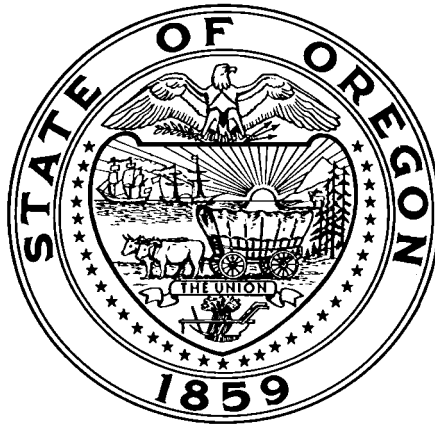


# **The Department of Justice**

## **Collaborative Dispute Resolution Pilot Project**



**A Report Submitted January 30, 2001**

**to**

**The Honorable Gene Derfler**

**Senate President**

**The Honorable Mark Simmons**

**House Speaker**

**and**

**Honorable Members of the Legislature**

**Pursuant to Oregon Laws Chapter 670, Section 17**

# Executive Summary:<sup>1</sup>

This report was prepared by the Department of Justice (DOJ) and describes the development a collaborative dispute resolution (CDR) pilot program as required under Oregon laws 1997, chapter 670, Section 17. The purpose of this program is to encourage the appropriate use of collaborative processes like mediation in order to more efficiently and effectively resolve civil cases involving the State of Oregon. As of January 2001, the department has:

- 1) Developed rules and procedures establishing a collaborative dispute resolution pilot program in the Trial and Civil Enforcement Divisions.
- 2) Established a process for screening civil cases to determine if the use of CDR is appropriate.
- 3) Convened a steering committee to assist in the development of the program.
- 4) Developed a protocol for evaluating the efficiency and effectiveness of cases resolved through collaborative processes. Preliminary results of this evaluation indicate that:
  - a) Cases that use mediation exclusively have lower legal bills, on average, than cases that use any other single means of dispute resolution.
  - b) The *legal costs* associated with a particular dispute resolution process may not be significant in all cases, when compared to the *peripheral and long-terms costs* of a case (e.g., the costs to public safety.) These long-term costs are alluded to in this report but not quantified.
- 5) Increased the use of collaborative and alternative dispute resolution processes.
- 6) Evaluated training needs and provided ADR training for Trial Division attorneys.
- 7) Begun distribution of lists of community mediation programs to every Oregonian who requested a consumer complaint form from the Financial Fraud/Consumer Protection Section of the Civil Enforcement Division.
- 8) Incorporated ADR into Assurance of Voluntary Compliance (AVC) under the Unfair Trade Practices Act. ADR provisions in these AVC's may provide, for example, that a business pay for the services of an impartial mediator to assist consumers in resolving claims resulting from a faulty building product.

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<sup>1</sup> Pursuant to ORS 192.245, an executive summary of this report has been sent to every member of the Legislative Assembly. If you have received the executive summary, and would like a copy of the full report, contact Mike Niemeyer, DOJ ADR Coordinator at (503) 378-4620.

# The Collaborative Dispute Resolution Project

This report was prepared by the Department of Justice (DOJ) and describes the development a collaborative dispute resolution program as required under Oregon laws 1997, chapter 670, Section 17.<sup>2</sup> The purpose of this program is to encourage the appropriate use of collaborative dispute resolution (CDR)<sup>3</sup> processes like mediation and to evaluate the efficiency and effectiveness of these processes for resolving civil cases involving the State of Oregon.

This project does not require that CDR or ADR be used in any case or obligate the state to accept a settlement. This project also does not limit the state's duty to participate in ADR as the result of any rule or order of a court.

In 1997 a steering committee<sup>4</sup> was convened to assist the department in using CDR more effectively. Since 1997, the department has held meetings with the Steering Committee and senior Trial division attorneys in order to develop and institutionalize best practices with respect to CDR. The department has also established systems for evaluating and monitoring cases that utilize CDR. The department has also:

- **Adopted program rules**, including OAR 137-005-0300, establishing the scope the Collaborative Dispute Resolution Pilot Project, and OAR 137-005-0310, which establishes the notice of referral to the collaborative dispute resolution pilot project.
- **Established case screening<sup>5</sup> and evaluation procedures** to ensure that collaborative dispute resolution processes like mediation are carefully considered in each civil case.
- **Conducted an assessment of ADR training needs.**<sup>6</sup> DOJ trial attorneys were surveyed, goals were established and training offered<sup>7</sup> which would increase attorney skills in the use of collaborative forms of dispute resolution.
- **Created opportunities for mediators to meet with DOJ attorneys.**
- **Developed procedures for expediting the use of mediation**, including the development of: a mediator personal services contract; an expedited mediator procurement process; and the development of a model "agreement to mediate."

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<sup>2</sup> See endnote to ORS 183.502

<sup>3</sup> CDR is part of the larger class of dispute resolution processes referred to as alternative dispute resolution or ADR. ADR includes arbitration, early neutral evaluation, summary jury trials and other alternatives to the litigation process.

<sup>4</sup> The committee included: Judge Kristena LaMar; Professor Richard Birke of the Willamette University Center for Dispute Resolution; Mr. Harold Harding, a commissioner with the Oregon Dispute Resolution Commission; Mr. Michael Baird, with the Risk Management Division of DAS; Mr. Tim Wood, the DOJ Trial Division Administrator; Mr. Pete Shepherd, who, at that time was the Attorney in Charge of the DOJ Financial Fraud/Consumer Protection Section; Mr. Mike Niemeyer, the DOJ ADR Coordinator; and senior trial attorneys from the Condemnation, General Torts, Employment Torts and Contract and Environmental Sections of the Trial Division.

<sup>5</sup> A copy of the Initial Impressions form is found in appendix III, page 19.

<sup>6</sup> Trial attorneys have become increasingly familiar with mediation and most have had training in mediation or mediation advocacy. In a survey conducted in early 1998, before instituting ADR training for the year, 53% of attorneys indicated that they had received some type of mediation *training* compared with only 20% who had similar training in 1993, while 71% of attorneys had *experience* with mediation compared with 60% in the 1993 survey.

<sup>7</sup> See Appendix II for a list of ADR training Sponsored by DOJ in the last two years.

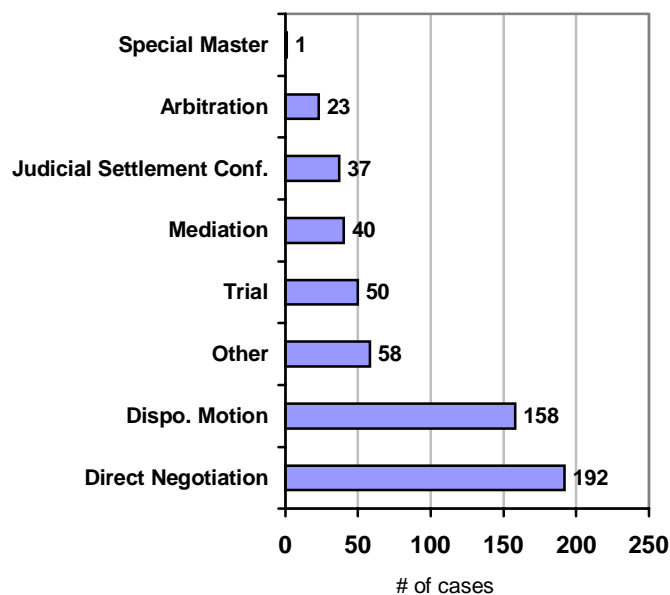
- **Conducted a review, in the Financial Fraud Section of DOJ,** to look for additional opportunities for using mediation and other forms of ADR. ADR is routinely incorporated into "Assurances of Voluntary Compliance" and consumers and business receive information on community dispute resolution programs<sup>8</sup>.

## A) Utilization of CDR

One of the objectives of the pilot project is to track the *use* of CDR in civil cases involving the state. The department has created a system for this purpose and collected detailed information on over 500 cases that were closed between October 1, 1998 and October 1, 2000. These cases are the source of most the statistics cited in this report. With this system, the department is now able to track its use

of mediation, direct settlement negotiations, arbitration, and judicial settlement conferences.

