

## Memorandum 2015-6

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct: Data From the Early Mediation Pilot Programs**

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Among other things, the legislative resolution directing the Commission<sup>1</sup> to study the relationship between mediation confidentiality and attorney malpractice and other misconduct specifically directs the Commission to consider “any data regarding the impact of differing confidentiality rules on the use of mediation.”<sup>2</sup> Empirical data on that precise point is limited at best.

However, there is other empirical data that may be of interest in this study. This memorandum discusses one source of such data: The Judicial Council’s study of the early mediation pilot programs established pursuant to a 1999 legislative mandate.<sup>3</sup> That study deserves special attention because it was an extensive project conducted in California. Other empirical data relevant to this study will be discussed in Memorandum 2015-7.

The following materials are attached for the Commission’s consideration:

*Exhibit p.*

- Judicial Council, *Evaluation of the Early Mediation Pilot Programs* (Feb. 27, 2004), pp. xix-xxxi (Executive Summary) ..... 1
- Judicial Council, *Evaluation of the Early Mediation Pilot Programs* (Feb. 27, 2004), pp. 53-64 (Findings Concerning the Impact of Pilot Programs on Litigant Satisfaction) ..... 15

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2012 Cal. Stat. res. ch. 108.

3. Judicial Council, *Evaluation of the Early Mediation Pilot Programs* (Feb. 27, 2004) (hereafter, “Judicial Council report”). The full report can be downloaded at <http://www.courts.ca.gov/documents/emppt.pdf>.

## EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS

As mediator Ron Kelly brought to the Commission's attention,<sup>4</sup> eleven years ago the Judicial Council issued a lengthy report (over 400 pages) entitled "Evaluation of the Early Mediation Pilot Programs," which presented extensive empirical data about five court-annexed civil mediation pilot programs in California.<sup>5</sup> The report may be of considerable interest to the Commission, because it provides some insights into the use and effectiveness of mediation in the California court system, and parties' attitudes towards the mediation process.

The discussion below summarizes the methodology and the results of the Judicial Council's study. The staff then examines the relevance of the data to the Commission's ongoing study. To facilitate further consideration of the Judicial Council's report, the Executive Summary and the section entitled "Findings Concerning the Impact of Pilot Programs on Litigant Satisfaction" are attached.<sup>6</sup>

### Basic Methodology

The five pilot programs discussed in the Judicial Council's report were established pursuant to a statutory mandate, which authorized each participating court to refer cases to mediation early in the litigation process.<sup>7</sup> The statute specified that one of the programs be established in the Los Angeles County Superior Court, in ten departments handling civil cases.<sup>8</sup> The statute directed the Judicial Council to select the other four participating superior courts;<sup>9</sup> the Judicial Council selected the superior courts in Contra Costa, Fresno, San Diego, and Sonoma counties.<sup>10</sup>

Under the pilot program statute, in three of the five programs, the court could require the parties to mediate (i.e., mediation was mandatory).<sup>11</sup> In the other two programs, mediation was voluntary.<sup>12</sup>

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4. See Minutes (Oct. 2014), p. 4.

5. Judicial Council report, *supra* note 3.

6. Exhibit pp. 1-14 (Executive Summary); Exhibit pp. 15-26 (Findings Concerning the Impact of Pilot Programs on Litigant Satisfaction).

7. See former Code Civ. Proc. §§ 1730-1743 (1999 Cal. Stat. ch. 67, § 4; see also 2000 Cal. Stat. ch. 127, § 3; 2000 Cal. Stat. ch. 688, §§ 9, 10). The text of former Code Civ. Proc. §§ 1730-1743 (as amended in 2000) is reproduced in the Judicial Council report, *supra* note 3, at 375-77.

8. See former Code Civ. Proc. § 1730(c) (2000 Cal. Stat. ch. 127, § 3). This program was not included when the pilot program statute was first enacted in 1999. It was added when the statute was amended in 2000.

9. See former Code Civ. Proc. § 1730(b) (1999 Cal. Stat. ch. 67 § 4; 2000 Cal. Stat. ch. 127, § 3).

10. Judicial Council report, *supra* note 3, at 4.

11. *Id.* at 2, 3; see former Code Civ. Proc. § 1730 (1999 Cal. Stat. ch. 67 § 4; 2000 Cal. Stat. ch. 127, § 3).

The mandatory programs were located in Fresno, Los Angeles, and San Diego counties. Judicial Council report, *supra* note 3, at 3, 4.

For each mandatory mediation program, the statute required the court to establish a panel of mediators.<sup>13</sup> If the parties selected a panel mediator, the parties would not be charged for the mediator's services. If the parties selected a mediator who was not on the panel, the court could exercise its discretion to pay the mediator with court funds; otherwise, the parties were responsible for paying the mediator.<sup>14</sup>

The pilot program statute directed the Judicial Council to study and report on the five programs. In particular, its report for the Legislature and the Governor was to examine "the settlement rate, the timing of settlement, the litigants' satisfaction with the dispute resolution process and the costs to the litigants and the courts."<sup>15</sup>

Some details of the programs varied from court to court.<sup>16</sup> The court environments also varied in a number of respects (e.g., the size of the civil caseload, the typical disposition time for a civil case, and whether the court had prior experience with court-annexed mediation).<sup>17</sup> The differences in the structure and court environments of the pilot programs mean that each program was unique, so any cross-program comparisons require care and caution.<sup>18</sup>

Consistent with the statutory mandate, the Judicial Council's report focuses primarily on the programs' impact on the following points:

- (1) The proportion of cases that went to trial.
- (2) The time it took for cases to reach disposition.
- (3) The litigants' satisfaction with the dispute resolution process.
- (4) The litigants' costs.
- (5) The courts' workload.<sup>19</sup>

All of these points may be significant in the Commission's ongoing study, but the litigants' level of satisfaction with the mediation process seems particularly pertinent. If an attorney or mediator engaged in misconduct during a mediation,

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12. Judicial Council report, *supra* note 3, at 2; see former Code Civ. Proc. § 1730 (1999 Cal. Stat. ch. 67 § 4; 2000 Cal. Stat. ch. 127, § 3).

The voluntary programs were located in Contra Costa and Sonoma counties. Judicial Council report, *supra* note 3, at 4.

13. Judicial Council report, *supra* note 3, at 2; see former Code Civ. Proc. § 1735 (1999 Cal. Stat. ch. 67 § 4; 2000 Cal. Stat. ch. 127, § 3).

14. Judicial Council report, *supra* note 3, at 2; see former Code Civ. Proc. § 1735 (1999 Cal. Stat. ch. 67 § 4; 2000 Cal. Stat. ch. 127, § 3).

15. Former Code Civ. Proc. § 1742 (1999 Cal. Stat. ch. 67 § 4; 2000 Cal. Stat. ch. 127, § 3).

16. Judicial Council report, *supra* note 3, at 4-6.

17. *Id.* at 4.

18. *Id.*

19. *Id.* at 1.

one might expect to see a low level of litigant satisfaction. That might not hold true in all instances of misconduct (e.g., if a litigant's satisfaction level was measured before the litigant discovered malpractice). In general, however, it seems likely that the frequency and severity of mediation misconduct would have an effect on the level of litigant satisfaction.

Accordingly, it is important to take a close look at the Judicial Council's methodology for assessing litigant satisfaction. For details regarding other aspects of its methodology, please see the description in its report.<sup>20</sup>

### **Methodology for Assessing Litigant Satisfaction**

Two surveys were the primary source of data for assessing litigant satisfaction: a postmediation survey and a postdisposition survey.<sup>21</sup>

#### *The Postmediation Survey*

The postmediation survey was distributed to persons who participated in a pilot program mediation between July 2001 and June 2002.<sup>22</sup> Two different questionnaires were used for this survey:

- (1) **Questionnaire for a party represented by an attorney.** If a party was represented by an attorney, the party was asked to complete a 2-page questionnaire that asked about:
  - The respondent's prior experience with litigation and relationship with the other parties.
  - The respondent's perception of the mediation process.
  - The respondent's satisfaction with the mediation, the outcome of the case, the services provided by the court, and the litigation process.
  - If the case settled at mediation, how much money the respondent spent on reaching resolution in the case.<sup>23</sup>
- (2) **Questionnaire for a self-represented party, an attorney, or an insurance adjuster participating in a pilot program mediation.** The questionnaire for a self-represented party, an attorney, or an insurance adjuster that participated in a pilot program mediation was similar to the one for a party represented by an attorney (see #1 above), but this questionnaire also sought information about:
  - The respondent's prior experience with mediation.
  - The characteristics of the case (e.g., number of parties, complexity, hostility of the parties, amount of damages).

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20. See *id.* at 7-27.

21. *Id.* at 12.

22. *Id.*

23. *Id.* at 12-13.



- How important various factors were to the case being mediated.
- If the case settled at mediation, the respondent's estimate of how much time the respondent actually spent on the case and the total actual litigation costs, as well as an estimate of the time and costs that would have been expended if the case had not been mediated.<sup>24</sup>

The mediator was to distribute these questionnaires at the conclusion of a mediation, and instruct each participant to return the completed questionnaire to the mediator before leaving the last mediation session, or mail it to court staff working on the pilot program.<sup>25</sup>

#### *The Postdisposition Survey*

The second survey, the postdisposition survey, was distributed to attorneys and parties whose cases reached disposition between July 2001 and June 2002.<sup>26</sup> This survey was distributed in *all* cases that were eligible for the pilot program (or a random sample of all such cases), not just in cases that were mediated or otherwise included in the pilot program.<sup>27</sup> The postdisposition survey was *not* distributed in cases that settled at mediation, because it would have duplicated the postmediation survey.<sup>28</sup>

Again, two different questionnaires were used in the survey:

- (1) **Questionnaire for a party represented by an attorney.** If a party was represented by an attorney, the party was asked to complete a 2-page questionnaire that asked about:
  - The respondent's litigation experience.
  - The respondent's satisfaction with the outcome of the case, the services provided by the court, and the litigation process.
  - How much money the party spent on reaching resolution in the case.<sup>29</sup>
- (2) **Questionnaire for a self-represented party or an attorney.** The questionnaire for a self-represented party or an attorney was similar to the one for a party represented by an attorney (see #1 above), but this questionnaire also sought information about:
  - The characteristics of the case (e.g., number of parties, complexity, hostility of the parties, amount of damages).
  - How important various factors were to the case being resolved.

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24. *Id.* at 13.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 13.

- How much discovery was completed in the case.
- The settlement outcome.
- The respondent's estimate of how much time the respondent actually spent on the case and the total actual litigation costs.<sup>30</sup>

The court mailed the postdisposition survey to the *attorneys* in a case shortly after the case reached disposition.<sup>31</sup>

Obtaining postdisposition input from the *parties* posed more of a challenge. As the Judicial Council explained in its report:

Because the courts did not have contact information for parties, they could not mail the party survey forms immediately. Instead, attorneys were asked to provide their clients' contact information so the courts could distribute the party survey forms. Most attorneys, however, did not provide this information. As a result, *only a small number of responses to the postdisposition survey were received from parties and comparisons of party satisfaction ... using post-disposition survey information could not be made.* Therefore, all comparisons regarding litigant satisfaction ... were based only on attorney responses to the postdisposition attorney survey.<sup>32</sup>

This is a significant limitation on the data from the postdisposition survey.

