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## The Sooner the Better

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BY ELLIE K. VILENDRER

# THE Sooner THE Better

**A new amendment to the California Discovery Act, Code of Civil Procedure Section 2016.090, fosters early dispute resolution by mandating expedited discovery processes**

**W**HILE COURTHOUSES ACROSS THE COUNTRY have been grappling with case backlogs, California courts face particularly severe challenges.<sup>1</sup> For comparison, in 2022 and 2023, all of the U.S. district courts combined added nearly 12,000 civil cases to their backlog,<sup>2</sup> but, in the same time period, California state courts have added 600,000 more than that—more than 50 times as many—thus threatening litigants’ fundamental right to a timely trial.<sup>3</sup>

*Ellie K. Vilendrer is a mediator and arbitrator with Signature Resolution focusing in the areas of commercial, employment, and intellectual property law. She is the budget officer of the American Bar Association’s Dispute Resolution Section and former co-chair of its Early Dispute Resolution Committee. Vilendrer coauthored Resolution 500 with Felicia Harris Hoss (Texas), Mary Cullen (Minnesota), and Meg Willoughby (Pennsylvania), and she spoke in favor of ABA Resolution 500 at the ABA House of Delegates. She authored the resolution form of SB 1141.*





Author and Heather Resertaris of the California Judicial Council at SB 1141 California Assembly hearing (July 2024).



Author urges ABA House of Delegates to adopt Resolution 500 (Feb. 5, 2024).

With criminal cases taking precedence for courts' resources, over one million civil cases have been added to California courts' backlog in the last five years.<sup>4</sup> Yet the civil case backlog is not something that was simply created by the pandemic. The problem started long before and continues to worsen. California unlimited civil case filings have exceeded dispositions since 2013.<sup>5</sup> In each of the last three years, the number of unlimited civil cases filed were more than double the number of unlimited civil cases disposed.<sup>6</sup> In 2023, the unlimited civil clearance rate (the number of outgoing cases as a percentage of incoming cases), which should have been 100 percent, was only 42 percent.<sup>7</sup> The standards of judicial administration establish case processing time to disposition goals for different types of civil cases.<sup>8</sup> For unlimited civil cases those goals are: 100 percent disposition within 24 months, 85 percent disposition within 18 months, and 75 percent disposition within 12 months.<sup>9</sup> Last year, not surprisingly, California courts did not meet any of these case processing time goals for unlimited civil cases.<sup>10</sup>

On July 1, 2024, the Los Angeles County Superior Court issued a press release stating that the Fiscal Year 2024-2025 state budget deficit resulting in a \$97 million reduction to trial courts statewide will “no doubt impact the Court’s ability to provide timely and efficient access to justice for Los Angeles County residents.”<sup>11</sup> In response to the approximate \$30.3 million reduction to the Los Angeles County Superior Court’s operating budget for Fiscal Year 2024-2025, the Court has launched a Voluntary Separation Incentive Program (VSIP) for eligible court employees to voluntarily elect to leave court service to enable the court to reduce staff positions. This budget reduction to trial courts statewide will certainly compound the problems caused by heavily congested California courts. The press release noted that court users should expect reduced or delayed service because of staffing reductions and other operational cuts.

It is often said that the Superior Court of Los Angeles County is the largest—in the state, the country, and even the world—in almost every category by which to measure courts.<sup>12</sup> As Los Angeles County Superior Court judges have seen their dockets grow, a vicious cycle began: Judicial retirements followed, resulting in larger caseloads per judge, followed by more judicial retirements. Unlimited civil caseloads have nearly doubled over the last decade from a court wide average of 443 cases per unlimited civil courtroom in