**Chart 1: Trial Division, Cases Closed by Process Used**  
(May be more than 1 process per case)



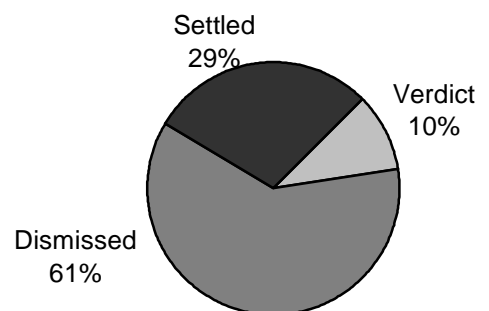
The decision to use a collaborative form of dispute resolution, like any process choice, is made by the trial attorney based on his or her experience, the policies of the department, the wishes of the client agency and the interests of the state. In choosing a particular case management strategy, the goal is to achieve the state's objectives in the most efficient and effective manner possible.

Chart #1 shows that the most frequently utilized process was direct settlement negotiation (192 cases.) Mediation was used in 40 cases and Judicial settlement conferences in 37. In most cases, multiple strategies/processes were

employed. Forty-seven of 50 cases that went to trial, for example, had also attempted mediation or settlement discussions or had made use of dispositive motions. As Chart #2 indicates, 90% of cases are resolved using some process other than full trial leading to a verdict.

To put the utilization of CDR by the Department of Justice in perspective, it is also necessary to consider the dispute resolution processes employed by state agencies. At the Department of Transportation, for example, eminent domain cases are aggressively settled through negotiation and mediation, before the case comes to the Trial Division.<sup>9</sup> Procedures<sup>10</sup> for the litigation

**Chart #2: Dispositions -**  
One Measure of Process Utilization  
Only 10% of 435 Cases went to Trial-verdict



<sup>8</sup> Examples of matters incorporating ADR may be found in Appendix I, page 17.

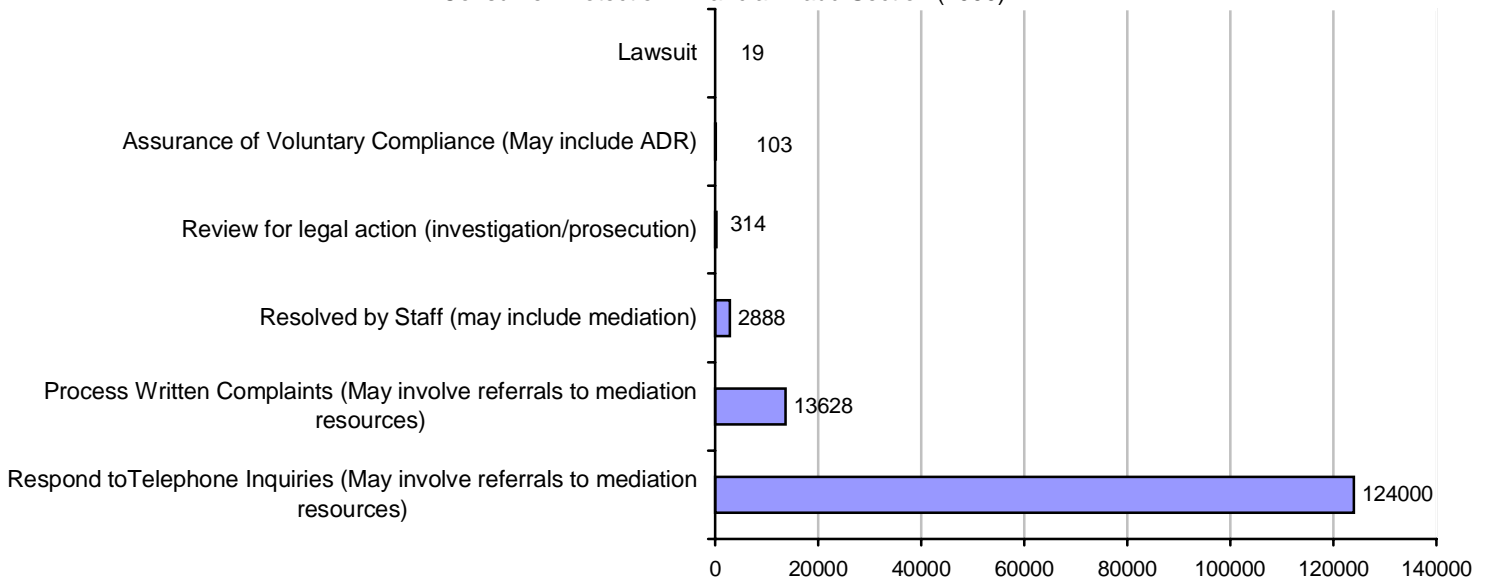
<sup>9</sup> Between 1/1/96 and 12/31/96 the Right of Way Section of the Department Of Transportation (ODOT) handled 579 eminent domain files. Of these files, 91% were resolved by ODOT, leaving only 51 of the most difficult cases going to DOJ.

of these cases, and the fact that DOJ attorneys frequently negotiate settlements without a neutral, also limit the number of cases in which mediation is necessary or appropriate.

Other examples of how the early and effective use of ADR by agencies may limit the use of ADR by DOJ:

- The inclusion of ADR provisions in state contracts also means that arbitration or mediation is attempted before these matters come to the Trial Division.<sup>11</sup>
- Mediation is one of the processes used by The Department of Administrative Services (DAS) Risk Management in resolving claims against the state. Between 1994 and 1999 DAS resolved 13,356 claims without litigation, only 1,352 claims were litigated (2%).
- As seen from Chart #3, most matters handled by the Consumer Protection/Financial Fraud Section are resolved early, through low-cost/informal means of dispute resolution. Cases go to litigation only after attempts at settlement or mediation have already failed or are determined to be inappropriate.

Chart #3: Utilization of Various Dispute Resolution Mechanisms by Consumer Protection-Financial Fraud Section (2000)



## B) The "Costs" of our Dispute Resolution Processes

What does it "cost" the state to resolve disputes in litigation? What does it cost the state to *not* take a dispute to court? Is mediation less "costly" than litigation? An objective of the pilot project is the evaluation of the relative efficiency and effectiveness of collaborative forms of dispute resolution. To answer these questions it is necessary to consider the *proximate costs* (i.e., the legal expenses, any

