

# **ALTERNATIVE DISPUTE RESOLUTION (Civil Litigation) ORANGE COUNTY, CALIFORNIA**

## **Meeting the Local Expectations in 2008**

Institute for Court Management  
Court Executive Development Program  
Phase III Project

March 10, 2008



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**"The perceived fairness of court outcomes is influential in the public's evaluations  
of the California courts."**

***2005 Public Trust and Confidence in CA; David B. Rottman, PH.D***

## **ACKNOWLEDGEMENTS**

Special thanks to those who contributed to this research project. Of particular thanks, and without hesitation, Alan Slater, Chief Executive Officer for the Orange County Superior Court, who is truly a visionary leader for the Court and the Judicial Council. Mr. Slater has been supportive of a comprehensive ADR program.

Many thanks to the Honorable Retired Judge Robert Monarch who is a settlement legend unto himself and who openly, shared his vast knowledge and insight for the author's benefit as well as for this report.

Thanks is also given to the members to the Orange County Superior Court, Arbitration and Mediation Committee which is comprised of equal members of the Orange County Bar Association and Superior Court Judicial Officers and specifically, Committee Chair, Hon. Sheila Fell; Supervising Judge of the Civil Panel, Frederick P. Horn; Supervising Judge of the Complex Litigation Center, Hon. David Velasquez; Hon. W. Michael Hayes; Hon. Kirk Nakamura; and Hon. Jamoa Moberly. Special thanks to Suzanne Chamberlain, Esq. from the Orange County Bar Association who provided the Committee and staff with valuable insight regarding the local legal community. All of these individuals played a key role in providing information regarding the various ADR programs in relation to Orange County's needs.

Thanks go to Al Glover, the Orange Superior Court Alternative Dispute Resolution (ADR) Analyst. It was through his own learning of the various ADR court programs throughout California that aided in this report.

Thanks goes to ADR administrators of San Mateo, Sonoma, Fresno, Los Angeles and San Diego courts who willing shared their own court experiences in person and through the statewide electronic network.

Special thanks go to Geoff Gallas, Dean, Institute of Court Management Court Executive Development Program at the National Center for State Courts, who served as my relentless advisor on this research project.

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## **ABSTRACT**

This report brings together relevant information necessary to formulate a well rounded Alternative Dispute Resolutions (ADR) program in the Superior Court of California located in Orange County which serves 2,846,289 people. The Orange County Superior Court is the third largest trial court in the state and the fourth largest in the nation with 143 judicial officers including 34 commissioners. Despite the size of the county and the volume of litigants, currently ADR is not widely used by the Orange County Superior Court. Can and should ADR be expanded for the benefit of citizens, litigants, the civil bar and judicial officers?

Because Orange County has a limited ADR program, the assessment of ADR required research not only about current practices and perceptions of the bench, the bar and court lawyers and staff in Orange County but also data collected from the California Administrative Office of the Courts and three California trial courts: Los Angeles, San Mateo and San Diego. In Orange County, research methods included group and individual interviews with the Orange County Bar, Superior Court Judicial Officers, research attorneys, court administrators, and line staff. Data review and case audits were conducted on the Orange County Superior Court's two existing programs of arbitration and traditional judicial settlements.

Three questions grounded the research: What are the preferred methods of ADR for the Court and its community? What is the perception of a successful ADR program? And, can an expanded ADR program improve litigant satisfaction?

Findings from this research support a more encompassing ADR program to better meet the needs of the community through more efficient use of judicial resources, cost effectiveness, improved perception of fairness, and increased litigant satisfaction. In interviews conducted with



Orange County Superior Court judges, research attorneys, and staff supported expanding the existing ADR program beyond arbitration to include mediation and early neutral evaluation.

The findings showed that judicial settlements were an effective alternative to trial; however, they often required more judicial time when compared to the typical cost of arbitration. Findings also showed that Orange County litigants who were ordered into arbitration were likely to have their case returned to the court's active case inventory further taxing judicial time in activities such as discovery motions.

In comparison, when California courts of San Diego and San Mateo expanded their ADR programs to include mediation, they reported a near 95% decrease in arbitration. This alone resulted in a significant cost savings in judicial time and the program monitoring. Interviews with the three California trial courts of Los Angeles, San Mateo and San Diego confirmed that when mediation is available there are cost savings and increased litigant satisfaction.

Expanding court connected ADR beyond arbitration and judicial settlements and the existing second tier of private mediation with typical fees charged by neutrals ranging from \$400 to \$800 per hour is recommended. The current climate for expanding the Court's program to include mediation and early neutral evaluation is positive. A better rounded ADR program realistically promises reduced costs, improved access, better court performance and increased Public Trust and Confidence.

## **INTRODUCTION**

### **Civil Alternative Dispute Resolution (ADR) – Orange County, California**

The Superior Court of California in Orange County is the third largest trial court in the state and the fourth largest in the nation. There are a total of 143 judicial officers including 34 commissioners. Orange County is a large urban community with a population of approximately 2,846,289 people and is the second most populous county in the state. The median income per family is \$76,000. The county as a whole is comprised mostly of middle-class citizens. The cost for private mediation in Orange County can range from \$400 to \$800 per hour or more.

The Superior Court has offered a modest Alternative Dispute Resolution (ADR) program (or more appropriately, an alternative to trial) for the past 12 years.<sup>1</sup> The findings in this report reflect two civil ADR programs used by the Superior Court as successful judicial settlements and ineffective arbitrations. Judicial officers assigned to unlimited civil actions (cases over \$25,000) may hold settlement conference hearings.

When compared to other courts of similar size in California, Orange County offers fewer ADR programs. Most of the large courts provide mediation and neutral evaluation as part of their comprehensive program. This is true in Los Angeles and San Diego as well as some of the medium sized courts of Fresno, San Mateo and Santa Barbara.

This report begins with a summary of the history of ADR in relation to today's needs. The purpose is to provide a snapshot of how ADR can blend into today's environment and explores ways of achieving a successful program while maintaining a fair and affordable program that will meet the needs of the judicial bench and Orange County civil litigants. Each of

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<sup>1</sup> The Court also provides small claims mediation. Since the focus of this research is on civil ADR programs, small claims mediation is excluded from the report.

the common methods of ADR is described in depth. The methods include mediation, early neutral evaluation, judicial settlement hearings and arbitration.

Statistical data used in this report was collected by the California Administrative Office of the Courts and the Orange County Superior Court, other information and data came from interviews based on specific areas of success such as case type, stage of case at assignment to program, and cost savings to litigants, neutrals and the court. The below Methods section and the Appendix includes the tools used to collect and evaluate data as well as a post-session evaluation for court users.

### *Outline of the Report*

The methods and findings that follow are outlined as follows: (1) Orange County statistical data analysis, (2) San Diego statistical data analysis (used to provide a perspective for mediation), (3) case file audit, and (4) stakeholder information analysis – group discussions, and judicial and court attorney interviews, and (5) site visits and interviews with three California trial courts of Los Angeles, San Mateo and San Diego. Included, when relevant, are the findings to the three statements of a) preferred method of ADR, b) perception of a successful ADR program, and c) improved litigant satisfaction.

The report provides recommendations supporting a comprehensive ADR program designed for Orange County. Recommendations include suggestions about:

- Components of a full ADR program;
- Education for judicial officers, staff, and neutrals;
- Implementation of an outreach program;
- Improving data collection; and
- Quality neutral selections.

## **LITERATURE REVIEW**

Material for that is research was examined from many sources. Much of the literature review was from the National Center for State Courts (NCSC) Library. Alternative Dispute Resolution (ADR) literature was very abundant during the late 1980's to the early 1990's with most of the subject matter focused on private ADR, and then expanding to the Federal Courts. The Federal Courts, primarily the Northern District of California, provided excellent literature and perspective that shaped the current methods of neutral evaluations used today.

Much of the data used in this report came directly from studies compiled by the California Judicial Council, Administrative Office of the Court regarding pilot programs used in California trial courts from the counties of Los Angeles, San Mateo, San Diego, and Fresno who have been leading the way for ADR programs. Data from Orange County is also included. Data was captured from many sources and collected from group discussions, court visits to those who conducted the pilot programs, and individual interviews. Aside from the literature review, data is captured in the methods of this report and is intended to further enhance the topics reviewed herein.

During the earlier years of ADR there was a lack of empirical data for the Courts. In the book, ADR Cost Savings & Benefits Studies, 1994, CPR Institute for Dispute Resolution,<sup>2</sup> the authors provided several reasons for the lack of national data. The reasons stated in their study and in other literature ranged from private ADR with its limited record-keeping to court-connected ADR programs that provided inconsistent data. For the courts, it is good news to know that the vast majority of recent studies are coming from court-connected programs.

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<sup>2</sup> CPR Institute for Dispute Resolution, **ADR Cost Savings & Benefits Studies**, 1994.

However, even with this, it is recognized that there needs to be a means of collecting consistent and meaningful data.

Other obstacles to valid data collection in court-connected ADR programs include the inability to compare similar data between courts for a variety of reasons. The data is typically collected either manually or through case management systems that pull ad hoc data reports that are based on inconsistent docketing methods and inconsistent document types.

It has only been in recent months that the California Administrative Office of the Courts has implemented a single state-wide case management system, California Court Management System (CCMS). The development team consisted of civil experts from six California Courts, including Orange County. The new program is designed to collect consistent data to ensure accurate reporting for ADR programs.<sup>3</sup> In five years, data will be available statewide to show time line comparisons for case management using a variety of ADR programs. This data may clearly show the success rates of ADR programs in California.

### **ADR 10 Years Ago**

How did Alternative Dispute Resolution look ten years ago? The answer in short is... not much different. However, today we have more answers as a result of the experiences gleaned from other courts, studies and evaluations. In the year 1998 and today, only five percent of civil cases actually go to trial. The literature reviewed reveals that discovery has increased thereby adding complexity to civil litigation. The increase is further supported by a recent judicial meetings related to the increase in discovery motions filed within the Orange County Superior

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<sup>3</sup> Author of this report, Virginia Davidow, participated as Court Lead for the development of CCMS V3, specifically the Case Management and ADR modules. At the writing of this report, the California AOC is developing additional modules to further facilitate consistent data collection statewide.

Court as well as at the State level.<sup>4</sup> As discovery increases and consumes more court time, so does the need for solutions to achieve earlier resolution. The American Bar Association states,

“Since most litigation results in settlement, not trial, ADR is often an alternative to trial preparation, including discovery. Even though only five percent of civil cases go to trial, the courts have become increasingly crowded with discovery disputes and other collateral matters. ADR should not be considered a substitute for all litigation, and may not be the solution for everyone. Even those who champion the increased use of alternate methods concede that there are some matters that can only be resolved through the courts.”<sup>5</sup>

### **Does Alternative Dispute Resolutions (ADR) Benefit Criminal Case Processing?**

Taking a look back into the past can give a prediction of current problems within the Court. For example, when criminal caseloads increase, the first area to be impacted is usually civil. Courts should always be cognizant of the affect to civil workload when judicial officer resources are reallocated to criminal calendars. Over ten years ago, “RAND”<sup>6</sup> studied congestion in the nation’s largest trial court in Los Angeles in “Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court” wherein litigants were waiting an average of five years to get a jury trial.

“Primary causes of the delay included a shortage of judges and the high priority afforded to criminal cases. Other reasons included a less than optimal approach to management of cases and of the court and some purposeful strategic litigant delay.”<sup>7</sup>

The National Center for State Courts reports that it takes an average of 14 months for a civil case to reach a conclusion. “In 1992 and 1993, ten states had to close courthouse doors due to demands of the criminal caseload.”<sup>8</sup> As of the date of the writing of this report, the same effect is taking place in the Riverside trial courts. Civil cases are reaching their five-year

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<sup>4</sup> As of the writing of this paper, such data is specifically available in Orange County; however, Court judicial officers and research attorneys have stated that workload in this area has increased considerably. The California Judicial Council has a Committee that is currently reviewing discovery rules.

<sup>5</sup> Patricia A. Garcia for the American Bar Association, **ADR Map**, 2000, page 7

<sup>6</sup> The RAND Corporation is the original non-profit think tank helping to improve policy and decision making through objective research and analysis.

<sup>7</sup> See Note 2 **supra**, page I-7.

<sup>8</sup> Ide, William, *ADR: A Giant Step Toward the Future*, **The Arbitration Journal**, December 1993, pages 20,22 cited in Note 2 **supra**, Introduction-page 10

statutory mark and are faced with losing jurisdiction. The San Diego and Orange County Superior Courts have been assisting with the civil case backlog. Orange County Superior Court is now faced with the decision to discontinue assistance due to their judicial needs for criminal workload.

Interestingly, civil backlogs continue to be subject to trial delays that are unrelated to civil. For example, in 1991, the average criminal case required “more than three and a half times the judicial attention of the average personal injury, death or property damage claim.”<sup>9</sup> The benefits of good case management – not just in the obvious area of civil, but in criminal, have a major impact on the court. ADR can help criminal backlogs by working towards resolving civil cases to free up judges to assist where most needed.

In fiscal year 2006-2007, Orange County civil filings increased by 12% (8% of the increased filings were cases less than \$25,000). So far, the filings for fiscal year 2007-2008 have shown a 7% increase trend over a three month period. Given the sluggish economy thus far, it is anticipated that there will be on-going increases in civil filings.

### **What are the Cost Savings and Benefits?**

Today, there are many other ways to determine the success of ADR. Reporting the success of public perception is one method. California data collected by the Judicial Council, Administrative Office of the Courts reflect users have a strong sense of satisfaction, fairness, efficiency and effectiveness, and time savings.<sup>10</sup> The data was provided by several superior courts that piloted mediation and early neutral evaluation programs. These courts were San Diego, Contra Costa, San Mateo, Sonoma, Los Angeles, Santa Barbara, and Fresno.