December 2014 to 847 in December 2023.<sup>13</sup> One can see how this dramatic shift could threaten the quality of judicial services, not only because judges have to do more work with fewer resources but also because the most qualified in our profession may be less incentivized to pursue service on the bench. In furtherance of the Los Angeles County Superior Court's goal to help litigants resolve their legal disputes quickly and efficiently, Los Angeles Superior Court is launching a new alternative dispute resolution (ADR) program to provide mediation to litigants, primarily for unlimited civil cases at the onset.<sup>14</sup>

Although litigants, attorneys, judges, and other stakeholders already feel the pain of congested courthouses, lag effects mean that the full consequences of the court's inability to timely clear the cases on its docket have not been fully realized. As lawyers are not only stakeholders in this system but are also problem solvers, everyone in our profession should be asking what changes need to be made to turn the tide. Many experts across the country believe that a shift from an adversarial culture to a collaborative, problem-solving culture is what is needed.<sup>15</sup>

### **EDR Solves the Problem**

A significant number of cases will remain in litigation up until the eve of trial, yet most will not be tried. Paradoxically, these parties who invest in a trial that will not take place ultimately choose voluntary settlement to avail themselves of a host of benefits unavailable through trial—such as control, certainty, lower costs, creative solutions, preserved relationships, and greater satisfaction with the process and outcome. These benefits have the highest potential when parties use ADR early, known as Early Dispute Resolution (EDR). Early Dispute Resolution, which is used to resolve disputes in a time-efficient and cost-effective manner, includes early negotiation, early mediation, and ombudspersons.<sup>16</sup>

**Control.** Party autonomy and self-determination in dispute resolution supports procedural and substantive justice and also gives the parties greater sense of empowerment. "Settlement has the benefit of control. Even the most confident of counsel should remain ever heedful of the non-pecuniary benefits of settlement. Notably the client is able to control his or her or its own destiny and not leave it in the hands of an over-worked, harried judge or the vagaries of pooled strangers from all walks of life."<sup>17</sup>

**Greater Certainty.** Parties can dictate the timing, method, and outcome of dispute



David Slayton, Los Angeles Superior Court, Executive Officer/Clerk of Court, with author after SB 1141 California Senate hearing.

resolution, reducing years of uncertainty often associated with court proceedings.

**Cost Savings.** Choosing to negotiate early also puts parties in control of the process, providing more expedient and economical outcomes. Beyond the tangible cost savings from early resolution, litigation stress is avoided, a major distraction is removed, and time is reclaimed. Even if the parties do not settle at an early stage, the issues can be clarified and future legal work focused. Moreover, a reality check of the

San Diego, Fresno, Contra Costa, and Sonoma Counties. The evaluation of these five programs—called “Early Mediation Pilot Programs”—culminated in a 445-page report. All five programs were successful, resulting in “substantial benefits to both litigants and the courts. 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 qualifying cases up to \$150,000 in controversy—passed 38-0 in the California Senate but stopped short in the Assembly Judiciary Committee hearing. Section 1775.5, which has not been updated in over 30 years despite inflation, currently only allows courts to refer cases to mediation that are valued between \$35,000 and \$50,000. The Conference of California Bar Associations sponsored SB 1141, and it was 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. David Slayton—executive officer and clerk of the Los Angeles County Superior Court—and the author testified in support of SB 1141 at the Senate Judiciary Committee hearing on April 30, 2024, and Heather Resetarits of the Judicial Council of California and the author testified for the bill at the Assembly Judiciary Committee hearing on July 2, 2024.

As an acknowledgement of both the problems we are facing and the value that ADR provides, particularly when used early in a dispute, on February 5, 2024, the American Bar Association House of Delegates unanimously passed Resolution 500, which reads: “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.”

The Resolution encourages disputants and their counsel to proactively consider the benefits of ADR—party self-determination, certainty, time efficiency, cost-effectiveness, creative solutions, and relationship preservation—at the early stages of a dispute, when their value to the parties is greatest.