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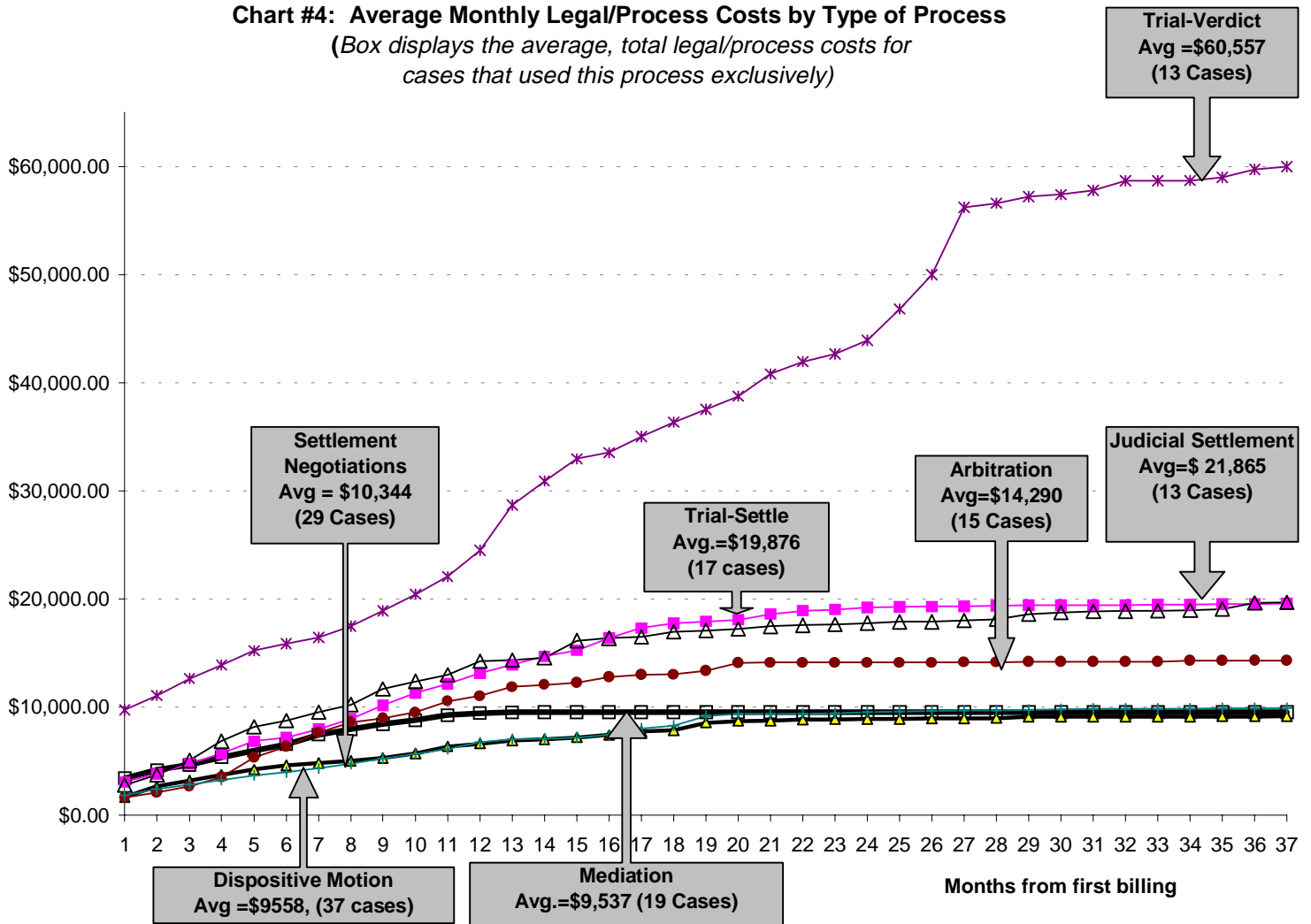
Of these 51 cases, 47 were settled, one was resolved through dispositive motion, two had "other" dispositions," and only one went to trial.

<sup>10</sup> Such as procedures governing exchange of appraisals, requirement of an offer 30 days prior to trial, etc.)

<sup>11</sup> The Contracts and Environmental Section of the Trial Division has been instrumental in including ADR clauses in the contracts for ODOT Highway construction, the Department of Forestry (for timber sales) and The Department of Administrative Services for Public Improvement Contracts. In addition, the General Counsel Division, Transactions Section has developed ADR clauses for other standard contracts.

settlement that must be paid out, etc.) and the *peripheral and long-term costs* (e.g., cost to the environment or the impact on the state's ability to protect public safety.)

**Chart #4: Average Monthly Legal/Process Costs by Type of Process**  
 (Box displays the average, total legal/process costs for cases that used this process exclusively)



**Proximate Costs (Process, legal and settlement costs)**

Example #1: The State is clearly at fault for damage to private property as the result of a fire at a state construction site. The Department of Administrative Services, Risk Management Division, has reviewed the claim and offered the property owner \$6,000. The property owner has rejected this offer, and filed a lawsuit seeking \$100,000. Initial conversations between attorneys indicate some willingness to negotiate. The DOJ attorney estimates that the case could get as much as \$20,000 from a jury or as little as \$4,000. The facts of the case are straightforward, and the potential outcome at trial can be predicted with some certainty. This case has two significant "costs." Referred to here as "proximate costs." This includes the cost of the settlement (most likely around \$10,000) and the "cost" of the dispute resolution process. Chart #4 compares the legal/process costs<sup>12</sup> of each process. Not surprisingly, the cost of resolving a case by taking it through a trial to a verdict (\$60,557)

<sup>12</sup> "Legal/Process costs" include all the charges, billings and expenses associated with a particular process such as the DOJ attorney billing, mediator and expert witness fees, and related expenses, but does not include the amount of any award or settlement resulting from the process or time invested by agency staff who may be involved in the process/case.

is, on average, the most expensive process. At the other end of the spectrum, mediation costs about \$9,537.

In example #1 the "process" costs could vary between \$10,000 and 60,000 depending on whether it goes to trial or not. These process costs have a significant impact on the overall costs associated with this case. Taking the case to trial, and getting a \$10,000 plaintiff verdict, would cost \$70,000 (when legal costs of \$60,000 are included.) Settling the case for \$10,000, via negotiation or mediation, would ultimately cost about \$20,000. Early settlement via mediation (or direct negotiation) is clearly a more efficient and less costly process choice than trial.

How well do we manage these process costs in real cases? A comparison of charts #1 and #4 demonstrates that DOJ Trial Division attorneys are more likely to use processes that have the lowest process costs (i.e., most cases are resolved through dispositive motions.) There are however, cases in which these *proximate costs* (Process, legal and settlement costs) are secondary considerations.

## Peripheral and Long-Term Costs

In evaluating the costs and benefits of one dispute resolution process over another we must also consider the *peripheral and long-term costs* associated with a particular case. One way to determine if these costs are significant in a particular case is to ask:

*Would an adverse outcome in this case have significant, negative impacts to the state, beyond this immediate case? Could an adverse outcome in this case, for example, result in a large group or class of persons making similar claims, or could an adverse outcome significantly damage:*

- *The credibility of essential government institutions?*
- *Important, long-term relationships?*
- *The state's ability to enforce public policy or protect public safety?*

The answer to this question may not be significant in all cases. In Example #1 the answer would be "no" or "probably not." In the following example, however, the answer is likely to be "yes."

Example #2: A foreign student has claimed residency status for purposes of calculating his tuition at the University of Oregon. The University has determined that the student does not meet the residency requirement and must pay the higher tuition, a difference of \$8,000 a year. This order-in-other-than-a-contested-case is challenged by the student in a lawsuit. The University and the Trial Division attorney believe that this case has no merit. The University also sees no difference in the residency status of this student and thousands of others who are currently paying the higher tuition. The student's attorney has indicated a willingness to try and "work things out" and is open to settling this matter quickly. As in example #1 the process costs for this case will vary depending on the process used. A trial would be much more expensive than what this case could settle for. A dispositive motion would certainly be an efficient way to resolve the matter in the state's favor, but if that was unsuccessful, direct settlement negotiations or mediation would generally be cheaper than going to trial - but that is if it is only the *proximate costs* (legal expenses, settlement, etc.) that are considered. What about any *peripheral and long-term costs*? In this example it is clear that the *peripheral and long-term costs* would be significant. An adverse outcome in this case could result in thousands of other students making similar claims for a reduced tuition. The efficiency and effectiveness of any dispute resolution process in this case must, therefore, be evaluated in light of how well it mitigates these peripheral and long-term costs.

It is not difficult to imagine other cases in which the peripheral and long-term impacts of a case are significant. The state's ability to protect children, the elderly or the environment or the state's ability to manage its resources effectively are often on the line when the Department of Justice defends the state from a lawsuit or prosecutes a civil or criminal matter.

## C) Efficiency, Effectiveness and Satisfaction

Limiting the direct and peripheral costs of resolving state of Oregon civil cases is one of the goals of the Collaborative Dispute Resolution Project. The following five pages compare the relative costs and efficiencies of *mediation to trial* and to other process and case management strategies. The data for these charts was drawn from over 500 cases closed between October 1, 1998 and September 31, 2000 by the Trial Division of the Oregon Department of Justice. Criminal cases and post-conviction inmates cases were not included in these statistics.

The following five pages provide some limited comparisons of the efficiency, effectiveness and satisfaction<sup>13</sup> associated with mediation, direct settlement negotiations, dispositive motions, judicial settlement conferences and trial.