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<sup>9</sup> State Bar of California, *Alternative Dispute Resolution Action Plan 2*, May 1991, cited in Note 2 *supra*, page I -10

<sup>10</sup> [http://www.courtinfo.ca.gov/reference/documents/Calif\\_Courts\\_Book\\_rev6.pdf](http://www.courtinfo.ca.gov/reference/documents/Calif_Courts_Book_rev6.pdf) , page 32, Public Agenda and Doble Research Associates, *2005 Trust and Confidence in California Courts Report*

A recent 2005 Judicial Council study of Public Trust and Confidence showed that user perception was justified by how they were treated. This sense of fairness was noted as a key factor to court-connected ADR programs. Participants from these pilot programs stated that ADR programs can:

**Reduce hostility.** This is especially true in cases involving family members or neighbors.

**Lower costs of civil litigation.** Cases are increasingly more complex with extensive discovery which increases the cost of attorneys' fees. In addition, there are indirect costs to the litigants themselves due to the loss of time associated with litigation.

**Early resolutions.** Time saved is an obvious cost savings in discovery, motions, additional court filings, attorney fees, juror fees, court reporter fees, judicial time, staff time and personal costs such as time off work.

**Perceived litigant satisfaction.** Litigant satisfaction is best captured through the use of post hearing evaluations. Data shows that satisfaction rates are very high from litigants and attorneys. As a result of the high level of satisfaction, there is positive reflection on the court and the sense of fairness.

During interviews<sup>11</sup> conducted during December 2007 – January 2008 with Orange County judges and court research attorneys/temporary judges, several of them commented that they did not always see an actual staff cost savings as a result of settlement conferences but did recognize that there were improved efficiencies permitted in other areas such as the additional time available for judges to review discovery motions and to help narrow issues.

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<sup>11</sup> Interviews are located in the methods section, Table 6, of this report.



## When Doesn't ADR Provide Benefits?

ADR does not provide benefits if,

“A party seeks to establish precedent, a dispositive motion requiring little preparation will probably succeed, a party needs the protections of formal litigation, or a party prefers that a judge preside over all processes.”<sup>12</sup>

There have been arguments that without the protection of the law and the formal setting of the courtroom, those who cannot afford an attorney will be at a disadvantage. One person who has supported this argument is Laura Nader, who wrote against the use of ADR in the court. She states that she,

“does not see the client empowerment and choice agenda promoted by many proponents of multi-door courthouses and Court-connected ADR. Instead she sees a deliberate plan to turn back the rights revolution of the 1960s in Supreme Court Justice Warren Burger's embrace of ADR as a docket clearing device.”<sup>13</sup>

Based on interviews from ADR Administrators who participated in California mediation pilot programs, ADR lacks benefits when the participation is mandatory.<sup>14</sup>

## What Does Successful ADR Look Like in California?

The common umbrella of court-connected ADR programs in California courts includes arbitration, mediation, neutral evaluation and judicial settlement conferences. Research shows that most successful programs are those which are not mandatory and provide for confidentiality of the sessions. This is one of the key selling points of private mediation.<sup>15</sup>

The following table gives an overview of ADR as used in California during 2004.

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<sup>12</sup> [www.adr.cand.uscourts.gov](http://www.adr.cand.uscourts.gov), **ADR Dispute Resolutions Procedures in the Northern District of California – US District Court**, 2007 Handbook

<sup>13</sup> Warren Burger, **Agenda for 2000: A Need for Systematic Anticipation**, in **The Pound Conference: Perspectives on Justice in the Future**, pages 23-25 cited in Carrie Menkel-Meadow, **Dispute Processing and Conflict Resolution**, 2003, page 12

<sup>14</sup> Reference is found in the methods section, Table 8, of this report.

<sup>15</sup> **Los Angeles Daily Journal**, August 13, 2007, editorial discusses the possibility of legislation to require certain information to be public. Opponents are confident that private ADR will remain confidential in the upcoming years.

**Table 1 - Courts Offering ADR programs in 2004**

<b>The following questions and results were published by the California Judicial Council Task Force on ADR in 2004.</b>	
	Number of Courts responding out of 58 counties:
Does your court currently offer any ADR programs for civil cases?	Yes - 36
Judicial Arbitration	33
Small Claims Mediation	14
Mediation program for general civil cases under Civil Action Mediation Program	9
Other Mediation Program	18
Neutral Evaluation	8
Settlement Conferences	32
Other ADR Program	7

A common theme of success is found where judicial officers and parties are able to select a program that works best for the case at hand. Having a multi-faceted umbrella will provide court users confidence in the Court.

A good ADR program should insist on high minimum qualifications and standards for neutrals who wish to apply to be on a court panel. The profiles and/or resumes of the neutrals appointed to such panels should be readily available to litigants as they make their selections and appointments. In today's over-saturated market of neutrals, litigants have an opportunity to select the best person for their case.

The following categories describe the common processes used in California. Arbitration is currently the only program used in Orange County (aside from the Small Claims Mediation program which is part of the Dispute Resolution Program Act which is not part of this report).

**Mediation.** In mediation, the mediator does not have the power to impose a resolution on the parties. The objective is for the parties to decide on the outcome. The neutral is not required be an attorney and the process is completely confidential.

Studies and results from California courts that have piloted in recent programs have shown that the leading form of ADR that is most preferred by litigants is mediation. In California, mediation is particularly competitive.

The practice for the San Diego Superior Court in California is to provide the first two hours of mediation at a low rate of \$150 per hour. Any additional time is at the market rate. Some courts, such as San Mateo Superior Court, permit neutrals to charge the market rate for all hours of the session. In both instances, the parties are able to pre-select the neutral (attorney) based on a review of their profiles which are readily available at the court. Since San Diego implemented mediation, they have seen a nearly 95% decrease in arbitration because the parties are stipulating to mediation “in lieu” of mandatory arbitration. This has resulted in a significant time savings for staff.<sup>16</sup>

The reduction in arbitration is also echoed by Sonoma County Superior Court’s Commissioner, Nancy Shaffer, as she writes in a December 2007 ADRNetwork survey that part of their supporting discussion for a recent grant stated:

“General civil cases would particularly benefit from a No Fee Civil Mediation Program. Use of Judicial Arbitration in Sonoma County has declined significantly. During fiscal years 00-01 through 03-04 an average 143 cases were arbitrated through the Court’s Judicial Arbitration Program. In FY 04-05 the total number was 75; and in FY 05-06 only 44 cases were arbitrated through the Court’s Program. A significant drawback to Judicial Arbitration is the lack of finality. For fiscal years 00-01 through 05-06, requests for trials de novo were filed, on average, in 77% of the cases arbitrated. Lack of finality results in increased costs to the litigants and requires additional Court and Judicial resources.”<sup>17</sup>

San Diego found that their mediation program reduced the number of cases that went to trial. They determined that they saved 521 trial days per year. The trial rate for unlimited civil cases was reduced by 24% within their control group of cases in the mediation pilot program.

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<sup>16</sup> Court interview with San Diego Superior Court ADR Committee Chair, Judge Barton, and ADR Administrator, Linda Craig, August 23, 2007 in San Diego

<sup>17</sup> Orange County Superior Court survey, **ADRNetwork**, December 2008

Significant impacts were found for limited civil non-auto personal injury cases and unlimited civil contract cases. The study concluded that the 521 trial days saved could equate to a monetary value of approximately \$1.6 million.

San Diego found that the average time to disposition of the control group was reduced by 12 days for unlimited civil cases. Of interest is that the program group included cases not referred to mediation. The median time to disposition was reduced by 19 days. However, their data suggests that the time increased for cases that did not settle.

Additional analysis was done on cases that did not resolve at mediation. A relationship was found that supports that 19% of cases that did not resolve were later settled as a result of the mediation. Another 28% felt that the mediation played a very important role in the settlement of the case.

Litigant satisfaction was also assessed. Most attorneys rated the program very high. Of significant interest to this report is that attorneys in limited civil were more satisfied with the outcome of their mediation than in unlimited civil. Most of the actions with high ratings were personal injury case types.

During a recent interview with the San Diego ADR Committee Judicial Chair, Judge Barton and ADR Administrator, Linda Craig, they had explained how their program was no longer a pilot program and that the program was changed to be a voluntary program. *Note that case law requires the court to be liable for payment of neutral fees in all court ordered mandatory ADR.*<sup>18</sup>

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<sup>18</sup>**JELD-WEN, INC., Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY**, Respondent; MARLBOROUGH DEVELOPMENT CORP. et al., Real Parties in Interest. D048782

Since the change, they stated the program was more successful. As a result of mediation, their arbitration sessions had dropped to nearly zero percent since parties were requesting mediation in lieu of mandatory arbitration. Additional staff savings was noted as a result of having less arbitration. (The selection process for arbitrators can be very labor intensive.) The neutrals for mediation are selected by the parties, the fees are set by the court for the first two hours and thereafter parties pay the market rate. All fees are paid directly to the neutral thereby saving additional staff time.

In a California statewide e-mail survey sent through ADRNetwork in early December 2007, a question was posed:<sup>19</sup>

“If your court offers a mediation program, do you have an estimate on the percentage of drop in your arbitration program that resulted from the implementation of the mediation program? Do you have any statistics on the percentage of your court’s caseload that is resolved by mediation?”

Monterey Superior Court administrator, Diana Valenzuela, responded that,

“Monterey’s Court Directed Mediation Program has been working fairly well and the results are resolution at about 60% of cases referred. As a result we have only processed seven cases through non binding judicial arbitration and I believe the number was the same for 2006.”

In Orange County Superior Court there is no court-connected mediation program; there is only private mediation through businesses such as Judicial Arbitration and Mediation Services (JAMS) and Judicate West. Their services typically cost \$400 - \$800 per hour.

Sheila Purcell is the ADR Director at the California Superior Court of San Mateo. In a recent article she suggests which cases are best suited for court-connected mediation:<sup>20</sup> Drivers involved in a vehicle accident who cannot agree who was at fault;

- Neighbor to neighbor disputes;

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<sup>19</sup> See Note 16, **Supra**

<sup>20</sup> Sheila Purcell, **California Courts Review**, Growing Mediation in Our Courts – Why and How One Court Made the Journey, Spring 2007, page 11

- Actions wherein a partnership is being dissolved;
- Emotional type cases such as civil harassment.

Mediation is not always the best option for cases requiring an interpretation of law. As Sheila Purcell states,

“Mediation cannot replace trials for interpreting the law, establishing precedent, and providing a forum for decisions by a jury of one’s peers. As one party noted in his response to our court’s survey, “Mediation is a very effective means of resolving cases in many instances. In the particular case, it had little or no effect.” The Multi-Option ADR Project is designed around the premise that the court should try to provide litigants with the most appropriate dispute resolution option for their particular case, whether that is a trial, mediation, or some other dispute resolution process. We view mediation as just one option in the spectrum of appropriate dispute resolution processes available to litigants, and we see helping litigants identify and access the most appropriate option as the key to litigant satisfaction and program success.”<sup>21</sup>

Research literature reviewed herein suggests that litigants are opting to go to private mediation.<sup>22</sup> One driving force is because mediation ensures confidentiality. As a point of interest, this new tier of justice could have a negative impact on consumers and the public’s “need to know” of harmful impacts in areas of concern which could impact public safety.

**Early Neutral Evaluation (ENE)** – Early Neutral Evaluation is an evaluation process. The process saves relationships much like mediation and has benefits in addition to mediation. The neutral evaluator (an attorney with expertise in specific areas of law) helps the parties plan their case; provides an opportunity to make summary presentations and review evidence.

Unlike mediation which is statutorily confidential, there is no such provision in the neutral evaluation process; however, the parties may stipulate to confidentiality. As the title suggests, the neutral simply evaluates the case. The evaluation is a tool for helping the parties plan the steps of their litigation. The federal courts have had success with this type of ADR. The

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<sup>21</sup> See Note 13 *supra*, page 12

<sup>22</sup> Private mediation has an interesting spin that may point to a dual judicial system which is designed for the affluent thereby diminishing the court’s prized value of “Access and Fairness.” Private mediation may be luring judges to retire early from the court since the benefits are very lucrative.

method is just starting to be used more and more in the trial courts and the California Administrative Office of the Courts is encouraging its use by offering grants to implement such programs. At this time Orange County has received such a grant and is working towards the development of a program for ENE.

A study of the program in the Northern District of California conducted by professors at the University of San Francisco School of Law in 1992 showed,

“The study found that the skill of the evaluator is the most important determinant of the ENE success. The next most important factor is the attitude of the assigned judge. If the judge endorses the process and makes clear to the litigants that they should pay attention to it and can expect to find it helpful, the litigants and their attorneys report that they do tend to participate more actively and find the process helpful.”<sup>23</sup>

**Table 2** shows the benefits of using early neutral evaluation. The process has similar qualities to a high bred arbitration but without statute to govern the process.

**Table 2 - 1992 Survey on ENE Benefits**

<b>BENEFIT OF ENE</b>	
Study of program in Northern District of California conducted by professors at the University of San Francisco School of Law in 1992	
Realistic assessment of likely outcome	
Understanding of legal issues	
Understanding of facts	
Understanding of litigation processes	
Understanding of opponent's views	
Improved settlement potential by understanding trial costs and fees	

During an ENE neutral training session held at the Central Justice Center of the Orange County Superior Court in early December 2007, instructor Howard Herman, ADR Director for the Federal Northern District, further supported the benefits noted in Table 2. The same benefits

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<sup>23</sup> Plapinger, Elizabeth, Margaret Shaw and Donna Stienstra, **Judge's Desk book on Court ADR**, CPR, 1993, summarizing Rosenberg, Joshua, Jay Folberg and Robert Barrett, *Report Regarding the Early Neutral Evaluation Program of the U.S. District Court for the Northern District of California*, (Task Force on Alternative Dispute Resolution of the Civil Justice Reform Act Advisory Group for the Northern District of California, December 1, 1992), page 16 cited in See Note 2 **supra**, page I-98

were expressed during interviews<sup>24</sup> conducted with Orange County judges and court research attorneys/temporary judges, several of them shared the similar perceptions today as described above in the 1992 study shown in Table 2.

