# REPORT ON THE CALIFORNIA THREE TRACK CIVIL LITIGATION STUDY

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# Preface

This report summarizes the findings of a study on civil procedure in unified courts, conducted by Policy Studies Inc. The Judicial Council allocated funds for this project in December 2000 from the Trial Court Improvement Fund. The research described in this report provides data and analysis for the "Three-Track Study," a larger, long-term joint study by the Judicial Council and California Law Revision Commission. This information will be used to help develop proposals for improvements in the three-track system of civil procedure: small claims, limited civil cases (formerly municipal court cases other than small claims), and unlimited civil cases (formerly superior court cases). The report, however, has not been reviewed by the Judicial Council or the Law Revision Commission, and the points of view, opinions, concepts, conclusions, and recommendations expressed in this report are those of the authors and do not represent the positions of the Judicial Council or the Law Revision Commission.

The Three-Track Study is mandated by Government Code section 70219, part of the legislation passed to implement trial court unification under Proposition 220, a constitutional amendment approved by California voters in June 1998. Proposition 220 authorized unification of the superior and municipal courts in each county, and since February 2001, the courts in every county have been unified. Unification created one level of trial court but retained the existing three-track system of civil procedure. The Three-Track Study is intended to reevaluate this system and its underlying policies in light of trial court unification and to develop recommendations for improvements including legislative and rule proposals. The study "may entail elimination of unnecessary procedural distinctions, reassessment of the jurisdictional limits for small claims procedures and economic litigation procedures, and reevaluation of which procedures apply to which type of case."[1]

Staff of the Administrative Office of the Courts and the Law Revision Commission began meeting periodically in 1999 to develop a plan for and to begin carrying out the Three-Track Study. One conclusion reached in staff discussions was that more information and data were needed about the actual problems and needs of the courts that are related to the three-track system and unified structure. Staff explored ways to obtain data from the courts and concluded it would be desirable to conduct empirical research. Beginning in 2001, the Administrative Office of the Courts retained Policy Studies Inc. to gather and analyze data to evaluate the effect of trial court unification and proposed changes in the three-track system on the quality of justice, access to the courts, and efficient processing of cases.

The research for this report was conducted by using statewide case data and a survey of attorneys, and from in-depth studies of the courts in three counties: Fresno, San Diego, and San Francisco. A Project Team of staff at the Administrative Office of the Courts gave direction and assistance throughout the project, and an Advisory Group of judges, court staff, attorneys from various practice areas, and others provided additional input and feedback at several stages in the project.

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[1] *Trial Court Unification: Revision of Codes,* 28 Cal. Law Rev. Comm. Reports 51, 82–83 (1998).

# Acknowledgements

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We would like to give special thanks to the following:

- The Project Team of the Administrative Office of the Courts (AOC): Janet Grove, Project Manager and Associate Attorney; Bonnie Hough, Senior Attorney; Kenneth Kann, Supervising Attorney; Patrick O'Donnell, Senior Attorney; Ron Pi, Research Analyst; Alice Vilardi, Managing Attorney (for the first several months of this study); Karen Viscia, Senior Research Analyst; and Cara Vonk, Attorney.

- The members of the Project Advisory Group and others who provided comments and direction (affiliations are listed for identification purposes only): Mark Adams, Attorney, member of the Board of the California Defense Counsel; Albert Balingit, Staff Attorney, Department of Consumer Affairs; Saul Bercovitch, Staff Attorney, State Bar of California; Hon. Douglas Carnahan, Commissioner, Los Angeles County Superior Court; Deborah Chase, Family Law Facilitator, Alameda County Superior Court; Gisele Corrie, Supervising Budget Analyst, Finance Division, AOC; Paul Crane, Attorney, member of the State Bar Committee on the Administration of Justice; Mary Lou Des Rochers, Director, Management Services, Orange County Superior Court; Chris Dolan, Attorney, member of the Board of the Consumer Attorneys of California; Hon. Roderic Duncan, Retired Judge of the Alameda County Superior Court; Margaret Farley, Attorney, member of the State Bar Committee on the Administration of Justice; Hon. Robert Freedman, Judge of the Alameda County Superior Court; Barbara Gaal, Staff Attorney, California Law Revision Commission; Christina Harbridge, California Association of Collectors; Hon. Mary Thornton House, Judge of the Los Angeles County Superior Court; Hon. Barbara Kronlund, Commissioner, San Joaquin County Superior Court; Dennis Maio, Attorney, member of the State Bar Committee on the Administration of Justice; Claudia Ortega, Court Services Analyst, Trial Court Programs Division, AOC; Hon. Stephen Petersen, Judge of the Los Angeles County Superior Court; Daniel Pone, Senior Attorney, Office of Governmental Affairs, AOC; Prof. William Slomanson, Thomas Jefferson Law School; and William Tanner, Attorney, Legal Aid Society of Orange County.

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***Charles D. Edelstein, J.D.***. Judge Charles Edelstein (Ret.) has over 35 years of experience in many phases of the justice system. He served as a prosecutor, defense lawyer, judge, trial court administrator, and a teacher from the community college level through directing a graduate program in judicial administration at the University of Southern California. He also served as Associate Dean of the Institute for Court Management and directed the trial advocacy program at the University of Miami School of Law. Edelstein has been a justice consultant since 1972, working on a wide range of projects involving caseflow management, case assignment, public defender assessment, juvenile courts, and family courts. He was project director for several jail overcrowding studies in Cook County, Illinois; San Francisco, California; Miami, Florida; and other jurisdictions. As an assistant

court administrator, he participated in many studies of the defense function, including alternative means of delivery of defense services in conflict cases. Judge Edelstein was a member of the both the Florida Supreme Court's Judicial Management Council and its Technology Commission. He has served on various committees that considered and adopted criminal justice standards. In addition to his publications, he was the criminal justice editor for the Gregg Division of McGraw Hill.

***Brenda J. Wagenknecht-Ivey, Ph.D.***, is an organizational development and change consultant who has been working with PSI for ten years. She is a skilled change agent, facilitator, planner, and researcher and has provided consulting, technical assistance, and evaluation services to public and private sector organizations and audiences of all types. Additionally, Wagenknecht-Ivey has extensive knowledge of the justice system, having worked previously for the Michigan Court System and the National Center for State Courts, and having consulted with many other courts and justice system agencies across the country. Since establishing her own consulting practice, Wagenknecht-Ivey's work has focused primarily on organizational development and organizational change as broadly defined. She has provided consulting, facilitation, and training services in such areas as long-range strategic planning, organizational change, leadership and management development, team development and team building, collaborative decision making, consensus building, and continuous quality improvement. Her work also has included conducting individual and small-group interviews and focus groups of various types. Within the last few years, she has facilitated more than 30 statewide, community, or organizational long-range strategic planning processes and continuous quality improvement efforts in jurisdictions across the county.

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# Executive Summary

This report summarizes the major findings and recommendations from the study of the three-track civil system in California conducted by Policy Studies Inc. (PSI). The report is based on:

- interviews of judges, court staff, attorneys and litigants in San Diego, Fresno and San Francisco counties,
- aggregate caseload statistics from those three counties,
- responses to a statewide web-based survey of attorneys conducted by PSI, and
- data from a separate study of the pilot early mediation programs in Fresno and San Diego conducted by the Administrative Office of the Courts (AOC) staff.

The study was commissioned by the Judicial Council of California in conjunction with a joint study by the Council and the California Law Revision Commission. The views expressed herein are solely those of the authors of this report.

## SUMMARY OF RECOMMENDATIONS

For over two decades, California's courts have offered disputants a three-tiered civil case processing system composed of separate small claims, limited, and unlimited tracks. This report summarizes the results of an assessment designed to address the following four essential questions about the three-track system:

- Is there a continued need for different case processing tracks?
- What should be the jurisdictional scope and procedural characteristics of the different case processing tracks?
- What types of court infrastructure are required to support each of the different case processing tracks?
- How can the California courts implement changes to the current system to make an effective transition to an improved system?

The analysis presented in this report shows that:

- The need for three different civil case processing tracks remains great;
- Some relatively modest changes in jurisdictional claim limits are warranted;

- The success of each processing track in providing effective and efficient access to the courts while maintaining the quality of justice -- especially the success of the small claims and limited civil tracks – is highly dependent on the adequacy of supporting infrastructure within a particular jurisdiction, such as the availability and sophistication of commissioners or judge pro tems, and the availability of assistance programs for self-represented litigants; and

- An incremental, jurisdiction-by-jurisdiction, and pilot project focused change strategy should be used to implement alterations to the existing three track system.

Specifically, three general policy recommendations are supported by the analysis.

First, we recommend that the present small claims jurisdiction be retained, but that pilot projects be established and closely monitored to test the effects of raising the limit to $7,500 and $10,000.

Small claims courts clearly provide needed service to litigants with cases too small to justify an attorney or a full-blown trial. However, we believe that increasing the small claims limit has the potential to result in the following three negative effects, depending on the extent that overall small claims caseloads or the size of the claims in small claims court increase.

- First, some more complicated cases, with more difficult issues of proof, would likely come into small claims court. Many litigants have difficulties in presenting their cases and proving their claims in small claims court at the present limits. Those difficulties would be greatly magnified for larger, more complicated cases. This would raise a greater possibility of injustice in those cases.

- Second, the additional caseload would strain the resources in some courts, including requiring additional pro tem judges and additional commissioners to handle cases where parties do not stipulate to a judge pro tem.

- Third, the use of volunteer pro tem judges in larger cases, which would likely be necessary in many jurisdictions around the state, causes us concern with regard to the quality of justice. As the cases get larger, the impact of a wrong decision on the parties is greater, particularly on the plaintiffs, who have no right to appeal.

Still, if the claim limit is raised, additional changes to accompany an increase might include:

- Allow plaintiffs to appeal for cases over $5,000. A wrong decision can go against a plaintiff as well as a defendant. Unfortunately, the notion that plaintiffs have

exercised a choice in selecting to sue in small claims court is questionable, given the difficulty in finding a lawyer to take those cases in the regular civil docket.

- Allow parties to be represented by attorneys for cases over $5,000, with cases handled like a small claims appeal (e.g. simplified procedure). With no discovery allowed, an attorney might be willing to take a case of that size for a reasonable fee.

Moreover, we recommend that pilot projects established for experimenting with increasing small claims jurisdiction to $7,500 and $10,000 should include:

- an extensive training program for pro tem judges, including courses on contract, consumer and tort law, and mentoring;

- small claims advisors located at the court; and

- rigorous data collection, including data on case types, claim amount, real amount in controversy for cases at the upper limit, contested issues (e.g. liability vs. damages), case outcomes, type of disposition (default, settlement, mediation, judge trial, commissioner trial, judge pro tem trial), appeals and outcomes of the appeals, litigant experiences in using the small claims court (e.g. seeking attorney assistance, getting advice on legal rights and what to say and present at trial, other problems), and litigant satisfaction.