### Efficiency

To evaluate the relative efficiency and effectiveness of one dispute resolution process over another we must know what each process "costs" and what the benefits are for the costs expended. This task is made more difficult by the fact that most of the 500 cases in our study used more than one dispute resolution process. This makes it difficult to isolate the costs of mediation relative to the costs for settlement negotiations or other processes that may have been used in that same case. One way to isolate the cost of mediation, however, is to look at cases in which mediation was the *only* process used.

One measure of *efficiency* is the cost of legal services relative to the benefit received. For cases in which an initial prayer was specified, the benefit is the difference between what the plaintiff asked for and what the state actually paid in resolving the lawsuit. On each of the following five pages there is a chart titled, "*A measure of the EFFICIENCY of...*" these charts were developed using cases in which only that process (e.g., mediation) was used. The charts compare the average legal/process costs for that process with the average prayer<sup>14</sup> and average disbursement.<sup>15</sup> This measure of the efficiency of various dispute resolution processes does not consider the peripheral and long-term costs that were discussed earlier. While not quantified, the potential peripheral and long-term costs associated with the use of each process is alluded to in the narrative discussion for each process.

### Effectiveness

One measure of the *effectiveness* of each process is the final disposition of the case in which that process is used. A chart titled, "*A Measure of EFFECTIVENESS - disposition of all Cases Using...*" presents the disposition of all cases using a particular process. These charts include cases

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<sup>13</sup> ORS 183.502(7) states that the purpose of agency ADR programs is to: "Increase agency efficiency; Increase public and agency satisfaction with the process and results of dispute resolution; and decrease the costs of resolving disputes."

<sup>14</sup> The prayer is the amount specified by the plaintiff (state is defendant). Note that most cases did not have an initial prayer amount or involved non-economic issues and were not included in this study.

<sup>15</sup> The disbursement is the amount paid by the state as the result of a judgement, award or settlement.

that may have used multiple process, such as mediation and judicial settlement conferences. It will be difficult, therefore, to attribute the outcome *exclusively* to that particular process. There are, however, distinct differences between the dispositions of cases in which mediation was *one* process used and the disposition of all cases that used, for example, dispositive motions.

## **Satisfaction**

The department has established a system for evaluating client and attorney satisfaction with the various dispute resolution and case management processes used in a case. This system has been in use for several years for our attorneys and for our clients in the Contracts and Environmental Section but evaluation forms have been sent to all our clients only since the spring of 2000. The following charts, titled "*A Measure of SATISFACTION, how helpful was...*" display the responses by both attorneys and clients to questions like "How helpful was mediation?" Most of the responses to these questions, however, are from the trial attorneys.

## Mediation

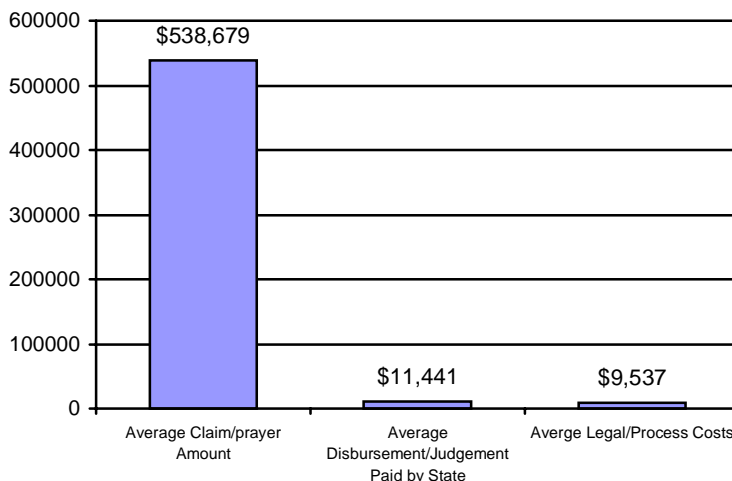
For the purposes of this report, mediation is a process in which an impartial third party, other than a judge, assists the parties in resolving a dispute. The type of mediation employed was generally “evaluative” in style, as that term is defined by Leonard Riskin.<sup>16</sup>

Of 510 cases only 19 had used mediation as the primary or exclusive process for managing the case. The legal/process costs<sup>17</sup> for these 19 cases averaged \$9,537. These costs were lower than for cases that were resolved through any other means.

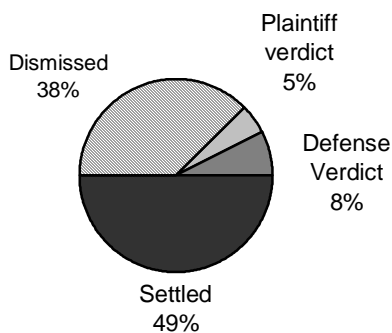
Chart #5 presents one limited measure of efficiency and cost-effectiveness, based on the cost of the process and the settlement amount. The potential long-term and peripheral costs and benefits of mediation could be much more significant than these "process costs." Mediation may, for example, reduce the risk of an unfavorable jury verdict or ensure that an unfavorable legal precedent is not established. Facilitative forms of mediation, particularly when involving confidential communications with a mediator, may allow the parties to address underlying problems or to do problem-solving that might not be available otherwise. This type of mediation may also be helpful in preserving important long-term relationships or may result in more "durable" settlement agreements.

If used inappropriately however, mediation (or any form of negotiated settlement) could send the message that the state is willing to compromise on matters of significant policy and law, or that frivolous claims will be settled by the state in order to avoid the costs of litigation.

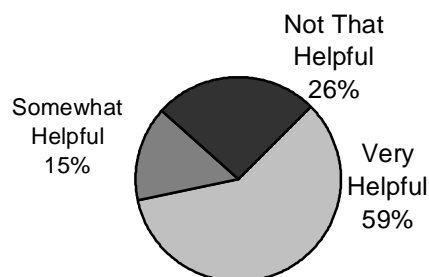
**Chart #5: One measure of the EFFICIENCY of Mediation \$55 = (Claims-Judgements)/Costs**



**Chart #6: A Measure of EFFECTIVENESS**  
Disposition of All Cases Using Mediation (n=40)



**Chart #7: A Measure of SATISFACTION**  
"How helpful was Mediation? (n=27)



<sup>16</sup> See Leonard Riskin, *Understanding Mediators Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harvard Negotiation Law review, 7-51. (1996).

<sup>17</sup> Includes legal billing, expert witness fees, support staff, travel, etc. Note that in most cases the costs of the mediator are shared by the parties.

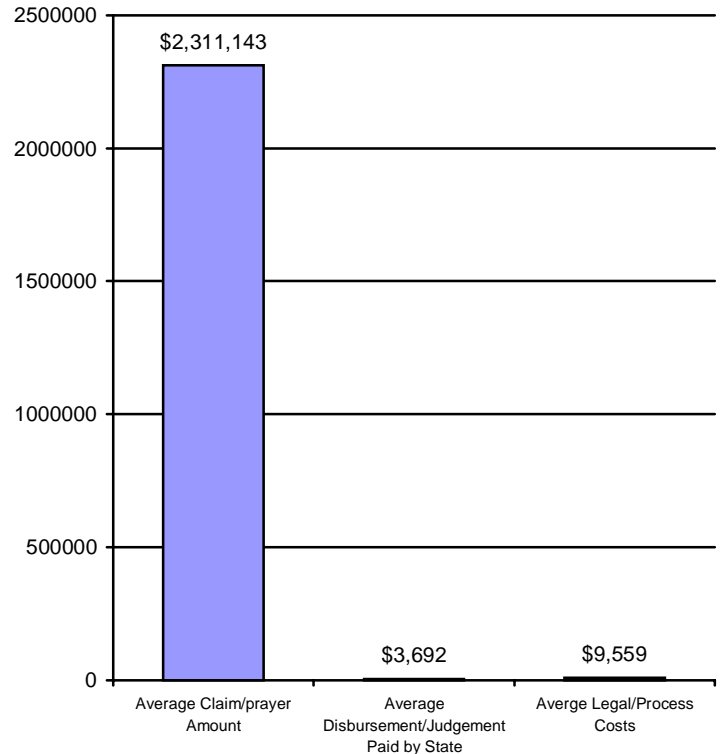
## Dispositive Motions

In many cases the use of dispositive motions is the most efficient way to resolve the case. The process involves little risk, is inexpensive and is usually successful. Of 534 cases closed between 10//1998 and 09/31/2000, dispositive motions were filed in 158 cases (29%). The state generally prevailed on these motions (case dismissed 85% of the time.) As can be seen from chart #8, dispositive motions are also a very cost-effective way to reduce the exposure of the state. Using the formula "*(claims - judgements) / legal costs*" dispositive motions were the most efficient of all dispute resolution process.