**Judicial Settlement Conferences.**<sup>25</sup> Just as the title suggests, these conferences are presided over by the assigned judge to the case or a temporary judge. The settlement judge provides an assessment of the merits of the case and facilitates the potential settlement of the case. Many judges use ADR techniques when conducting settlement conferences.

**Judicial Settlement Conferences – Orange County.** Settlement Conferences are governed by Orange Superior Court Rule 448. The conference may be held by the trial judge or a temporary judge. Nearly all judicial held settlement conferences held in Orange County are done on a volunteer basis. In Orange County, the temporary judge may be the judicial officer's assigned research attorney who is familiar with the case or an attorney from court's panel of temporary judges. This is a valuable assistance to the judicial officer and the litigants. The type of case referred to judicial settlement ranges from a simple limited civil action to the more sophisticated actions of a complex civil action.

**Table 3** reflects a sample of the number of volunteer settlement conferences held and settled in 2006.<sup>26</sup>

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<sup>24</sup> See Note 11 *supra*

<sup>25</sup> Federal courts consider any judicial settlement conference that requires ADR skills, and then the conference is ADR in nature.

<sup>26</sup> Settlement conference statistics are based on pre-scheduled hearings held and are not reflective of settlement conferences occurring as a result of a non pre-scheduled underlying hearing.



**Table 3 - Settlement Conferences**

**Volunteer Settlement Conferences – 2006**

**Superior Court – Orange County**

The following data was collected from the Case Management System, Civil Banner.

	<b>Voluntary Settlement Conferences</b>
<b>Unlimited Civil &gt;\$25k</b>	<b>266</b>
<b>Limited Civil &lt;=\$25k</b>	<b>20</b>

**Arbitration.** The arbitrator is an attorney with the power to determine the information to be exchanged and to provide a decision in the case based on evidence presented. If either party disagrees with the arbitrator's award, a trial de novo may be requested. The court has the power to order parties to arbitration in certain instances. California Code of Civil Procedure, Section 1141.11 et. seq. states that in courts of 18 or more judges, all non-exempt unlimited civil cases shall be submitted to non-binding arbitration if the amount in controversy does not exceed \$50,000. The case is typically ordered at the first case management conference which is set within 120 days of the filing of the action.

**Arbitration - Orange County in Retrospect.** During 2005, Orange County had a total of 34 cases resulting in a final arbitration award (with no trial de novo). This equated to 17% of all arbitrated cases. This means that the litigants in 34 arbitrated cases out of 171 cases referred to arbitration were satisfied with the outcome of the award.

**Table 4** shows that 86 cases were dismissed. It is possible that the dismissals were directly related to the arbitration process.

**Table 4 - Orange County Arbitration Cases with Award**

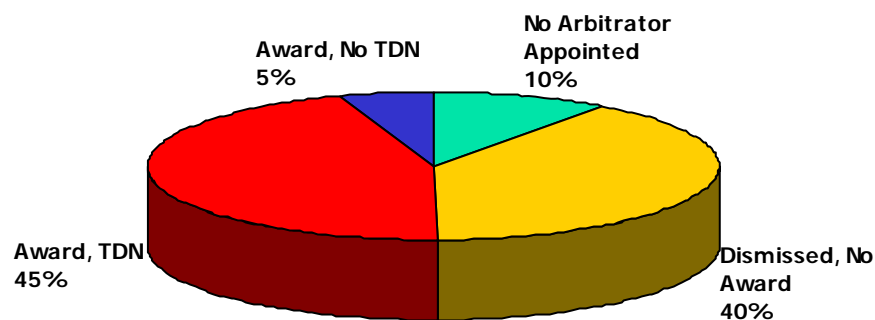
## 2005 Arbitration Cases Data

Numbers	All Cases	PI Auto	PI Other	Other Civil
<b>Total Cases</b>	<b>190</b>	<b>132</b>	<b>14</b>	<b>44</b>
<b>No Arbitrator Appointed</b>	<b>19</b>	<b>13</b>	<b>2</b>	<b>4</b>
Dismissed	14	11	1	2
Fees Not Paid	10	4	2	4
<b>Arbitrator Appointed</b>	<b>171</b>	<b>119</b>	<b>12</b>	<b>40</b>
Dismissed before award	72	52	5	14
Award Made	99	66	7	26
Trial De Novo Requested	82	59	5	18
No Trial De Novo Requested	17	7	2	8

Page 1

**Figure 1** below shows the percentage of 171 cases in which an arbitrator was actually appointed; 40% of those cases were dismissed by the parties before an award was made by the arbitrator. It can be assumed that the parties settled prior to the filing of the award. It can also be assumed that a portion of the negotiated settlements resulted in dismissal to avoid an award entered on the court record.

**Figure 1 – Percentage of Arbitrated Cases**



### **Successful ADR Programs in 2007.**

Review of many ADR programs throughout California reveal a common thread defining what a successful program in 2007 should include. This was not clearly defined in 1997.<sup>27</sup> Below is a list of items to consider when developing any local ADR program. A good program should ensure:

- Partnerships between the court, the local bar, and the community.
- Shared interest of community.
- Timely dispositions.
- Expedited information to the litigant regarding their case.
- Gaps are filled in that normally go unnoticed in the conventional law suit or complaint.
- Litigant satisfaction with the Court and their lawyer.
- Highly trained neutrals are reflective of the court's expectation of quality professionals.
- Staff are hired and trained specifically to support court ADR programs.
- Consideration is given to the types of cases best suited for specific ADR programs.
- Quality statistical data of specific events is captured and court users provide evaluation of the program.

Other areas of concern are as follows:

- The court must be careful not to force less attractive types of cases to participate in ADR programs as just a means to clearing the court calendar.
- For a program to be successful, it is important to ensure the program is not “second-class” to other programs or to trial.

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<sup>27</sup> See Note 9 *supra*

- The court should equally provide for ADR in all civil actions to ensure fairness to all litigants.

## METHODS

This report incorporates review of literature, existing studies done in California Courts that participated in ADR pilot programs, studies by the National Center for State Courts as well as:

- Orange County statistical data analysis,
- San Diego statistical data analysis,
- Orange County case file audit,
- Orange County stakeholder surveys and analysis of group discussions, and judicial, court attorney and court administration interviews, and
- Site visits and interviews with the three California trial courts of Los Angeles, San Mateo and San Diego.

### *(1) Statistical Data Analysis – Orange County*

Data was extracted from the Orange County Civil Case Management System, Banner.<sup>28</sup> The cases reviewed were of general jurisdiction unlimited civil complaints. These are actions over \$25,000. The data was downloaded into an Excel format for ease in filtering the data. Where possible, efforts were taken to ensure the same data requirements were used for arbitration and judicial settlements. The purpose of the data collection was to show the time frames from the initial case management conference (CMC) to disposition of cases with arbitration or judicial settlements. The time measure was from the first CMC date to final disposition; this is the point at which the court typically determines alternative methods to resolution and when the case actually comes under the court's control. Matrices are located in Appendix E and F and reflect the required data fields pulled from Banner.

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<sup>28</sup> As of December 3, 2007, the Orange County Superior Court uses the State case management system of California Court Case Management System (CCMS).

There were a total of 12,968 cases filed in Orange County during 2005 that were subject to Case Management.

**Figure 2** below reflects the format sequencing of data collected used to evaluate arbitrated cases.

**Figure 2 - Arbitration Data Collection Table**

All Unlimited Civil Cases with Complaint filed in 2005 - Arbitration																
Case Management Conference hearings are set at 120 days from date of file date. Typically, a case may be ordered to arbitration at the hearing. Total civil complaints subject to case management filed: 12,968. Note: "Dispo" equates to "Disposition."																
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Case #	File Date	Dispo Date	Award filed	Dispo Code	#Days from File Date to Final Dispo	<90 days	91 - 120	121- 150	151- 180	181- 210	211- 240	241- 270	271- 300	301- 360	361- 420	>420

The reasoning for collecting the specific data is as follows:

#### Column 1 – Case Number

All cases subject to case management were dumped into the matrix. Excluded from the table are case types of unlawful detainers and petitions, plus any case designated as a complex litigation action. All case numbers were captured to permit random auditing of data collected. This proved to extremely beneficial during the file audit to determine the reasoning for the lapse in time between the arbitrator's award and the final disposition.

#### Column 2 – File Date

The file date of when the complaint was filed is needed to be able to calculate the actual start time the case was actively under the Court's control.

#### Column 3 – Disposition Date

The disposition date reflects the point at which the entire case is fully disposed.

#### Column 4 – Award Filed

There is an indicator of “X” used to reflect if the arbitrator filed an award. Banner was not able to provide a date. The indication of an “X” worked well for the purposes of this report. Each case was reviewed to determine reasons why the case had or did not have a trial de novo filed. The reasons are found in the Findings.

#### Column 5 – Dispo Code

Extracted from Banner were the actual codes used for determining the final disposition of the case. These were used to make a comparison of cases resolved by Judicial Settlement hearings which is described later in this report. The type of final disposition often reflected a clerk or judicial disposition entered rather than a final disposition as a result of arbitration.

#### Column 6 – Number of Days from File Date to Final Disposition

This column revealed the findings for the number of days that the case was actually active. It does not include any time out of the Court’s control such as any bankruptcy, federal removal or conditional settlement.

#### Columns 7-17 – Number of Days from the first CMC to Final Disposition

The calculation for columns 7-17 were calculated from Column 6 – Final Disposition Date minus 120 days which is when the first CMC hearing is typically held. The dates were based on 30-day intervals.

**Figure 3 - Judicial Settlement Data Collection Table**

<b>All Unlimited Civil Cases with Complaint filed in 2005 - Judicial Settlement</b> Case Management Conference hearings are set at 120 days from date of file date. Total civil complaints subject to case management filed: 12,968.												
1	2	3	4	5	6	7	8	9	10	11	12	13
Case #	File Date	Disposition Date	Judicial Settlement?	Dispo Code	Complex Case? (Y/N)	Notice of Settlement filed Date	#Days from File Date to Final Dispo	<180 days	181-360 days	360-540 days	>540 days	No Dispo

**Figure 3** shows the methods used to evaluate judicial settlements.

Columns 1, 2, 3, 5, and 8 – Same method as used for Arbitration

The same methodology for collection of data was used for arbitration and judicial settlement.

Column 8 used the same data as column 6 of **Figure 2**.

Column 4 – Judicial Settlement

An indicator of “X” is used to reflect if the case had a judicial settlement hearing set. The number of hearings is actually far greater than the number extracted from Banner.

Column 6 – Complex Case Indicator

Cases designated as a complex litigation case were captured and reported in a separate table.

Column 7 – Notice of Settlement File Date

Cases with a settlement filed and where the disposition took place in columns 11-13.

***(2) Statistical Data Analysis – San Diego Study – Mediation.***

Since Orange County has a limited Alternative Dispute Resolution program, statistics from neighboring trial court of San Diego were used as a comparison tool to provide a perspective for mediation.<sup>29</sup> San Diego is similar in population and court size. The statistics are based on general jurisdiction civil cases over \$25,000. The data was reviewed to find similar statistics as used in Orange County with an eye towards the time from the first CMC to final disposition.

***(3) Case File Audit.***

Random audits were used to confirm and expand on data gathered regarding judicial arbitration and settlement conferences. The related electronic<sup>30</sup> cases were randomly reviewed to

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<sup>29</sup> Judicial Council of California/Administrative Office of the Courts, **Evaluation of the Early Mediation Pilot Programs**, February 27, 2004, page 96-104.

<sup>30</sup> Civil cases in Orange County are imaged and available electronically. The electronic file is designated as original.



ensure the accuracy of the data pulled. The cases were reviewed to provide an explanation for the time frame of data reported.

An Excel software worksheet was used to capture data. A sample is provided below in **Figure 4** and in **Appendix G-1 and G-2**.

#### Arbitration Audit.

All of the 190 cases ordered to arbitration were reviewed. The Excel worksheet shown in **Figure 4** and **Appendix G-1** was set up to use “X”s where possible. This enabled the worksheet to be easily filtered. The numbers were then used to create **Table 4**.

#### Column 1 – Case Number

The case number of each case audited was captured in this column.

**Figure 4 – Arbitration Case Audit – Appendix G-1**

Random Audit of All Unlimited Civil Cases with Complaint filed 2005 and either ordered or volunteered to Arbitration										
1	2	3	4	5	6	7	8	9	10	11
Case #	Award Filed	Dismissed Before or After Award Filed	Settlement Filed	Trial de novo Requested	Trial de novo Held	Reclassified to Limited Civil Juris.	Transfer	Trial Type	Case Type	Other
	X				X			Court	Auto	
	X				X			Jury	Other	Bifurcated
	X	A								Dismissed 6 mo after
	X	B		X						
	X		X							

#### Column 2 – Award Filed

Cases with an award from the arbitrator were indicated in this column by using an “X.”

#### Column 3 – Dismissed Before or After Award filed

A “B” or “A” was used to denote when dismissal was filed.

#### Column 4 through 8

An “X” was used to denote the response as “yes.”