Second, we recommend that the state test raising the limited civil limit to $50,000. The limited civil process has a clear value in providing a forum that allows attorney representation but holds down the costs of litigation by controlling discovery and streamlining the trial process. The primary weakness of the process is that it still does not reduce costs enough for the lower end of the jurisdiction to make attorney representation economical.

Reasons for increasing the limited civil jurisdiction claim limit to $50,000 include:

- The original reason for limiting discovery in cases under $25,000 twenty years ago -- that the cost of litigation in those cases would make attorney representation uneconomical, both in hourly fee cases and contingent fee cases -- now applies equally to cases under $50,000. Without limits on discovery in hourly fee cases, it would be hard today to bring a case to trial for under $50,000, including attorney fees and costs. In contingent fee cases, the time spent by the attorney on the case could easily exceed the fee, making it uneconomical for the attorney to take and risk the possibility of no recovery (and thus no fee).

- Inflation alone would bring the value of a $25,000 case in 1979, when the economical litigation project began, to over $60,000 today.

As raising the jurisdictional limit of limited civil may result in cases falling under limited civil for which the limit of one deposition is too restrictive, we also recommend that a pilot project be used to test the effects of raising the number of depositions to two for cases falling between $25,000 and $50,000. In particular, the pilot should test the extent to which the extra deposition affects the cost of litigation and meets the needs of the attorneys for adequate trial preparation.

Third, we recommend that the California judiciary test as a pilot project an additional option for resolving cases with amounts in controversy of between $5,000 and $15,000. Under the present California three-track civil system, those cases are too low in value to pursue cost-effectively with an attorney. At the same time those cases are still subject to the full panoply of civil procedure, and the amount at risk is great enough that most litigants would be ill advised to pursue them pro per.

Specifically, we recommend that a new process for cases other than unlawful detainer cases with an amount in controversy under $15,000, with an award cap of $15,000, be tested first as a pilot project in one or more jurisdictions. The new process would provide an alternative to the limited civil process. As the process described below may raise constitutional issues with regard to the right to a jury trial, we suggest that it operate as a voluntary alternative to and in concurrent jurisdiction with the present small claims and limited civil processes.

Features incorporated into the recommended process should include:

- simplified notice pleading as in small claims cases;
- an answer required of the defendant;
- provision for a Statement of Evidence and Witnesses, with the same effect as in the present limited civil procedure, on request by the opposing party;
- no additional discovery permitted;
- simplified trial procedure such as is followed in small claims court;
- attorneys permitted at trial;
- all trials before a judge or commissioner;
- no jury trials; and
- appeal on the record.

In short, California's attempts to reduce the costs of litigation for smaller cases should be continued.

## VARIATIONS AMONG COUNTIES

We found a substantial variation in the handling of small claims and limited civil cases among the three counties that we studied in-depth in this project. This suggests that statewide changes in procedures and jurisdictional limits are likely to have very different effects in different counties around the state. Further, the extent and nature of the variation cannot be easily categorized into patterns based on county size or region of the state. For example, we heard of substantial differences in procedures and uses of resources between neighboring counties in the Central Valley and in the San Francisco Bay area.

The variation appeared to be due to several factors that played out in different combinations:

- differences in where the counties are with regard to implementing unification, particularly in merging the judges and the case management practices of the former superior court and municipal court;
- differences in resources available, including judges, commissioners, judge pro tems, small claims advisors, and alternative dispute resolution options;
- differences in case management practices and approaches to implementing civil Fast Track rules;
- differences in jury awards and their effects on the tactics of attorneys and insurance companies;
- differences in caseload mix; and
- differences in local legal culture.

## THE DESIRABILITY OF PILOT PROJECTS

We recommend that any substantial changes to the present civil process, including changes in small claims, limited civil and unlimited civil, be made first on a pilot project basis, and that all changes be rigorously evaluated. We make this recommendation for two reasons.

First, as noted above, there is likely to be substantial variation among counties in the effects of changes. This suggests a "go slow" approach with careful consideration given to infrastructure needs of individual counties as changes are implemented.

Second, the effects that changes in small claims or limited civil jurisdiction will have on attorney tactics, decisions as to where to file cases, and strategies for settlement are impossible to predict. As a result, it is not possible to predict the effects of jurisdictional changes on the caseloads of the three tracks merely by looking at present caseload data.

# Section 1
# Introduction

The Judicial Council of California and the California Law Revision Commission are conducting a joint study to re-examine the existing three-track system of civil procedure and its underlying policies in light of unification. As part of this study, empirical research was needed to inform possible proposals for revision of the three tracks. In December 2000, the Judicial Council approved funding for this research. Policy Studies Inc. was selected as the contractor to conduct the research on the three civil case tracks. The results of this study are being used to evaluate proposals to expand the small claims procedure and limited civil case procedure to larger cases and to increase the use of ADR in both types of cases. The three-track evaluation was undertaken to determine what effect that expansion might have on:

- the quality of justice;
- access to the courts and efficiency for the parties; and
- efficiency for the courts.

Note that throughout this document, the views expressed herein are those of the authors and not of the Judicial Council of California or the California Law Revision Commission.

## HISTORY OF THE THREE-TRACK SYSTEM

In 1998 California law was changed to permit the unification of superior and municipal courts in each county into one superior court. As of February 2001, the courts in each of California's 58 counties have unified. While court unification created one level of trial court, it retained three separate procedural tracks divided according to the amount in controversy.

- Unlimited civil cases are those in which more than $25,000 is at stake.
- In limited civil cases, $25,000 or less is at issue. Economic Litigation Procedures, a set of simplified procedures with limited discovery, apply to these cases. (Code Civ. Proc. §§ 90–100.)
- The small claims division may be used for disputes in which $5,000 or less is at issue. The procedures are designed for cost-effective resolution of small disputes by parties without attorneys. (Code Civ. Proc. §§ 116.110–116.950.)

A review of the evolution of the three track system reveals that while the goals for civil case processing have been consistent over the years, the mechanisms for meeting goals have changed, and the changes have been accompanied by a variety of unanticipated, as well as anticipated, consequences.

The small claims court was created in 1921 to provide a fair, fast, and inexpensive procedure for parties to resolve disputes that have a relatively small monetary value. At that time the jurisdictional limit was $50. Since then it has been raised periodically, and since 1990 it has been set at $5,000. While small claims disputes may be "small" in terms of the amount of money as issue, they are often of great importance to the persons involved. Small claims court is intended to make it as easy and convenient as possible for individuals to resolve their disputes in the public court system.

Main features of the small claims procedures include the following:

- Parties represent themselves; attorneys generally are not allowed at trial.
- There is no right to a jury trial.
- The plaintiff has no right to appeal an adverse decision, but the defendant may appeal. Appeals consist of a trial de novo in superior court.
- Third party assignees are not allowed; only the parties directly involved in the dispute may participate in small claims court.
- No unlawful detainer actions may be filed.

The Economic Litigation Procedures are an outgrowth of a project that began on January 1, 1978 called the Economical Litigation Pilot Project (ELPP). The ELPP was undertaken in four courts in the state, the Southwest District of the Los Angeles County Superior Court, the Fresno County Superior Court, the Los Angeles Municipal Court, and the Municipal Court of Fresno County. The pilot project was aimed at reducing the cost of litigation and delay by limiting the use of discovery and streamlining the process for: (1) specified types of cases with an amount in controversy of $25,000 or less in the two superior courts; and (2) all specified cases other than small claims cases in the two municipal courts, which at that time had a jurisdictional limit of $15,000. The program thus applied to civil cases up to $15,000 in the two municipal courts and cases from $15,000 to $25,000 in the two superior courts.

An evaluation of the pilot projects in the Los Angeles Municipal Court and the Torrance Division of the Los Angeles Superior Court, conducted in 1980-81 revealed that the

ELPP had mixed results.[1] The project in the superior court resulted in substantially reduced case processing times, while the project in the municipal court had no effect on case processing times. (Some of the difference was due to differences in the process used in the two levels of courts.) Surveys of attorneys revealed that both projects resulted in savings of attorney fees for the parties in hourly fee cases but not in contingent fee cases. On the negative side, surveys of the attorneys in both courts revealed substantial dissatisfaction with the projects due to the inability to discover relevant evidence and, as a result, the inability to evaluate cases adequately for settlement purposes.

After the ELPP's inception in 1978, it underwent two changes, in 1979 and 1980, to remove some of the more burdensome requirements. It was eventually terminated in 1983. A statute adopted in 1982, however, retained most of the limits on discovery and some of the other simplified civil procedures of the ELPP in the economic litigation procedures applied to the municipal courts statewide, except for small claims cases and unlawful detainer cases (Code Civ. Proc. §§ 90–100). Then, effective January 1, 1986, the jurisdictional limit of the municipal courts was raised to $25,000, thus applying simplified procedures to the same caseload that had been included under the original pilot projects, but now solely through the municipal courts. The municipal courts also had a maximum award of $25,000.

Small claims jurisdiction was also increased during this period. At the inception of the ELPP in 1978, the small claims jurisdiction was $1,500. The present small claims jurisdictional limit of $5,000 was adopted in 1990. Litigants with a case under the small claims limit also have the option of filing the case as a limited civil case in order to be represented by an attorney.

To implement trial court unification, in 1998 the Legislature created the new category of limited civil case, to which the simplified procedures used in the old municipal courts are applied. This category comprises cases up to a maximum amount in controversy of $25,000, excluding small claims cases. This in effect retains municipal court civil procedures for the equivalent set of cases in the newly unified superior courts. There is one major difference between the present limited civil procedure and the original ELPP program in the superior courts. Under the present limited civil procedure there is a maximum award of $25,000, thus retaining the award limit of the old municipal courts, whereas there was no award limit for cases in the superior court under the original ELPP.

[1]See Weller, S., Ruhnka, J. and Martin, J., *What Happened When Interrogatories Were Eliminated?* THE JUDGES JOURNAL, Summer, 1982, and Weller, S., Ruhnka, J., and Martin, J., *American Experiments for Reducing Civil Trial Costs and Delays.* 1 CIVIL JUSTICE QUARTERLY 151-174 (1982).

The evaluation in this report was designed to help the California courts address four essential questions in the context of unification:

- Is there a continued need for different case processing tracks?
- What should be the jurisdictional scope and procedural characteristics of the different case processing tracks and the use of ADR within each track?
- What types of court infrastructure are required to support each of the different case processing tracks?
- How can the California courts implement changes to the current system to make an effective transition to an improved system?

The data collection for the evaluation was designed to assess the effects of the different tracks on three broad independent variables:

- the ability of the courts to provide quality justice in all cases;
- effective and efficient access to the courts for parties; and
- the ability of the court system to handle its caseload efficiently.