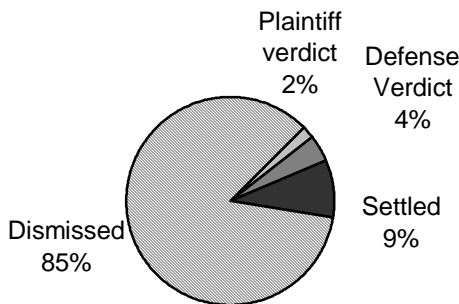
This process also can substantially limit the *peripheral and long-terms costs* of a case by discouraging others from filing similar lawsuits. In a case involving a challenge to the states right of eminent domain or the states ability to remove a child from an unsafe home, a successful dispositive motion also reinforces and affirms the states ability to take these actions.

The use of dispositive motions also received high marks for satisfaction by attorneys and clients. 137 persons responded to the question of satisfaction in cases involving dispositive motions. In 85% of those cases dispositive motions were rated as "very helpful" in resolving the case.

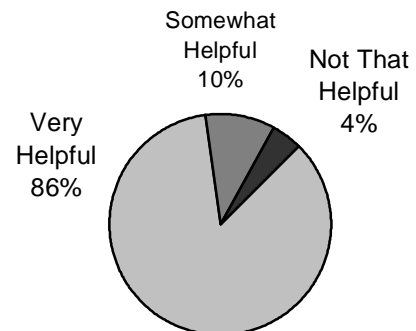
**Chart #8: One measure of the EFFICIENCY of Dispositive Motions, \$241 = (Claims - Judgements) / Costs**



**Chart #9: A Measure of EFFECTIVENESS - Disposition of All Cases Using Dispositive Motions (n=158)**



**Chart #10: A Measure of SATISFACTION "How helpful was the use of Dispositive Motions? (n=137)**



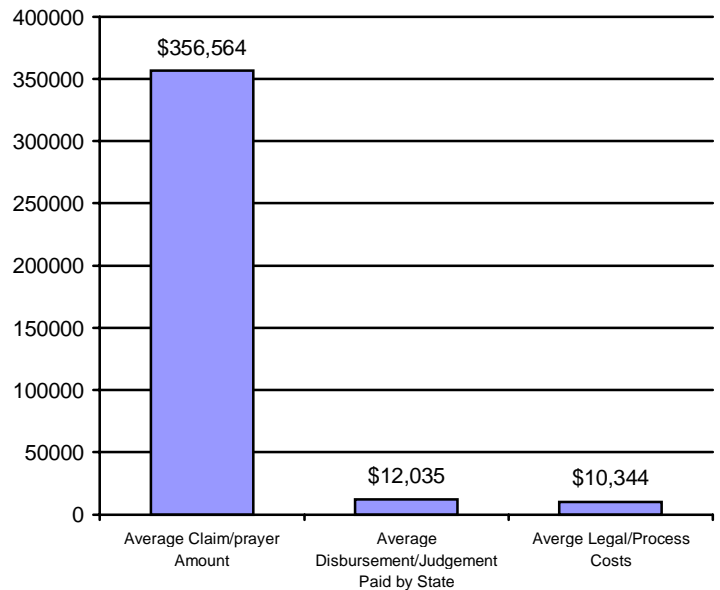
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## Direct Settlement Negotiations

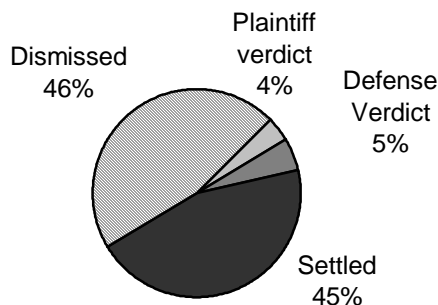
When settlement is appropriate, it is generally pursued through direct negotiations with opposing counsel. These cases are dismissed or settled 91% of the time. Interestingly, these cases were about equally as likely to be dismissed (46%) as settled (45%). This may be due in part to how the dispositions of the cases are categorized by the attorney or the court. Cases may, for example, be "dismissed" as the result of a settlement agreement between the parties rather than through a dispositive motion.

In cases in which settlement negotiations were the only process used (29 cases) the average legal/process costs were \$10,344 dollars. This was not significantly different for the costs of cases resolved exclusively through mediation or dispositive motions. Direct settlement negotiations are routinely used whenever the state is willing to settle a case and would almost always be used before mediation is attempted.

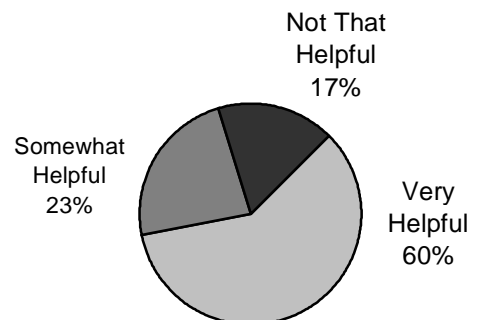
**Chart #11: One measure of the EFFICIENCY of Direct Settlement Negotiations,  $\$33 = (\text{Claims} - \text{Judgements}) / \text{Costs}$**



**Chart #12: A Measure of EFFECTIVENESS**  
Disposition of All Cases Using Direct Settlement Negotiations (n=192)



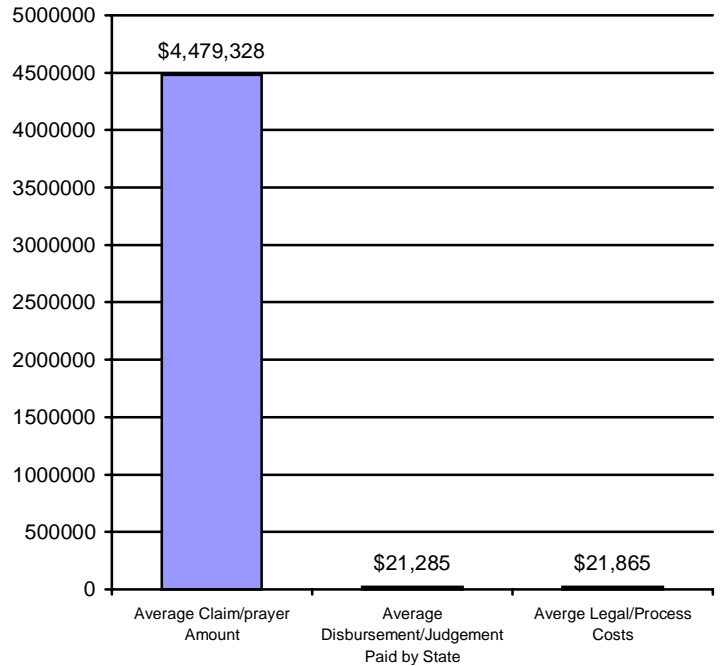
**Chart #13: A Measure of SATISFACTION**  
"How helpful were direct settlement negotiations? (n=133)