#### *Other Data Bearing on Litigant Satisfaction*

In addition to the postmediation survey and the postdisposition survey, the Judicial Council gathered data in a number of other ways. Of particular note for present purposes, researchers conducted focus group discussions with parties in pilot program cases, as well as similar discussions with attorneys. Researchers also surveyed mediators from the pilot program panels.<sup>33</sup> These steps provided an opportunity for parties and other mediation participants to air concerns about the mediation process; they are thus another indicator of satisfaction levels.

### **Overview of the Results**

The Judicial Council's study lasted for 30 months.<sup>34</sup> More than 25,000 cases filed in 2000 and 2001 were eligible for possible referral to mediation in the five pilot programs.<sup>35</sup> Of the eligible cases, more than 6,300 unlimited civil cases and almost 1,600 limited civil cases (a total of about 7,900 civil cases) participated in

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30. *Id.*

31. *Id.*

32. *Id.* at 13-14 (emphasis added).

33. *Id.* at 15.

34. *Id.* at xix.

35. *Id.*

pilot program mediations.<sup>36</sup> Still more civil cases were directly affected by the pilot programs, for a variety of reasons (e.g., educational materials on mediation were distributed to the litigants, the case was assessed for referral to mediation but not actually referred, or the case was referred to mediation but resolved before mediation could take place).<sup>37</sup> Thus, “[s]imply in terms of the number of parties who participated in, were exposed to, and were educated about the mediation process, and the number of cases that were resolved as a result of mediation, these pilot programs had substantial impact on both litigants and the courts.”<sup>38</sup>

The pilot programs were also successful based on the criteria specified by the Legislature in the pilot program statute. As the Judicial Council explained in its report,

Based on the criteria established by the Early Mediation Pilot Programs legislation, all five of the Early Mediation Pilot 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 in some or all of the participating courts.<sup>39</sup>

More specifically, the Judicial Council found that “[o]n average, 58 percent of the unlimited cases and 71 percent of the limited cases settled as a direct result of early mediation.”<sup>40</sup> It further found the following:

- ***Trial rate.*** Because of limitations in the data, it was not possible to definitively determine whether the pilot programs in Contra Costa, Fresno, and Sonoma counties had a significant impact on trial rates.<sup>41</sup> In San Diego and Los Angeles counties, however, the courts had relatively short disposition times and good comparison groups.<sup>42</sup> The pilot programs in those counties “reduced the trial rates in program cases by a substantial 24 to 30 percent.”<sup>43</sup> Consequently, the programs saved a considerable amount of court time: “In San Diego, the total potential time saving from the pilot program was estimated to be 521 trial days per year (with an estimated monetary value of approximately \$1.6 million) and in

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36. *Id.*

37. *Id.* at 32-33.

38. *Id.* at 34.

39. *Id.* at xix.

40. *Id.* at 29.

41. *Id.* at 42-43.

42. *Id.* at 41.

43. *Id.*

Los Angeles, it was estimated to be 670 trial days per year (with an estimated monetary value of approximately \$2 million)."<sup>44</sup>

Because many court costs are fixed (e.g., judicial salaries), this time saving "does not translate into a fungible cost saving that can be reallocated to cover other court expenses."<sup>45</sup> Rather, it "allowed the judges in these courts to focus on other cases that needed judicial time and attention, which is likely to have improved court services in these other cases."<sup>46</sup>

- **Disposition time.** "All five pilot programs reduced disposition time."<sup>47</sup> The biggest impact was in courts with a relatively long disposition time before the pilot program began.<sup>48</sup>

Interestingly, the study also showed that cases that did not settle at early mediation took longer to resolve than cases that were not mediated.<sup>49</sup> As the Judicial Council explained, "[t]hese program cases essentially detoured off the litigation path to participate in mediation and then came back to the litigation path when the cases did not settle at mediation; it is understandable that this detour required some additional time."<sup>50</sup> The Judicial Council therefore concluded that "courts should carefully select cases for referral to mediation ...."<sup>51</sup>

- **Litigant costs.** In all of the pilot programs, attorneys in cases that settled at mediation were asked to provide "an estimate of the time they would have spent and what the costs to their clients would have been had they not used mediation."<sup>52</sup> If the estimated figures for all five pilot programs are added together, "the total estimated savings calculated based on attorney estimates of savings in 2000 and 2001 cases that settled at pilot program mediations was considerable: \$49,409,698 in litigant cost savings and 250,229 in attorney hours savings."<sup>53</sup> Other data collected by the Judicial Council also suggested that the pilot programs reduced litigant costs.<sup>54</sup>
- **Court workload.** In four of the five pilot programs (San Diego, Los Angeles, Fresno, and Sonoma, but not in Contra Costa), "there was evidence that the program reduced the number of motions, the number of 'other' pretrial hearings, or both."<sup>55</sup> Those decreases "were substantial, ranging from 18 to 48 percent for motions and

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44. *Id.*

45. *Id.* at 41-42.

46. *Id.* at 42.

47. *Id.* at 44.

48. *Id.*

49. *Id.* at 48-49.

50. *Id.* at 49.

51. *Id.* at 51.

52. *Id.* at 66.

53. *Id.* at 65.

54. See *id.* at 65-69.

55. *Id.* at 70; see also *id.* at 71-72.

11 to 32 percent for ‘other’ pretrial hearings.”<sup>56</sup> In some of the programs, the effect was offset to some extent by addition of mediation-related court events (e.g., case management conferences).<sup>57</sup> Nonetheless, the total potential time savings from reduced numbers of court events was estimated at “479 judge days per year in San Diego (with an estimated monetary value of approximately \$1.4 million), 132 days in Los Angeles (with an estimated monetary value of approximately \$400,000), and 3 days in Sonoma (with an estimated monetary value of approximately \$9,700).”<sup>58</sup> According to the Judicial Council, “[t]hese estimates suggest that early mediation programs can help courts save valuable judicial time that can be devoted to other cases requiring judges’ attention.”<sup>59</sup>

The Judicial Council’s report also included data showing how the pilot programs affected the degree of litigant satisfaction with court services. Those findings are discussed below.

### **Findings Concerning the Impact of the Pilot Programs on Litigant Satisfaction**

As previously mentioned, it proved difficult to circulate the postdisposition survey to parties whose cases were not mediated (the control group). Consequently, it was not possible to determine whether litigants who participated in the pilot program were *more* satisfied with their litigation experience than litigants in the control group.<sup>60</sup> It was possible, however, to determine whether litigants who participated in the pilot program were satisfied (as opposed to dissatisfied) with their litigation experience.

#### *Satisfaction Level*

Both attorneys and parties who participated in mediation were asked to “rate their level of satisfaction with the mediator’s performance, the mediation process, the outcome of the mediation, the litigation process, and the services provided by the court on a scale from 1 to 7 where 1 is ‘highly dissatisfied’ and 7 is ‘highly satisfied.’”<sup>61</sup> “[M]ost of the scores were in the highly satisfied range

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56. *Id.* at 70.

57. *Id.* at 70, 72, 73.

58. *Id.* at 70.

59. *Id.* at 76.

60. *Id.* at 53 n.75; see note 30 *supra* and accompanying text.

Although comparison data was unavailable for *parties*, it was possible to determine whether *attorneys* who participated in the pilot program were more satisfied with their litigation experience than *attorneys* in the control group. The results show “that the experience of participating in pilot program mediation increased attorneys’ satisfaction with the services provided by the court, even if the case did not resolve at mediation.” Judicial Council report, *supra* note 3, at 53.

61. Judicial Council report, *supra* note 3, at 58.

(above 5.0) and all of the average satisfaction scores were above the middle of the satisfaction scale (4.0).”<sup>62</sup>

“The patterns of responses were virtually identical in all of the pilot programs and for both unlimited and limited cases.”<sup>63</sup> As the Judicial Council explained,

Both parties and attorneys were most satisfied with the performance of mediators (average score of 5.8 or above for parties and 6.0 or above for attorneys). They were also highly satisfied with both the mediation process (average score of 5.0 or above for parties and 5.7 or above for attorneys) and services provided by the court (average score of 5.2 or above for parties and 5.3 or above for attorneys). In general, both parties and attorneys were least satisfied with the outcome of the case (average score of 4.0 or above for parties and 4.9 or above for attorneys).<sup>64</sup>

*Perceptions of Fairness of the Mediation Process and the Outcome*

Both attorneys and parties were also asked “to indicate whether they agreed that the mediator treated the parties fairly, that the mediation process was fair, and that the mediation resulted in a fair/reasonable outcome.”<sup>65</sup> In addition, they were asked “whether they agreed that they would recommend the mediator to friends with similar cases, that they would recommend mediation to such friends, and that they would use mediation even if they had to pay the full cost of the mediation.”<sup>66</sup> For these questions, the researchers used a 1 to 5 scale (not 1 to 7), where 1 was “strongly disagree” and 5 was “strongly agree.”<sup>67</sup>

Here again, “most of the scores were in the ‘strongly agree’ range (above 4.0) and, with the exception of two scores for parties concerning the outcome, all of the average scores were above the middle of the agreement scale (3.0).”<sup>68</sup> More specifically,

[T]he response patterns were virtually identical in all of the pilot programs and for both unlimited and limited cases. Both parties and attorneys expressed very strong agreement (average score of 4.0 or above for parties and 4.4 or above for attorneys) that the mediator treated the parties fairly, the mediation process was fair,

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62. *Id.*

63. *Id.*

64. *Id.* “The one exception was parties in Sonoma: they were least satisfied with court services.” *Id.* According to the Judicial Council, “[t]his anomaly may have resulted because the Sonoma pilot program was the only program in which the court did not provide any kind of financial subsidy for mediation services; parties in Sonoma had to pay the full cost of mediation themselves.”

65. *Id.* at 59.

66. *Id.*

67. *Id.*

68. *Id.* at 60.

they would recommend the mediator to friends with similar cases, and they would recommend mediation to such friends. Both parties and attorneys indicated less agreement that they would use mediation if they had to pay the full costs; the average score was 3.3 or above for parties and 3.9 or above for attorneys. The lowest scores related to the fairness/reasonableness of the mediation outcome ....<sup>69</sup>

#### *Comments of the Judicial Council on the Results*

According to the Judicial Council, “[i]t is clear from the responses to both the satisfaction and fairness questions that while parties and attorneys were generally very pleased with their mediation experience, overall they were less pleased or neutral in terms of the outcome of the mediation process.”<sup>70</sup> In reporting that result, the Judicial Council pointed out that at the time of the postmediation survey, many of the cases were not yet resolved.<sup>71</sup> “[T]he way parties and attorneys responded to the two outcome questions depended largely on whether their cases settled at mediation.”<sup>72</sup> In cases that settled at mediation, the participants felt more positively about the outcome than in cases that remained unresolved:

Average satisfaction with the outcome in cases that settled at mediation was 6.0 for attorneys and 5.2 for parties, more than 50 percent higher than the average scores of 4.0 for attorneys and 3.3 for parties in cases that did not settle at mediation. Similarly, average responses concerning the fairness/reasonableness of the outcome were 4.3 for attorneys and 3.8 for parties in cases settled at mediation, more than 60 percent higher than the 2.6 for attorneys and 2.4 for parties in cases that did not settle at mediation.<sup>73</sup>

The Judicial Council also observed that “while both parties and attorneys were generally very pleased with their mediation experience, *attorneys* were more pleased than *parties*.”<sup>74</sup> In fact, attorneys’ average scores on the satisfaction and fairness questions “were consistently higher than those of parties ....”<sup>75</sup> The Judicial Council suggested two possible explanations for this result: (1) it “may reflect attorney’s greater understanding about what to expect from the mediation process and suggest the need for additional educational efforts targeted at

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69. *Id.*

70. *Id.*

71. *Id.* at 61.