## REPORT ORGANIZATION AND CONTENTS OVERVIEW

This report is organized around general topics – e.g., access to justice, quality of justice, and infrastructure needs – and each of the three tracks is discussed within each topic. This is done because of the extensive interplay of tracks within each topic. For example, with regard to access to justice, understanding the interactions and overlaps among the tracks is critical to understanding the overall picture of access.

Section 2 describes the data collection and analysis methods and the assessment methodology. Statewide data collection included analysis of statewide automated court data, and a statewide web-based survey of attorneys. In addition, more detailed information collected in Fresno, San Francisco, and San Diego Counties included case descriptive data, and extensive information about court practitioner and user perceptions of the different processing tracks.

Section 3 provides profiles of the three case processing tracks, including descriptions of the caseload, case processing and the uses of ADR, in each of the three target counties. The detailed caseload descriptions include comparison of:

- limited civil caseloads with unlimited civil caseloads;

- limited civil caseload under $10,000 with the limited civil caseload of $10,000-$25,000; and

- limited civil caseload under $10,000 with the small claims caseload.

Section 4 examines issues regarding litigant access to justice. It discusses the potential support from attorneys for raising the limit and the value of small claims and limited civil in:

- reducing the costs of litigation by streamlining the trial process;

- overcoming the inability of litigants to obtain or afford attorney representation.

Section 5 reviews quality of justice issues. With regard to small claims, these issues include the ability of litigants to represent themselves, the quality of commissioners and judges pro tem in hearing small claims cases, and the overall quality of justice. With regard to the limited civil case processing track, issues reviewed include the ability of litigants to obtain the necessary information for settlement purposes and the trial, the ability to anticipate and respond to issues that the other side will raise at trial, and the quality of effort put into cases by attorneys and judges.

Section 6 examines the infrastructure and case management needed to support each processing track, including:

- the infrastructure that would be needed to manage the caseload for each track if the jurisdictional limit were to be raised;

- case management issues under Fast Track procedures; and

- the potential role of different forms of ADR.

Section 7 presents a detailed discussion of our recommendations to:

- retain the small claims limits as they presently are, but implement pilot projects to test the effects of raising the claim limit to $7,500 and $10,000;

- increase the jurisdictional limit for limited civil cases to $50,000; and

- institute a pilot project to test a new procedure for cases with amounts in controversy between $5,000 and $15,000.

# Section 2
# Evaluation Methods

This section presents a brief description of the project methodology for the evaluation. The methodology incorporates suggestions from the Advisory Group and Project Team at two planning meetings and continued discussions with the AOC project management team as the project progressed.

The project included two levels of data collection: (1) a statewide data collection effort; and (2) intensive data collection in three counties, Fresno County, San Diego County and San Francisco County. The three counties for in-depth analysis were selected collaboratively by the AOC Project Team, the project Advisory Group and the PSI project staff. The criteria for site selection included consideration of the following.

- Geography. We wanted representation from different parts of the state, including the north, the south and the central valley.

- Case processing times. We wanted a mix of jurisdictions that were relatively faster and slower in processing unlimited and limited civil cases. For this analysis we used statewide case processing data provided by the AOC. San Diego was relatively fast in processing both limited and unlimited civil cases. Fresno was relatively fast in processing limited civil cases and relatively slow in processing unlimited civil cases. Data on unlimited civil cases was unavailable for San Francisco, but San Francisco was relatively fast in processing limited civil cases.

- Jury verdicts in personal injury cases. Fresno and San Diego are reputed to have relatively conservative jury verdicts in soft tissue personal injury cases, while San Francisco juries are reputed to be more generous in those cases.

- Manageability of the data collection. Los Angeles was initially considered for inclusion in the in-depth site analysis but was eliminated due to the difficulty of collecting data from all of the branch courts. Other courts were also excluded because of anticipated data collection difficulties.

## STATEWIDE DATA COLLECTION

The statewide data collection included two components, an analysis of statewide automated court data and a statewide web-based survey of attorneys.

The statewide data collection included aggregate caseload and case processing time data available through the AOC's statewide automated data system. These data provide information on the percentages of limited civil and unlimited civil cases resolved in 12,

18 and 24 months, and small claims cases resolved in 70 and 90 days in each California county. They also provide statewide trends in filings and dispositions of different limited and unlimited civil filings and dispositions.

The statewide web-based survey of attorneys provides statewide descriptive data on how the attorneys use the limited civil case procedure and the unlimited civil case procedure for different types of cases and attorney support for changes in the limited civil and small claims jurisdictions. The survey was conducted using PSI's proprietary web site www.justicesurvey.com. Attorneys responded to the survey by accessing the web site and answering the questions on-line. The full survey instrument is attached as Appendix A.

The purpose of the web survey was to tap attorney opinions from around the state and not just in the three counties targeted for in-depth study. A total of 160 attorneys responded to the survey. All 58 California counties were represented, and on average the respondents listed practicing in five counties. About 83% of the respondents (n=131) indicated that they represented parties in limited civil cases, and 94% (n=144) indicated that they were familiar with limited civil procedures.

Tables 2-1 through 2-4 describe the respondents to the survey. Table 2-1 shows the number of respondents by type of practice and type of law included in their practice. The respondents covered a variety of types of practice and a wide range of areas of law. Over half of the attorneys indicated having some tort practice, over half indicated having some contract practice, and over a quarter indicated having some collections practice. The three major types of cases that appear in the limited civil caseload are thus well represented in the survey respondents.

Tables 2-2 and 2-3 present the distribution of respondents for categories of counties by region and by population size. The category definitions and county lists are those used by the AOC in its statewide filings and dispositions trends analyses. The numbers show a good distribution of respondents throughout the state. Note that many attorneys practice in more than one region and size category. The numbers in each table thus add up to more than 160.

Table 2-4 shows how the respondents in each region and size category are distributed according to type of practice. The table shows a representation of all types of practice for the respondents in each county category.

| Table 2-1. Practice Type by Type of Law of Attorney Respondents | | | | |
|---|---|---|---|---|
| Type of Law Practices (Multiple responses possible) | Current Practice Type | | | Total |
| | Solo Practitioner | Practitioner in a Law Firm | Other | |
| • Tort – Auto | 45 | 28 | 9 | 82 |
| • Tort – Other personal injury | 44 | 33 | 14 | 91 |
| • Tort – not personal injury | 35 | 29 | 9 | 73 |
| • Collections | 22 | 11 | 8 | 41 |
| • Contracts (other than collections) | 39 | 28 | 13 | 80 |
| • Employment | 16 | 13 | 7 | 36 |
| • Real property (except unlawful detainer) | 23 | 18 | 9 | 50 |
| • Unlawful detainer | 21 | 6 | 13 | 40 |
| • Probate | 16 | 6 | 5 | 27 |
| • Family/juvenile | 14 | 3 | 8 | 25 |
| • Criminal | 9 | 5 | 6 | 20 |
| • Other | 16 | 18 | 15 | 49 |

| Table 2-2. County List and Number of Responses by Region Category | |
|---|---|
| Region | Counties |
| Northern and Mountain (n=20) | Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, Glenn, Humboldt, Inyo, Lake, Lassen, Mariposa, Mendocino, Modoc, Mono, Nevada, Plumas, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Tuolumne, Yuba |
| Sacramento Metro (n=25) | El Dorado, Placer, Sacramento, Yolo |
| S. F. Bay Area (n=53) | Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma |
| Central Valley (n=29) | Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, Tulare |
| Coastal (n=41) | Monterey, San Benito, San Luis Obispo, Santa Barbara, Santa Cruz, Ventura |
| Los Angeles (n=89) | Los Angeles |
| Southern (n=80) | Imperial, Orange, Riverside, San Bernardino, San Diego |

| Table 2-3. County List and Number of Responses by Size Category | |
|---|---|
| Category | Counties |
| Los Angeles (n=89) | Los Angeles |
| Big 2 (n=63) | Orange, San Diego |
| Large 5 (n=99) | Alameda, Riverside, Sacramento, San Bernardino, Santa Clara |
| Medium 6 (n=69) | Contra Costa, Fresno, Kern, San Francisco, San Mateo, Ventura |
| Moderate 13 (n=58) | Butte, Marin, Merced, Monterey, Placer, San Joaquin, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Stanislaus, Tulare |
| Smallest 31 (n=31) | Alpine, Amador, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Imperial, Inyo, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Modoc, Mono, Napa, Nevada, Plumas, San Benito, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Tuolumne, Yolo, Yuba |

| Table 2-4. Practice Type of Attorney Respondents by County Category (Percentages add to 100% across rows) | | | | |
|---|---|---|---|---|
| Characteristics | Current Practice Type | | | Total (n) |
| | Solo Practitioner | Practitioner in a Law Firm | Other | |
| <u>Practice by Region</u> | | | | |
| • Northern and Mountain | 25.0% | 55.0% | 20.0% | 20 |
| • Sacramento Metro | 32.0% | 52.0% | 16.0% | 25 |
| • San Francisco Bay Region | 42.3% | 44.2% | 13.5% | 53 |
| • Central Valley | 27.6% | 55.2% | 17.2% | 29 |
| • Coastal | 43.9% | 41.5% | 14.6% | 41 |
| • Los Angeles | 52.3% | 38.3% | 9.1% | 89 |
| • Southern | 38.8% | 41.3% | 20.0% | 80 |
| <u>Practices by County Size</u> | | | | |
| • Los Angeles | 52.3% | 38.6% | 9.1% | 89 |
| • Big 2 | 39.7% | 46.0% | 14.3% | 63 |
| • Large 3 | 43.9% | 40.8% | 15.3% | 99 |
| • Medium 6 | 45.6% | 44.1% | 10.3% | 69 |
| • Moderate 13 | 35.1% | 49.1% | 15.8% | 58 |
| • Smallest 31 | 35.5% | 45.2% | 19.4% | 31 |

## DATA COLLECTION IN TARGET COUNTIES

The analysis of the target counties is based on three sources of data:

- case descriptive data from automated case records in Fresno and San Francisco;
- case descriptive data from the AOC's ongoing evaluation of the Early Mediation Pilot Program (EMPP) in San Diego County; and
- data on the perceptions of different participants in the three tracks in all three counties, from interviews of judges and court staff, attorneys, and small claims litigants.

The data collection efforts are described below.

### Case Descriptive Data

The automated caseload data from Fresno provide profiles of the caseload in each track with regard to:

- the distribution of case types for the small claims, limited civil, limited civil under $10,000, and unlimited civil caseloads, and
- the distribution of methods of disposition for each case type for the limited civil caseload.

The automated caseload data from San Francisco provide information about the distribution of case types for the limited civil and unlimited civil caseloads.

Caseload data from the evaluation of the Early Mediation Pilot Program in Fresno and San Diego provide information about the distribution of limited and unlimited civil cases eligible for the mediation project that reached the at-issue stage.