## Judicial Settlement Conferences/Mediation

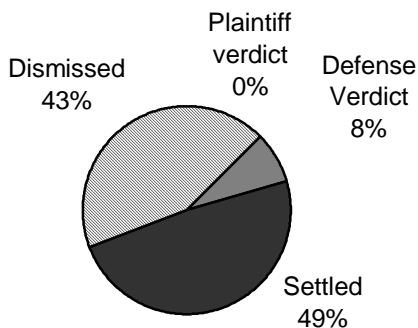
Judicial settlement conferences (JSC) are presided over by a judge, usually at no cost to the parties. These conferences may be used to narrow the issues in dispute, to agree on procedural matters, streamline discovery or to encourage settlement by providing clients or attorneys with a judicial “reality check” of the possible outcomes at trial. These conferences vary in tone. In most cases, the judge will use his or her experience on the bench to evaluate the case with respect to likely outcomes at trial and use that information in various ways to focus the settlement discussion. On one extreme, the judge may be very directive and forceful in getting the parties to settle on certain terms and to avoid trial. In other conferences, the judge sees his or her role as primarily one of facilitating negotiations between the parties and their lawyers. There is little cost associated with the JSC itself as the settlement judge is free. Settlement conferences generally occur later in the case, however, after significant discovery and motion practice has occurred, making the overall cost higher in those cases resolved by JSC than those resolved by any other process other than trial. One reason the JSC occurs late in the case is that court rules require a JSC prior to the trial (or assignment of a trial date), unlike direct settlement negotiations or mediation which are usually requested by counsel earlier in the litigation when the legal bill would be considerably less. An advantage of the JSC is that it significantly reduces the risk of an unpredictable outcome at trial and is less expensive than trial.

**Chart #14: One measure of the EFFICIENCY of Judicial Settlement Conferences**  
 $\$204 = (\text{Claims} - \text{Judgements}) / \text{Costs}$

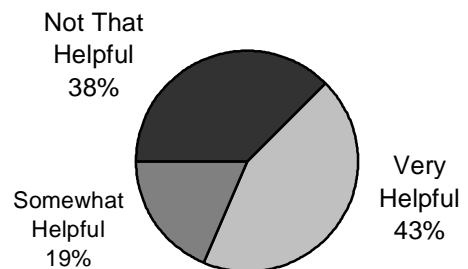


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**Chart #15: A Measure of EFFECTIVENESS**  
 Disposition of All Cases Using Judicial Settlement/mediation (n=37)



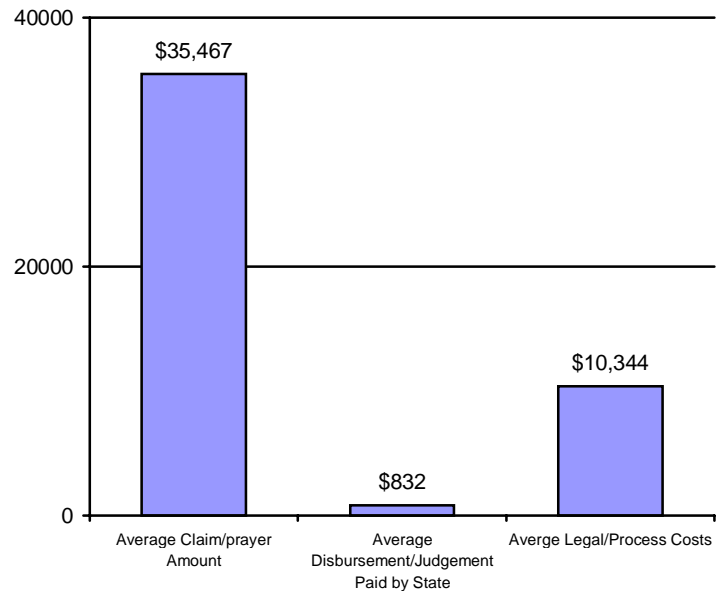
**Chart #16: A Measure of SATISFACTION**  
 "How helpful was judicial settlement/mediation? (n=16)



## Arbitration

Arbitration was used less than any other dispute resolution process (23 cases.) With respect to the cost of the process (\$10,344 dollars on average) and the benefit received (initial prayer of \$35,467 reduced to an average disbursement of \$832 dollars) arbitration was the least efficient process available. This is due to the fact that initial prayer amounts are much lower than in cases exclusively using any other dispute resolution process. The utilization of binding arbitration and the low initial prayer amounts are a reflection of the mandatory use of arbitration in certain civil cases pursuant to ORS 36.400. Under this Court Arbitration Program, circuit courts may mandate arbitration in cases involving less than \$25,000 (or less than \$50,000 as determined by a majority of judges in that court.)

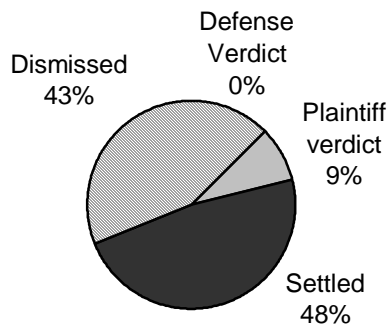
**Chart #17: One measure of the EFFICIENCY of Arbitration,  
\$2 = (Claims - Judgements) / Costs**



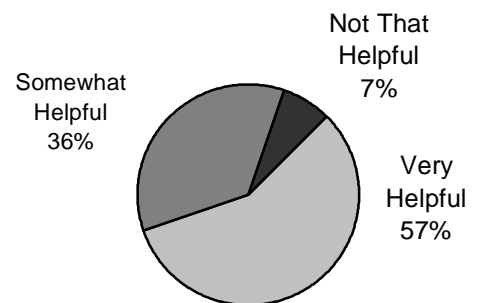
Arbitration may also be used in certain contract disputes related to highway construction.

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**Chart #18: A Measure of EFFECTIVENESS  
Disposition of All Cases Using Arbitration  
(n=23)**



**Chart #19: A Measure of SATISFACTION  
"How helpful was Arbitration? (n=14)**



## Trial

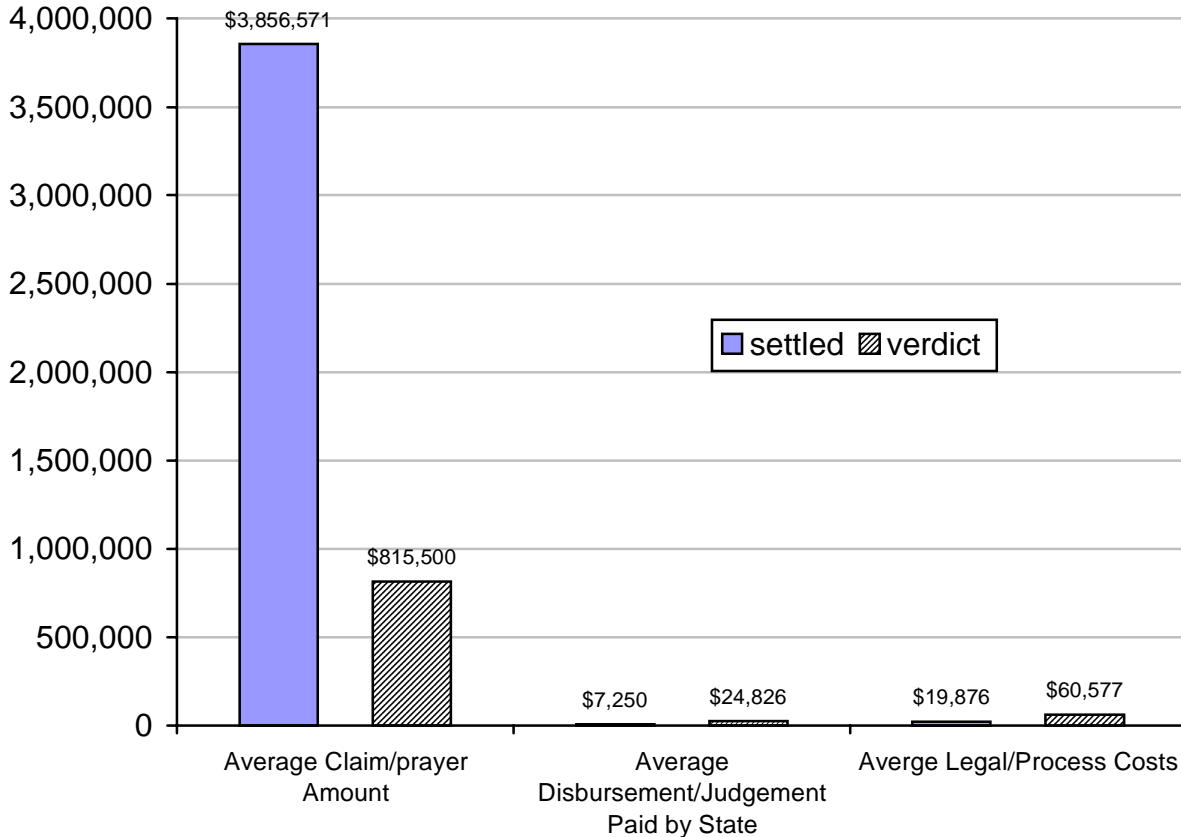
As noted earlier very few cases actually go to trial and even fewer (only 10% of all cases) see the trial through to a verdict. Although the state usually prevails in the cases it takes to trial the process costs are high (\$60,577 on average for a trial that results in a verdict.)