72. *Id.*

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.*

parties,”<sup>76</sup> and (2) it may “reflect the fact that parties’ satisfaction with both the court and with the mediation was much more closely tied than attorneys’ satisfaction to what happened within the mediation process — whether they felt heard, whether the mediation helped their communication or relationship with the other party, and whether the cost of mediation was affordable.”<sup>77</sup>

In suggesting that parties might benefit from additional educational efforts, the Judicial Council explained that in focus groups, “several parties indicated that they had received almost no information from their attorneys about the mediation process and did not know how the process would work.”<sup>78</sup> The report’s discussion of litigant satisfaction did not mention any other comments from the focus groups. The report’s failure to mention any complaints about attorney or mediator misconduct tends to suggest that such complaints were rare to nonexistent, or at least not frequent enough or serious enough to merit inclusion in the report requested by the Legislature.

### **Impact of the Judicial Council’s Report on the Commission’s Study**

When Mr. Kelly alerted the Commission to the Judicial Council’s report, the Commission expressed interest in examining the raw data that is summarized in the report (the actual questionnaires completed by mediation participants). That point is discussed below. Afterwards, we turn to other implications of the Judicial Council’s study.

#### *Use of the Judicial Council’s Raw Data for the Commission’s Current Study*

At the October meeting, the Commission discussed the possibility of selecting and examining questionnaires of pilot program participants who said they were dissatisfied with the mediation process. The idea was to see whether those questionnaires included any complaints about attorney or mediator misconduct, or any other comments that might be of interest in the Commission’s study.

As directed by the Commission, the staff raised this matter with Heather Anderson (a Senior Attorney for the Legal Services Office of the Judicial Council). Ms. Anderson and one of her colleagues were the Primary Authors of the Judicial Council’s report.

Ms. Anderson checked into the situation and then informed us that it would not be possible to provide access to the raw data, because the survey participants

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76. *Id.* at 63; see also *id.* at 61.

77. *Id.* at 63-64; see also *id.* at 61-63.

78. *Id.* at 61.



completed their questionnaires after receiving assurance that their responses would be used *only* for purposes of the Judicial Council's study of the early mediation pilot programs. It would violate the terms of their participation to use the questionnaires for other purposes, such as the Commission's study. A further complication is that some of the raw data is no longer available due to a technical problem.

#### *Other Implications of the Judicial Council's Study*

Although the Commission will not be able to review the raw data from the Judicial Council's study, the results of that study still provide important insights for purposes of the Commission's work. In particular, **the results suggest that early mediation programs provide important benefits to courts and litigants.** Specifically, such programs appear to: (1) reduce trial rates, allowing judges to focus on cases that otherwise might not receive as much attention as needed, (2) reduce the time required for cases to reach disposition, (3) reduce litigants' costs, and (4) reduce pretrial workloads of the courts, again allowing judges to focus on cases that otherwise might not receive as much attention as needed.

Even more importantly, the results of the Judicial Council's study also show that at the time of the study (during 2000-2001), pilot program litigants generally had a strong favorable impression of the mediation process. **That result tends to suggest that there was little or no professional misconduct in the pilot program mediations.** Heather Anderson's comments and the apparent lack of focus group concerns relating to misconduct lend further support to that conclusion.

**It is important to remember, however, a number of limitations on interpretation of the data from the Judicial Council's study:**

- The pilot program litigants responded to the postmediation questionnaire almost immediately after completing the mediation process. Their feelings about the mediation process might have changed over time. For instance, it is possible that a litigant initially felt satisfied with the mediation process, but became dissatisfied upon learning that counsel committed malpractice during the mediation.
- The data pertains only to court-connected, early mediations. It does not encompass any purely private mediations. Nor does it include any pre-litigation mediations. It is not clear whether the results would be similar for such mediations. Likewise, it is not clear whether the results would be similar for court-connected mediations that are structured differently from the early mediation model used in the pilot program.

- The data is more than a decade old. It is not clear whether the results would be similar under current conditions. In particular, it is not clear whether the results would be similar now that the California Supreme Court has issued its decision in *Cassel v. Superior Court*, which holds that private attorney-client communications, like any other communications, are “confidential, and therefore ... neither discoverable nor admissible — even for purposes of proving a claim of legal malpractice — insofar as they [are] ‘for the purpose of, in the course of, or pursuant to, a mediation ....’”<sup>79</sup>
- The participants in the Judicial Council’s study knew that the mediation program was being evaluated and such programs might not continue if the results were poor. That may have influenced their conduct during the mediations. For example, it is possible that some mediators or attorneys were eager to make a good impression in the pilot program and would have acted in a less exemplary fashion in a program that was not being scrutinized.

Due to these limitations on using the data from the early mediation pilot programs, the staff asked Ms. Anderson whether she was aware of any more recent empirical data on California mediations. She has worked on many aspects of alternative dispute resolution for the Judicial Council, so she is familiar with resources in the area. She said that the Judicial Council did not have any more recent empirical data, but individual courts might.

To help the Commission obtain any data that might exist, she offered to post a message soliciting such information on a listserv for court ADR program administrators. The staff gratefully accepted the offer and assisted in preparing such a message, which has been posted to the listserv. As yet, the Commission has not received any information in response. The staff will notify the Commission regarding any information it receives.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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79. 51 Cal. 4th 113, 138, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).



# **Evaluation of the Early Mediation Pilot Programs**

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FEBRUARY 27, 2004



ADMINISTRATIVE OFFICE  
OF THE COURTS

# Executive Summary

## Introduction and Background

This is a report about five court-annexed civil mediation programs in California: three mandatory programs operating in the Superior Courts in Fresno, Los Angeles, and San Diego counties and two voluntary programs operating in the Superior Courts in Contra Costa and Sonoma counties. These five programs, called Early Mediation Pilot Programs, were implemented under a statutory mandate, which authorized early referrals to mediation. The statute required the Judicial Council of California to study the five programs and to report the results of the study to the California Legislature and Governor.

This report was prepared to fulfill that statutory mandate. It describes the results of a 30-month study of these five separate mediation programs. The findings reported below focus primarily on the pilot programs' impact in five areas:

- (1) the trial rate;
- (2) the time to disposition;
- (3) the litigants' satisfaction with the dispute resolution process;
- (4) the litigants' costs; and
- (5) the courts' workload.

## Overview of Findings

Based on the criteria established by the Early Mediation Pilot Programs legislation, all five of the Early Mediation Pilot 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 in some or all of the participating courts.

- **Mediation referrals and settlements**—A very large number of parties and attorneys were exposed to and educated about the mediation process through participation in the five Early Mediation Pilot Programs. More than 25,000 cases filed in 2000 and 2001 were eligible for possible referral to mediation in the five Early Mediation Pilot Programs. More than 6,300 unlimited civil cases and almost 1,600 limited cases participated in pilot program mediations. On average, 58 percent of the unlimited cases and 71 percent of the limited cases settled as a direct result of early mediation. The mandatory and voluntary pilot programs generally followed the expected pattern: a higher percentage of cases were referred to mediation in the mandatory programs than in the voluntary programs, but a lower percentage of cases reached settlement in the mandatory programs than in the voluntary programs. However, the referral, mediation, and settlement patterns in the San Diego (mandatory) and Contra Costa (voluntary) programs were similar to each other, suggesting that mandatory mediation programs may be able to achieve high resolution rates when courts consider party preferences in making referrals to mediation, as they did in the San Diego pilot program, and that voluntary mediation programs may be able to achieve high referral

rates when courts urge parties to consider mediation and provide some financial incentive to use the court's mediation program, as they did in the Contra Costa pilot program. The low percentage of limited cases that stipulated to mediation in Sonoma's voluntary pilot program model, in which the parties paid for the mediation, suggests that incentives are needed to encourage litigants in smaller-value cases to participate in mediation.

- **Trial rate**—In San Diego and Los Angeles, where the courts had relatively short times to disposition and there were good comparison groups, the study found that the pilot programs reduced the proportion of cases going to trial by a substantial 24 to 30 percent. By helping litigants in more cases reach resolution without going to trial, these pilot programs saved a substantial amount of court time. In San Diego, the total potential time saving from the pilot program was estimated to be 521 trial days per year (with an estimated monetary value of \$1.6 million); in Los Angeles, the potential saving was estimated to be 670 trial days per year (with an estimated monetary value of approximately \$2 million). These results suggest that early mediation programs can help courts save valuable judicial time that can be devoted to the other cases that need judges' attention.
- **Disposition time**—All five pilot programs had some positive impact on reducing the time required for cases to reach disposition. The largest reductions in average disposition time occurred in those courts that had the longest overall disposition times before the pilot program began. In all the programs, there were indications that dispositions accelerated around the time that the mediation took place, which was largely attributable to cases settling earlier at mediation than similar cases that were not in the program. There were also indications that early case management conferences and early referrals to mediation played important roles in improving time to disposition. However, the study also found that not settling at mediation resulted in longer disposition times. Overall, these results suggest that careful assessment of cases for referral to mediation is important and that early case management conferences and early mediations are important elements to incorporate into the program to improve disposition time; however, courts that have relatively long disposition times are more likely to experience dramatic reductions in disposition time as a result of implementing an early mediation program than courts with relatively short disposition times.
- **Litigant satisfaction**—All five pilot programs had positive effects on attorneys' satisfaction with the services provided by the court, with the litigation process, or with both. The levels of satisfaction with the courts' services reported by attorneys who participated in the San Diego, Los Angeles, Fresno, and Contra Costa pilot programs were 10 to 15 percent higher than those reported by attorneys in nonprogram cases.<sup>1</sup> Similarly, attorneys' satisfaction with the litigation process was

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<sup>1</sup> In the San Diego pilot program, because of offsetting decreases in satisfaction among unlimited program-group cases that were not referred to mediation or that were removed from mediation, this impact was evident only for limited cases.

about 6 percent higher in program cases in the San Diego, Fresno, Contra Costa, and Sonoma pilot programs than in nonprogram cases.<sup>2</sup> Attorneys' satisfaction with the outcome of their cases was linked to whether those cases settled at mediation—attorneys were more satisfied with the outcome in cases that settled and less satisfied in cases that did not. Attorneys were also generally more satisfied with the litigation process when their cases settled at mediation. However, attorneys whose cases were mediated were more satisfied with the services provided by the court regardless of whether their cases settled at the mediation. These results indicate that the experience of participating in pilot program mediation increased attorneys' satisfaction with the services provided by the court, even if the case did not resolve at mediation. In all five of the pilot programs, both parties and attorneys who participated in mediations expressed high satisfaction with their mediation experience; their highest levels of satisfaction were with the performance of the mediators. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.