### Data on Perceptions of the Actors in the System

In each county, project staff spent one week interviewing judges, commissioners and court administrative staff and one week interviewing attorneys. Between 15-20 judges and court staff and 15-20 attorneys were interviewed in each site. In addition, between 10-15 small claims litigants were interviewed in both Fresno and San Diego.

Judge and court staff interviews. Project staff conducted personal face-to-face interviews of judges and court administrative staff in all three target counties. The interviews investigated:

- the quality of attorney performance in limited civil cases vs. unlimited civil cases;
- the quality of trials in all three tracks;
- the need for continuances;
- any procedural difficulties, including case management;
- the ability of the parties to understand the process and the outcome;
- the overall quality of justice;
- recommendations for changes;
- recommendations for the infrastructure needed to support each track; and
- recommendations for implementing changes.

The interview protocol is attached as Appendix B.

Interviews of attorneys. Project staff interviewed attorneys with different types of practices in each county, to assess attorney perceptions of the quality of the three tracks, their strategies in filing cases as limited civil cases as opposed to unlimited civil cases, their uses of discovery, and their recommendations for changes to the three-track system. In all three sites the initial list of attorneys to be interviewed was developed by local judges and court staff. Additional attorneys were then added to the interview list based on recommendations from attorneys previously interviewed. The attorney interview protocol is attached as Appendix C.

Interviews of litigants. Project staff interviewed small claims litigants in Fresno and San Diego. The Fresno litigants were interviewed immediately after their small claims hearing, which means that they did not yet know the decision in their cases. The San Diego litigants were interviewed immediately after they spoke with the small claims advisor, which means that they had not yet had their trial. We also interviewed some small claims frequent filers in both counties. The interviews investigated the following:

- litigant understanding of the process;
- difficulties that litigants faced in learning what to do;

- whether disputants talked to an attorney and what the attorney told them;
- perceptions of fairness of the process; and
- overall satisfaction with the process.

The litigant interview protocol is attached as Appendix D.

## LIMITATIONS OF THE DATA AND THE NEED FOR FURTHER RESEARCH

This study is just the beginning of an ongoing process to consider possible modification of the three-track civil process in California. Thus, three limitations of the data provided here need to be acknowledged.

First, the in-depth studies were conducted in only three sites in the state. There was substantial variation in procedures, caseloads and resources in those three sites and, according to attorney interviews, further differences in neighboring counties. This suggests that other counties in the state may differ substantially from the three studied. As the state reviews the issues discussed in this report, it may find it useful to conduct further site studies of other counties, particularly rural counties.

Second, the automated caseload data in the three courts that we studied was very limited. For example, it was not possible to obtain data on the amount in controversy or the uses of discovery. Fresno did include the filing fee in their automated data files, which allowed us to separate limited civil cases over and under $10,000. If changes in small claims or limited civil jurisdiction are instituted as pilot projects, as recommended in this report, the data collection should be built into the projects.

Third, some of the effects of changes that might be made to small claims or limited civil jurisdiction will be driven by strategy decisions of lawyers or parties. These decisions cannot be predicted merely from present data on the mix of cases at different levels of amount in controversy. For example, with regard to smaller personal injury cases, lawyers will still have to exercise some discretion as to whether to file a case as a limited civil or unlimited civil case. The decision will depend on a variety of factors, such as how sure they are as to the maximum value of the case, what they perceive as their needs for discovery, and whether they are willing to live with the award cap. With regard to small claims cases, the decision to file larger cases in small claims court may be driven by the willingness of a party to cut back on the amount of a claim to fit within small claims jurisdiction or the ability to find an attorney to take the case.

# Section 3
# Profiles of the Three Tracks

A central part of the study was to provide profiles of the caseloads and case processing of the different tracks. The discussion that follows is divided into two parts, small claims, and limited and unlimited civil.

## SMALL CLAIMS

This discussion presents

- a profile of the caseload, including legal jurisdictional provisions;
- a discussion of case processing, including trial management; and
- the uses of ADR to help resolve cases.

### The Caseload

The maximum claim and award in small claims court is $5,000. There is a filing limit of two cases per claimant per calendar year for claims in excess of $2,500 for all claimants other than government agencies. The two-case limit applies statewide, although this is difficult for any one county to track. There is no limit on the total number of cases that a party may file, but the filing fee increases after a party has filed 12 cases in the previous twelve-month period. Third party claimants are prohibited from suing, but creditors can sue to collect their own accounts. A party with a claim greater than $5,000 may still choose to sue in small claims court and waive the excess damages over $5,000.

Any case may be filed as a civil case in the superior court in lieu of filing in small claims court. Plaintiffs with small collection cases who want to be represented by an attorney must file on the limited civil docket. Interviews of judges, court staff and collection attorneys revealed that some companies prefer to file small collection cases as limited civil cases rather than small claims cases, as they find it more cost-effective to have an attorney handle those cases than to send a staff person to sit in small claims court. In addition, some corporate collection plaintiffs, such as credit card companies, do not have a local office with an employee who can go to small claims court.

#### *Fresno Caseload*

The number of small claims filings in Fresno has been declining since the early 1990s, from 9,238 in 1991 to 5,072 in 2001. The caseload consists of small personal injury, small contract, debt collection, auto and other repair, and a variety of interpersonal

disputes. Some more complicated claims, such as medical malpractice, do appear but, according to the commissioners and judges pro tem that we interviewed, are virtually impossible for a plaintiff to prove. There are some frequent filers in small claims court, including the City of Fresno Risk Management Department, large landlords suing for lost rent, finance companies and car dealers. The frequent filers make up about 5% of the small claims caseload. Typically they just drop off a stack of complaints at the clerk's desk for service by certified mail. A hand case count for a typical month showed that about 25% of the caseload had claims above $2,500 and 75% of the caseload had claims of $2,500 or less. Of the cases above $2,500, 59% involved contracts and 41% involved torts. For cases with a claim of exactly $5,000, however, only 39% were for contracts, and 61% were for torts. The judges pro tem we interviewed noted that most cases for $5,000 involve actual damages in excess of $5,000 and a plaintiff who is willing to waive the excess to sue in small claims court.

### *San Diego Caseload*

In the year 2001 a total of 11,926 small claims cases were filed in San Diego. Filings have been flat to slightly decreasing over the past twelve quarters. There are some frequent filers in small claims court, including the City of San Diego, San Diego County, a check cashing service and several department stores. Other potential frequent filers, such as the local hospitals, prefer to assign their collection claims to collection agencies.

### *San Francisco Caseload*

In the year 2001 a total of 5,848 small claims cases were filed in San Francisco. Filings were up in January, 2002. There are some frequent filers in small claims court in San Francisco, including the City and the County of San Francisco, the county Department of Human Services, the tax collection office, some of the local hospitals, and a few individuals.

## Case Processing

Parties may not be represented by an attorney at the small claims trial, although attorneys may appear in small claims court as witnesses or on their own behalf as parties. The small claims trial has simplified procedures, including permitting hearsay evidence and documentary evidence in lieu of live testimony. According to data from the AOC, the time from filing to trial is short – on a statewide basis 74% of small claims cases are disposed of in less than 70 days and 84% are disposed of in less than 90 days. Many small claims cases are handled by judges pro tempore (or pro tem), attorneys who try cases on order of the court and stipulation of the parties. The stipulation may be implied if the parties are notified but do not object to the case being tried by a temporary judge (Cal. Rules of Court, rule 1727).

Still, the judge must apply the law in small claims cases, and the plaintiff must present competent evidence to prove the defendant's liability and damages. Proof must be presented to the court even to obtain a default judgment.

The defendant in a small claims trial has the right to an appeal, which is held as a trial de novo. It is also possible for the defendant against whom a default judgment has been entered to request that the judgment be vacated. The plaintiff does not have the right to appeal but does have the right to request that a default judgment for the defendant be vacated. While appeal and reversal rates provide some measure of the quality of the small claims decisions, it must be kept in mind that the trial de novo will typically have parties who are represented by attorneys and can involve a very different presentation of the evidence than occurred in the small claims trial.

## Processing Small Claims Cases, Fresno

The Small Claims Trial Calendar. There are two dockets set at filing, (1) a default docket for cases (mostly collection involving frequent filers) that the clerk believes are likely to default, and (2) a docket of likely contested cases. Cases are scheduled for either morning or afternoon. On the day of trial, the parties must decide whether to stipulate to a judge pro tempore or wait for a commissioner or judge. In Fresno the judges pro tem are volunteers who serve without compensation. A substantial majority of the contested cases are heard by judges pro tem, as parties wishing to have their cases heard by a judge will usually have to reschedule the case to another day. Some of the frequent filers, however, including the City of Fresno, will not stipulate to the pro tems. The default calendar is heard by a judge.

Appeals. Appeals from small claims decisions for a trial de novo are heard either by a judge or, with stipulation, by a commissioner. Attorneys are permitted in the trial de novo, but the process is still run like a small claims trial, with simplified procedure. The appeal rate is higher from decisions of judges pro tem than from decisions of commissioners or judges. From March 1, 2001 to March 31, 2002 a total of 138 appeals were filed from small claims cases in the central court in Fresno. Of those, 115, or 83%, were from decisions of pro tems, 23, or 17%, were from decisions of a judge or commissioner. For comparison, data on small claims cases resulting in a contested trial from March 1, 2001 to December 31, 2001 show that 75%, were before a pro tem and 25%, were before a judge. Thus 75% of the trials are heard by pro tems but 83% of the appeals are from decisions of pro tems.

## Processing Small Claims Cases, San Diego

The Small Claims Trial Calendar. Cases are scheduled for either morning or afternoon. On the day of trial, the parties must decide whether to stipulate to a judge pro tem or wait for a commissioner. Some parties, including at least one frequent filer, refuse to

stipulate even in default cases. As the commissioners also hear traffic cases, and the traffic docket has priority, a party who refuses to stipulate to a pro tem may not have the case heard that day.

Appeals. Appeals for a trial de novo are assigned equally among the civil departments of the superior court. Attorneys are permitted in the trial de novo, but the process is still run like a small claims trial, with simplified procedure. The judges and court staff that we interviewed indicated that the appeal rate and reversal rate are higher from decisions of judges pro tem than from decisions of commissioners.

## Processing Small Claims Cases, San Francisco

The Small Claims Trial Calendar. A party wishing to file a small claims case must appear at the filing counter with the filled-out complaint form. The clerk then enters the complaint into the computer, and the computer generates a typed complaint to be served on the defendant. Service may be by certified mail or in person by the sheriff or a private process server. About half of the cases use certified mail.

The small claims computer files can be sorted by plaintiff to show how many cases each plaintiff has filed over the prior twelve months and for what claim amounts. The courtroom clerk checks the cases for each day to assure that filing limits have not been exceeded in the San Francisco court, but the computer files do not provide information on claims filed in other counties.