With the cases that go to trial it is the peripheral and long-term factors that are often the most

### Chart #20: One measure of the EFFICIENCY of Trial,

Trial/settled \$194 = (Claims-Judgements) / Costs

Trial/verdict \$13 = (Claims-Judgements) / Costs



significant in determining what the ultimate costs of the case might be. Cases often go to trial, for example, in order to establish or affirm critical points of law. These cases may be expensive to litigate but the costs of a \$50,000 or even a \$100,000 trial may be insignificant when compared with the costs of not establishing the validity of a law that may, for example, give authority to an agency to halt the discharge of pollutants into a river.

Cases may also go to trial because:

- The defendants or their attorney are liable to take advantage of any settlement or protracted settlement discussions to the detriment of the public.
- The resolution of a matter needs to be seen as sufficiently punitive so as to discourage others from similar conduct.

- The case can likely be resolved quickly and effectively at trial.
- The matter involves support of agency policy, which settlement may undermine. (The agency is holding the line on an issue.)
- There are other, similar or related cases and the State needs to be concerned about consistency in the outcome of this matter.
- Substantial settlement efforts have already been made in the case, and failed.
- Based on our estimate of the likely outcome at trial the state perceives the case will cost less to litigate than to resolve through other means.

Chart #21: A Measure of SATISFACTION  
 "How helpful was Trial? (n=15)

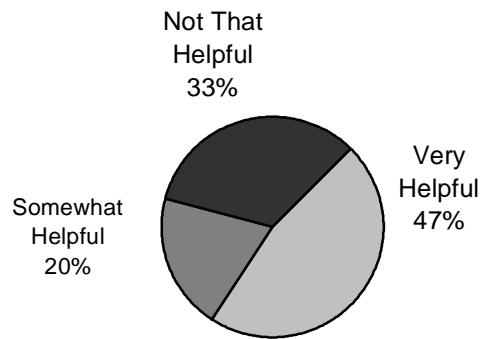
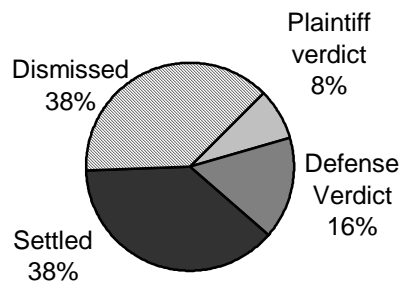


Chart #22: A Measure of EFFECTIVENESS  
 Disposition of All Cases going to Trial (n=50)



## Examples of Matters Utilizing ADR

From The Consumer Protection - Financial Fraud Section<sup>18</sup>

***In the Matter of David Kern; In the Matter of Kern Family Services, Inc.; In the Matter of SCI-Oregon and Uniservice Corporation:*** David Kern, operator of Kern Family Services, Inc., stole over \$5M of prearranged funeral trust funds from customers of three southern Oregon funeral facilities (2 parlors and a cemetery). Kern Family Services, Inc., bought the facilities in 1996 from SCI-OR, a subsidiary of Texas-based Service Corporation International (SCI), the nation's largest funeral service corporation. Kern's unlawful conduct was facilitated by the failure of both SCI-OR and US Bank to make sure the funds were properly transferred and placed in special trust accounts. Kern Family Services filed a Chapter 11 bankruptcy shortly after the trust funds were discovered to be missing. DOJ collaborated with the State Mortuary & Cemetery Board and Secretary of State's Office in the investigation of Kern, SCI-OR, and US Bank. The case went to mediation twice – once in October, 1999 with a private mediator, and again in August with the federal bankruptcy judge. The August session produced an agreement between the parties that resolved all of the state's concerns, provided for replenishment of the missing trust funds, and facilitated the sale of the facilities to a new owner.

***Toys R Us (TRU):*** A multistate antitrust case, in which forty-four state attorneys general filed a complaint in federal court in NY alleging that TRU entered into unlawful agreements with various toy manufacturers to restrict or eliminate the manufacturers' sales of certain popular toys to some of TRU's major competitors. Faced with increasing price competition from Walmart, Target and other warehouse stores, TRU convinced major toy manufacturers such as Hasbro, Mattel and Little Tikes to restrict or eliminate sales of certain toy lines to Walmart, Target and others so that TRU could charge an artificially high price for those toys. A mediator (Judge Renfru - retired) was appointed by one of the state court judges. Judge Renfru soon became the mediator in all of the pending matters. As a result of ten months of mediation (off and on) the parties resolved their disputes with a series of settlements. As part of the multistate settlement, TRU will donate toys to each of the 45 states for three years (1999-2001). The toys are distributed during the Christmas holidays. In the last two years, Attorney General Myers has donated the toys to families in the Willamette Valley and in eastern Oregon communities. In addition, Oregon and the other states recovered the costs of the investigation and prosecution.

***In the Matter of Vacation Marketing Systems, Inc. and Mike Vasey:*** Travel club that misrepresented the sorts of benefits available to members (“lowest prices” on airfare and hotel rates, etc.). We negotiated an Assurance of Voluntary Compliance (AVC) in December 2000, which provides for submission of future disputed consumer claims to arbitration if not settled within 60 days.

***In The Matter of Protection One:*** agents of Protection One misrepresented the nature of consumers' financial obligations by misstating the length of contract terms, requiring consumers to pay for unprovided services and other related tactics. Protection One agents also misrepresented the benefits, uses and characteristics of alarm monitoring services in various ways. We obtained an AVC with the company, which requires arbitration of future complaints in the event Protection One is unable or fails to voluntarily resolve the dispute. National Arbitration Forum will provide the services, and Protection One will pay the arbitration costs/fees (unless consumer seeks arbitration in bad faith).

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<sup>18</sup> The following are summaries of cases concluded between July 1999 – January 2001, in which some form of Alternative Dispute Resolution was used to either 1) settle the case, or 2) was included as a condition of settlement as a mechanism to resolve future consumer complaints.