- **Litigant costs**—In the Contra Costa pilot program, estimated actual litigant costs were 60 percent lower and average attorney hours were 43 percent lower in program cases than in nonprogram cases. In the San Diego, Contra Costa, and Fresno pilot programs (where it was possible to break down program cases into subgroups based on their different experiences in the pilot program) the study found that the estimated actual litigation costs incurred by parties, hours spent by the attorney in reaching resolution, or both were lower in program cases that settled at mediation than in similar nonprogram cases. The percentage savings in litigant costs calculated through regression analysis were 50 percent in the Contra Costa pilot program; savings in attorney hours were 40 percent in the Contra Costa pilot program, 20 percent in the Fresno pilot program, and 16 percent in the San Diego pilot program. In all five pilot programs, attorneys in program cases that settled at mediation estimated savings ranging from 61 to 68 percent in litigant costs and 57 to 62 percent in attorney hours from the use of mediation to reach settlement. Based on these attorney estimates, the total estimated savings in litigant costs in all of the 2000 and 2001 cases that settled at pilot program mediations ranged from \$1,769,040 in the Los Angeles pilot program to \$24,784,254 in the San Diego pilot program. The total estimated attorney hours saved ranged from 9,240 hours in the Los Angeles pilot program to 135,300 in the San Diego pilot program. The total estimated savings calculated based on these attorneys estimates in 2000 and 2001 cases that settled at mediation in all five programs was considerable: \$49,409,385 in litigant costs and 250,229 attorney hours.
- **Court workload**—The pilot programs in San Diego, Los Angeles, Fresno, and Sonoma reduced the number of motions, the number of other pretrial court events, or both in program cases. The reductions were substantial, ranging from 18 to 48 percent for motions and from 11 to 32 percent for other pretrial hearings. Reductions in cases that settled at mediation were even larger, ranging from 30 to 65 percent, compared to similar nonprogram cases. In Fresno, because of special conferences

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<sup>2</sup> In the San Diego pilot program, because of offsetting decreases in satisfaction among unlimited program-group cases that were not referred to mediation, this impact was evident only for limited cases.

required under pilot program's procedures, these decreases were offset by increases in the number of case management conferences in program cases.<sup>3</sup> However, in the San Diego, Los Angeles, and Sonoma programs, these reductions resulted in overall savings in court time. The total potential time savings from reduced numbers of court events were estimated to be 479 judge days per year in San Diego (with an estimated monetary value of approximately \$1.4 million), 132 days in Los Angeles (with an estimated monetary value of approximately \$400,000), and 3 days in Sonoma (with an estimated monetary value of approximately \$9,700). These estimates suggest that early mediation programs can help courts save valuable judicial time that can be devoted to other cases requiring judges' attention. In addition, survey results indicate that there were fewer postdisposition compliance problems and fewer new proceedings initiated in program cases, suggesting that the pilot programs not only reduced court workload in the short term but also may have reduced the court's future workload.

### **Summary of Findings Concerning San Diego Pilot Program**

There is strong evidence that the mandatory pilot program in San Diego reduced the trial rate, case disposition time, and the court's workload, improved litigant satisfaction with the court's services, and lowered litigant costs in cases that resolved at mediation.

- **Mediation referrals and settlements**—7,507 cases that were filed in the Superior Court of San Diego County in 2000 and 2001 (5,394 unlimited and 2,112 limited) were referred to mediation, and 5,035 of those cases (3,676 unlimited and 1,358 limited cases) were mediated under the pilot program. Of the unlimited cases mediated, 51 percent settled at the mediation and another 7 percent settled later as a direct result of the mediation, for a total resolution rate of approximately 58 percent. Among limited cases, 62 percent settled at mediation and another 14 percent settled later as a direct result of the mediation, for a total resolution rate of approximately 76 percent. In survey responses, 74 percent of attorneys whose cases did not settle *at* mediation indicated that the mediation was important to the ultimate settlement of the case.
- **Trial rate**—The trial rates for both limited and unlimited cases in the program group were reduced by approximately 25 percent compared to those cases in the control group. This reduction translates to a potential saving of more than 500 days per year in judicial time that could be devoted to other cases needing judges' time and attention. While this time savings does not translate into a fungible cost saving that can be reallocated to other purposes, its monetary value is equivalent to approximately \$1.6 million per year.
- **Disposition time**—The *average* time to disposition for unlimited cases in the program group was 12 days shorter than that for cases in the control group and 10 days shorter for limited cases in the program group. The *median* time to disposition

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<sup>3</sup> The Superior Court of Fresno County has since changed its case management procedures so that additional case management conferences are not required in program cases.

was 19 days shorter for unlimited cases in the program group and 25 days shorter for limited cases in the program group. For unlimited cases, program and control-group cases were disposed of with similar speed from filing until about the time of the case management conference, when the pace of dispositions for program-group cases quickened and the percentage of program-group cases reaching disposition exceeded that of control-group cases. For limited cases, program-group cases were being disposed of faster than control-group cases well before the time of the early case management conference, suggesting that the possibility of attending the conference and being referred to mediation may have increased dispositions. Program-group cases, both unlimited and limited, were disposed of fastest around the time of the mediation. Comparisons with similar cases in the control group confirmed that when program-group cases were settled at mediation, the average disposition time was shorter, but also indicated that when cases were mediated and did not settle at the mediation, the disposition time was longer.

- **Litigant satisfaction**—Attorneys in limited program-group cases were more satisfied with the court's services than attorneys in limited control-group cases. Attorneys' levels of satisfaction with the court's services, the litigation process, and the outcome of the case were all higher in both limited and unlimited program-group cases that settled at mediation than in similar control-group cases. Attorneys in program-group cases that went to mediation and did not settle at mediation were also more satisfied with the court's services than attorneys in similar control-group cases. This suggests that participating in mediation increased attorneys' satisfaction with the court's services, regardless of whether their cases settled at mediation. Both parties and attorneys who participated in pilot program mediations expressed high satisfaction with their mediation experience, particularly with the performance of the mediators. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.
- **Litigant costs**—Estimates of actual attorney time spent in reaching resolution were 16 percent lower in program-group cases that settled at mediation than for similar cases in the control group. Comparisons between program-group cases that settled at mediation and similar control-group cases also suggested that litigant costs were lower in program-group cases that settled at mediation. In cases that settled at mediation, 87 percent of attorneys responding to the study survey estimated some savings in both litigant costs and attorney hours from using mediation to reach settlement. Average savings estimated by attorneys per settled case was \$9,159 in litigant costs and 50 hours in attorney time. Based on these attorney estimates, the total estimated savings in litigant costs in all 2000 and 2001 cases that settled at mediation was \$24,784,254 and the total estimated savings in attorney hours was 135,300.
- **Court workload**—The pilot program in San Diego reduced the court's workload. In addition to the reduction in trials discussed above, the pilot program reduced the average number of pretrial court events by 16 percent for unlimited cases and 22 percent for limited cases in the program group. This translates to a potential saving of



479 days per year in judicial time that could be devoted to other cases needing judges' time and attention. While this time savings does not translate into a fungible cost saving that can be reallocated to other purposes, its monetary value is equivalent to approximately \$1.4 million per year. There was strong evidence of even larger reductions in pretrial events—between 40 and 45 percent—in cases that resolved at mediation. In addition, there were fewer postdisposition compliance problems and fewer new proceedings initiated in program-group cases, suggesting that the pilot program may have reduced the court's future workload.

## **Summary of Findings Concerning Los Angeles Pilot Program**

There is strong evidence that the mandatory pilot program in Los Angeles reduced the trial rate, case disposition time, and court workload, improved litigant satisfaction with the court's services, and lowered litigant costs in cases that resolved at mediation.

- **Mediation referrals and settlements**—560 unlimited cases that were filed in the Superior Court of Los Angeles County between April and December 2001 were referred to mediation, and 399 of these cases were mediated under the pilot program. Of the unlimited cases mediated, 35 percent settled at the mediation and another 14 percent settled later as a direct result of the mediation, for a total resolution rate of approximately 49 percent. In survey responses, 78 percent of attorneys whose cases did not settle *at* mediation indicated that the mediation was important to the ultimate settlement of the case.
- **Trial rate**—The trial rate for unlimited civil cases in the program was reduced by approximately 30 percent compared to cases in the control groups. This reduction translates to a potential savings of more than 670 days in judicial time that could be devoted to other cases needing judges' time and attention. While this time saving does not translate into a fungible cost saving that can be reallocated to other purposes, its monetary value is equivalent to approximately \$2 million per year.
- **Time to disposition**—The overall *average* time to disposition for program-group cases was approximately 19 days shorter and the *median* time to disposition was 23 days shorter, than for cases in the control departments. The disposition rate in the program group was higher than that in either control group for the entire study period. The pace of dispositions rose for program cases, reaching its fastest pace, both around the time when case management conferences were held and when mediations were completed in the program group, suggesting that both the case management conference and the mediation may have increased dispositions. Among cases that settled at mediation, cases in the pilot program took less time to reach disposition than like cases in either control group that settled in the Civil Action Mediation program established by Code of Civil Procedure sections 1775-1775.16 (1775 program). Among cases that did not settle at mediation, program-group cases took more time to reach disposition than like cases in either control group under the 1775 program.