Small claims court is held five days per week plus Monday evenings. Trials are scheduled in blocks of 20-25 at different times during the day. Small claims cases are heard by a commissioner, with only occasional use of judges pro tem as a backup when the commissioner is away. The judges pro tem are not volunteers, as in Fresno and San Diego, but are paid $256 per day by the court for the days that they work. Presently the court has about ten judges pro tem on its call list. Later in this report we recommend that other jurisdictions that use pro tems consider this approach

The commissioner tries to hear the shorter cases first in each session, starting with defaults. At the calendar call the clerk will determine which cases are likely to take the most time for trial, based on the number of witnesses, the need for interpreters, etc. In contested cases the commissioner never rules from the bench. She may hold a default until later in the session to give the missing party a chance to show up. If it is the plaintiff that fails to show, she will issue a judgment for the defendant, not just a dismissal without prejudice. The commissioner also hears motions to vacate default judgments. She vacates frequently, as long as good cause is shown and the request to vacate is timely filed. Both defendants and plaintiffs may move to vacate default judgments.

Appeals. A de novo trial from a small claims judgment may be heard, with stipulation, by a volunteer judge pro tem. This sets up the unusual situation of a volunteer pro tem judge hearing an appeal from the decision of a full time commissioner.

### Alternative Dispute Resolution

In Fresno, mediation is also available on trial day, conducted by volunteer mediators through the better business bureau. If the mediation fails, the parties still can have their trial on that day. The mediations are held in the cafeteria, so there is no privacy and no separate room for caucusing. According to statistics from the better business bureau, the settlement rate for small claims mediations is about 60%.

In San Diego, volunteer mediators are provided by the San Diego Mediation Center in the Central, East, and South County Divisions of the court and by Lifeline in the North County Division of the court. On occasion, if the mediation is not successful, the trial may have to be rescheduled for another day.

In San Francisco there is a small claims mediation program attached to the court, run by a professor from University of San Francisco Law School and using law students who are enrolled in the mediation classes at USF and Hastings Law Schools. A professor from one of the classes attends every small claims session and announces the availability of the mediators. The students then approach parties in the hallway and offer to mediate. The small claims court clerk reported to us that the mediations result in settlement about 50% of the time. If the mediation does not result in a settlement, the parties will have their trial the same day.

## Limited and Unlimited Civil Cases

### The Caseload

With some exclusions, civil cases involving amounts in controversy of $25,000 or less are classified as limited civil, with limits on discovery and the availability of a variety of special procedures aimed at streamlining pre-trial preparation and the trial. Unlawful detainer cases in which the amount at issue is $25,000 or less are classified as limited civil cases, but different procedures apply to them. For personal injury cases, where the amount in controversy is not indicated in the complaint, the plaintiff must request that the case be classified as limited civil. The claim limit also serves as a cap on the possible award in limited civil cases. The filing fee for a limited civil case is about half of the filing fee for an unlimited civil case. For cases of $5,000 and under that are eligible for filing as a small claims case, there is concurrent jurisdiction with the small claims court.

Cases may be reclassified from limited civil to unlimited civil or vice versa by filing an amended complaint or a cross complaint, stipulation, motion by either party, or the

court's own motion. Judges and attorneys in all three sites indicated to us that, although rarely requested, a motion for reclassification from limited civil to unlimited civil is typically granted as a matter of course, with payment of the higher filing fee. In addition, it is possible to request additional discovery, on motion to the court, and the lawyers can agree among themselves to permit additional discovery.

Tables 3-1 through 3-7 provide different aspects of caseload data in Fresno, San Diego and San Francisco. Unlawful detainer cases and unemployment compensation reimbursement cases filed by the State of California are excluded from the data. Limited civil caseload figures are based on March, 2001-December, 2001 for Fresno, March, 2000-December, 2000 for San Diego, and the year 2001 for San Francisco. Unlimited civil caseload figures are based on the year 2001 for Fresno, March, 2000-December, 2000 for San Diego, and the year 2001 excluding data for May and August (for which data was not available) for San Francisco.

Tables 3-1 through 3-3 present the profiles of the limited and unlimited civil caseloads in Fresno, San Diego and San Francisco. The category "Tort PI, PD, WD" stands for tort personal injury, property damage or wrongful death. As the San Francisco unlimited civil caseload includes one unique case type, an average of 71 asbestos cases per month, Table 3-4 presents a comparison of the distribution of case types in the San Francisco unlimited civil caseload including and excluding asbestos cases.

The profiles illustrate the variation in caseload that can exist from one county to another. Fresno and San Diego have similar limited civil caseloads, but San Francisco's limited civil caseload has a higher percentage of tort cases and a lower percentage of collection cases. The unlimited civil caseloads vary even more among the three sites. All three sites, however, have a smaller percentage of collection cases and a higher percentage of tort cases in unlimited civil than in limited civil.

Table 3-5 presents limited civil caseload data for Fresno for cases over and under $10,000. (The filing fee in limited civil is different for cases over and under $10,000. In Fresno the filing fee is included in the electronic case file, making it possible to obtain comparative caseload data on limited civil cases over and under $10,000.) The Fresno limited civil caseload data show that the distribution of limited civil cases under $10,000 differs dramatically from the distribution of cases from $10,000-$25,000. The caseload between $10,000 and $25,000 has a much larger percentage of torts cases and a much smaller percentage of collection cases. It should be kept in mind that, according to our interviews of attorneys, the collection caseload under $10,000 includes some cases under $5,000 that the plaintiff elected to bring as a limited civil case in order to be represented by an attorney.

Table 3-5 compares the distribution in Fresno of the unlimited civil caseload with the limited civil caseload for cases between $10,000 and $25,000 (excluding unlawful detainer

cases and unemployment reimbursement cases). Of particular note is the consistency of the percentage of Tort PI/PD/WD cases in the two caseloads. The table is based on data from Fresno's new computer system for unlimited civil filings for the year 2001 and limited civil filings from March, 2001 through December, 2001.

The Fresno court's new computer system has disposition data for limited civil cases starting in July 2001. Table 3-7 presents disposition data for limited civil cases in Fresno from July 2001-December 2001. The distribution of methods of disposition differs substantially for the three major types of limited civil cases. The data show that tort cases have the highest settlement rate, contract cases have the highest trial rate and collection cases have the highest clerical default rate.

The "Other" category in the unlimited civil caseload includes a wide variety of types of cases, including probate hearings, medical and other professional malpractice, other contract, quiet title, business tort, wrongful termination, product liability, civil rights violations, and miscellaneous complaints and petitions. The "Other" category in the limited civil caseload includes: enforcement of judgment, other petitions, other complaints, insurance subrogation, other torts (business torts, professional negligence, fraud, product liability), other contract, quiet title, wrongful eviction, and contractual arbitration.

Table 3-1. Fresno Limited and Unlimited Civil Caseload Comparison
(Average monthly caseload)

| Case Type | Limited Civil | Percentage | Unlimited Civil | Percentage |
|---|---|---|---|---|
| Collection | 237.4 | 57.2% | 13.8 | 3.8% |
| Breach of Contract | 66.5 | 16.0% | 31.5 | 8.7% |
| Tort PI, PD, WD | 76.2 | 18.4% | 158.6 | 43.7% |
| Other | 35.0 | 8.4% | 159.3 | 43.9% |
| Total | 415.1 | 100.0% | 363.2 | 100.1% |

Table 3-2. San Diego Limited and Unlimited Civil Caseload Comparison
(Average monthly caseload)

| Case Type | Limited Civil | Percentage | Unlimited Civil | Percentage |
|---|---|---|---|---|
| Collection | 757.7 | 58.7% | 51.8 | 5.4% |
| Breach of Contract | 189.3 | 14.7% | 187.4 | 19.4% |
| Tort PI, PD, WD | 243.0 | 18.8% | 430.8 | 44.6% |
| Other | 100.1 | 7.8% | 296.1 | 30.6% |
| Total | 1290.1 | 100.0% | 966.1 | 100.0% |

| Table 3-3. San Francisco Limited and Unlimited Civil Caseload Comparison (Average monthly caseload) | | | | |
|---|---|---|---|---|
| Case Type | Limited Civil | Percentage | Unlimited Civil | Percentage |
| Collection | 216.8 | 46.9% | 37.6 | 6.0% |
| Breach of Contract | 59.9 | 13.0% | 91.6 | 14.6% |
| Tort PI, PD, WD | 146.8 | 31.7% | 226.1 | 36.0% |
| Other | 38.9 | 8.4% | 272.3 | 43.4% |
| Total | 462.4 | 100.0% | 627.6 | 100.0% |

| Table 3-4. San Francisco Unlimited Civil Caseload Including and Excluding Asbestos Cases | | | | |
|---|---|---|---|---|
| Case Type | Including Asbestos Cases | Percentage | Excluding Asbestos Cases | Percentage |
| Collection | 37.6 | 6.0% | 37.6 | 6.8% |
| Breach of Contract | 91.6 | 14.6% | 91.6 | 16.5% |
| Tort PI, PD, WD | 226.1 | 36.0% | 226.1 | 40.6% |
| Other | 272.3 | 43.4% | 201.3 | 36.2% |
| Total | 672.6 | 100.0% | 556.6 | 100.1% |

| Table 3-5. Fresno Limited Civil Caseload Under and Over $10,000 | | | | | |
|---|---|---|---|---|---|
| Case Type | Total | <$10,000 | $10,000-$25,000 | Percentage <$10,000 | Percentage $10,000-$25,000 |
| Collection | 2374 | 2167 | 207 | 75.2% | 16.3% |
| Breach of Contract | 653 | 451 | 202 | 15.6% | 15.9% |
| Tort PI, PD, WD | 762 | 187 | 575 | 6.5% | 45.3% |
| Other | 362 | 77 | 285 | 2.7% | 22.5% |
| Total | 4151 | 2882 | 1269 | 100.0% | 100.0% |

| Table 3-6. Fresno Civil Caseload Comparison (Average monthly caseload) | | | | |
|---|---|---|---|---|
| Case Type | Unlimited Civil | $10,000-$25,000 | Percentage Unlimited Civil | Percentage $10,000-$25,000 |
| Collection | 13.8 | 20.7 | 3.8% | 16.3% |
| Breach of Contract | 31.5 | 20.2 | 8.7% | 15.9% |
| Tort PI, PD, WD | 158.6 | 57.5 | 43.7% | 45.3% |
| Other | 159.3 | 28.5 | 43.9% | 22.5% |
| Total | 363.2 | 126.9 | 100.1% | 100.0% |

| Table 3-7. Fresno Limited Civil Dispositions | | | | | |
|---|---|---|---|---|---|
| Case Type | Dismissed by the Parties (Settled) | Dismissed by Court Order (Failure to Prosecute) | Trial Judgment | Clerical Default (No Answer) | Total (Percent) |
| Collection | 339<br>31.0% | 11<br>1.0% | 30<br>2.7% | 715<br>65.3% | 1095<br>100% |
| Breach of Contract | 242<br>53.4% | 11<br>2.4% | 31<br>6.8% | 169<br>37.3% | 453<br>99.9% |
| Tort PI, PD, WD | 273<br>90.7% | 23<br>7.6% | 5<br>1.7% | 0<br>0% | 301<br>100% |

## Case Processing

Most general civil cases in California fall under Fast Track rules. Under the rules, general civil cases include all cases except small claims, unlawful detainer, probate, guardianship, conservatorship, family, juvenile proceedings, and some specialized petitions. Some larger cases such as complex cases are also excluded.