#### Column 9 and 10

The type of attribute was entered.

#### Column 11 – Other

This column was used to capture attributes of interest.

#### Judicial Mandatory Settlement Hearings Audit.

**Figure 5 – Judicial Settlement Case Audit – Appendix G-2**

Random Audit of All Unlimited and Complex Civil Cases with Complaint filed 2005 and ordered or volunteered to Judicial Settlement					
1	2	3	4	5	6
Case Number	Dismissed Before or After Hearing	Settlement Filed	Type of Trial	Case Type	Other
	B			Unlmt	
	B			Complex	
		X	Court	Unlmt	
	A	X		Complex	
		X		Unlmt	

The statistics encompassed a sampling of 2737 unlimited civil cases. The Excel worksheet shown in **Figure 5** and **Appendix G-2** was set up as shown in the sample. This enabled the worksheet to be easily filtered.

#### Column 1 – Case Number

The case number of each case audited was captured in this column.

#### Column 2 – Dismissed Before or After the Hearing

A “B” or “A” was used to denote when dismissal was filed.

#### Column 3 – Settlement Filed

An “X” was used to denote when a settlement was filed.

#### Column 4 – Type of Trial

Capture Court or Jury trial in this column.

Column 5 – Type of Case

Capture Unlimited Civil or Complex Civil in this column.

Column 11 – Other

This column was used to capture attributes of interest.

***(4) Stakeholders.***

The stakeholders are judicial officers, members of the Bar Association, and court staff. The methods used were a) group discussions, and b) individual interviews to gain an understanding of how ADR methods are perceived to be successful. Answers were sought to specific questions related to, a) preferred method of ADR, b) perception successful ADR programs and c) improved litigant satisfaction.

Stakeholders were invited to participate in the Court's Arbitration and Mediation Committee. The Committee was formed to oversee existing programs and to develop an improved ADR program.<sup>31</sup> Over a period from January 2007 to January 2008, there were eleven sessions with meaningful topics to facilitate discussions. These occurred on the second Tuesday of each month in the Blackstone Conference Room at the Central Justice Center of the Superior Court located in Santa Ana, California. All members of the Committee actively participated in discussions. The Committee consisted of equal members of the Bar Association and Judges and all were familiar with the needs of the Court and the public. Bar Association members played a major role in obtaining feedback from other Bar Association members. The communication from the Committee members was clearly representative of a larger community. Participants were permitted to appear in person or by telephonic conferencing.

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<sup>31</sup> Since Orange County has a limited ADR program, it will be beneficial to do a post program evaluation after the expansion of existing ADR program.

The initial plan for interviewing and surveying stakeholders was to gain a “needs assessment” of our local community.<sup>32</sup> A survey was to be distributed to all members of the Orange County Bar Association and then Focus Group Interviews would be held. Instead, the Arbitration and Mediation Committee served as the vehicle for obtaining information and feedback through group discussions within the usual course of the agenda. The feedback was assessed through the Committee.

Included in the Appendix of this report are the tools that were developed for the initial plan. These can be found as:

Appendix A – Executive Summary to ADR Survey.

The summary was used as a recommendation tool to support future programs. It included who the recipients of the focus group interviews and surveys were intended for and method of tools such as posting on the Internet. The summary also provided the timeline for the surveys.

Appendix B – ADR Interview, and Appendix C – User Survey.

Appendix B was used for interviews and captured in the next section of this report. The questions can be separated into the three focal points used throughout the methodology: a) preferred method of ADR, b) perception about programs to be implemented and c) preferred method that will result in higher litigant satisfaction.

Appendix C has since been changed to a Post Evaluation Survey that will be used as part of the Court’s on-going review of any ADR program implemented. The evaluation was designed to capture data into a larger chart and limits comments to just one area. The case number can become crucial for additional comments that may require follow up.

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<sup>32</sup> The original plan was for a survey of members of the Orange County Bar Association to gain an understanding of expectations for a court ADR program. This was not necessary as was evident at group meetings held with the Court and Bar Association members. See Appendix A – Executive Summary to ADR Survey, Appendix B – ADR Focus Group Interview, and Appendix C – Post Session Survey.

### *Group Discussions.*

Group discussions took place on the second Tuesday of each month from January 2007 to January 2008 with the Arbitration and Mediation Committee members: Hon. Sheila Fell, Chair; Hon. David Velasquez, Supervising Judge for the Civil Complex Litigation Center; Hon. Frederick P. Horn, Supervising Judge for the Civil Panel and member of the Early Neutral Evaluation subcommittee; Hon. W. Michael Hayes; Hon. Kirk Nakamura; Hon. Jamoa Moberly; Joesph Chairez, 2007 President Orange County Bar Association; Suzanne Viau Chamberlain and Darren Aitken, Board Members for the Orange County Bar Association, and Kenneth Wang, Esq.

The discussions were based on the three topics of a) preferred method of ADR, b) perception of successful ADR programs and c) improved litigant satisfaction. There were substantial discussion points and responses captured; however, for the focus of this portion of the report, only those that fell into the three topics were used.

### *Judicial, Court Attorney and Staff Interviews.*

Ten judicial officers, four court research attorneys (who also serve as temporary judges), four court administrators and four court line-staff were interviewed. The interviewees were selected as a controlled group and not a random sampling. This method was selected to encourage meaningful thought to the responses. Most of the group elected to respond via e-mail rather than a one-on-one interview; however, the responses that were in writing and in person were meaningful and detailed. The group worked mostly with unlimited civil and complex civil cases, but was also versed in limited civil actions. There are a total of 35 judicial officers assigned to hear these cases.

The judicial officers were: two supervising judges, two who support going to trial over court-connected ADR programs, two were expert settlement judges, one appellate division

supervising judge, and three who were extremely knowledgeable and supportive of ADR. The judges interviewed were located at two separate facilities within Orange County: Central Justice Center, and Civil Complex Center.

The research attorneys were of management and supervisory levels and often served as temporary judges on mandatory settlement conferences. Administrative staff consisted of one ADR analyst, one ADR/civil administrator and two civil operational managers. Line staff included two civil supervisors and two counter staff familiar with arbitration processes.

A list of questions was developed and tested on a judicial officer. The questions are located in **Appendix D**. The same questions were used for all participants.

The method for conducting interviews was two-fold. First it was to capture answers to the specific questions of a) preferred method of ADR, b) perception of successful ADR programs and c) will an expanded ADR program improve litigant satisfaction. Second, it was an opportunity to gain perspective from the bench and staff regarding their expectations for a comprehensive program.

The responses were collected into an Excel spreadsheet which is simulated in **Appendix H – Data Collection Worksheet #4 – Interviews/Survey**. The relevant responses were simplified (commonalities were determined) and used for this report as shown in **Table 10. 5)**

**Site Visits and Interviews with Three California Trial Courts: Los Angeles, San Mateo and San Diego.**

Personal visits and telephonic conference calls were done with California Court ADR administrators and judges in counties other than Orange. The courts that were selected were medium in size and had participated in pilot ADR programs through grants provided by the

California Judicial Council. Through the grants, each court was required to capture extensive and consistent data regarding their program. Each court tracked the success of their programs.<sup>33</sup>

In planning for the site visits, the Court ADR Administrator was contacted and informed of the purpose of the visit. The objective was to meet with the administrator and simply have him or her provide an overview of their program with the opportunity for Orange County attendees to ask questions. The trial courts visited included Los Angeles, San Mateo and San Diego. Los Angeles and San Mateo court visits were conducted by the ADR Analyst, Al Glover along with Civil Deputy Manager, Vicky Brizuela. The San Diego court visit was conducted by the Hon. Kirk Nakamura,<sup>34</sup> Civil Unit Manager/ADR Administrator, Virginia Davidow, and Al Glover.

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<sup>33</sup> See Note 23 **supra**.

<sup>34</sup> Hon. Kirk Nakamura, Virginia Davidow, Vicky Brizuela and Al Glover participate on the Orange County Superior Court, Arbitration and Mediation Committee during 2007 – 2008.

## FINDINGS

The findings follow each of the research methods used in this report: (1) Orange County statistical data analysis, (2) San Diego statistical data analysis,<sup>35</sup> (3) case file audit, and (4) stakeholder information analysis – group discussions, and judicial and court attorney interviews, and (5) site visits and interviews with three California trial courts.

Included, when relevant, are the findings to the three statements of a) preferred method of ADR, b) perception of successful ADR programs: and, c) improved litigant satisfaction.

### *(1) Orange County Statistical Data Analysis*

Data was collected from the civil case management system, Banner. The purpose of the data collection was to show the time from the initial case management conference to disposition when arbitration or judicial settlements were involved.

#### Arbitration.

**Table 4 and Figure 1** show that there were 190 unlimited civil cases referred to mandatory arbitration in 2005; however, in only 171 cases an arbitrator *was* appointed, 40% of those cases were dismissed with no award filed with the Court. This suggests that the cases settled before the first case management conference but after the arbitration hearing. It could not be confirmed whether parties settled to avoid having an award entered against them or if the parties met and conferred as a result of the first case management conference, and then settled. It should also be noted that it is common for parties to first meet one another at the first case management conference.

The data collected from cases with awards revealed interesting information. In **Figure 6**, page 44, the data shows the time from the first case management hearing to disposition. All of

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<sup>35</sup> Since Orange County has limited ADR programs, statistics from San Diego were used to provide a perspective for mediation.

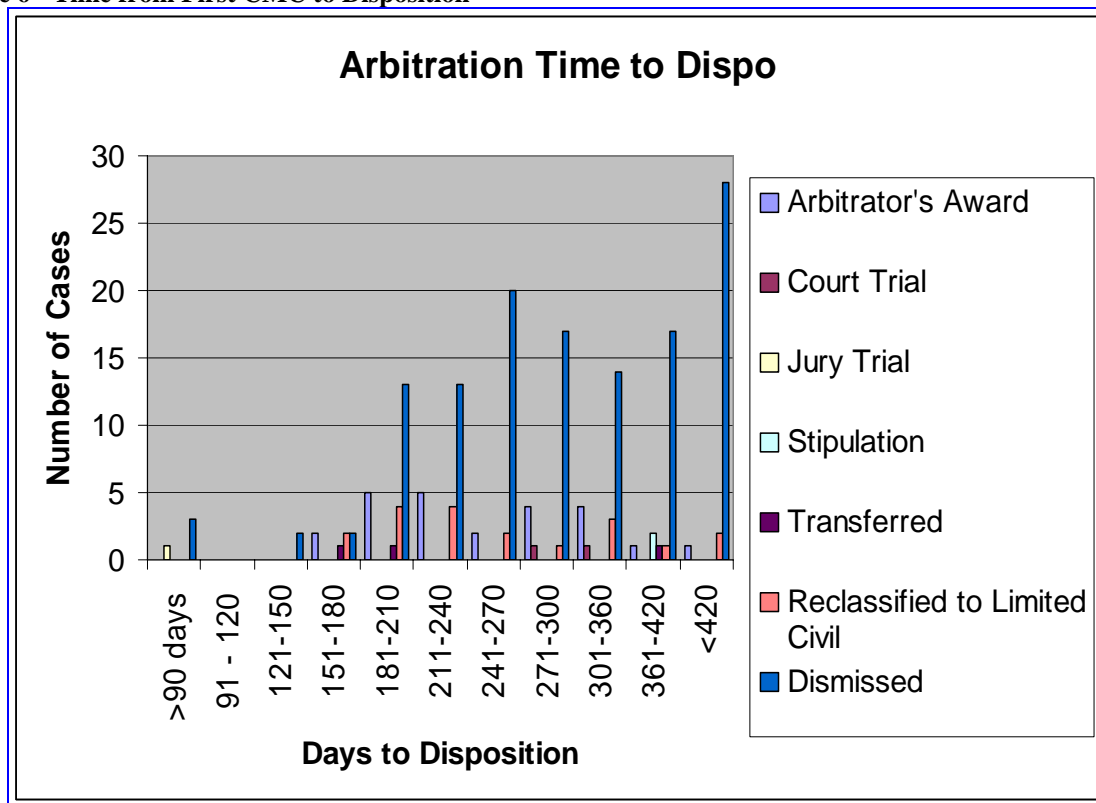


the cases had an award of arbitrator filed. In nearly all cases, the award was filed within 90 days of being ordered to arbitration at the first case management conference. This raises the question of “why were so many cases disposed six months plus from the date of the conference date?” A review of the individual cases showed the following:

- Some cases had a clerical error that resulted in no final disposition entered.
- The arbitration session seemed to help the parties understand their case. This is an educated guess based on the request for a trial de novo and then conducting on-going discovery motions. In most instances the cases settled and there was no trial de novo.
- It would appear that the parties learned from the arbitration hearing and gained valuable information much like a neutral evaluation session.
- The majority of the cases were dismissed presumably as a result of settlement.
- The majority of cases disposed were over 18 months old.

Overall, cases that went to arbitration took over one year to reach final resolution and most were disposed after 18 months; this is more than 12 months after the initial case management conference. When considering the results achieved by San Diego Superior Court’s mediation program (Literature Review) and their noted decline in arbitration, as well as the noted decline in Sonoma Superior Court by Commissioner Nancy Shaffer that her court reported, “Lack of finality results in increased costs to the litigants and requires additional Court and Judicial resources;” it appears that mediation is by far more effective based on the increase in usage as well as more efficient based on shorter time that mediated cases are in the court.

Figure 6 - Time from First CMC to Disposition<sup>36</sup>



Settlement or dismissal activity takes place in twice as many arbitrated cases as compared to the cases that were subjected to judicial settlement hearings. Judicial settlements are clearly more efficient and effective; however, they often require more judicial time to resolve when compared to the typical cost of \$150 for an arbitrator.