- **Litigant satisfaction**—Attorneys in program-group cases were more satisfied with the court’s services than attorneys in control-group cases. Attorneys whose cases settled at mediation under the pilot program were also more satisfied with both the outcome of the case and with the services of the court compared to attorneys in cases that settled at mediation under the 1775 program. However, attorneys whose cases did not settle at mediation under the Early Mediation Pilot Program were less satisfied with outcome of the case than attorneys whose cases did not settle at mediation under the 1775 program. Both parties and attorneys who participated in pilot program mediations expressed high satisfaction with their mediation experience, particularly with the performance of the mediators. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.
- **Litigant costs**—In cases that settled at mediation, 75 percent of attorneys responding to the study survey estimated some savings in both litigant costs and attorney hours from using mediation to reach settlement. Average savings per settled case estimated by attorneys was \$12,636 in litigant costs and 66 hours in attorney time. Based on these attorney estimates, the total estimated savings in litigant costs in all 2001 cases that were settled at mediation was \$1,769,039 and total estimated savings in attorney hours was 9,240. There was also evidence that both litigant costs and attorney hours were lower in program cases that settled at mediation under the Early Mediation Pilot Program compared to like cases in the control departments that settled at mediation under the 1775 program; both litigant costs and attorney hours were approximately 60 percent lower in program-group cases that settled at mediation compared to similar cases in the control groups.
- **Court workload**—The pilot program in Los Angeles reduced the court’s workload. In addition to the reduction in trials discussed above, the pilot program reduced the average number of “other” pretrial hearings in program cases by 11 percent compared to control cases in the participating departments and may also have reduced motion hearings in program-group cases compared to cases in both control groups. These decreases were partially offset by a 16 percent increase in the number of case management conferences (CMCs) in the program group compared to control cases in the participating departments. However, because motions and “other” pretrial hearings take more judicial time on average than case management conferences, the changes in the number of pretrial court events caused by the pilot program resulted in saving judicial time. The total potential time savings from the reduced number of court events was estimated at 132 judicial days per year (with a monetary value of \$395,000 per year).
- **Comparison of mandatory pilot program mediation and voluntary mediation in Los Angeles**—The statutes establishing the Early Mediation Pilot Programs required the Judicial Council report to compare court-ordered mediation under the pilot program with voluntary mediation in Los Angeles County. In comparisons between cases valued over \$50,000 referred to mediation under pilot program (court-ordered referrals) and cases valued at over \$50,000 referred to mediation under (voluntary

referrals) in Los Angeles, the study found lower trial rates, disposition time, and court workload in those cases valued over \$50,000 referred to mediation under the 1775 program pilot program compared to the 1775 program. The trial rate for these pilot program cases was approximately 31 percent lower than in these 1775 program cases, disposition time was approximately 20 to 30 days shorter in the pilot program cases, and there were 10 percent fewer pretrial court events on average in these pilot program cases. Results of the study also suggested that attorneys' satisfaction with the court's services and the litigation process may have been higher in those cases valued over \$50,000 referred to mediation under pilot program than under the 1775 program. However, it is not clear whether these differences were due to the mandatory referrals to mediation in the pilot program versus the voluntary referrals under the 1775 program or due to other differences between these two programs, such as the pilot program's earlier case management conferences and mediations.

### **Summary of Findings Concerning Fresno Pilot Program**

There is strong evidence that the mandatory pilot program in Fresno reduced case disposition time, improved litigant satisfaction with the court's services and the litigation process, and decreased litigant costs in cases that resolved at mediation.

- **Mediation referrals and settlements**—Almost 1,300 cases that were filed in the Superior Court of Fresno County in 2000 and 2001 (871 unlimited and 414 limited) were referred to mediation, and more than 700 of these cases (514 unlimited and 214 limited) were mediated under the pilot program. Of the unlimited cases mediated, 47 percent settled at the mediation and another 8 percent settled later as a direct result of the mediation, for a total resolution rate of approximately 55 percent. Among limited cases, 58 percent settled at mediation and another 3 percent settled later as a direct result of the mediation, for a total resolution rate of approximately 61 percent. In survey responses, 67 percent of attorneys whose cases did not settle at mediation indicated that the mediation was important to the ultimate settlement of the case.
- **Trial rate**—Because a large proportion of the cases being studied had not yet reached disposition, there was not sufficient data to determine whether the pilot program in Fresno had an impact on the trial rate.
- **Disposition time**—In direct comparisons between unlimited cases filed in 2001 in the program and control groups, the average time to disposition in the program group was 39 days shorter than in the control group and the median time to disposition was 50 days shorter. For limited cases filed in 2001, the average time to disposition for cases in the program group was 26 days shorter than for cases in the control group and the median time to disposition was 6 days shorter. The results of regression analysis that accounted for case type differences suggest that the average time to disposition in the program group was 40 days shorter than in the control group for both unlimited and limited cases. For both unlimited and limited program-group cases, starting at about the time that pilot program mediations occurred on average, the pace of dispositions outstripped that of cases in the control group, suggesting that the mediations

contributed to shortening the time to disposition. Comparisons with similar cases in the control group indicate that when program-group cases were settled at mediation, the average disposition time was shorter, but when cases were mediated and did not settle at the mediation, the disposition time was longer.

- **Litigant satisfaction**—Attorneys in both unlimited and limited program-group cases were more satisfied with both the litigation process and the court's services than attorneys in control-group cases. Attorneys' satisfaction with the court's services, the litigation process, and the outcome of the case were all higher in program-group cases that settled at mediation than in similar control-group cases. While attorneys whose cases did not settle at mediation were less satisfied with the outcome of the case, they were still more satisfied with both the litigation process and the services provided by the court than attorneys in like cases in the control group. This suggests that participating in mediation increased attorneys' satisfaction with both the litigation process and the court's services, regardless of whether the case settled at mediation. Both parties and attorneys who participated in pilot program mediations expressed high satisfaction with their mediation experiences, particularly with the performance of the mediators. They strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.
- **Litigation costs**—There was evidence that both litigant costs and attorney time were reduced when cases resolved at mediation. In cases that settled at mediation, 89 percent of attorneys responding to the study survey estimated some savings in both litigant costs and attorney hours from using mediation to reach settlement. Average savings estimated by attorneys per settled case was \$9,915 in litigant costs and 50 hours in attorney time. Based on these attorney estimates, the total estimated savings in litigant costs in all 2000 and 2001 cases that settled at mediation was \$3,619,136 and the total estimated savings in attorney hours was 24,455.
- **Court workload**—Unlimited program-group cases filed in 2001 had 13 percent fewer motion hearings than cases in the control group, and limited program-group cases had 48 percent fewer motion hearings. However, this decrease in motions was completely offset by an increase in the number of case management conferences and other pretrial hearings in pilot program cases so that, overall, there was an increase in the total number of pretrial court events in the program group and a small increase in the judicial time spent on program cases during the study period. The increase in the number of case management conferences for program cases was understandable given court procedures (since changed) that required conferences in all program cases that did not settle at mediation and in most program cases when the parties wanted their case removed from the mediation track. The court's procedures did not generally require case management conferences in other cases. Unlimited program-group cases that settled at mediation had 45 percent fewer court events overall compared to similar cases in the control group. This overall reduction stemmed from reductions in motion and other hearings; there were 80 percent fewer motion hearings and 60 percent fewer other hearings in unlimited program cases that settled at mediation compared to like cases in the control group.

## Summary of Findings Concerning Contra Costa Pilot Program

There is evidence that the voluntary pilot program in Contra Costa reduced disposition time and litigant costs and increased attorney satisfaction with the litigation process and the services provided by the court.

- **Mediation referrals, mediations, and settlements**—1,650 cases that were filed in the Superior Court of Contra Costa County in 2000 and 2001 were referred to mediation and almost 1,200 of these cases were mediated under the pilot program. Of the cases mediated, 53 percent settled at the mediation and another 7 percent settled later as a direct result of the mediation, for a total resolution rate of approximately 60 percent. In survey responses, 75 percent of attorneys whose cases did not settle *at* mediation indicated that the mediation was important to the ultimate settlement of the case.
- **Trial rate**—No statistically significant reduction in the trial rate was found either in comparisons between cases filed before and after the program began or in comparisons between cases in which the litigants stipulated to mediation and those in which they did not. However, this does not necessarily indicate that the pilot program had no impact on the trial rate; there were limitations associated with the comparisons that made it difficult to evaluate whether the program affected trial rates.
- **Disposition time**—There was evidence that the pilot program decreased disposition time. Pre-/post-program comparisons suggested that the median disposition time for cases filed after the pilot program began was shorter than the median disposition time for cases filed before the program began. These comparisons also showed that the disposition rate for post-program cases was higher than that for pre-program cases for the entire 34-month period studied, but most noticeably between 6 and 12 months after filing, when it ranged from about 1.5 to 3 percent higher than that for pre-program cases. Comparisons between disposition rates in cases in which the litigants stipulated to mediation and cases in which they did not showed that while nonstipulated cases began to resolve earlier than stipulated cases, from 9 to 18 months after filing, stipulated cases were disposed of at a faster pace than nonstipulated cases and ultimately more stipulated than nonstipulated cases had reached disposition by the end of 18 months after filing. The pace of dispositions for stipulated cases was fastest at 9 months after filing, about the time that mediations took place, suggesting that mediations increased the pace of dispositions among stipulated cases. Comparisons with similar stipulated and nonstipulated cases confirmed that when cases were settled at mediation, the average disposition time was shorter, but also indicated that when cases were mediated and did not settle at the mediation, the disposition time was longer.
- **Litigant satisfaction**—Attorneys in cases in which the litigants stipulated to mediation cases were more satisfied with the overall litigation process and services provided by the court than attorneys in cases in which the litigants did not stipulate to mediation. They were, however, less satisfied with outcome of the case compared to attorneys in nonstipulated cases. Attorneys' levels of satisfaction with the court's

services, the litigation process, and with the outcome of the case were all higher in stipulated cases that settled at mediation than in similar nonstipulated cases. Attorneys in stipulated cases that went to mediation but did not settle at mediation were also more satisfied with the court's services than attorneys in similar nonstipulated cases. This suggests that participating in mediation increased attorneys' satisfaction with the court's services, regardless of whether their cases settled at mediation. Both parties and attorneys who participated in pilot program mediations expressed high satisfaction with their mediation experience, particularly with the performance of the mediators. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.

- **Litigant costs**—There was evidence that the pilot program reduced both litigant costs and attorney time, particularly in cases that settled at mediation. Litigant costs in were approximately \$7,500 lower in cases in which the litigants stipulated to mediation compared to those in which the litigants did not stipulate to mediation. Both direct comparisons between stipulated and nonstipulated cases disposed of in over six months and comparisons between litigant costs and attorney hours in stipulated cases and nonstipulated cases with similar characteristics using regression analysis suggested that litigant costs and attorney hours were reduced in stipulated cases. Regression analysis also suggested that litigant costs were reduced by approximately 50 percent and attorney hours were reduced by 40 percent in both cases that were settled at mediation and in cases that did not settle at mediation compared to similar nonstipulated cases. In cases that settled at mediation, 87 percent of attorneys responding to the study survey estimated some savings in both litigant costs and attorney hours from using mediation to reach settlement. Average savings estimated by attorneys per settled case was \$16,197 in litigant costs and 78 hours in attorney time. Based on these attorney estimates, the total estimated litigant cost savings in all 2000 and 2001 cases that settled at mediation was \$9,993,839 and the total estimated savings in attorney hours was 48,126.
- **Court workload**—The evidence concerning the Contra Costa pilot program's impact on the court's workload was mixed. In pre-/post-program comparisons, the average number of case management conferences held per case was 27 percent higher and the number of "other" pretrial hearings was 11 percent higher the year after the program began compared to a year before the pilot program began. The increase in case management conferences may have been due, at least in part, to the introduction of the Complex Litigation Pilot Program in 2000. In comparisons of stipulated and nonstipulated cases, stipulated cases had fewer motion hearings but more case management conferences than nonstipulated cases, so that the total number of all pretrial events was essentially the same in both groups. However, comparisons of only those cases disposed of in over six months suggested that the total number of hearings may have been lower in the stipulated group. In addition, when cases settled at mediation, the total number of court events was 20 percent lower, on average, in stipulated cases compared to nonstipulated cases with similar characteristics. Conversely, similar comparisons suggested that the number of pretrial hearings might have increased when cases did not settle at mediation.