The Fast Track program has three categories: Plan 1, cases to be resolved in one year; Plan 2, cases to be resolved in 18 months; and Plan 3, cases to be resolved in two years. The goal of the Fast Track program is to resolve 90% of the civil cases in less than one year. There is substantial variation in the ways that different courts in California have implemented and are applying the Fast Track rules. This variation will be reduced under the new and amended case management rules that became effective July 1, 2002.

Although evaluating the Fast Track system was not part of this study, we received numerous comments about it both from the attorneys we interviewed and from the attorneys who responded to the web survey. Many were critical of the ways in which Fast Track has been implemented in the past, especially for collection cases and other

small cases. The following comments from the web survey were typical of the comments we received.

- "What is economical about five status conferences between filing the case and trial? Sometimes, if you are a late calendar call number, it can take all morning to complete the status conference, not including travel time and parking costs." [Solo practitioner; broad civil practice but not PI]

- "Cut down on the number of appearances. They are a waste of time and money. Allow cases to be set for trial with a memo to set or an at-issue memo instead of a trial setting conference. Make ADR voluntary and set it up so it can be done without court appearances for status conferences and case management conferences. Again, these are a big waste of time and money." [Solo practitioner; collections practice]

- "Allow six months before there's an initial status conference so the case can be disposed of by default judgment (as most collection cases are). But, at the same time, provide for a method to set the case for trial without having to appear at a CMC conference." [Solo practitioner; collections practice]

There are differences in the processing of appeals from limited civil cases and unlimited civil cases. Appeals from limited civil cases are to the appellate division of the superior court. Appeals from unlimited civil cases are to the court of appeals. The paperwork required for appeals to the appellate division is substantially less than that required to get a case to the court of appeals.

### Processing Limited and Unlimited Civil Cases, Fresno

Case Management. The Superior Court in Fresno works on a master calendar for both limited and unlimited civil cases. For the master calendar, all case events up to the trial are handled by a law and motion judge. The law and motion judge also hears prove-ups of defaults that require additional evidence outside of the file and thus are not eligible for clerical default.

There are three case management tools used for civil cases:

- a Case Management Conference (CMC) before a court clerk or by phone 120 days from filing to set a trial readiness date and a date for the mandatory settlement conference;

- a mandatory settlement conference held two weeks prior to trial, held by a commissioner or a settlement judge; and

- a trial readiness hearing on the Friday before the week of trial, handled by the presiding judge.

All unlimited civil cases are scheduled for the mandatory settlement conference. Limited civil cases involving personal injury claims and bench trials estimated at four hours or less are not scheduled for a mandatory settlement conference.

The judges do not believe that it is possible to meet the goal of Fast Track of disposing of 90% of cases in one year or less in Fresno, due to lack of judicial resources. Fresno has received only one new judgeship since 1985, although the city has been one of the fastest growing in the United States since that time. As civil cases must yield to criminal cases, it is particularly difficult to get longer civil trials scheduled. Shorter civil trials can sometimes be squeezed in when a criminal trial finishes.

The judges and attorneys whom we interviewed in Fresno believe that the primary cause of longer trials in civil cases, and thus a primary candidate for case management, is the use of multiple expert witnesses testifying to the same issue. Expert witnesses greatly lengthen a trial, and therefore its cost. Attorneys consistently told us that the judges, however, do not exercise much control over the use of expert testimony, as the appellate courts in California have overturned judges who attempted to limit expert testimony.

Entries to the computer system and methods for retaining judgments in Fresno are handled differently for limited civil and unlimited civil cases. Because unlimited civil judgments must be permanently retained, they are microfilmed.

The Trial Docket. There are three dockets:

- a clerical default docket for cases in which no answer is filed and proof of the claim is on the face of the documents in the file,

- a special docket for unlawful detainer cases, and

- a master calendar for all other cases.

Prove-ups of court default cases are handled by the law and motion judge. Trial judges do not see cases until the day of trial. Criminal cases receive priority for trial, and trial judges for civil cases are assigned as available after all criminal cases for the trial week are assigned. If a case is ready but there is no courtroom available on the day of trial, the case is assigned an NCA (no courtroom available) status and will receive priority at the next trial setting, usually a month later. A second delay results in an NCA2 status, with higher priority, and so on. The court has an easier time squeezing in limited civil cases, which typically have shorter trial times. It is particularly difficult to get a case scheduled with extensive expert testimony. The inability to get a courtroom in those cases is

expensive for the parties, as the parties will have scheduled their experts and typically have to pay them for the day anyway.

As discussed above, the judges and attorneys whom we interviewed noted that it is very difficult in Fresno to get an unlimited civil case to trial at the first trial setting, or even the second one, due to the lack of courtrooms and the required priority for criminal cases. One advantage of being in limited civil jurisdiction is that the trials are shorter, so that the court can usually find a space for them sometime during the week of the first trial setting.

## Processing Limited and Unlimited Civil Cases, San Diego

Case Management. In San Diego County, limited and unlimited civil cases are randomly distributed among individual calendar departments, with the exception of master calendar cases such as civil harassment TROs, limited unlawful detainer cases, limited account stated (collection) cases, and petitions for name change. This may vary within the four geographical divisions depending on available resources. Case management of civil cases is left up to the individual judges on their individual calendars. There appears to be a strong commitment to Fast Track and to disposing of cases in one year, to the point where attorneys complain that it is difficult to get even short continuances that would take a case beyond the year's time.

The more complicated cases may be subject to a case management order by a judge, specifying case events, time limits and a discovery schedule. In essence the case management order creates its own case-specific civil procedure. In the future, these procedures will apply to all civil cases. For construction defect cases, which are often filed as class actions and involve multiple experts in different areas of expertise, two departments (judges) hear all the cases. Special Masters, paid for by the parties, are typically used in these cases.

The Trial Docket. There are three dockets:

- a special docket for account stated cases;
- a special docket for unlawful detainer cases; and
- an individual calendar for all other cases.

A clerical default procedure is available for cases in which no answer is filed and proof of the claim is on the face of the documents in the file. Default cases requiring additional proof are handled by the judges on their individual calendars.

## Processing Limited and Unlimited Civil Cases, San Francisco

Case Management. The superior court in San Francisco works on a master calendar for both limited and unlimited civil cases. Prior to assignment to a trial judge, case management is handled by a delay commissioner, two law and motion judges, and two discovery commissioners. The one exception to the master calendar is for cases falling under the court's complex litigation pilot project. Cases that fall under that project are singly assigned to a judge and then managed as under an individual calendar system. The designation of cases to that program may be made by the parties or the presiding judge.

To enforce the Fast Track rules, the court makes extensive use of Orders to Show Cause (OSC) that require the party to appear at a hearing unless the relevant event is completed within the required time limit. The court uses OSCs to monitor compliance with time limits for service of process and for completion of required ADR. In addition, the court will issue OSCs for failure to take a default when the defendant fails to file an answer, for failure to get a case at issue, and for any failure to appear at a required hearing.

Under Fast Track rules, limited civil cases are set for a status conference 120 days after filing, and unlimited civil cases are set for a status conference 150 days after filing. The date of the conference is set at filing, and the notice of the conference accompanies the complaint that is served on the defendant. The delay commissioner handles the status conferences. Twenty days prior to the conference, both parties must file a statement indicating whether the case is at issue and what form of ADR will be attempted and by what date. The commissioner then sets a date for completion of ADR and a trial date. The parties need not appear for the status conference unless they wish to contest the ADR order or the trial date. Appearance at the status conference, if necessary, may be by telephone. Fewer than 15% of the cases set for status conference actually need to appear. Some of these procedures will be modified under the new case management rules.

One problem that has arisen with regard to the status conference involves pro per litigants. The notice of the date of the status conference is sent with the complaint. Some pro per litigants think that this date is the first time that they have to appear and do not understand that they must file an answer as well, despite the fact that the notice of the status conference states that an answer must still be filed.

The Trial Docket. The presiding judge handles the assignment of trials to judges. For each trial week, the presiding judge gets the files on the Friday before trial week. Parties must appear for trial assignments on the Monday of the trial week. Criminal cases get first priority, then eviction cases. On the civil side, the presiding judge assigns the more complicated cases to the more experienced judges. Limited civil cases have low priority. All cases scheduled for trial in San Francisco, however, will get a courtroom during the week that they are scheduled.

There are two types of default cases. Clerical defaults are handled by the default section of the clerk's office. Cases for which clerical defaults may be issued include unlawful detainer cases for possession only, common counts (such as department store charge accounts and jewelry installment plans), and some contract actions where the contract is written and specific. If the plaintiff in a contract action wants attorney fees and agrees to an attorney fee schedule, the clerk can proceed with a clerical default. Otherwise, that type of case must be handled as a court default. Court default cases, requiring a prove-up before a judge, are distributed among the judges. All personal injury cases, cases requesting attorney's fees, unlawful detainer cases involving money judgments, and defaults of a settlement agreement are handled as court default cases.

The San Francisco Superior Court seems to be a magnet court for the filing of asbestos cases. The court does not have a separate docket for these cases but spreads them out among the judges. Asbestos cases are not classified as "complex" under the complex litigation pilot program and are Plan 1 cases under Fast Track. One strategy that the court has adopted to handle these cases is to group them by defendant. These cases typically settle.

Wrongful eviction cases are another type of case with special issues in San Francisco. Many apartments in San Francisco are under rent control. As the rent in those apartments is typically well below market, a successful wrongful eviction case can result in substantial damages if the tenant is forced to rent another apartment at full market rental. The damages to the tenant would be the difference in rent that the tenant had to pay for the duration of the lease in the rent-controlled apartment. On the other side, a losing plaintiff may be required to pay the landlord's attorney fees.

## ALTERNATIVE DISPUTE RESOLUTION

Judicial arbitration is a mandatory, non-binding arbitration program established by statute (Code Civ Proc. §1141.10 et seq.). Under this program, superior courts with 18 or more judges must submit to arbitration most civil cases, other than limited civil cases, in which the amount in controversy is $50,000 or less. Other superior courts may adopt a similar program by local court rule. In a court in which a judicial arbitration program has been established, parties may stipulate to submit any civil case to the program, regardless of the amount in controversy. In many courts, San Diego, for example, the court pays the arbitrator. Appeal from an arbitration award is for a trial de novo. If the appealing party does not improve on the award, that party must pay the costs of the other side. Under state statute, all motor vehicle personal injury cases with just one plaintiff and one defendant are sent to arbitration. In the three sites studied, "short cause" cases, with estimated trials of less than one day, were not sent to arbitration.