This report did not include a cost analysis of arbitration verses settlement conferences. It would be easy to surmise the costs by reviewing the figures and tables that follow.

#### *Settlement Conferences.*

**Tables 5 and 6** capture the approximate time from the first case management conference to disposition. To determine the time, 120 days was subtracted from the final disposition date. This method was selected because it was not possible to determine the exact CMC because it was

<sup>36</sup> Findings stated section (3) Case File Audits, are incorporated into Figure 7.

revealed that the hearings were often incorrectly scheduled as a status conference or other CMC. However, the statistics that were collected are still reflective of the active case time from the first CMC to final disposition. However, the typical first case management date is set approximately 120 days from the file date. The actual settlement hearing may take place at any time between the first CMC and 30 days before the trial.

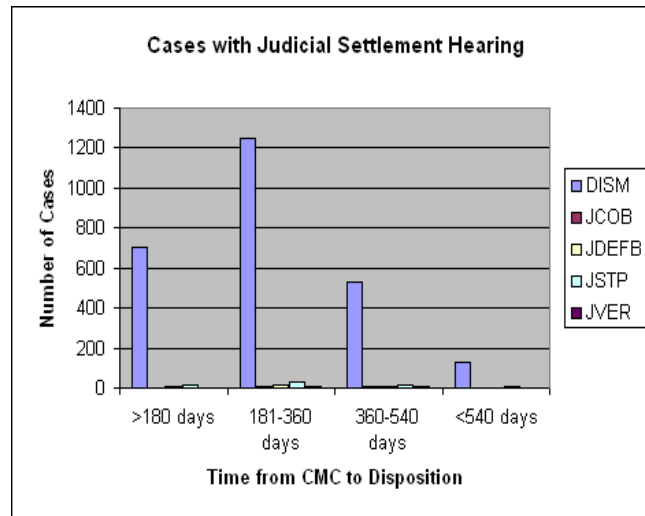
Each table shows the type of resulting disposition. One percent of the unlimited civil cases were audited to provide the information shown in Table 5. Figure 7 is reflective of Table 5.

**Table 5 - Unlimited Civil Judicial Settlements**

All Unlimited Civil Cases filed in 2005 Case Management hearings are set 120 days from file date of complaint. Total cases subject to case management: 12,968 <b>Case with Judicial Settlement Hearing</b>				
<b>Disposition</b>	<b>&lt;180 days</b>	<b>181-360 days</b>	<b>360-540 days</b>	<b>&gt;540 days</b>
Dismissal	706	1250	526	125
Court Judgment	0	7	4	1
Default Judgment	11	15	8	1
Stipulated	16	34	15	7
Verdict	0	5	4	2

**Table 5** reflects the data collection of unlimited civil cases from the Case Management Conference to the final disposition after a judicial settlement hearing. The median case settled approximately 270 days after the first CMC. **Figure 7** is reflective of the table.

**Figure 7 – View of Table 5**



**Table 5** and **Figure 7** above show that the median time for an unlimited civil case to reach disposition when a case had at least one judicial settlement hearing, is between 6 and 12 months of the first CMC. Most of the cases subject to judicial settlement hearings resulted in a dismissal. This becomes an obvious cost savings for litigants due to the sheer early disposition. The cost savings is a direct impact to the parties in time and attorney fees. An assumption can be made that early disposition provides judicial time to other functions and allows for meaningful judicial time to be spent on workload as well as an overall efficiency (which may not be a “cost” savings but clearly allows for efficient use of judicial and staff time). An audit of the files concluded many reasons for the delay.

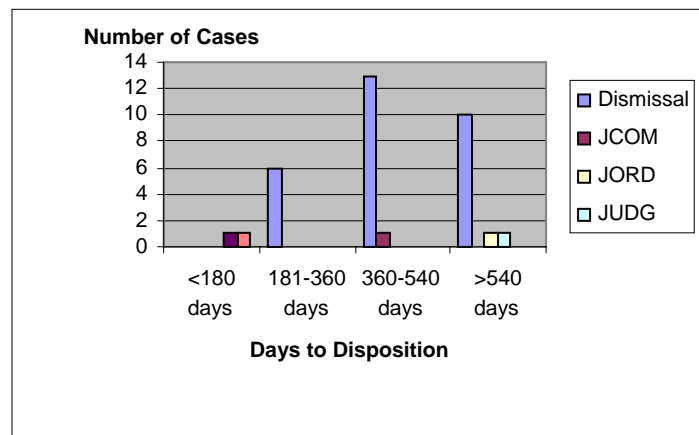
A separate case sampling was done on 32 complex civil cases. **Table 6** captures the data collected for complex civil cases. Since there were less complex cases than unlimited cases, each case was audited. Each case reviewed had at least one court settlement conference on each case. The median case settled 540 days after the first CMC. **Figure 8** is reflective of the table. There were less than 1% of other types of dispositions that were not included in the table. The same

assumptions can be made for complex civil cases as with unlimited civil cases. By the sheer definition of a complex litigation, a greater savings would be seen as a result of early dispositions.

**Table 6 – Complex Cases with Judicial Settlement**

Complex Civil Cases filed in 2005 with a Judicial Settlement Hearing. Days to final disposition after first Case Mgmt Hearing				
Disposition	<180 days	181-360 days	360-540 days	>540 days
Dismissal		6	13	10
Offer to Compromise			1	
Judgment by Order				1
Other Judgment				1

**Figure 8 - View of Table 6**



## ***(2) San Diego Statistical Data Analysis***

The analysis of San Diego Superior Court’s civil mediation program was used to provide information for Orange County since there was no such program available. The data along with interviews show that court-connected mediation is favored by litigants and has been used as an alternative to arbitration in those cases that are statutorily subject to arbitration.

When considering that San Diego experienced a 95% decrease in arbitrated cases, and if the same percentage was applied to Orange County, then Orange County would see a similar reduction that could equate to approximately 10-20 arbitrations per year, or less.

Not shown in this report is the workload associated with the arbitration process. The additional workload when compared to other ADR processes includes a triple option random selection process,<sup>37</sup> clerk's notice of arbitrators, noticing, receipt of fees, applying fees to a trust account and payment of fees to the arbitrator upon filing of the award by the arbitrator.

San Diego's process requires the parties to pay the mediator directly thereby removing most of the clerical work. The findings point toward improving efficiency and cost savings for the court. Additionally, there may be an improved litigant service because parties participate in the decision of their case versus conceding to, or appealing, an arbitrator's award. The public's perception of the program was not available but based on the opportunities provided it is geared towards fairness.

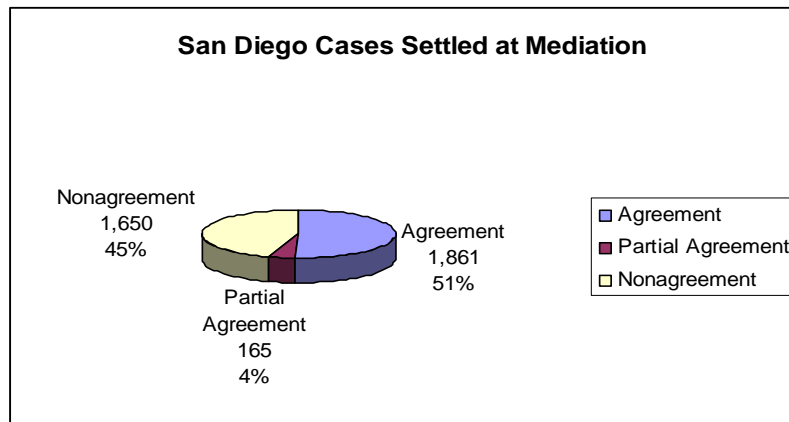
San Diego data reflected that in 2000-2001, cases in the mediation program that returned to case management had actually extended the court life of those cases. Linda Craig, ADR Administrator in San Diego, stated in an interview conducted August 23, 2007, that mediation sessions now receive a firm trial date 90 days from the date of referral to mediation. Based on this, it can be stated that Orange County should see efficiencies in dispositions if the same or similar method was implemented. Since statistics show that cases continue in case management between 6-12 months after arbitration and there are judicial resources used in settlement conferences, the court may find increased efficiencies and effectiveness.

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<sup>37</sup> Most California Courts pay the arbitration fee in accordance to civil procedural statutes. Orange County requires the parties to deposit the fee in accordance with Administrative Orders, 2003; parties may opt out of arbitration.

**Figure 9 - Cases Referred to Mediation.** This chart shows the number of unlimited civil cases referred to mandatory mediation during the years 2000-2001. The selected cases were part of a control group of cases used in the San Diego pilot program.

**Figure 9 - Cases Referred to Mediation and Settled.**



**Figure 9 - Cases referred to mediation and settled** shows that of 3,676 cases, some level of agreement was reached in 55% of the cases as a result from mediation. The cases that did not settle were returned to the CMC track.

In a follow up interview with Linda Craig, ADR Administrator for San Diego Superior Court, San Diego had noted a drastic decline in arbitrated cases as a result of litigants requesting mediation in lieu of arbitration. In 2007, their arbitration hearings dropped to 95%.

Review of the literature shows that San Diego saved 521 trial days each year. The median time to disposition was reduced by 19 days. However, their data suggests that the time increased for cases that did not settle. The study concluded that the 521 trial days saved could equate to a monetary value of approximately \$1.6 million.

San Diego found that the average time to disposition of the control group was reduced by 12 days for unlimited civil cases. Additional analysis was done on cases that did not resolve at mediation. A relationship was found that supports that 19% of cases that did not resolve were

later settled as a result of the mediation. Another 28% felt that the mediation played a very important role in the settlement of the case.

### ***(3) Case File Audit***

The case file audits proved to be informative in explaining the time lapse between the arbitration and judicial settlement hearing to the final disposition. All cases had a hearing date pending and so this means that none of the cases were idle and all were in the control of the court. Some of the cases did not show a disposition because staff had failed to enter the disposition code and quality control measures were lacking.

Arbitration. In arbitrated cases, each file was audited to determine if the case resulted in a new trial after the Request for Trial de Novo was filed. Of interest is that once the award of the arbitrator was filed with the court, 45% of the cases continued to be active after the filing of a trial de novo (see **Table 4** and **Figure 1**). The file audit of the active cases revealed that ongoing discovery took place. An assumption can be made that this lead to a settlement since only three cases actually went to trial de novo! This implies that while arbitration did play a role in the settlement of all but three cases out of 171 cases assigned to arbitration in 2005, there still continued to be judicial time spent between the arbitration award and the final disposition.

The findings revealed that in 10% of the cases, no arbitrator was ever appointed. The case audit revealed that this was because the case either settled or the arbitrator fees were not received by the Court. In 19 (5%) of the cases ordered to arbitration, the fees were not paid. The file audit revealed these cases either settled or decided to return to case management.

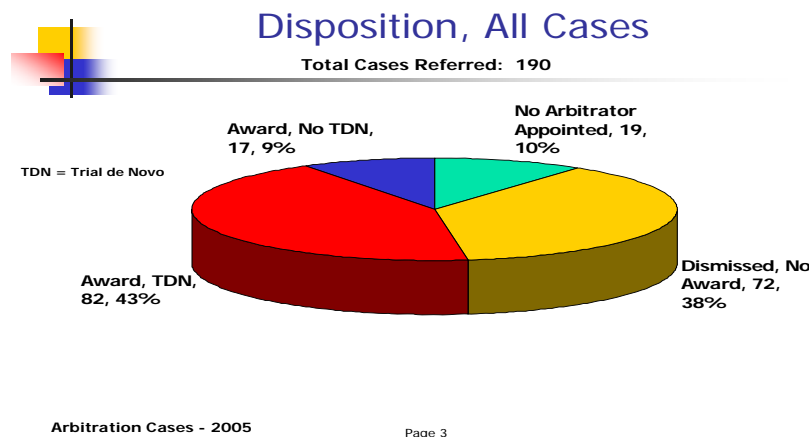
In order to consider the time to disposition impact, it's necessary to understand the number of cases entered into arbitration. The total number seems relatively low. First, only PI cases that are under \$50,000 are subject to mandatory arbitration. Unfortunately, it was not possible to collect data meeting this criterion. Another reason may be the result of cases not



being referred since California Rule of Court, rule 3.811<sup>38</sup> permits exceptions to arbitration based on good cause. Most PI cases exceed \$50,000; therefore, the total number of cases reviewed is low when compared to the total number of unlimited civil PI filings for 2005 which was nearly 5,000.

**Figure 10** shows the collective cases in the arbitration program. There were nearly equal amounts of cases dismissed as those that resulted in an award filed.

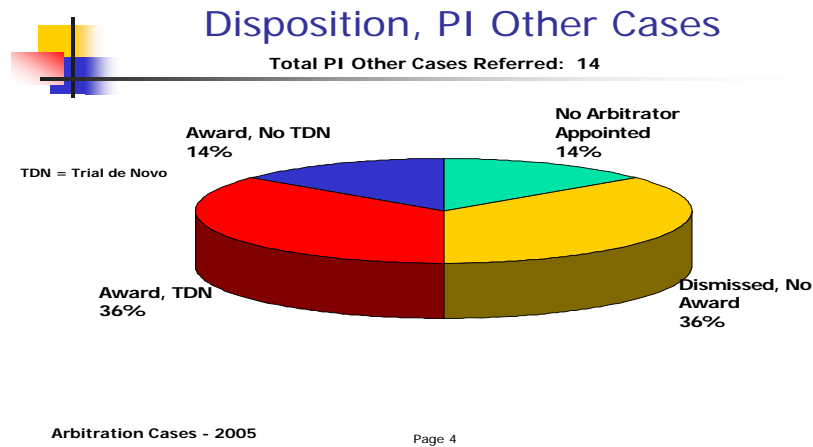
**Figure 10 - Disposition of All Cases**



**Figures 11 and 12** are reflective of the data shown in **Table 4**. The figures show a visual comparison between the different PI cases that were in the arbitration program. The review of the files show these appeared to be credited to the arbitration process based on the close time period from the arbitration award to the final disposition of the case.