Underscoring the importance and value of EDR, before the resolution was presented to the House for a vote, several sections and divisions co-sponsored it, including the ABA Section of Dispute Resolution, the ABA Section of State and Local Government, and the ABA Senior Lawyers Division. The resolution also received support from the ABA Business Law Section, the ABA Section of Labor and Employment Law, the ABA Young Lawyers Division, and the ABA Section of Government and Public Sector Lawyers.<sup>25</sup>

To promote awareness of this resolution, the Dispute Resolution and Tort Trial

## **AS PENDING FEDERAL COURT** civil cases have doubled in the last few years, and state courts are even more stretched for resources, both national and statewide initiatives are responding to the urgent need for broader adoption of EDR.

strengths, weaknesses, and ambiguities of a case early in the litigation may help the client to develop reasonable expectations and to make better informed decisions about the course of the dispute. Early discussions of the option of pursuing settlement also may reduce the risk of clients’ second-guessing their attorneys’ strategies if they ultimately settle after paying substantial legal fees.<sup>18</sup>

**Creative Solutions.** Early dispute resolution encourages problem-solving, allowing parties to explore innovative solutions beyond the confines of traditional court remedies. While 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.

**Preserved Relationships.** Early-stage negotiation produces results before the parties are so polarized that settlement is difficult. For parties who have to keep working together or are otherwise in a relationship, EDR is even more valuable.

As costs are lowest, relationships have yet to be damaged beyond repair, and a greater number of options are available early on, early resolutions usually provide higher value to parties than outcomes that are delayed. Importantly, early private resolutions benefit not only the participants of EDR but also those who must depend on the courts for timely adjudication. Early Dispute Resolution alleviates court congestion by resolving cases sooner, freeing up resources for more complex matters that demand greater judicial attention.

Between 2000 and 2003, five court-annexed civil mediation programs operated in California trial courts in Los Angeles,

mediation in some or all of the participating courts.”<sup>19</sup>

In San Diego, the total potential time saving from their mandatory mediation program was estimated to be 521 trial days per year, and in Los Angeles, 670 trial days per year (with an estimated monetary value of approximately \$2 million then, approximately \$3,500,000 today).<sup>20</sup> In Sonoma County, 90 percent of attorneys whose cases did not settle at mediation indicated that the mediation was important to the ultimate settlement of the case.<sup>21</sup> In addition, there were fewer post-disposition compliance problems and fewer new proceedings initiated, suggesting that the programs not only reduced court workload in the short term but also may have reduced the court’s future workload.<sup>22</sup>

As pending federal court civil cases have doubled in the last few years,<sup>23</sup> and state courts are even more stretched for resources, both national and statewide initiatives are responding to the urgent need for broader adoption of EDR. The new amendment to the California Discovery Act, which now requires that all parties provide initial disclosures within 60 days of a demand by any party to the action, emerges as a new tool in fostering early dispute resolution.<sup>24</sup> By expediting discovery, more parties will be positioned to engage in productive early negotiations and early mediations.

Other California legislation aimed at fostering efficient dispute resolution was introduced and nearly passed this year. Senate Bill 1141—a bill that would amend Code of Civil Procedure Section 1775.5 to allow courts the discretion to order to

and Insurance Practice Sections of the ABA co-sponsored two webinars, free of charge and open to the public, to educate practitioners on some important EDR tools, namely risk analysis and early mediation.<sup>26</sup>

It is important to note that ABA Resolution 500 urges consideration of EDR, but its use is not a mandate. 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.<sup>27</sup> In those disputes for which judicial resources are essential, the resolution seeks to reduce the growing backlogs at the courthouse so that valuable limited judicial resources may be reallocated to enable more expeditious and less costly judicial decisions.<sup>28</sup> This is a reason Resolution 500 could profoundly and positively improve the justice system. Early Dispute Resolution plays a role in helping courts achieve timely adjudication, thus protecting our fundamental rights.