Mediation is also available and is the favored form of ADR in civil cases among the attorneys that we interviewed in all three sites. In two of the counties studied in depth,

Fresno and San Diego, a pilot early mediation program is in effect. In Fresno County, cases are selected randomly for mediation shortly after filing, but the parties can request to be excused from mediation at the case management conference. In San Diego County, cases are selected at random to attend an early case management conference at which the judge determines whether to order the case to mediation. Both courts pay for up to four hours of mediation.

Any party in a civil case can make an offer to compromise under Section 998 of the Code of Civil Procedure. This device can be a powerful tool to force settlement, because if the non-offering party proceeds to trial but does not beat the offer, that party may be liable for the other side's expert witness costs at trial.

## Alternative Dispute Resolution Options in Fresno

There are two court ADR programs: (1) a pilot early mediation program, with cases selected randomly but allowed to seek to be excused at the CMC; and (2) a judicial arbitration program for cases up to $50,000, with an appeal in the form of trial de novo. The court pays the cost of both the mediators and the arbitrators.

In addition, there is a mandatory settlement conference, handled by a settlement judge or sometimes a judge pro tem, two weeks before the scheduled trial date. All unlimited civil cases are scheduled for the settlement conference. Limited civil cases, except for personal injury cases and cases with length of trial estimated at less than four hours, are also scheduled for a mandatory settlement conference. Limited personal injury cases are excluded, unless requested by the parties, because the judges have found that these cases are unlikely to settle.

## Alternative Dispute Resolution Options in San Diego

There are two court ADR programs: (1) a pilot early mediation program, where cases are randomly assigned to participating departments at the time of filing and assessed for mediation amenability at the CMC; and (2) a judicial arbitration program for cases up to $50,000, with an appeal trial de novo. The court pays the cost of both the mediators and the arbitrators.

Some attorneys noted that some insurance companies in San Diego have been reluctant to settle soft tissue injury cases when the insurer utilizes computer assessment technology. The court, through the pilot mediation program, is looking further into the settlement issues in those types of cases.

## Alternative Dispute Resolution Options in San Francisco

Under local rules, all long cause civil cases (defined as cases with trials estimated to take longer than five hours), with a few exceptions, must attempt some form of ADR. The parties may choose the form of ADR, including mediation, judicial arbitration and binding arbitration. In the absence of agreement by the parties, the delay commissioner will order cases to ADR. Certain cases with an amount in controversy of $50,000 or less will be sent to judicial arbitration, including all limited civil cases with a jury demand. Limited civil cases with no jury demand are classified as short cause cases and are not sent to arbitration. The rest of the cases are sent to an early settlement program run by the Bar Association using volunteer attorneys.

In addition to the ADR requirement, all cases except for short causes and de novo appeals from arbitration are set for a settlement conference two weeks prior to the trial date. The judges conduct the settlement conferences. The date of the settlement conference is set at the status conference. Further, on trial day volunteer attorneys are available to conduct settlement conferences for cases awaiting trial. The presiding judge may send a case to such a conference.

# Section 4
# Issues of Access to Justice

Most of the arguments for increasing the jurisdictional limits of small claims and limited civil are based on increasing access to justice for litigants with disputes that are not economical to pursue through the regular civil process. This section evaluates the effects of small claims and limited civil procedures and jurisdictional limits on access to justice.

## SMALL CLAIMS

Small claims court is a critical part of the court system. Litigants with smaller cases cannot justify the expense of an attorney, but many pro per litigants face substantial and often insurmountable difficulties in trying to represent themselves in regular civil court. The availability of a simplified procedure that is both quick and fair is essential. Further, what constitutes a "smaller case" rises over time with inflation and with the cost of attorney representation.

### Raising the Claim Limit

Our interviews of judges and attorneys indicted that there is a clear need for a more streamlined process for cases at least up to $10,000-$15,000, as it is typically not economical for an attorney to take cases of that size. A substantial majority of the attorney respondents to the web survey supported raising the limits. About 74% of the respondents support some increase in the limit, with $10,000 the most favored limit by a substantial margin. The level of support for increasing the small claims limit is fairly consistent across the state regardless of region or size of county. Tables 4-1 through 4-3 present the results.

Table 4-1. Increasing the Small Claims Jurisdictional Limit

| | Number | Percent |
|---|---|---|
| Do You Favor Increasing the Jurisdictional Limit in Small Claims Cases? | | |
| Yes | 69 | 47% |
| Yes, depending on amount | 39 | 27% |
| No | 39 | 27% |
| If Yes, What Limit Do You Favor? | | |
| $7,500 | 18 | 16% |
| $10,000 | 74 | 66% |
| $25,000 | 8 | 7% |
| Other | 12 | 11% |

| Table 4-2. Increasing the Small Claims Jurisdictional Limit By Geographic Location | | | | | | | |
|---|---|---|---|---|---|---|---|
| | North Mtn | Sacra-mento | SF Bay | Central Valley | Coast | LA | South |
| Do You Favor Increasing the Jurisdictional Limit in Small Claims Cases? | | | | | | | |
| Yes | 35% | 41% | 45% | 37% | 49% | 47% | 41% |
| Yes, Depends | 41% | 36% | 30% | 33% | 18% | 26% | 31% |
| No | 24% | 23% | 26% | 30% | 33% | 27% | 28% |
| Total | 100% (n=17) | 100% (n=22) | 101% (n=47) | 100% (n=27) | 100% (n=39) | 100% (n=85) | 100% (n=75) |
| If Yes, What Limit Do You Favor? | | | | | | | |
| $7,500 | 8% | 18% | 11% | 26% | 7% | 14% | 14% |
| $10,000 | 69% | 71% | 72% | 53% | 67% | 69% | 63% |
| $25,000 | 15% | 12% | 11% | 16% | 15% | 6% | 9% |
| Other | 8% | 0% | 6% | 5% | 11% | 11% | 14% |
| Total | 100% (n=13) | 101% (n=17) | 100% (n=36) | 100% (n=19) | 100% (n=27) | 100% (n=64) | 100% (n=57) |

| Table 4-3. Increasing the Small Claims Jurisdictional Limit By Size of County | | | | | | |
|---|---|---|---|---|---|---|
| | LA | Big 2 | Large 5 | Medium 6 | Moderate 13 | Smallest 31 |
| Do You Favor Increasing the Jurisdictional Limit in Small Claims Cases? | | | | | | |
| Yes | 47% | 40% | 42% | 45% | 45% | 36% |
| Yes, Depends | 26% | 30% | 31% | 26% | 30% | 39% |
| No | 27% | 30% | 27% | 29% | 25% | 25% |
| Total | 100% (n=85) | 100% (n=60) | 100% (n=90) | 100% (n=65) | 100% (n=53) | 100% (n=28) |
| If Yes, What Limit Do You Favor? | | | | | | |
| $7,500 | 14% | 14% | 15% | 15% | 18% | 14% |
| $10,000 | 69% | 66% | 65% | 69% | 70% | 62% |
| $25,000 | 6% | 7% | 12% | 10% | 8% | 14% |
| Other | 11% | 13% | 9% | 6% | 5% | 10% |
| Total | 100% (n=64) | 100% (n=44) | 101% (n=68) | 100% (n=48) | 101% (n=40) | 100% (n=21) |

One reason offered by judges and attorneys for raising the small claims limit is to keep up with inflation. The following are some of the attorney comments on the web survey.

- "The car you could repair with a SC judgment of $4800.00 last year will cost $5,500.00 next year: the evidence required to prove the case is the same, the

expertise/knowledge remain essentially the same, but if the SC limits don't rise with income, goods and services, more people will be forced to discount their losses, give up on their cases altogether, or try (mostly without success) to find an attorney to take the case." [Legal aid attorney; collections and UD practice]

- "With the jurisdictional limit not reflecting the economic increase in what constitutes a business "small claim" I believe the small claims court system can and should handle business disputes up to $10,000." [Attorney in a law firm; tort non-PI, contract, and real property practice]

### Inability to Get Attorney Representation

Those attorneys who support raising the small claims limit do so primarily because of the inability of parties to find attorneys who will handle cases between $5,000 and $10,000 for a fee that does not eat up all the potential award. It is often even difficult to find attorneys who will take those cases at all. The open-ended responses to the attorney questionnaire provide insight into the problems of access to justice for litigants with cases between $5,000 and $10,000 and the reasons why raising the small claims limit could improve access to justice for those litigants.

- "When I have a client/potential client who has the ability to state his/her case, and the potential recovery is under $10,000, I encourage them to go to small claims court and not pay an attorney fee. It is faster than going through the litigation system, and the clients can net more than if an attorney represents them. I have seen a lot of cases where the plaintiff nets $0 after fees and costs are paid." [Solo practitioner; tort practice]

- "$10,000 seems to be about the break point for representing a client. Under that amount, it is difficult to handle a case on a contingency fee basis, and survive economically as a lawyer. If it is an hourly case, it is difficult to obtain a favorable result and yet keep billings low enough that the client obtains a meaningful recovery." [Attorney in a law firm; tort and contract practice]

- "Many poor people do not have effective access to attorneys, and allowing them to bring meaningful cases in small claims court would increase their access to the courts and justice." [Attorney in a law firm; PI and criminal practice]

- "Small property damage cases with relatively minor personal injuries are cost prohibitive for practitioners and clients alike. If the client can't get the insurance company to settle, they need a lawyer for a limited civil case. But, with low value, the deposition (even if only one) and written discovery take too much time compared to the contingency fee. From the client's perspective, they have to pay a fee to a lawyer when they could handle it in a small claims venue. They don't

need depositions, they can just show up and tell the story about the accident to the judge." [Attorney in a law firm; PI practice]

Cost is not the only potential barrier to obtaining attorney representation. A number of the small claims litigants whom we interviewed had gone to attorneys and been told to take their cases to small claims court. The cases involved ranged from $1,200 to $5,000. Most of the people we interviewed who had been refused assistance by attorneys had cases involving disputes between individuals or between an individual and a small business, such as return of security deposits, defective repair of auto or home, unpaid roommate phone bills, a defective car purchased from a private party, and personal loans. The judges and attorneys whom we interviewed indicated to us that attorneys will shy away from these types of interpersonal disputes even if they are over the small claims jurisdictional limit, as they tend to have messy facts and hostile litigants.