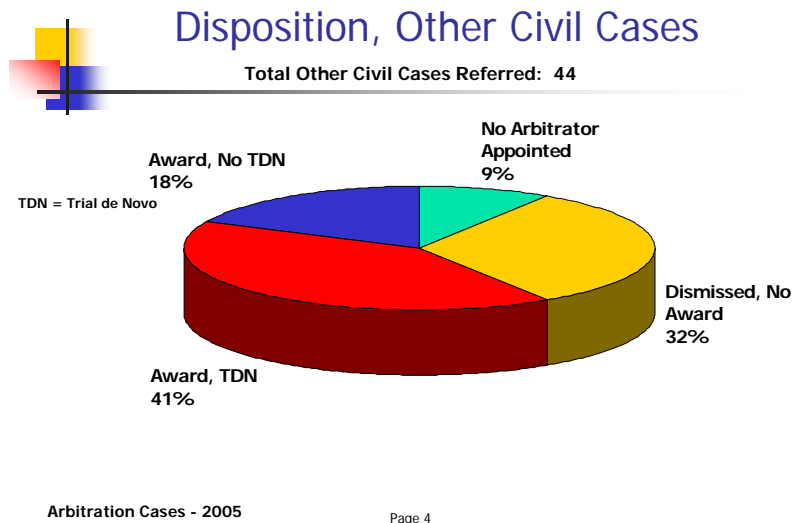
<sup>38</sup> California Rules of Court, rule 3.811.

Figure 11 - Personal Injury



Page 4

Figure 12 - Disposition of all Civil Cases



Page 4

**Table 7** shows the typical reasons for the delay from the filing of the award to final disposition.

**Table 7 - Arbitration Case Audit**

<b>CASE AUDIT – ARBITRATION TIME FRAMES</b>	
<i>Random Audit of Data – Explanation of Time Frames</i>	
<ol style="list-style-type: none"><li>1. After award was filed, trial de novo requested, the complaint was amended, responses filed and case settled.</li><li>2. Award filed, trial de novo requested, on-going discovery occurred, case settled.</li><li>3. Award filed, trial de novo requested, summary judgment entered.</li><li>4. Award filed, trial de novo requested, amendments filed, jury trial requested, case settled.</li><li>5. Case was severed and only part of case went to arbitration. The rest of the case went to court trial.</li></ol>	

Judicial Mandatory Settlement Hearings. In mandatory settlement hearing cases, it was difficult to accurately capture the number of hearings held due to the use of generic minute codes by staff.

An audit of 1% of the cases revealed patterns for the delay between the settlement hearing and the final disposition of the case. The case audits revealed that judicial settlements were more effective than arbitration in that settlement was achieved at or shortly after the settlement hearing wherein cases that went to arbitration expended additional judicial time. Several assumptions could be made that would not be reflected in a case audit or in the statistics. The assumptions could suggest that parties are more apt to consider settlement when the case is in the court's control. Litigants ordered to judicial settlement are faced with a judicial officer who has more discretionary power than an arbitrator which could also elevate the feasibility for settlement. Cases set for trial de novo on arbitrated cases may have realized that more discovery was necessary to achieve a win or settlement.

An obvious assumption is that judicial settlement costs the litigants and the court. When court calendars are full, judicial resources are stretched.

**Table 8- Judicial Settlement Case Audit**

<b>CASE AUDIT</b> <b>– SETTLEMENT TIME FRAMES</b> <i>Random Audit of Data – Explanation of Time Frames</i>	
1.	Most cases revealed that within one month of the settlement hearing, a Notice of Settlement was filed by the parties, and then the court set an OSC re: Dismissal. Final disposition was entered on an average of 60 – 90 days after the Notice was filed.
2.	Some cases had a Motion for Summary Judgment filed within 30-60 days of the court settlement hearing. Some of these cases resulted in settlement and others resulted in dismissal.
3.	OSC re: Dismissals are typically set after a settlement hearing or after the filing of the Notice of Settlement. The hearing is scheduled by the staff. The disposition could have been entered sooner had the hearing been scheduled within a reasonable time of the settlement hearing.

***(4) Stakeholder Analysis – Group Discussions, Judicial, Court Attorney and Staff Interviews***

**Group Discussions.**

The group discussions were an excellent tool for taking the temperature of the bench and the community. Face to face discussions provided valuable insight that would not ordinarily be captured through tools such as multiple select answers typically used in surveys. However, group discussions can present a challenge in capturing the specifics of any topic. For this reason, the topics were worked into the three headers shown in **Table 9**.

**Table 9 - Arbitration and Mediation Committee Discussion Points, Jan. 2007 – Jan. 2008<sup>39</sup>**

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**Comments related to “Preferred method of ADR.”<sup>40</sup>**

Committee members supported:

- Mediation was the program of choice.
  - San Diego as the model mediation program local needs incorporated.
  - Important to have a stake in the decision of whether or not to agree to ADR.
  - The preferred method had to be simple for neutrals and staff.
  - Visiting three courts that were similar in size to Orange County and/or that were recognized for having established ADR programs. These were the Superior Courts of Los Angeles, San Mateo, and San Diego.
- 

**Comments to “(Perception of) successful programs for Orange County.”**

Committee members supported:

- Costs – Neutral fees should be kept low.
  - Assignment to ADR should occur early in the case. I.e. first Case Management Conference.
  - Simple program process – Guidelines and forms should be clear and simple to ensure the neutral does not inherit excessive work for minimal pay.
  - Low impact to court workload – Process should be simple to lessen the workload.
  - Stipulation in lieu of arbitration – Court staff workload should lessen if parties stipulate to use mediation in lieu of mandatory arbitration.
  - Establishing guidelines and consistent forms and notices to be used by the neutrals would ensure consistency for litigants giving a sense of fairness.
  - High quality panel of neutrals – Minimum qualifications of court-connected neutrals would be high.
  - Working group subcommittee – A working group should be established to review feasibility of an early neutral evaluation program and civil mediation.
- 

**Comments to “Improved litigant satisfaction.”**

Committee members supported:

- Having appropriate alternatives to meet litigant needs will improve satisfaction.
- Having programs to be on a volunteer basis.
- Requiring a litigant post-program evaluation would be beneficial.
- Establishing stringent qualifications for neutrals serving on each panel. Consider length of time as an active member of the Bar Association, minimum number of cases litigated and/or mediated, and the amount of training required.
- Overall, by keeping costs low and ensuring consistency there would be improved litigant service.

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<sup>39</sup> Discussions consisted of Orange County Superior Court judicial officers and Orange County Bar Association members: Hon. Sheila Fell, Hon. W. Michael Hayes, Hon. K. Nakamura, Hon. David Velasquez, Hon. Jamoa Moberly, Attorneys: Joesph Chairez, Suzanne Viau Chamberlain, Darren Aitken, and Kenneth Wang,

<sup>40</sup> The Committee reviewed programs of California Courts. Information was requested from each trial court. Each court provided their literature that outlined the ADR programs used and as related to particular case types.

Overall, the participants were anxious to have mediation available in the Court. Every interviewee was anxious to have mediation first and early neutral evaluations second. The Orange County Bar Association members within the group stressed that processes must be kept simple in order to off-set the low cost that would be paid to the attorney-neutrals used in court-connected program. They also shared what didn't and what did work in other court programs in the nearby counties of Los Angeles and San Diego. The key points captured in **Table 9** are clearly a necessary component in any program to be designed for Orange County.

#### Judicial and Court Staff Interviews.

Just as with the group discussions, those who agreed to face-to-face interviews provided valuable insight compared to those who elected to respond in writing via the survey. However, most respondents did an excellent job at providing detailed comments. The results shown in **Table 10** revealed many commonalities. The charts shown in **Figures 13 – 17** are based on 32 respondents of the group discussions and interview survey. All respondents clearly agreed that mediation was the preferred method of ADR. They also agreed that the litigants would see a cost benefit and assignment to ADR would occur at the first case management conference (CMC).

Those who elected to complete the questions without a survey responded in detail. Those who elected to interview openly provided additional information insight beyond the questions asked.

An e-mail and questionnaire was sent to each person. Those who agreed to be interviewed were scheduled an appointment. Each interview took 30-45 minutes. The entire interview process spanned over several weeks between December 2007 and January 2008.

**Table 10 – Court Interview / Survey – December 2007 – January 2008**

What method of ADR is best for Case Management?	Judge (10)	Attorney (4)	ADR Administrator (1)	Administration (3)	ADR Line Staff (4)
	all	mediation, arbitration		all	mediation
	mediation	all		all	mediation
	mandatory settlements	all		all	mediation
	mediation	all	ENE		arbitration
	mediation				
	mediation				
	all				
	mandatory settlements				
	all				
	none				

- 32% of all respondents felt mediation was the best method of ADR for Case Management.
- 41% felt that all types of ADR were best for Case Management.
- One judge felt that ADR did not belong in the court and should be left for the private sector businesses.
- Two judges felt that mandatory settlements were the best methods for efficiency and effectiveness.
- One ADR Administrator supported ENE (early neutral evaluation) as the most effective method.

Do you see ADR as a cost savings for the Court?	Judge (10)	Attorney (4)	ADR Administrator (1)	Administration (3)	ADR Line Staff (4)
	yes	yes		yes	yes
	yes	yes		yes	yes
	yes	yes		yes	not sure
	no	yes	yes		not sure
	yes				
	yes				
	yes				
	no				
	yes				
	no				

- 77% of respondents agreed that ADR was a cost savings for the Court.
- 13% judges stated that there was not a cost savings. However, one added that the Court was more efficiently and effectively managing their workload that in past years and that ADR was a service to the litigants that would improve satisfaction and save litigants time and money.
- Two ADR line staff were not sure.

Do you see ADR as a cost savings for litigants?	Judge (10)	Attorney (4)	ADR Administrator (1)	Administration (3)	ADR Line Staff (4)
	yes	yes		yes	yes
	yes	yes		yes	yes
	yes	yes		yes	yes
	yes	yes	yes		yes
	yes				
	yes				
	yes				
	yes				
	yes				

- 100% of respondents agreed that litigants would have a cost savings as a result of ADR.

Which case types benefit the least from ADR?	Judge (10)	Attorney (4)	ADR Administrator (1)	Administration (3)	ADR Line Staff (4)
	small cases	uncommon legal issues		unlawful detainer	unlawful detainer
	parties want to extend process	no agreement to ADR		unlawful detainer	unlawful detainer
	unrealistic assessment of case	incompetent neutral		government	contractual
	uncommon legal issues	minimal issues and the case is straight forward.	uncommon legal issues		not sure
	small cases				
	government cases				
	insurance lawyer and government cases				
	unrealistic assessment of case				
	small cases				

- 23% of respondents said cases wherein the parties had an unrealistic assessment of their cases benefited the least.
- 18% of respondents said that unlawful detainer actions benefited the least. This came from administrative and line staff.
- 14% of respondents said that insurance lawyers and/or government cases benefited the least. The reason was because these parties did not have the authority to negotiate or settle.
- 13% of respondents said that small cases benefited the least because the amount in controversy was low and therefore the impact and cost savings were also minimal in the scheme of ADR.
- 13% of respondents said that cases that had uncommon legal issues were not suitable cases for ADR.
- 19% had various responses as shown in the chart.



Which case types benefit the most from ADR?	Judge (10)	Attorney (4)	ADR Administrator (1)	Administration (3)	ADR Line Staff (4)
	big cases with lots of discovery	relevant law		high value cases	contractual
	all	issues are straight forward		on-going relationships are necessary	high value cases
	personal injury	issues are straight forward		complex cases	civil harassment
	parties agree on their own to ADR	all	parties agree on their own to ADR		personal injury
	all				
	personal injury				
	complex cases				
	all				
	on-going relationships are necessary				
	private individuals and middle class				

- 18% said all cases benefit
- 14% said personal injury cases benefit. Some of the responses stated this was partly due to being the better choice when compared to arbitration.
- 14% felt that complex cases and “big cases” benefited because of the cost savings impact.
- Two felt that cases with high value benefited.
- Two felt that cases with relationships were best (such as partnerships, neighbors, family).
- Two attorneys stated that cases with simple law in question were best.
- One was passionate that ADR benefited private individuals and the middle class society.

At which stage of the case is ADR most beneficial to the Court?	Judge (10)	Attorney (4)	ADR Administrator (1)	Administration (3)	ADR Line Staff (4)
	early - after discovery has started	early - after discovery has started		early	at case management conference
	at all stages	early		early	at case management conference
	early	early - after discovery has started		early	Any time after the first appearance of all parties.
	depends on parties	early - after discovery has started	early - after discovery has started		at case management conference
	early - after discovery has started				
	early - after discovery has started				
	at all stages				
	early				
	early				
	early				

- 36% of respondents stated that ADR was the most beneficial early in the case, before costs.
- 32% had a similar response to “early” but specified that some discovery was beneficial.
- 14% stated at the case management conference. This would typically account for the first time when parties often meet one another.
- 18% had various responses as shown in the chart.