## Summary of Findings Concerning Sonoma Pilot Program

There is evidence that the voluntary pilot program in Sonoma reduced disposition time, reduced the court's workload, increased attorney satisfaction with the litigation process and the court's services, and reduced litigant costs in cases that settled at mediation.

- **Mediation referrals, mediations, and settlements**—737 cases that were filed in the Superior Court of Sonoma County in 2000 and 2001 were referred to mediation and 574 of these cases were mediated under the pilot program. Of the unlimited cases mediated, 62 percent settled at the mediation. In survey responses, 90 percent of attorneys whose cases did not settle *at* mediation indicated that the mediation was important to the ultimate settlement of the case.
- **Trial rate**—Because a large proportion of the cases being studied had not yet reached disposition, there was not sufficient data to determine whether the pilot program in Sonoma had an impact on the trial rate.
- **Disposition time**—The pilot program had a positive impact on case disposition time for both limited and unlimited cases. The average disposition time for limited cases filed after the program began was 37 days shorter than the average for limited cases filed before the program began. The disposition rate for unlimited post-program cases was higher than for pre-program cases for the entire 34-month follow-up period. The pace of dispositions for limited post-program cases accelerated about the time when, under the court's rules, early mediation status conferences were set, suggesting that this conference played a role in improving disposition time. Comparisons of the disposition rates in stipulated and nonstipulated cases showed that while nonstipulated cases begin to resolve earlier, once stipulated cases begin reaching disposition, they were disposed of faster than nonstipulated cases and ultimately more stipulated than nonstipulated cases reached disposition by the end of 34 months. The fact that stipulated cases were disposed of fastest between 6 and 12 months after filing, about the time that mediations would have occurred under the court's pilot program rules, suggests that participation in mediation may have increased the rate of disposition for stipulated cases.
- **Litigant satisfaction**—Attorneys in stipulated cases were more satisfied with the overall litigation process and services provided by the court. Both parties and attorneys expressed high satisfaction when they used mediation through the Sonoma pilot program, particularly with the services of the mediators. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.
- **Litigant costs**—There was evidence that both litigant costs and attorney time were reduced when cases resolved at mediation. In cases that settled at mediation, 95 percent of attorneys responding to the study survey estimated some savings in both litigant costs and attorney hours from using mediation to reach settlement. Average savings estimated by attorneys per settled case were \$25,965 in litigant costs and 93 hours in attorney time. Based on these attorney estimates, a total of \$9,243,430 in

litigant costs and 33,108 in attorney hours was estimated to have been saved in all 2000 and 2001 cases that were settled at mediation.

- **Court workload**—There was evidence that the pilot program reduced the court's workload. Comparisons between cases filed before and after the pilot program began indicated that average number of "other" pretrial hearings was 15 percent lower in unlimited cases filed after the pilot program began than in unlimited cases filed before the program began. Comparisons between stipulated and nonstipulated cases using regression analysis to control for differences in case characteristics indicated that the average number of motion hearings was 50 percent lower in cases in which the parties stipulated to mediation compared to similar cases in which the parties did not stipulate to mediation and that the average number of "other" pretrial hearings was 45 percent lower. The smaller number of court events in program cases means that the time that judges would have been spent on these events could be devoted to other cases needing judicial time and attention. The total time saving from the reduced number of court events in program cases compared to cases filed before the program began was estimated at 3.2 judge days per year (with an estimated monetary value of approximately \$9,700 per year).



## ***F. Findings Concerning the Impact of Pilot Programs on Litigant Satisfaction***

This section examines the pilot programs' impact on litigants' satisfaction with their dispute resolution experiences.

### **Summary**

In all five pilot programs, attorneys in program cases reported greater satisfaction than attorneys in nonprogram cases with the services provided by the court, with the litigation process, or with both.<sup>75</sup> In San Diego, Los Angeles, Fresno, and Contra Costa, attorneys in program cases expressed levels of satisfaction with court services that ranged from 10 to 15 percent higher than the satisfaction levels expressed by attorneys in nonprogram cases.<sup>76</sup> Similarly, in San Diego, Fresno, Contra Costa, and Sonoma, attorneys' satisfaction with the litigation process was about 6 percent higher in program cases than in nonprogram cases.<sup>77</sup> As might have been expected, attorneys' satisfaction with the outcome in program cases corresponded to whether those cases settled at mediation; settling at mediation increased their satisfaction with the outcome, but not settling at mediation decreased their satisfaction compared to that of attorneys in similar nonprogram cases. The study found that attorneys were generally more satisfied with both the courts' services and with the litigation process when their cases settled at mediation; settling at mediation generally made attorneys happier with all aspects of their experience. However, the study also found that attorneys whose cases were mediated and did *not* settle at mediation were also generally more satisfied with the services provided by the court. This indicates that the experience of participating in pilot program mediation increased attorneys' satisfaction with the services provided by the court, even if the case did not resolve at mediation. In all five pilot programs, both parties and attorneys who participated in mediation expressed high satisfaction with their mediation experience. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others.

While parties and attorneys were both generally very pleased with their mediation experience, attorneys were more satisfied than parties. This may reflect attorneys' greater understanding of what to expect from the mediation process and may suggest the need for additional educational efforts targeted at parties. It may also reflect the fact that parties' satisfaction with the court and the mediation was more closely tied than attorneys' to what happened during the mediation process—whether they felt heard, whether the mediation helped with their communication or relationship with the other party, and whether the cost of using mediation was affordable.

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<sup>75</sup> Because of low response rates to surveys from parties in nonprogram cases, it was not possible to compare the satisfaction levels of parties in program and nonprogram cases.

<sup>76</sup> For the San Diego pilot program, because of offsetting decreases in satisfaction in unlimited program-group cases that were not referred to mediation or that were removed from the mediation track, this impact was evident only for limited cases.

<sup>77</sup> For the San Diego pilot program, because of offsetting decreases in satisfaction in unlimited program-group cases that were not referred to mediation, this impact was evident for only for limited cases.

## **All of the Pilot Programs Increased Attorneys' Overall Satisfaction with the Courts' Services, the Litigation Process, or Both**

To measure the pilot programs' impact on attorneys' satisfaction, attorneys who provided representation in both program and nonprogram cases<sup>78</sup> were asked to rate their satisfaction with the outcome of their cases, the services provided by the court in their cases, and the litigation process from filing through disposition.<sup>79</sup> Satisfaction was rated on a scale from 1 to 7 where 1 is "highly dissatisfied" and 7 are "highly satisfied." The responses of attorneys in program and nonprogram cases were then compared. Table II-5 summarizes the results of this comparison for unlimited cases in each of the five pilot programs. Table II-6 summarizes the same results for limited civil cases in the San Diego and Fresno pilot programs. While it is helpful to see the results of these comparisons and examine them for all of the pilot programs together, because of differences in program structure and available data (many of which are noted in the table footnotes), the satisfaction scores reported in these tables are not directly comparable to one another.

As these tables show, all five pilot programs increased attorneys' overall satisfaction with the services provided by the court, the litigation process, or both.

The San Diego, Los Angeles, Fresno, and Contra Costa pilot programs all showed statistically significant increases in attorneys' overall average satisfaction with the courts' services in pilot program cases compared to nonprogram cases (for the San Diego pilot program, this impact was evident for limited cases but not for unlimited cases). The increases ranged from .5 point on the satisfaction scale in Los Angeles to .7 point in Fresno and Contra Costa. Expressed as percentages, these increases ranged from almost 10 percent in Los Angeles to almost 15 percent in Contra Costa.

The tables also indicate that the San Diego, Fresno, Contra Costa, and Sonoma pilot programs increased attorneys' satisfaction with the litigation process (for the San Diego pilot program, this impact was evident for limited cases, but not for unlimited cases). The increases in attorney satisfaction with the litigation process were all approximately .3 point on the satisfaction scale. Expressed as percentages, these were approximately 6 percent increases.

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<sup>78</sup> See Appendix C for copies of the surveys used and Appendix D for survey distribution and response rate information.

<sup>79</sup> Parties in both program and non-program cases were also asked similar questions. However, because of low response rates to surveys from parties in non-program cases, it was not possible to compare the satisfaction levels of parties in program and non-program cases.

**Table II-5. Unlimited Cases—Average Satisfaction Levels Reported by Attorneys in Program<sup>80</sup> and Nonprogram<sup>81</sup> Cases**

	<u>Court Services</u>			<u>Litigation Process</u>			<u>Outcome</u>		
	<i>Program</i>	<i>Non-program<sup>81</sup></i>	<i>Difference</i>	<i>Program</i>	<i>Non-program<sup>81</sup></i>	<i>Difference</i>	<i>Program</i>	<i>Non-program<sup>81</sup></i>	<i>Difference</i>
San Diego	5.4	5.6	-0.2*	5.2	5.4	-0.2*	5.1	5.2	-0.1
Los Angeles	5.6	5.0	0.6***	5.3	5.0	0.3	5.2	5.2	0
		5.1	0.5***		5.0	0.3		5.0	0.2
Fresno	5.7	5.0	0.7***	5.3	5.0	0.3***	5.0	5.0	0
Contra Costa <sup>82</sup>	5.4	4.7	0.7***	5.1	4.8	0.3***	5.0	5.3	-0.3***
Sonoma <sup>83</sup>	5.1	4.9	0.2	5.2	4.9	0.3***	5.3	5.4	-0.1

\*\*\* p < .5, \*\* p < .10, \* p < .20.

<sup>81</sup> There are two nonprogram groups in Los Angeles: control cases from the nine pilot program departments and cases from the other civil departments that were not participating in the pilot program.

<sup>80</sup> In the mandatory programs (San Diego, Los Angeles, and Fresno), “program cases” were program-group cases. In San Diego and Los Angeles these included all cases that might be *considered* for possible referral to pilot program mediation while in Fresno they included only cases actually referred (on a random basis) to pilot program mediation. In the voluntary programs (Contra Costa and Sonoma), “program cases” were cases that stipulated to mediation and were disposed of six or more months after filing. For Los Angeles, only cases filed in 2001 were included; for the other programs, cases filed in both 2000 and 2001 were included.

<sup>81</sup> In the mandatory programs, “nonprogram cases” were control-group cases. In San Diego and Los Angeles, these were the otherwise-eligible cases that could not be considered for possible referral to pilot program mediation. However, in Los Angeles, control-group cases did have access to another, different court-connected mediation program. In Fresno, the control group consisted of all eligible cases not referred to pilot program mediation. In the voluntary programs, “nonprogram cases” were eligible cases that did not stipulate to mediation under the pilot program and that were disposed of six or more months after filing. For Los Angeles, only cases filed in 2001 were included; for the other programs, cases filed in both 2000 and 2001 were included.

<sup>82</sup> Because stipulated and nonstipulated cases have different characteristics, this comparison may not accurately measure program impact. Regression analysis taking case characteristic differences into account showed that in stipulated cases, attorney satisfaction with the services of the court was 12 percent higher, satisfaction with the litigation process was 5 percent higher, and satisfaction with the outcome of the case was 6 percent lower in stipulated cases than in nonstipulated cases with similar characteristics.