### Considering EDR First

The case study of “Carole” cogently demonstrates why EDR should always be considered. Carole took a business loan from an acquaintance. After years of making on-time payments, Carole’s life took a devastating turn. She suffered a serious car accident, the tragic loss of her sister, a heart attack, and finally a diagnosis of stage four cancer. This relentless adversity led to Carole’s falling behind on her loan payments.

The creditor quickly initiated suit. Knowing that the legal battle would diminish her ability to repay the loan, Carole promptly made the best offer she could to settle the case: to liquidate her entire inventory even though it would put her out of business. Had the creditor accepted the offer, he would have recovered 75 percent of the loan balance within three to four months. Despite diligent efforts by Carole’s counsel to negotiate on Carole’s behalf, the creditor’s counsel ignored the offer and refused to discuss settlement of anything less than 100 percent of the amount owed. Ironically, the longer the case persisted, the more Carole’s assets dwindled, and the less viable collection of the debt became.

Tragically, five years later, Carole has passed away. The lawsuit is still pending, and the creditor has spent nearly as much

in attorney’s fees as the amount he seeks. The travesty is that a much better outcome was possible. Utilizing EDR, the plaintiff would have recovered most of the debt while avoiding years of aggravation and lost time. For Carole, her death perhaps would not have been hastened by the stress of the lawsuit and the knowledge that her family would have to deal with ongoing litigation while grieving the loss of their wife and mother.

Any win at trial for the creditor will be a pyrrhic victory because the creditor failed to use the right tool. “When all you have is a hammer, every problem looks like a nail.”<sup>29</sup> Traditional litigation is a tool that can be used effectively in the right circumstances, and so is EDR. Parties should know that both are options and use each appropriately.

Carole’s story serves as a poignant reminder of the need for greater use of EDR, while California’s new discovery rule and the ABA’s adoption of Resolution 500 mark a notable advancement. As we strive to enhance our justice system and provide our clients with more valuable resolutions in the wake of congested courthouses and budget cuts, let us persist in championing early collaboration, communication, and problem solving. ■

<sup>1</sup> See, e.g., Court Statistics Project, CSP STAT Civil Clearance rates comparison by state *available at* <https://www.courtstatistics.org/court-statistics/inter-active-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil> (last accessed Aug. 12, 2024).

<sup>2</sup> U.S. Courts, Table C-1—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary (December 31, 2023), *available at* <https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2023/12/31>; Table C-1—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary (December 31, 2022) *available at* <https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2022/12/31>.

<sup>3</sup> 2024 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS 2013-14 THROUGH 2022-23 78 (Judicial Council of California) [hereinafter 2024 COURT STATISTICS REPORT].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 48, 49, 78.

<sup>6</sup> *Id.* at 78.

<sup>7</sup> *Id.* at 49, 78.

<sup>8</sup> *Id.* at 50.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 50, 79.

<sup>11</sup> Press Release, Superior Court of California, County of Los Angeles, Superior Court of Los Angeles County to Reduce Staff Positions in Response to Significant State Budget Cuts Which Will Result in a Reduction in Services (July 1, 2024), *available at* [www.lacourt.org/newsmedia/uploads/14202471102334NR07-01-2024-courtoreducestaffandeliminatevacantpositions.pdf](http://www.lacourt.org/newsmedia/uploads/14202471102334NR07-01-2024-courtoreducestaffandeliminatevacantpositions.pdf).

<sup>12</sup> LOS ANGELES SUPERIOR COURT ANNUAL REPORT 4 (2005), *available at* [www.lacourt.org/newsmedia/uploads/14201792614502005annualreport.pdf](http://www.lacourt.org/newsmedia/uploads/14201792614502005annualreport.pdf).

<sup>13</sup> UNLIMITED CIVIL FILINGS AND CASELOADS ARE RISING IN THE SUPERIOR COURT OF LOS ANGELES COUNTY (June

5, 2024), a report by Superior Court of Los Angeles County Management Research Unit.