**Figure 13 - Preferred Method of ADR**

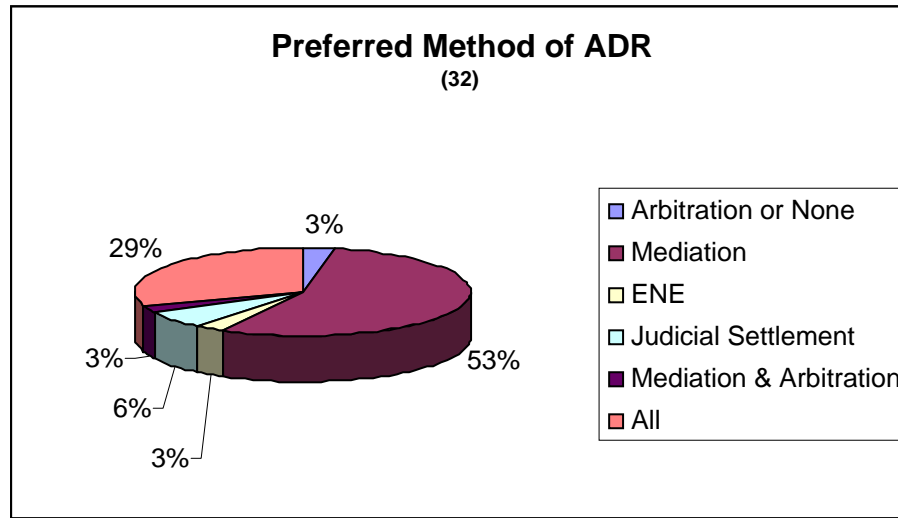


Figure 3 shows 53% of those who were interviewed stated the preferred method of ADR as Mediation.

**Figure 14 - Perceived Cost Savings**

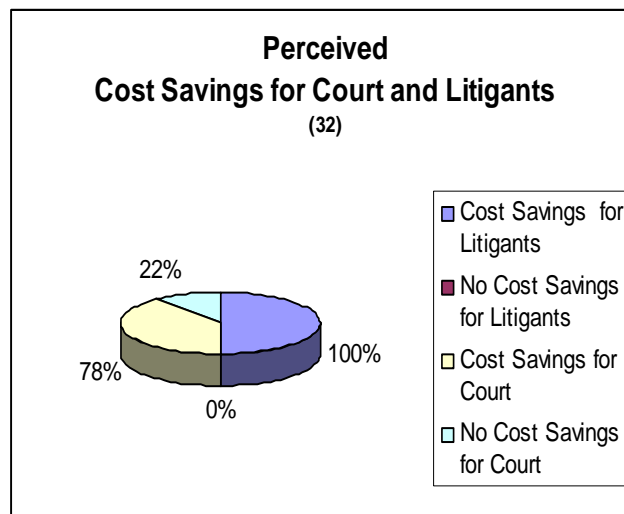
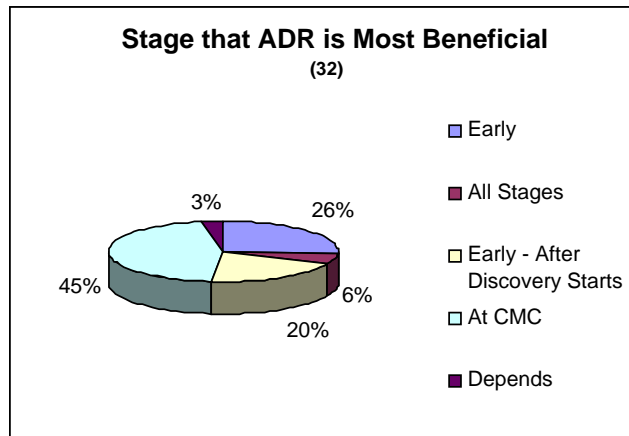


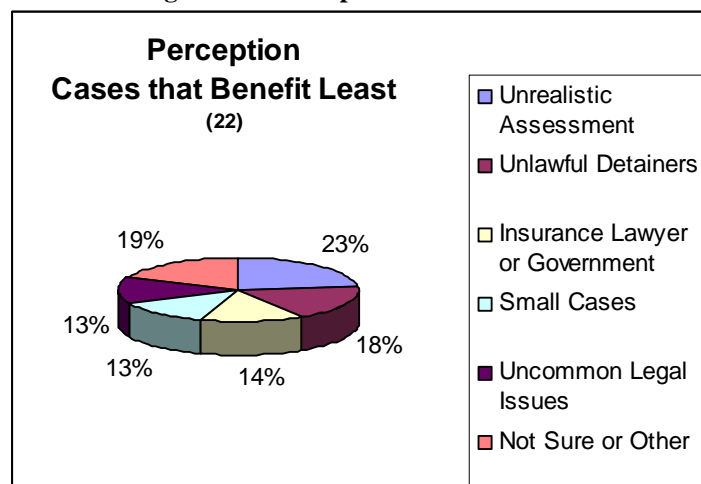
Figure 14 shows that all of those who were interviewed stated that 100% cost savings for the court and litigants.

**Figure 15 – Most Beneficial Stage**



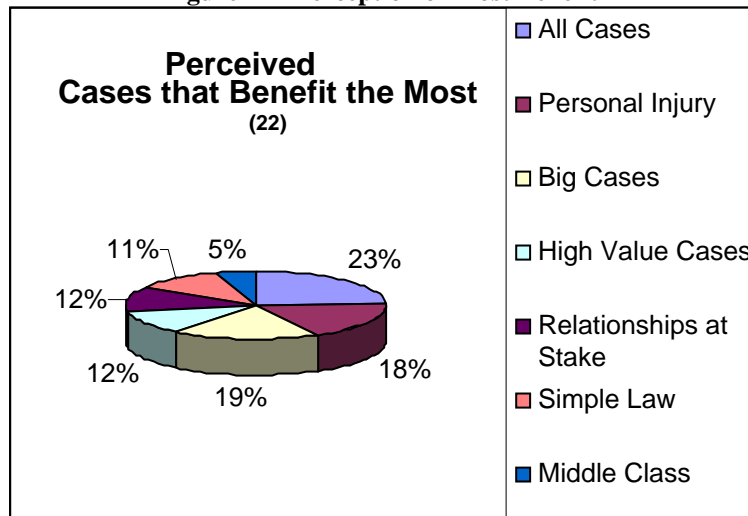
The following two charts do not include the discussion group.

**Figure 16 – Perception of Least Benefit**



In **Figure 16**, line staff clearly thought that unlawful detainer actions did not benefit from ADR because they felt that the plaintiff/landlord would not agree.

**Figure 17 - Perception of Most Benefit**



**Figure 17** is interesting in that most respondents thought of case type while one respondent focused on the type of litigant involved in the case. That respondent, a judicial officer, felt that it was clearly the nature of the party. He felt strong that middle class benefited the most from ADR.

#### ***(5) Site Visits and Interviews with Three California Trial Courts***

The site visits and interviews proved to be most beneficial in understanding the needs of Orange County and why certain programs are successful in other Courts. Three California trial courts were visited to provide Orange County with successful tips to use in the potential development of their own ADR program. These were Los Angeles Superior Court, San Mateo Superior Court and San Diego Superior Court.

The visits allowed for open-ended discussions and were based on, “What makes ADR successful for your Court?” **Table 11** below, captures the key discussion points.

**Table 11 - Success Stories of Three Cal. Superior Courts – Key Discussion Points**

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## **Success Stories from Three California Superior Courts**

**Los Angeles Superior Court** visit with Julie Bronson, ADR Administrator (May 2007)

- Early Neutral Evaluation program was recently implemented. The addition of this program adds to the full compliment of the ADR umbrella.
  - Mediation program is mandated.
  - Two neutral panels exist:
  - Pro bono panel. Parties ordered to ADR select neutrals from this panel.<sup>41</sup>
  - Party paid panel. Parties who stipulate to ADR select neutrals from this panel. The panel has become an elite group of neutrals and is highly sought.
- 

**San Mateo Superior Court** visit with Sheila Purcell, ADR Director (June 26, 2007).

- Nearly all litigants request mediation.
  - There are two judges and the ADR Administrator assigned to the courtroom for first CMC. The Administrator is ready to sign litigants up for the ADR program.
  - The judges understand the importance of making the appropriate referrals.
  - All mediator neutrals are paid at market rate.
  - Quality neutrals play a key role in the program's success.
  - Professional staff is hired to be dedicated to the program.
  - Since everyone is strongly encouraged to attend ADR, there is a sense of fairness.
  - Arbitration has dropped significantly. Although there are no statistics, it is estimated that there are approximately less than ten requests for arbitration during 2007.
- 

**San Diego Superior Court** visit with Linda Craig, ADR Administrator (August 23, 2007).

- Parties volunteer to participate in the program.
- Neutrals are paid a discounted rate of \$150 per hour for the first two hours and market rate thereafter.
- Litigants select a neutral that they both agree upon from the court's panel. The neutral profiles are made available at the clerk's office and on the Internet.
- Arbitration has dropped by 95%.

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<sup>41</sup> Further review with non-attorney mediators who mediate Small Claims actions in Orange County shared that the Pro Bono Panel is paid less than the Attorney Mediator Panel. This type of panel raises concerns for experienced non-attorney neutrals as well as the perception of fairness in the program.

The collective key points from **Table 11** provided insight to three statements of a) preferred method of ADR, b) perception of a successful ADR program and c) improved litigant satisfaction as follows:

***Preferred method of ADR:***

Mediation was the number one choice. Arbitration was determined to be the least preferred method. All courts opted for the most efficient method of procedures for all options which was to have the parties select their own neutral and method.

***Perception of Successful ADR Program:***

Litigants are encouraged to attend ADR. Selection is not based on specific case types thereby adding to a sense of fairness. By giving all case types the same opportunities to an ADR method of the litigant's choice, the perception of fairness is present. In San Mateo, ADR is discussed at the first Case Management Conference by a panel of two judges. This ensures perceived fairness versus judicial preference as to whether or not a case will be referred to ADR regardless of the party's desire.

Perception of fairness is also increased when the parties are able to stipulate to a neutral of their choice. The perception is further increased when the panel of neutrals is held to high standards through stringent qualifications. Perception of fairness is further increased by having affordable options to trial.

***Improved Litigant Satisfaction:***

Litigant satisfaction is improved by allowing parties to volunteer in the program of their choice. All of the courts interviewed either had or were in the process of providing access to neutral profiles on their court websites. This was requested by several of their attorneys so selections could take place before coming into court.

Litigants received improved professional service by court staff that were hired and assigned specifically for each Court's ADR program. This ensured the program received adequate staffing levels at all times.

## CONCLUSIONS AND RECOMMENDATIONS

The goal of this report is to provide a base line of necessary program components for a well rounded Alternative Dispute Resolutions (ADR) program for Orange County that meets the needs of the Superior Court judicial officers and the local community while focusing on achieving a fair and affordable program for civil litigants. The cost for private mediation in Orange County can range from \$400 to \$800 per hour or more which is costly and can impede justice.

A common theme is noted throughout the literature review: a well rounded program should address multiple options to trial, perceived fairness, low cost, and consistency in procedures and application. The same theme is found in the reports prepared for the Judicial Council of California, 2005 and 2006 Trust and Confidence in California Courts<sup>42</sup> and in Justice in Focus: The Strategic Plan for California's Judicial Branch, 2006–2012.<sup>43</sup>

Research provided in both California Judicial Council reports state Procedural Fairness as a primary expectation from the public of the Court system. Also is the expectation to be heard in Court, to be ensured neutrality; to be respected, and for the Court to provide low cost access to the court. By implementing a comprehensive alternative dispute resolution program, the Orange County Superior Court will be taking a step to improve Trust and Confidence. Goal III of the Strategic Plan provides for Modernization of Management and Administration of the Court by developing and promoting innovative and effective practices that foster the fair, timely, and efficient processing and resolution of all cases. Goal IV, number 6, is to improve Quality of Justice and service to the public, by supporting and expanding the use of successful dispute resolution programs.

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<sup>42</sup> 2006 video - <http://www.courtinfo.ca.gov/jc/access.htm>

<sup>43</sup> [http://www.courtinfo.ca.gov/reference/documents/strategic\\_plan\\_2006-2012.pdf](http://www.courtinfo.ca.gov/reference/documents/strategic_plan_2006-2012.pdf)



Based on the research in this report and the goals of the California Judicial Council, the Orange County Superior Court should implement a comprehensive alternative dispute resolution program and consider consistent processes to ensure programs are readily available to all litigants early in the case. The Court should consider that while parties may prefer to volunteer to enter a program, specific programs may be particularly useful when a relationship needs to be preserved. An experienced judicial officer can help litigants communicate and reach agreement by ensuring they participate in a program that best fits their situation.

Based on the findings that support the need for other ADR programs and that show that the Court and its community are ready for additional programs, an improved and more encompassing ADR program can be an effective alternative to trial. The addition of mediation to the Court's ADR program can be expected to be an anticipated alternative to mandatory arbitration which, as shown by the data, can result in cases being returned to the case management track and needlessly using staff resources. This is further supported by findings in the Superior Courts of Sonoma, San Mateo, and San Diego wherein their arbitration programs decreased by nearly 95% when they expanded their programs. Based on the interviews of ADR administrators and judicial officers in Los Angeles, San Mateo and San Diego, mediation will be highly received by litigants of any type of civil action.

When compared to other courts of similar size in California, Orange County offers fewer ADR programs. Most of the large California courts provide at least mediation and other courts also include neutral evaluation as part of their comprehensive program. Examples of comprehensive court-connected programs are found in Los Angeles and San Diego as well as some of the medium sized courts of Fresno, San Mateo and Santa Barbara.

The approach to a comprehensive program should be very simple using only the cream of the crop neutrals on a panel. Litigants should be provided a consistent and low rate<sup>44</sup> for the first two hours and then market rate thereafter. Neutrals should be selected by the litigants from the Court's panel of neutrals and only the absolute minimum required forms and post-session evaluations should be required. Both San Mateo and San Diego Superior Courts have shown success with these tactics.