<sup>83</sup> Because stipulated and nonstipulated cases have different characteristics, this comparison may not accurately measure program impact. Regression analysis taking case characteristic differences into account showed that attorney satisfaction with the litigation process was 6 percent higher in stipulated cases than in nonstipulated cases with similar characteristics. The regression analysis also indicated that attorney satisfaction with the services provided by the court was higher in stipulated cases than in nonstipulated cases with similar characteristics, although the size of the difference was not clear. The regression analysis did not find a statistically significant difference in attorney satisfaction levels with outcome of the case between stipulated and nonstipulated cases.

**Table II-6. Limited Cases—Average Satisfaction Levels Reported by Attorneys in Program and Nonprogram Cases**

	<u>Court Services</u>			<u>Litigation Process</u>			<u>Outcome</u>		
	<i>Program</i>	<i>Non-program</i>	<i>Difference</i>	<i>Program</i>	<i>Non-program</i>	<i>Difference</i>	<i>Program</i>	<i>Non-program</i>	<i>Difference</i>
San Diego	5.7	5.1	0.6***	5.4	5.1	0.3*	5.2	5.2	0
Fresno	5.6	4.9	0.7***	5.3	5.0	0.3***	5.0	4.9	0.1

\*\*\* p < .5, \*\* p < .10, \* p < .20.

As discussed below, attorneys in unlimited program cases that were mediated under the San Diego pilot program expressed very high satisfaction (5.9 on average on a 7-point scale) with the services provided by the court. It therefore seems anomalous that no overall program impact on attorney satisfaction with the court's services was found for unlimited cases in the San Diego pilot program. This result may stem from the fact that, unlike in the other pilot programs, not being referred to pilot mediation or being removed from the pilot mediation track in unlimited cases actually reduced attorneys' satisfaction with the court's services in San Diego. Because well over half of the program group in San Diego consisted of cases that were not referred to mediation (53 percent of program group) or were removed from the mediation track (9 percent of program group), when the overall average for the program group as a whole was calculated, the reduced satisfaction in these cases completely offset increased satisfaction in cases that were mediated.

The results for satisfaction with the litigation process in San Diego are affected in this same way. Attorneys in program cases that were not referred to mediation in San Diego were less satisfied with the litigation process than attorneys in similar cases in the control group. When the overall average for the program group as a whole in San Diego was calculated, the reduced satisfaction in these cases completely offset the increased satisfaction reported in cases that were mediated.

This indicates that, for San Diego's pilot program, the overall average masks the unique responses of attorneys in these different subgroups, and thus is not a good measure of whether the pilot program had an impact on attorney satisfaction with the court's services and the litigation process.<sup>84</sup>

<sup>84</sup> Since the attorneys' lower satisfaction when their cases are not referred to mediation or are removed from the mediation track by the court may stem from the fact that the attorneys wanted to have access to the court's mediation services, this reduced satisfaction may actually reflect the attorneys' high regard for these court services.

## **Attorneys' Satisfaction with Case Outcome Corresponded to Whether Their Cases Settled at Mediation, But Attorneys' Satisfaction with the Courts' Services Was Generally Higher in Cases that Were Mediated Regardless of Whether the Cases Settled at Mediation**

In all three of the pilot programs in which the program cases could be broken down into subgroups,<sup>85</sup> the study found that attorneys' satisfaction with the outcome in program cases corresponded to whether or not their cases settled at mediation. As might have been expected, attorneys were more satisfied with the outcome when their cases settled and less satisfied when their cases did not settle.<sup>86</sup> For program cases that settled at mediation, attorney satisfaction with the outcome ranged from 9 percent higher in unlimited cases in the San Diego pilot program to 20 percent higher for both limited and unlimited cases in the Fresno pilot program compared to similar nonprogram cases. However, for program cases that were mediated but did not settle at mediation, attorney satisfaction with outcomes was lower, ranging from 10 percent lower for both limited and unlimited cases in the Fresno program to 21 percent lower for limited cases in the San Diego program compared to similar nonprogram cases. In all of the programs except Fresno, the percentage decrease in satisfaction with the outcome from not settling at mediation was larger than the increase from settling at mediation. The offsetting results in cases that settled and did not settle at mediation helps explain why satisfaction with outcome in program cases as a whole was not appreciably different from that in nonprogram cases.

Attorneys in cases that settled at mediation were more satisfied not only with the outcome, but also with the litigation process and the courts' services as well. In the San Diego, Fresno, and Contra Costa pilot programs, attorneys' satisfaction with the litigation process ranged from 5 percent higher in unlimited program cases that settled at mediation in the San Diego pilot program to 17 percent higher for unlimited program cases that settled at mediation in the Fresno pilot program compared to similar nonprogram cases.<sup>87</sup> In the San Diego, Fresno, and Contra Costa pilot programs, attorneys' satisfaction with the courts' services ranged from 8 percent higher in unlimited cases that settled at mediation in the San Diego pilot program to 23 percent higher in limited cases that settled at mediation in the San Diego pilot program compared to similar nonprogram cases.<sup>88</sup> Thus, settling at mediation appears to have generally made attorneys happier with all aspects of their dispute resolution experience.

What is interesting and significant, however, is that satisfaction with the courts' services did not go down when cases did not settle at mediation. In fact, in all the programs for

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<sup>85</sup> Subgroup information was not available for the Sonoma pilot program and comparisons in Los Angeles were to cases that participated in the court's other mediation program.

<sup>86</sup> The regression analysis method described in Section I.B. was used to make these subgroup comparisons.

<sup>87</sup> As discussed above, in San Diego, this increase was offset by a 5 percent decrease in satisfaction with the litigation process in unlimited cases that were not referred to mediation.

<sup>88</sup> As discussed above, in San Diego, the increase in satisfaction with the court services for unlimited cases was offset by an 8 percent decrease in satisfaction with the courts' services in cases that were not referred to mediation and a 10 percent decrease for cases that were removed from mediation.

which these subgroup comparisons could be made, when cases participated in mediation but did not settle at mediation, there was a statistically significant *increase* in attorneys' satisfaction with the courts' services. Attorneys' satisfaction with the courts' services ranged from 9 percent higher in limited cases in the San Diego pilot program to 16 percent higher for limited cases in the Fresno pilot program that did *not* settle at mediation compared to similar non-program cases. Thus, it was the experience of participating in a pilot program mediation that was the key to increasing attorneys' satisfaction with the services of the court—attorneys whose cases were mediated were more satisfied with the services provided by the court regardless of whether or not their cases settled at the mediation.

### **Both Parties and Attorneys in Cases That Used Pilot Program Mediation Expressed High Satisfaction with Their Mediation Experience**

Both parties and attorneys who participated in mediations in all five pilot programs expressed high satisfaction with their mediation experience. Litigants who participated in mediation were asked to rate their level of satisfaction with the mediator's performance, the mediation process, the outcome of the mediation, the litigation process, and the services provided by the court on a scale from 1 to 7 where 1 is "highly dissatisfied" and 7 is "highly satisfied." Table II-7 shows the average satisfaction scores given on each of these satisfaction questions by both parties and attorneys in unlimited cases in all five pilot programs. Table II-8 summarizes the same results for limited civil cases in the San Diego and Fresno programs.<sup>89</sup> As these tables show, most of the scores were in the highly satisfied range (above 5.0) and all of the average satisfaction scores were above the middle of the satisfaction scale (4.0).

The patterns of responses were virtually identical in all of the pilot programs and for both unlimited and limited cases. Both parties and attorneys were most satisfied with the performance of mediators (average score of 5.8 or above for parties and 6.0 or above for attorneys). They were also highly satisfied with both the mediation process (average score of 5.0 or above for parties and 5.7 or above for attorneys) and services provided by the court (average score of 5.2 or above for parties and 5.3 or above for attorneys). In general, both parties and attorneys were least satisfied with the outcome of the case (average score of 4.0 or above for parties and 4.9 or above for attorneys). The one exception was parties in Sonoma: they were least satisfied with court services. This anomaly may have resulted because the Sonoma pilot program was the only program in which the court did not provide any kind of financial subsidy for mediation services; parties in Sonoma had to pay the full cost of mediation themselves.

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<sup>89</sup> For the reasons outlined above in footnote 58, data on limited cases was not available from Contra Costa or Los Angeles. In addition, because of the small number of limited cases referred to mediation in Sonoma, the number of postmediation survey responses was not sufficient to provide data here.

**Table II-7. Unlimited Cases—Parties' and Attorneys' Satisfaction Levels in Mediated Program Cases**

	<u>Mediator Performance</u>		<u>Mediation Process</u>		<u>Court Services</u>		<u>Litigation Process</u>		<u>Outcome of Mediation</u>	
	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>
San Diego	6.0	6.1	5.5	6.0	5.3	5.9	4.9	5.5	4.3	4.9
Los Angeles	5.8	6.0	5.1	5.7	5.2	5.6	4.7	5.2	4.1	4.9
Fresno	6.1	6.3	5.3	5.9	5.2	5.8	5.1	5.4	4.0	5.0
Contra Costa	6.0	6.1	5.3	5.8	5.3	5.8	4.8	5.1	4.2	4.9
Sonoma	6.4	6.3	5.4	6.2	4.6	5.3	5.1	5.1	4.9	5.0

**Table II-8. Limited Cases—Parties' and Attorneys' Satisfaction Levels in Mediated Program Cases**

	<u>Mediator Performance</u>		<u>Mediation Process</u>		<u>Court Services</u>		<u>Litigation Process</u>		<u>Outcome of the Case</u>	
	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>	<i>Parties</i>	<i>Attorneys</i>
San Diego	5.9	6.2	5.0	6.2	5.3	6.1	4.8	5.8	4.4	5.4
Fresno	6.0	6.1	5.5	5.8	5.4	5.8	5.1	5.5	4.7	5.1

Both parties and attorneys who participated in pilot program mediations were also asked for their views concerning the fairness of the mediation and their willingness to recommend or use mediation again. Using a different 1 to 5 scale where 1 is "strongly disagree" and 5 is "strongly agree," litigants were asked to indicate whether they agreed that the mediator treated the parties fairly, that the mediation process was fair, and that the mediation resulted in a fair/reasonable outcome. They were also asked whether they agreed that they would recommend the mediator to friends with similar cases, that they would recommend mediation to such friends, and that they would use mediation even if they had to pay the full cost of the mediation. Table II-9 shows parties' and attorneys' average levels of agreement with these statements for unlimited cases in all five pilot programs. Table II-10 summarizes the same results for limited civil cases in the San Diego and Fresno programs.