<sup>14</sup> For a listing of the court’s ADR programs, see Superior Court of California, County of Los Angeles, Alternative Dispute Resolution, <https://www.lacourt.org/ADR> (last accessed Aug. 11, 2024).

<sup>15</sup> See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Hebert M. Kritzer et al., *Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer*, 9(3) AM. B. FOUND. RES. J. 569-604 (1984), *available at* <https://experts.umn.edu/en/publications/understanding-the-costs-of-litigation-the-case-of-the-hourly-fee->.

<sup>16</sup> While arbitration is recognized as one of many ADR options, and as an efficient and effective way to resolve many disputes, non-adjudicative methods that promote full party-autonomy are the focus of this article.

<sup>17</sup> Hon. Jay C. Gandhi, *Lawyers, leave the odds to Vegas*, L.A. DAILY J., Jul. 10, 2015, *available at* <https://www.jamsadr.com/publications/2015/lawyers-leave-the-odds-to-vegas>.

<sup>18</sup> SECTION OF LITIGATION, ABA, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS 7 (Aug. 2002), *available at* [https://www.americanbar.org/content/dam/aba/administrative/litigation/leadership\\_init/council\\_docs/settlementnegotiations.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/leadership_init/council_docs/settlementnegotiations.pdf).

<sup>19</sup> JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, OFFICE OF THE GENERAL COUNSEL, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS, EXECUTIVE SUMMARY XIX (Feb. 27, 2004).

<sup>20</sup> *Id.* at 29.

<sup>21</sup> *Id.* at xxx.

<sup>22</sup> *Id.* at 31.

<sup>23</sup> Federal court statistics from the last several years were compared. See, e.g., U.S. Courts, Table C—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary (Dec. 31, 2023), *available at* <https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2023/12/31>.

<sup>24</sup> CODE CIV. PROC. §2016.090.

<sup>25</sup> To access Resolution 500, its supporting documents, and video of the presentations made at the Mid-Year Meeting, visit American Bar Association, Midyear Meeting 2024—House of Delegates Resolution 500, *available at* [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2024/house-of-delegates-resolutions/500/?login](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2024/house-of-delegates-resolutions/500/?login).

<sup>26</sup> Those webinars were recorded and are available to watch free of charge here: Risk Analysis, <https://www.youtube.com/watch?v=vRlvA4gYyJU>; Early Mediation: Strategies for Success, <https://www.youtube.com/watch?v=ZdvaYbzdSZc>.

<sup>27</sup> American Bar Ass’n, Report on Resolution Adopted by House of Delegates, 2024 Midyear Meeting, Louisville, KY (Feb. 5, 2024), *available at* <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2024/500-midyear-2024.pdf>.

<sup>28</sup> Felicia Harris Hoss & Ellie Vilendrer, *ABA Unanimously Adopts Policy Encouraging Early Dispute Resolution*, ABA (May 29, 2024), *available at* [https://www.americanbar.org/groups/dispute\\_resolution/resources/just-resolutions/2024-may/aba-unanimously-adopts-policy-encouraging-early-dispute-resolution/?login](https://www.americanbar.org/groups/dispute_resolution/resources/just-resolutions/2024-may/aba-unanimously-adopts-policy-encouraging-early-dispute-resolution/?login).

<sup>29</sup> Paraphrase of original, attributed to both Abraham Kaplan and Abraham Maslow, which was: “Give a small boy a hammer, and he will find that everything he encounters needs pounding.” ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE* 28 (Chandler Publishing Co. 1964). The later, more popular version (“If the only tool you have is a hammer, it is tempting to treat everything as if it were a nail.”) is attributed to Maslow. ABRAHAM MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* 16 (Harper & Row 1966).



INTRODUCING

# Ellie K. Vilendrer

Signature Resolution welcomes Ellie K. Vilendrer to our panel of neutrals, specializing in a wide range of civil matters, including commercial, employment, and intellectual property law.

*Ellie Vilendrer*



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