The benefits that can be realized by a full program, especially mediation, include: improved efficiencies, improved settlement rates, reduced court workload in the areas of trial, motions, and discovery; disposition time reduced, litigant costs reduced and increased litigant satisfaction. In light of this, the following recommendations should be considered:

**Recommendation #1: Implement a full ADR program that includes:**

- Dedicated program administrator and staff
- Arbitration
- Judicial Settlement Conferences
- Mediation
- (Early) Neutral Evaluation
- Include in this umbrella, Small Claims Mediation (DRPA)
- Pilot newer programs and limit the case types and place a jurisdictional limit on the cases submitted to the program
- Complaint process (complaints against neutrals or staff)
- Committee oversight of program
- Court conference rooms to be used as necessary by neutrals and litigants; consider having access to conference rooms within a self-help center.

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<sup>44</sup> Most courts charge \$150 per hour for each of the first two to three hours.

**Recommendation #2: Implement ADR Education program that includes:**

- Neutral Training (ethics, standards) (include MCLE credits)
- Staff Training
- Judicial Training
- Public and staff outreach (education, articles, involvement)
- Understanding which cases are best suited for which type of program.
- Program Guidelines and forms for the Neutrals

**Recommendation #3: Implement Outreach program and consider:**

- Providing ADR information at Self Help Centers.
- Publish articles about the success and progression of the program in legal publications. Post articles on Court ADR web page.
- Consider State Rule of Court requiring ADR information to be added to the summons.
- Information should be available in multiple languages.
- Use newspapers and Internet to get inform the public of program benefits.
- Implement ADR web page and include neutral profiles.

**Recommendation #4: Improve data collection methods:**

- Enhance Case Management System (CCMS V3) to allow for consistent data collection and reports of the various methods of ADR.
- Capture date referred to program; date of completion of program; date of settlement and type of disposition.
- Implement and document post session evaluation.
- Evaluate each side and the neutral.
- Provide results to Court users (internet) and in handout material.

- Educate staff on importance/benefits of accurate data collection.

**Recommendation #5: Quality neutral selection to Panels:**

- Applicants should have a minimum of 10 active years of good standing with the Bar Association.
- Solicit applicants that have been in other Court panels such as the temporary judge program and arbitration panel.
- Application criteria should incorporate attorney litigation experience for participation on the Neutral Evaluation Panel. Consider a requirement that the individual have tried a significant number of cases all the way to verdict or award. Consider appellate experience also.
- Mediator criteria should incorporate number of cases mediated and number of parties typically involved.
- Criteria should include areas of neutral's expertise.
- Application should require disclosure of any misdemeanor or felony actions convictions against them.

**Recommendation #6: Other Nuts and Bolts:**

- Set trial date that ensures timely ADR progression. Recommend setting trial date 90 days from assignment to ADR program.
- Ensure compliance with California Rules of Court, rules 10.780 – 10.783.

The Orange County Superior Court should reap immediate benefits by the inclusion of mediation and early neutral evaluation programs in their overall program. Following the recommendations listed above will provide guidance in achieving this goal. Once the programs are implemented, the Court should continue with on-going relations between Courts who use similar programs to ensure the on-going exchange of knowledge, program evaluation and to

further facilitate the careful blending of venue transparency<sup>45</sup> to build upon the larger premise of fairness and accessible courts throughout California.

The immediate benefits from a comprehensive “Alternative to Trial” program will provide much needed support to the bench and improve upon the Court’s goal of Public Trust and Confidence.

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<sup>45</sup> California has a single unified court system.

**APPENDIX A – Executive Summary to ADR Survey**



**Superior Court of California  
County of Orange**

**M E M O**

**Date:** October 5, 2007

**To:** Arbitration and Mediation Committee

**From:** Virginia Davidow, Court Manager

**Subject:** Executive Summary – ADR Survey and Focus Group Interviews

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**EXECUTIVE SUMMARY**

Attached to this summary are two surveys to assist the Committee's understanding of the needs of our Court community. The surveys are intended to assist with the development of a successful ADR Program. The two surveys were developed to meet this requirement. The surveys will be used to gather information from members of the Orange County Bar Association, Judicial Officers, and neutrals.

The surveys have been reviewed and approved as to data collection methodology by Sandy Hilger, PhD., Director of Planning and Research.

**RECOMMENDATION 1 – Focus Group Interviews**

The use of the survey will ensure consistent data collection and provide additional information sharing opportunities between the Court and its users. The recommendation is to use this form to conduct focus group discussions.

**RECOMMENDATION 2 – ADR Survey Form**

The use of this survey will provide the Committee with information regarding expectations of a Court ADR program. This recommendation is to have the survey available to OCBA members and to have it posted on the Court Internet website.

**ACTION ITEM**

Both surveys will be implemented beginning October 22, 2007 and will be completed by November 21, 2007. The results will be summarized for this Committee's review at the December 4, 2007 meeting.

## **ALTERNATIVE DISPUTE RESOLUTIONS (ADR)**

### **Focus Group Interviews - *Superior Court of California - County of Orange***

The court is interested in providing an ADR Program for civil cases in Orange County. Your comments and concerns are important in regards to **mediation, early neutral evaluations, arbitration, and judicial settlement conferences.**

<b>Question</b>	<b>Response</b>
1. Is there a particular method of ADR that you feel is most suited for case management? (Explain.)	
2. Which case types benefit the most from ADR? Why?	
3. Which case types benefit the least? Why?	
4. At which stage of the case do you think ADR is most favorable for the outcome of the case?	
5. Do you see ADR as a cost savings to litigants? Why or why not?	
6. Do you see ADR as a cost savings to the court? Why or why not?	
7. How do you see ADR and Case Management working together? Please elaborate.	

**You are** ☐ **Judicial Officer** ☐ **Attorney** ☐ **Neutral** ☐ **Other:** \_\_\_\_\_

**Thank you for your time.**

APPENDIX C – Post Session ADR Survey

## ALTERNATIVE DISPUTE RESOLUTIONS (ADR) Post Session Survey *Superior Court of California, Central Justice Center*

We are interested in your comments in regards to **Court Alternative Dispute Resolution (ADR) programs** particularly **mediation, early neutral evaluations, and arbitration**. Your comments are very important to us and will be used to improve our services to you.

CASE NUMBER: \_\_\_\_\_

YOU ARE: ☐ Judicial Officer ☐ Plaintiff Attorney ☐ Defendant Attorney ☐ Neutral ☐ Other: \_\_\_\_\_  
☐ Plaintiff ☐ Defendant

Did you prevail on your case? ☐ Yes ☐ No

How do you rate the neutral? ☐ Unsatisfactory ☐ Satisfactory ☐ Above Standard ☐ Excellent

Would you recommend this program to others? ☐ Yes ☐ No

Do you feel you saved time and costs? ☐ Yes ☐ No

Check ✓ case type that applies to your case.	Arbitration	Mediation	Neutral Evaluation	Judicial Settlement Conference
\$7,500 and Less				
\$7,500 - \$25,000				
\$25,000 - \$50,000				
\$50,000 - \$75,000				
\$75,000 - \$100,000				
Over \$100,000				
Auto Tort				
Auto Personal Injury				
Non-Auto Personal Injury				
Contract				
Civil Harassment				
Other civil actions				
More than 2 parties in action				
High Party Hostility				
High Case Complexity				
<b>You may use the backside of this form for additional comments.</b> <b>THANK YOU!</b>				



## APPENDIX D —Interview

### CIVIL - ALTERNATIVE DISPUTE RESOLUTIONS (ADR)

#### Interviews - *Superior Court of California - County of Orange*

CJC will be piloting additional ADR programs. Currently, there is arbitration and judicial settlement conferences. The additional programs will be mediation and neutral evaluations.

These questions are intended to capture responses to: a) preferred method of ADR, b) your perception of ADR programs, and c) will any method result in higher litigant satisfaction. Your responses will be incorporated into a report being prepared for the National Center of State Courts, Court Executive Development Program.

**Judicial Officer:** \_\_\_\_\_ **Court Attorney:** \_\_\_\_\_ **Court Admin:** \_\_\_\_\_

Question	Response
<i>Preferred methods.</i>	
1. Is there a particular method of ADR that you feel is most suited for case management? (Explain.)	
2. Which case types ADR program(s) benefit the Court the most? (Explain.)	
<i>Perception.</i>	
3. Which case types benefit the least? (Explain.)	
4. At which stage of the case do you think ADR is most beneficial to the court?	
5. Do you see ADR as a cost savings to the court? Explain.	
<i>Litigant service.</i>	
6. Do you see ADR as a cost savings to litigants? Explain.	
7. How do you see ADR improving litigant service?	

## APPENDIX E – Data Collection Worksheet #1 – Arbitration Study

**All Unlimited Civil Cases with Complaint filed 2005 and either ordered or volunteered to Arbitration**  
**This report shows day from first Case Management Conference (CMC) to final disposition.**

**Note: Cases are typically sent to arbitration at the first CMC.**  
**Total cases filed in 2005 that were subject to Case Management equals 12,968.**

[illegible]

**APPENDIX F – Data Collection Worksheet #2 - Settlement Hearing Study (sample of data)**

<b>All Unlimited Civil Cases with Complaint filed in 2005</b> Case Management Conference hearings are set at 120 days from date of file date. Total civil complaints subject to case management filed: 12,968.								<i>Days to final disposition after Judicial Settlement Hearing</i>				
Case Number	File Date	Disposition Date	Judicial Settlement?	Dispo Code	Complex Case? (Y/N)	Notice of Settlement filed Date	#Days from column A to Final Dispo	<180 days	181-360 days	360-540 days	>540 days	No Dispo
05CC02328	1/19/2005	3/9/2007	Yes	DISM		11/13/2006	779				1	
05CC09476	8/19/2005	3/22/2007	Yes	DISM		12/1/2005	580				1	
05CC03355	2/18/2005		Yes		Y	6/4/2007						1
05CC09694	8/26/2005	1/5/2006	Yes	DISM		12/27/2005	132	1				
05CC03822	3/7/2005	3/22/2006	Yes	DISM		1/24/2006	380			1		
05CC11817	11/2/2005	7/5/2007	Yes	DISM		6/4/2007	610				1	
05CC11791	11/2/2005	10/13/2006	Yes	DISM		10/18/2006	345		1			
05CC09859	9/1/2005	10/23/2006	Yes	DISM		9/25/2006	417			1		

**APPENDIX G – (1) Data Collection Worksheet #3 – Case Audit for Arbitration (sample of data)**

Random Audit of All Unlimited Civil Cases with Complaint filed 2005 and either ordered or volunteered to Arbitration										
Case Number	Arbitration Award Filed	Dismissed Before or After Award Filed	Settlement Filed	Trial de novo Requested	Trial de novo Held	Reclassified to Limited Civil Juris.	Transfer	Type of Trial	Case Type	Other
	X				X					
	X				X					
	X				X					
	X	X		X						
	X		X							

**APPENDIX G – (2) Data Collection Worksheet #3 – Case Audit for Judicial Settlement**

Random Audit of All Unlimited Civil Cases with Complaint filed 2005 and either ordered or volunteered to Judicial Settlement						
Case Number	Settlement Hearing date	Dismissed Before or After Hearing	Settlement Filed	Type of Trial	Case Type	Other
	X			Court		
	X					
	X					
	X	X				
	X		X			

**APPENDIX H – Data Collection Worksheet #4 – Interviews/Survey (sample of data)**

Judge	Atty	ADR Admin	Civil Mgrs.	ADR Line Staff	Q - 1	Q-2	Q-3	Q-4	Q-5	Q-6	Q-7	Q-8
					What method of ADR is best for Case Management?	Do you see ADR as a cost savings for the Court?	Do you see ADR as a cost savings for litigants?	Which case types benefit the least from ADR?	Which case types benefit the most from ADR?	How do you see ADR and Case Management working together?	At which stage of the case is ADR most beneficial to the Court?	How do you see ADR improving litigant service?
	Bob Villandigham				No one method is superior to others. It is best determined by the nature of the case and the procedural posture.	Yes, but it depends on the circumstances of each case. Sometimes court-mandated ADR is just another cost item for parties to absorb and save the court nothing.	Yes, but not necessarily. If the parties have no genuine desire to resolve the matter, imposing court-ordered ADR simply increases costs.	Cases where novel or uncommon legal issues regarding liability and damages are involved.	Cases where the relevant law is relatively well settled and facts are largely undisputed.	Some courts have an active Case Management system where an administrator with time and resources to do the job properly, really focuses on the status of each case and is able to make a better evaluation of when ADR should occur.	It all depends on the nature of the case. Sometimes it is better at the very beginning and sometimes there is a need to wait until discovery has proceeded at some length.	Any time that a case can be resolved earlier than expected, it helps the parties.
	Sharah Reid				Arbitration and Mediation both seem to have a great deal of success. Arbitration can be binding and if it is, this is the most effective disposition of a case. Mediation is not binding but can result in a full settlement.	Yes. Especially when it results in full and final disposition of a case in early stages.	Yes. Especially those without insurance and who have a matter that does not require prolonged testimony.	Cases where settlement is highly unlikely, where parties will not agree to binding arbitration and where complex issues and voluminous evidence exist.	Cases where settlement is possible, parties will agree to binding arbitration, issues are straightforward and the amount of evidence is manageable.	Cases subject to mandatory arbitration or that are likely to completely resolve through ADR should be identified early, no later than the initial Case Management Conference. This information	No later than the initial Case Management Conference but certainly far in advance of trial.	ADR provides a speedier remedy than differential case management that can and sometimes does take up to two years after the filing of the Complaint. While there is the charge for the arbitrator, this pales in comparison to

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