**Table II-9. Unlimited Cases—Parties' and Attorneys' Perceptions of Fairness and Willingness to Recommend or Use Mediation (average level of agreement with statement)**

	<u>Mediator Treated All Parties Fairly</u>		<u>Mediation Process Was Fair</u>		<u>Mediation Outcome Was Fair/ Reasonable</u>		<u>Would Recommend Mediator to Friends</u>		<u>Would Recommend Mediation to Friends</u>		<u>Would Use Mediation at Full Cost</u>	
	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>
San Diego	4.5	4.7	4.2	4.7	3.1	3.6	4.2	4.6	4.2	4.7	3.5	4.0
Los Angeles	4.5	4.7	4.2	4.6	3.0	3.2	4.1	4.5	4.0	4.4	3.3	3.9
Fresno	4.5	4.8	4.2	4.7	2.9	3.4	4.3	4.7	4.2	4.7	3.6	4.2
Contra Costa	4.5	4.7	4.2	4.6	3.1	3.5	4.3	4.5	4.2	4.6	3.5	4.1
Sonoma	4.7	4.8	4.4	4.7	3.3	3.8	4.6	4.6	4.4	4.7	3.6	4.0

**Table II-10. Limited Cases—Parties' and Attorneys' Perceptions of Fairness and Willingness to Recommend or Use Mediation (average level of agreement with statement)**

	<u>Mediator Treated All Parties Fairly</u>		<u>Mediation Process Was Fair</u>		<u>Mediation Outcome Was Fair/ Reasonable</u>		<u>Would Recommend Mediator to Friends</u>		<u>Would Recommend Mediation to Friends</u>		<u>Would Use Mediation at Full Cost</u>	
	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>	<i>Parties</i>	<i>Attys</i>
San Diego	4.5	4.8	4.1	4.7	3.4	3.8	4.3	4.6	4.1	4.8	3.4	3.9
Fresno	4.5	4.7	4.3	4.6	3.5	3.6	4.3	4.5	4.2	4.6	3.4	4.2

As with the satisfaction scores, most of the scores were in the “strongly agree” range (above 4.0) and, with the exception of two scores for parties concerning the outcome, all of the average scores were above the middle of the agreement scale (3.0). Also similar to the satisfaction questions, the response patterns were virtually identical in all of the pilot programs and for both unlimited and limited cases. Both parties and attorneys expressed very strong agreement (average score of 4.0 or above for parties and 4.4 or above for attorneys) that the mediator treated the parties fairly, the mediation process was fair, they would recommend the mediator to friends with similar cases, and they would recommend mediation to such friends. Both parties and attorneys indicated less agreement that they would use mediation if they had to pay the full cost; the average score was 3.3 or above for parties and 3.9 or above for attorneys. The lowest scores related to the fairness/reasonableness of the mediation outcome, at only 2.9 or above for parties and 3.2 or above for attorneys.

It is clear from the responses to both the satisfaction and fairness questions that while parties and attorneys were generally very pleased with their mediation experience, overall they were less pleased or neutral in terms of the outcome of the mediation process (in



fact, on both outcome questions, about one-quarter of the parties and attorneys responded that they were neutral). In evaluating about this result, it is important to note that this survey was administered at the end of the mediation and that in a large proportion of cases a settlement was not reached at end of the mediation. As might have been expected, based on the discussions above concerning satisfaction with the outcome, the way parties and attorneys responded to the two outcome questions depended largely on whether their cases settled at mediation. Average satisfaction with the outcome in cases that settled at mediation was 6.0 for attorneys and 5.2 for parties, more than 50 percent higher than the average scores of 4.0 for attorneys and 3.3 for parties in cases that did not settle at mediation. Similarly, average responses concerning the fairness/reasonableness of the outcome were 4.3 for attorneys and 3.8 for parties in cases settled at mediation, more than 60 percent higher than the 2.6 for attorneys and 2.4 for parties in cases that did not settle at mediation. When the scores in both cases that settled and that did not settle at mediation were added together to calculate the overall average scores concerning the outcome, the higher scores in cases that settled were offset by those in cases that did not.

It is also clear from the responses to both the satisfaction and fairness questions, that while both parties and attorneys were generally very pleased with their mediation experience, attorneys were more pleased than parties. Attorneys' average scores were consistently higher than those of parties on all of these questions.<sup>90</sup> This may reflect attorneys' greater understanding about what to expect from the mediation process. Many attorneys, particularly those in San Diego, Los Angeles, and Contra Costa (where there were pre-existing mediation programs), are likely to have participated in mediations before, so they are likely to have been familiar with the mediation process and to have based their expectations about the process on this knowledge. Parties are less likely to have participated in previous mediations and may not have known what to expect from the mediation process. In focus groups, several parties indicated that they had received almost no information from their attorneys about the mediation process and did not know how the process would work. This may suggest the need for additional educational efforts targeted at parties, rather than attorneys.

The higher scores for attorneys may also reflect that parties' and attorneys' satisfaction was associated with different aspects of their mediation experiences. In all of the pilot programs, attorneys' responses on only four of the survey questions were strongly or moderately correlated with their responses concerning satisfaction with the mediation process—whether they believed that the mediation process was fair, that the mediation resulted in a fair/reasonable outcome, that the mediation helped move the case toward resolution quickly, and that the mediator treated all parties fairly.<sup>91</sup> In contrast, parties'

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<sup>90</sup> The one exception was the rate of satisfaction with the mediator's performance in Sonoma, where the average score for parties was 6.4 and 6.3 for attorneys.

<sup>91</sup> Correlation measures how strongly two variables are associated with each other,—i.e., whether when one of the variables changes, how likely the other is to change (this does not necessarily mean that the change in one caused the change in the other, but just that they tend to move together). Correlation coefficients range from -1 to 1; a value of 0 means that there was no relationship between the variables, a value of 1 means there is a total positive relationship (when one variable changes the other always changes the same direction), and a value of -1 means a total negative relationship (when one changes the other always changes in the opposite direction). A correlation coefficient of .5 or above is considered to show a high

satisfaction with the mediation process was also strongly correlated with whether they believed that the mediation helped improve communication between the parties, that the cost of using mediation was affordable, and that the mediator treated all the parties fairly. The parties' satisfaction was also moderately correlated with whether they believed they had had an adequate opportunity to tell their side of the story during the mediation.<sup>92</sup>

Attorneys' responses to only two of the survey questions were closely correlated with their responses regarding satisfaction with the outcome of the mediation—whether they believed that the mediation resulted in a fair/reasonable outcome and that the mediation helped move the case toward resolution quickly.<sup>93</sup> In contrast, parties' satisfaction with the mediation outcome was also strongly correlated with whether they believed that the mediation helped improve communication between the parties, that the cost of using mediation was affordable, and that the mediation helped preserve the parties' relationship, and it was moderately correlated with whether they believed the mediation process was fair.<sup>94</sup>

Finally, there was no strong or even moderate correlation between any of the attorneys' responses to these survey questions and their satisfaction with either the litigation process or the services provided by the court. In contrast, parties' satisfaction with the litigation process was correlated with whether they believed that the mediation helped move the case toward resolution quickly, that the mediation resulted in a fair/reasonable outcome, that the mediation helped improve communication between the parties, that the mediation process was fair, and that the cost of using mediation was affordable.<sup>95</sup> Similarly, parties' satisfaction with the court services was correlated with whether they believed that the mediation process was fair and that the cost of using mediation was affordable.<sup>96</sup>

All of this indicates that, compared to attorneys, parties' satisfaction with both the court and with the mediation was much more closely associated with what happened during the mediation process—whether they felt heard, whether they felt the mediation helped with their communication or relationship with the other party, and whether they believed that the cost of mediation was affordable. While most parties indicated that they had had an adequate opportunity to tell their story in the mediation (84 percent gave responses that were above the neutral point on the scale), fewer parties thought that the mediation had improved the communication between the parties (57 percent) or preserved the parties' relationship (32 percent),<sup>97</sup> and fewer thought that the cost of mediation was affordable

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correlation. The correlation coefficients of these questions with attorneys' satisfaction with the mediation process were .55, .55, .57, and .47, respectively.

<sup>92</sup>Correlation coefficients of .57, .53, .55, and .48, respectively, with parties' satisfaction with the mediation process.

<sup>93</sup>Correlation coefficients of .78 and .73, respectively, with attorneys' satisfaction with the outcome.

<sup>94</sup>Correlation coefficients of .63, .50, .51, and .49, respectively, with parties' satisfaction with the outcome.

<sup>95</sup>Correlation coefficients of .47, .49, .46, .48, and .48, respectively with parties' satisfaction with the litigation process.

<sup>96</sup>Correlation coefficients of .47 and .48, respectively, with parties' satisfaction with the courts' services.

<sup>97</sup> Note that in many types of cases, such as Auto PI cases, this simply may not have been relevant; 41 percent of parties and 55 percent of attorneys gave the neutral response to this question.

(60 percent). These perceptions therefore may have contributed to parties' lower satisfaction scores.

## Conclusion

The study found that all five of the pilot programs improved attorneys' overall satisfaction with the services provided by the court, with the litigation process, or with both.<sup>98</sup> Attorneys in program cases in San Diego, Los Angeles, Fresno, and Contra Costa expressed satisfaction levels with the services provided by the court that ranged from 10 to 15 percent higher than the satisfaction levels expressed by attorneys in nonprogram cases.<sup>99</sup> Similarly, attorneys' satisfaction with the litigation process was about 6 percent higher in program cases in the San Diego, Fresno, Contra Costa, and Sonoma pilot programs than in non-program cases.<sup>100</sup>

As might have been expected, attorneys' satisfaction with the outcome in program cases corresponded to whether their cases settled at mediation; settling at mediation increased their satisfaction with the outcome, but not settling at mediation decreased their satisfaction compared to the satisfaction of attorneys in similar nonprogram cases. In addition, the study found that attorneys were generally more satisfied with both the court services and with the litigation process when their cases settled at mediation; settling at mediation generally made attorneys happier with all aspects of their experience. However, the study also found that attorneys whose cases were mediated and did *not* settle at mediation were also generally more satisfied with the services provided by the court than attorneys in similar nonprogram cases. This indicates that the experience of participating in pilot program mediation increased attorneys' satisfaction with the services provided by the court, even if the case did not resolve at mediation.

In all five pilot programs, both parties and attorneys who participated in mediations expressed high satisfaction with their mediation experience; their highest levels of satisfaction were with the performance of the mediators and their lowest were with the outcome of the mediation process. They also strongly agreed that the mediator and the mediation process were fair and that they would recommend both to others. Parties and attorneys were less satisfied with the outcome of the mediation process and were more neutral about whether the outcome was fair/reasonable; this, again, corresponded to whether or not the case settled at mediation.

While both parties and attorneys were generally very pleased with their mediation experience, attorneys were more satisfied than parties. This may reflect attorneys' greater understanding about what to expect from the mediation process and suggest the need for additional educational efforts targeted at parties. It may also reflect the fact that parties'

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<sup>98</sup> Because of low response rates to surveys from parties in nonprogram cases, it was not possible to compare the satisfaction levels of parties in program and nonprogram cases.

<sup>99</sup> For the San Diego pilot program, because of offsetting decreases in satisfaction among unlimited program-group cases that were not referred to mediation or that were removed from mediation, this impact was evident only for limited cases.

<sup>100</sup> For the San Diego pilot program, because of offsetting decreases in satisfaction among unlimited program-group cases that were not referred to mediation, this impact was evident only for limited cases.

satisfaction with both the court and with the mediation was much more closely tied than attorneys' satisfaction to what happened within the mediation process—whether they felt heard, whether the mediation helped their communication or relationship with the other party, and whether the cost of mediation was affordable.