## DOJ ADR Training Conducted During the 1999 - 2001 Biennium

Date	Description	Provider	Agencies
11/6/1999	OMA Conference - Dispute Systems Design	Mike Niemeyer, Karen Hartley	Oregon Mediation Association
11/6/1999	OMA Conference - ADR in Consumer disputes	Pete Shephard, Mike Niemeyer	Oregon Mediation Association
11/8/1999	Public Law Conference - Complex Public Policy Disputes - 1.5 hrs (offered 3 times Nov and Dec. of 1999)	Jeff Wahl, Mike Niemeyer, Dale Blanton, Pete DeLuca	Agency managers & staff
11/8/1999	Public Law Conference - Designing Dispute Resolution Systems - 1.5 hrs (offered 3 times Nov and Dec. of 1999)	Karen Hartley, Mike Niemeyer,	Agency managers & staff
11/8/1999	Public Law Conference - Effectively Negotiating your interests in a Facilitated Process - 1.5 hrs (offered 3 times Nov and Dec. of 1999)	Richard Birke	Agency managers & staff
11/8/1999	Public Law Conference - Public Participation Processes - 1.5 hrs (offered 3 times Nov and Dec. of 1999)	Teya Penniman, Jeanne Lawson, Jamie Damon	Agency managers & staff
4/29/2000	ADR Barriers in State Government - 1.5 hours	Mike Niemeyer, Mary Barrett, Chris Carlson	NW ADR Conference
5/18/2000	ADR Update - DOJ Tax & Finance Section - 1 hour Training for AAG's	Mike Niemeyer	DOJ
6/5/2000	ADR Update - DOJ Business Activities Section - 1 hour Training, AAG's	Mike Niemeyer	DOJ
6/7/2000	ADR Update - DOJ Education Section - 1 hour Training for AAG's	Mike Niemeyer	DOJ
6/7/2000	ADR Update - DOJ Government Services Section - 1 hour Training for AAG's	Mike Niemeyer	DOJ
6/20/2000	ADR Barriers, Presented to the Oregon Tax Magistrates - 2 hours	Mike Niemeyer	Tax Magistrates
8/22/2000	ADR Essentials - 1.5 hour CLE for AAG's.	Mike Niemeyer & Amy Veranth	DOJ
8/25/00	ADR Theory and Skills for Child Support Agents. (on four dates , 8/25/00, 8/26/00, 11/2/00 and 11/2/00. 6 hrs each session)	Mike Niemeyer, Jean Fogarty, Ronelle Shankle, Jon Towsend, et al.	DOJ - DCS
11/2/2000	ADR in Complex Public Policy Disputes - 4 hour CLE for AAG's. 45 attendees.	Mike Niemeyer, Peter Adler, Chris Carlson	DOJ & client agencies

# Initial Impressions Form

Case Name \_\_\_\_\_ Date of assessment: \_\_\_\_\_

Plaintiff: \_\_\_\_\_ Defendant: \_\_\_\_\_

Billing#/ Cause no.: \_\_\_\_\_ The DOJ Trial Attorney on this case  
is: \_\_\_\_\_

**ALLEGATIONS:**

- 1) Tort allegations: \_\_\_\_\_
- 2) Other Allegations: \_\_\_\_\_

**PRELIMINARY RISK ANALYSIS**

- 3) Suit Demand \$ \_\_\_\_\_
  - a) Special \$ \_\_\_\_\_
  - b) General \$ \_\_\_\_\_
  - c) Attorney Fees \$ \_\_\_\_\_
  - d) Other (monetary) \$ \_\_\_\_\_
  - e) Non monetary narrative \_\_\_\_\_
  - f) Condemnation cases only: Our offer/amount on deposit \_\_\_\_\_ Owners demand \_\_\_\_\_

4) Estimated hours and legal charges

	Research <i>(for condemnation cases = hrs before 30 day offer)</i>	Discovery <i>(for condemnation cases = hrs within 30 days of trial)</i>	Trial	Subtotal hrs <i>(sum columns b,c &amp;d)</i>	Rate <i>(from current rate schedule)</i>	Cost <i>(column e *col. f)</i>
Attorney						
Investigator						
Paralegal						
Law clerk						
Travel						
Experts						
Other						
<b>TOTAL</b>						

5) % Negligence

a) Not applicable\_\_\_\_\_

b) Joint Tortfeasors \_\_\_\_\_%          Plaintiff \_\_\_\_\_%          State defendant \_\_\_\_\_%

6) Chance that case will go to trial\_\_\_\_\_%

7) Chance of a verdict favorable to the state, if the case goes to trial\_\_\_\_\_%

8) If case is lost at trial (*for condemnation cases skip to question 9*):

i) The most likely judgment at trial would be

(A) Monetary \$\_\_\_\_\_

(B) Non-monetary outcome (if applicable):\_\_\_\_\_

ii) The worst possible judgement would be \$\_\_\_\_\_

(A) Monetary \$\_\_\_\_\_

(B) Non-monetary outcome (if applicable):\_\_\_\_\_

9) *For condemnation cases only, if we lose in court and the other side gets attorney fees:*

(A) *Estimate of attorney fees for other side:*\_\_\_\_\_

(B) *Worst case "just compensation" amount:*\_\_\_\_\_

(C) *Total (calculated by Mat man system):*\_\_\_\_\_

10) *For Condemnation cases:*

a) *Did ODOT complete their negotiations?*

i) \_\_\_\_\_ yes, and reached impasse:

(A) *ODOT ROW last offer \$\_\_\_\_\_ on(date)\_\_\_\_\_*

(B) *Response to last offer , if any\_\_\_\_\_*

ii) \_\_\_\_\_ no, *fruitful negotiation between ODOT and owner is still a possibility.*

# 11) FACTORS AFFECTING THE CASE MANAGEMENT STRATEGY

		Which process choice(s) might be best given the presence of a particular factor? Check the most appropriate process(s)				
Check box if applicable	FACTOR	Dispositive Motion	Direct settlement negotiation	Mediation/facilitation	Trial	other/unknown
	1. There is an on-going relationship with a party that is of value to the State.					
	2. There is no single result that we need achieve; We have a lot of flexibility in how we resolve this.					
	3. The parties, and/ or their counsel, are known to be reasonable and settlement discussion would likely be fruitful.					
	4. A trial would likely be difficult, costly or lengthy, given the issues involved.					
	5. A favorable verdict at trial is not assured.					
	6. There may be benefits in one or more of the parties hearing directly from DOJ with communications being filtered through their attorney.					
	7. The other party or their counsel have unrealistic ideas that they can prevail against the state in a litigation.					
	8. Major settlement efforts have not been attempted yet.					
	9. Party may be able to offer us something outside of court that is more creative and more satisfactory to the state than what we would likely get in litigation.					
	10. The case involves important and unresolved legal principles; e.g., the constitutionality of an established agency practice.					
	11. The defendants or their attorney are liable to take advantage of any settlement or protracted settlement discussions to the detriment of the public.					
	12. The resolution of this matter needs to be seen as sufficiently punitive so as to discourage others from similar conduct.					
	13. The case can likely be resolved quickly and effectively in court.					
	14. Quick court action is needed for an immediate action on a dangerous or illegal practice.					
	15. The matter involves support of agency policy, which settlement may undermine. (The agency is holding the line on an issue.)					
	16. There are other, similar or related cases and we need to be concerned about consistency in the outcome of this matter.					
	17. Substantial settlement efforts have already been made.					
	18. The other party is unlikely to engage in meaningful settlement discussions.					
	19. We perceive the case will cost less to litigate than to resolve through other means.					
	20. This case is subject to some form of mandatory ADR.					

## CASE STRATEGY

12) What is the agency/ risk management recommendation regarding further settlement negotiations, if any:

\_\_\_\_\_

13) Based on your initial impressions, is ADR appropriate to resolve any of the issues in this case?

\_\_\_\_\_yes          \_\_\_\_\_no          \_\_\_\_\_ don't know at this time

14) What strategies or processes do you expect to employ in this case (check all that apply)

- a) \_\_\_\_\_ negotiate or stipulate a dismissal
- b) \_\_\_\_\_ file dispositive motions
- c) \_\_\_\_\_ direct settlement discussions with opposing counsel
- d) \_\_\_\_\_ judicial settlement conference or court appointed settlement judge
- e) \_\_\_\_\_ mediation (mediator hired by parties)
- f) \_\_\_\_\_ arbitration
- g) \_\_\_\_\_ stipulation to certain facts or procedural matters in order to streamline case management
- h) \_\_\_\_\_ appointment of a neutral expert
- i) \_\_\_\_\_ appointment of a Special Master to streamline discovery or other issues
- j) \_\_\_\_\_ taking case to trial

15) What is the timing/conditions under which you plan to use these processes?

16) Should a team approach be used? \_\_\_ yes    \_\_\_\_\_no    \_\_\_\_\_ not applicable

17) Briefly describe your overall strategy in this case: