition, more than half have some form of training in ADR procedures and techniques, and they average 11 years of experience in providing ADR services.

- **Characteristics of Heavy Hitters.** Most disputes are handled by a small share of neutrals. While 62 percent see fewer than 10 cases per year and account for only 9 percent of the total caseload, 8 percent of the neutrals see over 100 cases per year and account for 59 percent of the total caseload. Almost half of the "heavy hitters" (46 percent) are former judges. Otherwise, "heavy hitters" do not differ markedly from neutrals as a whole along the dimensions we examined.

- **Professional Experience and Caseload Characteristics.** The professional experience of neutrals is likely to have implications for their case mixes and for the types of procedures they provide. Former judges are somewhat more likely to see certain types of less-common cases (for example malpractice and environmental disputes) and higher-value disputes. Attorneys are far more likely to arbitrate disputes than judges or "others," and judges are far more likely than attorneys or "others" to provide procedures that approximate those of the court.

B. Discussion

While they do not directly address or resolve the issues surrounding private ADR, these findings are strongly suggestive of answers to several controversial and important points.

1. Effects of Private ADR on the Courts

Reducing the Court's Workload. At the moment, private ADR cannot be lightening the civil caseload of courts in Los Angeles to any appreciable degree because the private caseload is simply too small. Our findings, however, suggest that it does have considerable potential for accomplishing this goal eventually because it is such a rapidly growing component of all dispute resolution activity. Furthermore, a disproportionate share of high-value and durable disputes—disputes that might be expected to consume larger-than-average amounts of court time—are resolved through private ADR, suggesting it holds even greater potential for reducing the demands on the courts than might initially be expected.

Diverting Judicial Talent. The results of our study do not enable us to conclusively confirm or deny that the private sector is stripping the bench of valuable judicial talent. We can say, however, that about 91 former judges are now offering their services in Los Angeles as neutrals in private ADR. Most of the judges retired from the bench following 20 years of service and, therefore, cannot be characterized as leaving the bench "prematurely." On the other hand, it is likely that, absent the option of becoming a neutral, a number of them would not have chosen to retire but rather would have contributed some additional years of service on the bench. Thus, private ADR may well be "stripping the bench" of some judges, but at least thus far, it does not seem to be attracting them in substantial numbers before retirement age.

It remains to be decided at what point a move to the private sector ceases to be "stripping the bench" and becomes a desirable "transition" opportunity. It may be that the private sector offers senior judges an appropriate chance to work and then incrementally "wind down" their practices according to their own preferences or in response to signals from the marketplace which are harder to send to sitting judges.

It is frequently asserted that the problem of "stripping" is not a problem of numbers but of the "best talent" going to the private sector. Indeed, if this is the case, then it will lend more credence to concerns that the private sector will become a source of two-tiered justice serving the affluent. Our study, however, is unable to address this issue.

Impeding the Court's Ability to Establish Precedent and Reinforce Social Norms. Some opponents of private ADR argue that its growth will divert cases that may have precedential value and reduce the courts' ability to reinforce social standards through the public decision process. Characteristics of the current

marketplace certainly do not justify these fears. Not only is the proportion of the total dispute caseload going to the private sector small, but auto personal injury disputes account for almost half of the private caseload. These characteristics do not immediately suggest that the public sector is losing important cases.

Opponents' concerns may be more nearly realized in the future, however, if *large proportions* (whether or not the actual numbers are large) of particular kinds of disputes over issues where the case law is still fluid are diverted to the private sector through predispute contracting. Examples might be medical malpractice or environmental disputes.

2. Quality of the Private Sector

Assuring Procedural Quality. Private ADR differs from public adjudication in two ways that bear on quality. Neutrals are not selected on the basis of any public standards, nor are they held to any public standard. Furthermore, private proceedings are not public and, therefore, are not subject to the kind of scrutiny that may encourage neutrals to be attentive to quality.[51] Particularly because case law now makes appeal of any private ADR decision exceedingly difficult, there is good reason to focus on the issue of quality control in the private setting. Although we cannot draw any direct conclusions regarding the quality of the private ADR providers or services from the findings of our study, some of the results are certainly suggestive.

In general, it is fair to say that neutrals, as a group, have substantial training, are likely to have legal training, often have specific training (albeit probably not extensive) in ADR procedures and techniques, and have provided services for a number of years. Thus, to the degree that experience is a proxy for quality, Los Angeles neutrals, on average, should be competent. Relying on "experience" as the source of quality, however, may have its own problems. Our findings indicate that the more closely coupled a neutral is with the adjudicative paradigm, the less likely he or she is to use alternatives to that paradigm. Thus, neutrals would seem to be unlikely catalysts for major procedural shifts. It is possible, on the other hand, that, in confining themselves to the more traditional procedural formats, neutrals are simply responding to the demands of the parties or the agents of the parties. If demand shifts, so should the menu of services they render.

