

## The case for Early Dispute Resolution to fast-track justice

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There was once a time when alternatives to trial were rarely invoked. People sued each other in court, and justice was achieved fairly promptly. What a different world we live in today. A majority of legal disputes are now actually resolved outside the courtroom, as parties arbitrate, mediate, and negotiate their differences without judges or juries.

But getting those cases to the finish line can still be an enormously costly and challenging process. It's time to build a permanent onramp that takes appropriate cases directly into the dispute resolution fast lane. Efforts at both the state and national level could help to construct that onramp.

### Court backlogs

Courts across the country have been grappling with case backlogs, but California's courts have been particularly challenged. In 2022 and 2023, California state courts added more than 50 times as many civil cases to their backlog as all U.S. District Courts combined during the same period. More than a million civil cases were added to the California backlog over the last five years, and Unlimited Civil case filings have exceeded dispositions every year since 2013. In each of the last three years, the number of Unlimited Civil cases filed was more than double the number of Unlimited Civil cases closed. Last year, state courts failed to meet any of their case processing goals - 100 percent disposition within 24 months, 85 percent disposition within 18 months, and 75 percent disposition within 12 months - for Unlimited Civil cases.



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The Los Angeles County Superior Court (LASC) may be the largest in almost every category by which to measure courts. As LASC judges have seen their dockets grow, judicial retirements have followed, leading to larger caseloads per judge, followed by more judicial retirements. This threatens not only the timely disposition of cases but the very quality of judicial oversight. A July 1, 2024 press release from the LASC reported a \$97 million reduction to trial court budgets statewide resulting from a 2024-2025 state budget deficit. That reduction, the release said, will "no doubt impact the Court's ability to provide timely and efficient access to justice for Los Angeles County residents."

With approximately \$30.3 million less in the Court's operating budget, the LASC is encouraging eligible court employees to voluntarily leave their staff positions, a move likely to compound the problems already caused by heavily congested courts. Court users, according to the press release, should expect reduced or delayed service because of staffing reductions and other operational cuts. To help litigants resolve their disputes more quickly, LASC has now launched a new ADR program to provide mediation to litigants. It is targeted primarily at Unlimited Civil cases at the outset.

The bottom line is that, with criminal cases given priority, civil cases will continue to languish. Accident

victims may suffer years before receiving compensation for their injuries; ill, compromised, and older plaintiffs may not live long enough to have their day in court. Attorneys and litigants are already feeling backlog pain, but lag effects mean that the full consequences of courts' inability to timely clear cases on their dockets—especially in light of new trial court budget cuts—have not yet been fully realized. In far too many cases, justice delayed will ultimately be justice denied.

### The promise of early dispute resolution

While many cases remain in litigation up until the eve of trial, most will not be tried. A majority of parties who invest in a trial ultimately choose voluntary settlement to avail themselves of benefits unavailable at trial. These benefits become even more pronounced when the parties pursue Early Dispute Resolution (EDR), which can include early negotiation, early mediation, and use of ombuds.

When parties pursue early settlement of disputes, they retain control over the process and its outcome. Instead of relying on overworked judges and unpredictable juries, they are able to dictate the timing, method, and terms of their own case resolution. Besides providing greater certainty, this can significantly reduce economic, timing, and emotional costs and stresses.

Even when parties don't settle at an early stage, the issues can be clarified and any future legal work more tightly focused. Early consideration of settlement may also reduce clients second-guessing their attorneys' strategies if they settle after paying substantial legal fees.

EDR encourages problem-solving, allowing parties to explore innova-

tive solutions not available at trial. Courts are limited in the types of relief they can award; the options available to parties who engage in EDR are limited only by their creativity. EDR can also facilitate reaching mutually agreeable results before parties have become so polarized that settlement is difficult. For parties who will continue to work together or remain in a relationship, this can be invaluable.

Finally, EDR can benefit not only the participants but also those who must depend on the courts for timely adjudication. EDR alleviates court congestion by resolving cases sooner, freeing up resources for more complex matters that demand greater judicial attention.

### EDR success stories

Between 2000 and 2003, five court-annexed civil mediation programs operated in California trial courts in Los Angeles, San Diego, Fresno, Contra Costa, and Sonoma Counties. Evaluation of these Early Mediation Pilot Programs culminated in a 445-page report finding all five programs successful: "These benefits included reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts."

In San Diego, the estimate of total potential time savings from mandatory mediation was 521 trial days per year; in Los Angeles it was 670 trial days per year. With an estimated monetary value of about \$2 million at that time, it would amount to roughly \$3.5 million today. In

Sonoma County, 90 percent of the attorneys whose cases did not settle at mediation said the mediation was important to the ultimate settlement of the case. Fewer post-disposition compliance problems were reported and fewer new proceedings initiated. The programs not only reduced court workload in the short term but may also have reduced the court's future workload.

### Ways to increase EDR use

In recognition of the fact that EDR is an important and effective way to overcome court docket backlogs and help parties achieve more valuable outcomes, on Feb. 5, 2024, the American Bar Association House of Delegates unanimously passed Resolution 500, which reads as follows:

"RESOLVED, that the American Bar Association urges lawyers and all interested parties to increase the informed and voluntary use of Early Dispute Resolution: party-directed, non-adjudicative approaches to resolve disputes in a time-efficient and cost-effective manner, including, but not limited to, direct negotiation, mediation, and ombuds."

This resolution encourages disputants and counsel to proactively consider the benefits of ADR at the early stages of a dispute, when its value to parties is greatest.

At the state level, legislation was introduced that would increase the use of EDR. SB 1141 was drafted to give courts discretion to order mediation cases up to \$150,000 in controversy - far more than the CCP Section 1775.5 limit of between \$35,000 and \$50,000 that was established more than 30 years ago.

Such an increase would open the door for significantly more cases to be referred to mediation. The bill, sponsored by the Conference of California Bar Associations and supported by the Judicial Council of California, Los Angeles County Superior Court, Orange County Bar Association, Civil Justice Association of California, and California Chamber of Commerce, passed the State Senate unanimously but stopped short in the Assembly.

This should not be the end of our efforts to champion efficient dispute resolution in California. The stakes are too high to ignore viable solutions.

### Conclusion

As lawyers, we are not only stakeholders in this system, but we should also be problem solvers. We should all be asking what changes are needed to turn the tide. Experts across the country believe that a shift from an adversarial culture to a more collaborative, problem-solving culture is the next step in improving the legal system.

Pending federal court civil cases have doubled in the last few years, and California courts are even more stretched for resources. There is an urgent need for broader adoption of EDR. The California Discovery Act, which now requires all parties to provide initial disclosures "within 60 days of a demand by any party to the action," emerges as a new tool for fostering EDR. By expediting discovery, more parties will be positioned to engage in productive early negotiations and early mediations.

ABA Resolution 500 urges consideration of EDR, but it does not mandate its use. Early resolution of

disputes is not appropriate in every case. Trials protect essential and fundamental rights, fulfilling the important role of setting precedent and creating a space for effective speech on matters of public concern. Cases that warrant public adjudication should be efficiently and cost-effectively resolved through the public court system.

For disputes that must rely on judicial resources for resolution, EDR can significantly reduce growing courthouse backlogs, freeing up valuable limited judicial resources to enable more expeditious and less costly judicial decisions. ABA Resolution 500 - as well as SB 1141 - could profoundly and positively improve the justice system by helping courts achieve timely adjudication, thus protecting fundamental rights.

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