Assuring Fairness of Outcome. Many argue that the impartiality essential to fair decisions cannot be counted on in the private sector because financial incentives work to the contrary. This is the "repeat-player problem." According to the logic of these critics, providers (firms and neutrals) will favor those clients who are likely to bring repeat business. A number of our findings bear on this issue.

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51. Few firms report having any formal quality-assurance mechanisms, although some actively solicit feedback from clients on their satisfaction with the services of the neutral(s).

Our findings clearly indicate that private ADR is a *business* for the providers who account for most of the caseload. Even most non-profit firms behave competitively as they tailor their offerings and seek new clients. For the neutrals who handle most of the private caseload, private ADR is a serious professional and economic endeavor, occupying much of their time. Therefore, both firms and neutrals (although not necessarily most of the neutrals) handling most of the disputes can be expected to be quite sensitive to the satisfaction of customers they value.

This said, one cannot automatically conclude that neutrals are likely to bias their decisions to please certain customers. It may well be that firms and neutrals see the best avenue to long-term success in establishing a clear reputation for fairness;[52] after all, both parties must agree to any choice of neutral, and even repeat customers may well prefer a fair neutral to one who may show bias.[53]

Preserving Access to Private ADR. In the past, ADR was the province of nonprofit firms and pro-bono neutrals. As such, it has been heralded as the solution for those who cannot afford the costs of disputing in the courts.[54] As private ADR becomes a for-profit enterprise, it may substantially reduce disputing options for the less advantaged. Our results show that the costs specifically associated with ADR proceedings are likely to be substantially higher than court costs. We do not, however, compare the total costs of public and private-sector disputing. It is this comparison that is most meaningful.

C. Further Research

To reaffirm the cautionary note we sounded at the beginning of this report, it is important to remember that, while our findings may be suggestive, they describe only one private ADR marketplace. Although we have no reason to believe that Los Angeles differs from what is now or from what will be occurring shortly in other major metropolitan areas, legal cultures can differ markedly from place to place. Therefore, the next step must be to determine whether or not our findings apply in other locales. Beyond that step, this descriptive analysis lays the groundwork for important additional research.[55]

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52. *See* the comments of Judge Knight in Reuben *supra* note 5, at 55.

53. In addition, case law establishes that one of the few grounds for attacking an arbitrator's decision is bias. *See* Cal. Civ. Proc. Code §1286.2 (1992).

54. It should be noted that while this argument is made, the data do not consistently support the proposition that ADR is cheaper than going to court. *See supra* note 5 at 54.

55. For a similar, but not identical list, see Roehl *supra* note 28.

1. Consequences for Disputants

Although it is often argued that private dispute resolution offers significant practical benefits to disputants, there is little or no evidence verifying these benefits. To ascertain the value of this alternative form of dispute resolution, it would be useful to learn how total disputing costs (expert-witness fees, other case-development costs, and attorney fees) in the private sector compare with those in the public sector. Similarly, how do disposition times vary between the two sectors, and how satisfied are disputants with the processes they encounter in private and public forums? Since it is unlikely that all types of disputes are equally well served by the same alternative procedure, it would also be helpful to know what kinds of disputes are most appropriate for the private forum and how cases and procedures might be productively matched.

At the same time, questions have been raised regarding the equity of outcomes in the private arena, and policymakers need to learn whether or not the market is structured in such a way that disputants of all stripes are likely to gain a fair and unbiased hearing. While concern regarding a potential bias favoring "repeat players" has focused on large businesses and insurers, attorneys are likely to be instrumental in selecting neutrals. Thus, their role as repeat players should also be examined closely. In addition, the quality of the outcome is likely to depend on the talents of the neutral. As a result, a deeper understanding of what particular talents lead to equitable and satisfying outcomes would be helpful.

2. Consequences for the Public Sector

While this study has presented some findings that suggest private ADR may well reduce the court workload, our results are inconclusive. To draw strong conclusions, we must know more about the characteristics of the disputes being resolved in private ADR. How complex are they? Would they have been litigated. And would they have settled early in the litigation process had they been pursued in the courts?

At the same time, private ADR may adversely affect the ability of the courts to attract and retain good judges. Our findings are both preliminary and mixed on this subject, and additional research is warranted.

Regarding the fear that the private sector may lay claim to important, precedent-setting disputes, we need to learn more about the types of cases and proportions of each type of case that are resolved through private ADR. It will be particularly important to examine how the use of predispute contracts is increasing, and whether or not their increase might remove whole classes of disputes from the public sector. At the moment, this eventuality appears to pose private ADR's most significant threat to the evolution of case law.

Thus, while this study provides important information about the dynamics and characteristics of the private disputing marketplace, it leaves a significant number of questions unanswered. Further, because private ADR is likely to remain an

important and growing phenomenon, these questions should be explored in more detail.