### *Availability of Advice to Litigants*

A critical issue of access for small claims litigants is the availability of advice on how to pursue or defend a claim. The judges and pro tems whom we interviewed in all three sites indicated that some small claims litigants have special difficulties in representing themselves. Language issues can provide a particularly difficult barrier to overcome. In addition, there are some litigants who simply are not able to express themselves well enough, especially in front of a judge, to present their cases coherently. While all small claims courts in California are supposed to provide advisors for litigants, the source and quality of the advice varies. Further, plaintiffs need to come to court to file a case and thus are more likely to use the small claims advisors than are defendants. The three courts in this study handled the small claims advisors in the following ways.

In Fresno there is a small claims advisory center, using law students. The office is not in the courthouse, but rather in another downtown building. Neither of the two law students whom we interviewed had ever seen a small claims trial, although observing trials has now been added to the required training of the advisors. One advisor told us that the law students were not permitted to give legal advice, but merely advice on the process.

In San Diego there is a small claims advisor's office attached to the court, run by a full time attorney, with non-attorney volunteers working under him. The volunteers are able to help people with process questions. The supervising attorney is available to assist the volunteers with legal questions.

In San Francisco there is a full-time small claims advisor in the court and an advisor available full time by telephone, paid by the court. Both are attorneys. The advisor located in the court sees about 30 litigants per day. Her office is behind the clerk's counter, and there is a sign-up sheet in the clerk's area. She can advise on filing, on what

will be needed at trial, and on collection of judgments. Under California law the small claims advisors are immune from suit for malpractice.

Small claims litigants also get advice in other ways. The small claims litigants whom we interviewed gave us some insight as to the difficulties they faced in finding out what to do and the advice that they were able to obtain. For example:

- One plaintiff did not seek any legal advice because he was told that lawyers were not allowed in small claims court and thought that this meant that he wasn't supposed to talk to a lawyer. He got some advice from the court clerk on how to fill out the forms.

- A plaintiff who was suing a business had difficulty in figuring out how to file a case against a corporation. He received help from the court clerk.

- One defendant had his attorney in court with him as a witness. He reported that he would have been very nervous without his attorney by his side. He had gotten advice from his attorney on procedure, the law, and how to present his case.

- One plaintiff had a friend who was married to an attorney. The friend helped find the defendant for personal service after the defendant refused mail service.

- A Filipino immigrant trying to sue didn't know any attorneys. He received help from the small claims advisor on how to file his case.

- One plaintiff in an auto accident case with minor car damage and soft tissue injury claimed $2,000 in chiropractic bills. The defendant had his insurance adjuster with him at trial. The adjuster brought pictures of the car damage.

## LIMITED AND UNLIMITED CIVIL CASES

Even with the availability of small claims court, there are cases that have too great a value for the average person to risk trying without attorney representation but still too small a value to justify the expense of the full civil process. The process in limited civil jurisdiction provides a forum for those cases that makes attorney representation more economically feasible, primarily by limiting the use of discovery and providing for more disclosure in lieu of discovery.

### *Raising the Limited Civil Claim Limit*

Both plaintiff's attorneys and defendant's attorneys who handle smaller civil cases were supportive of raising the limited civil jurisdictional limit at least to $50,000. Both groups

believe that the limited civil process has value in reducing the potential for discovery abuse. Further, defendant's attorneys, particularly in insurance defense, were willing to sacrifice full discovery in trade for the limit on the award. On the other hand, personal injury plaintiff attorneys expressed a concern that raising the limit would make the $25,000-$50,000 cases harder to settle, as the award cap would reduce the incentive on the part of defendants and insurance companies to settle.

About 64% of the attorneys responding to the web survey support some increase in the limited civil jurisdictional limit, with the majority favoring a limit of $50,000. The level of support for increasing the limited civil limits is fairly consistent across the state regardless of region or size of county. Tables 4-4 through 4-6 present the results.

| Table 4-4. Support for Raising the Limited Civil Jurisdictional Limit | | |
|---|---|---|
| | Number | Percent |
| Do You Favor Raising the Jurisdictional Limit for Limited Civil Cases? | | |
| Yes | 60 | 40% |
| Yes, depending on amount | 36 | 24% |
| No | 55 | 36% |
| If Yes, What Limit Do You Favor? | | |
| $50,000 | 63 | 66% |
| $75,000 | 16 | 17% |
| $100,000 | 14 | 15% |
| Other | 3 | 3% |

| Table 4-5. Support for Raising the Limited Civil Jurisdictional Limit By Geographic Location | | | | | | | |
|---|---|---|---|---|---|---|---|
| | North Mtn | Sacra-mento | SF Bay | Central Valley | Coast | LA | South |
| Do You Favor Raising the Jurisdictional Limit for Limited Civil Cases? | | | | | | | |
| Yes | 26% | 29% | 38% | 33% | 37% | 41% | 35% |
| Yes, Depends | 21% | 29% | 28% | 26% | 32% | 23% | 28% |
| No | 53% | 42% | 34% | 41% | 32% | 36% | 37% |
| Total | 100% (n=19) | 100% (n=24) | 100% (n=50) | 100% (n=27) | 101% (n=41) | 100% (n=86) | 100% (n=75) |
| If Yes, What Limit Do You Favor? | | | | | | | |
| $50,000 | 67% | 86% | 67% | 75% | 54% | 62% | 57% |
| $75,000 | 11% | 7% | 12% | 13% | 25% | 20% | 21% |
| $100,000 | 11% | 7% | 18% | 13% | 21% | 16% | 17% |
| Other | 11% | 0% | 3% | 0% | 0% | 2% | 4% |
| Total | 100% (n=9) | 100% (n=14) | 100% (n=33) | 101% (n=16) | 100% (n=28) | 100% (n=55) | 99% (n=47) |

| Table 4-6. Support for Raising the Limited Civil Jurisdictional Limit By Size of County | | | | | | |
|---|---|---|---|---|---|---|
| | LA | Big 2 | Large 5 | Medium 6 | Moderate 13 | Smallest 31 |
| Do You Favor Raising the Jurisdictional Limit for Limited Civil Cases? | | | | | | |
| Yes | 41% | 35% | 39% | 38% | 38% | 28% |
| Yes, Depends | 23% | 28% | 27% | 30% | 22% | 24% |
| No | 36% | 37% | 34% | 32% | 40% | 48% |
| Total | 100% (n=86) | 100% (n=60) | 100% (n=94) | 100% (n=66) | 100% (n=55) | 100% (n=29) |
| If Yes, What Limit Do You Favor? | | | | | | |
| $50,000 | 62% | 61% | 63% | 64% | 76% | 60% |
| $75,000 | 20% | 21% | 15% | 18% | 9% | 13% |
| $100,000 | 16% | 13% | 21% | 16% | 15% | 13% |
| Other | 2% | 5% | 2% | 2% | 0% | 13% |
| Total | 100% (n=55) | 100% (n=38) | 101% (n=62) | 100% (n=45) | 100% (n=33) | 99% (n=15) |

Solo practitioners expressed a somewhat higher support for increasing limited civil limits and support for increasing the limits to a higher amount than did attorneys who practice in firms, although the differences did not rise to the level of statistical significance. The somewhat higher support may reflect the fact that solo practitioners are more likely to have cases falling in the limited civil jurisdiction and less likely to have the resources to undertake extensive discovery. Table 4-7 presents the results.

| Table 4-7. Support for Raising the Limited Civil Jurisdictional Limit By Size of Firm | | |
|---|---|---|
| | Solo Practitioners (n=71) | Attorneys in Law Firms (n=54) |
| Do You Favor Increasing Limited Civil Limits? | | |
| Yes | 45% | 37% |
| Yes, depending on amount | 24% | 20% |
| No | 31% | 43% |
| Total | 100% (n=71) | 100% (n=54) |
| If Yes, What Limit Do You Favor? | | |
| $50,000 | 59% | 74% |
| $75,000 | 18% | 16% |
| $100,000 | 20% | 7% |
| Other | 2% | 3% |
| Total | 99% (n=48) | 100% (n=30) |

## Protecting Against Overuse of Discovery

Discovery is the source of much of the cost of a case. An inability to absorb those costs can thus be a major barrier to access. One major area of overuse of discovery is with regard to depositions of expert witnesses. Some of the attorneys and judges interviewed believed that a substantial amount of discovery is undertaken merely to protect the attorney against a possible malpractice claim. One attorney noted that sometimes discovery is handled by a junior attorney working for a senior lead attorney. The junior attorney may be afraid to leave any stone unturned. Another abuse that the plaintiff's personal injury attorneys report is the overuse of all discovery by insurance companies to wear down a plaintiff with a small ($25,000-$50,000) case.

According to the judges and commissioners whom we interviewed, the major issues of contention that arise with regard to discovery include: (1) issues of privilege and harassment in depositions; and (2) issues of incomplete responses to interrogatories. Many disputes arise out of the use of interrogatories and requests for production of documents. The most common abuses of interrogatories include the use of endless interrogatories and the use of contention interrogatories (e.g. Do you contend that the defendant was negligent? on what basis?). A small number of cases seem to generate the majority of the discovery disputes. Sometimes depositions are used as a harassment tool (for example, deposing the president of an insurance company).

Another issue with regard to discovery in California is the statutory provision that parties do not have to disclose their expert witnesses until 50 days before the scheduled trial date. A number of the attorneys whom we interviewed noted that this leaves attorneys scrambling to take depositions of the opposing parties' expert witnesses at the last minute. It also seems to go against the idea that early disclosure is desirable in the interests of speedy justice. We suggest that this statute be reviewed.

Shifting some discovery costs may be a way to control the overuse of discovery, by requiring the party requesting the discovery to pay for it. One attorney respondent to the web survey had this suggestion with regard to copying costs for records subpoenaed under CCP 94(c):

- "I would suggest amending the statute to provide that this be done at the expense of the party seeking the discovery. This places the burden and expense squarely on the party who is conducting the discovery. Discovery in a limited civil case should be limited and costs should be held down – otherwise, there is no good reason to file as a limited civil case. Requiring the party conducting the discovery to think about its cost, and relieving the opposing party from the burden of increased costs necessitated by excess discovery, is in keeping with the intent of economic litigation." [Solo practitioner; PI and contract practice]

## Reducing Costs By Streamlining the Trial Process

Several of the procedures for limited civil cases are aimed at streamlining the trial process and reducing costs to litigants. The attorney respondents to the web survey were asked to indicate whether different aspects of the limited civil procedure aimed at streamlining the process contribute to the fair and timely disposition of limited civil cases. Table 4-8 presents the percentage of respondents indicating positive (contribute or somewhat contribute), neutral (no effect) and negative (somewhat detrimental or detrimental) assessments of different aspects of limited civil procedure. The distribution of responses for the subgroup of attorneys who indicated that they represented clients in limited civil cases is nearly identical to the distribution for all respondents that is presented in Table 4-8.

The opinions on discovery limits showed the greatest differences of opinion. Thus while 54% of the attorneys answered that the limit on depositions contributes to the fair and timely disposition of limited civil cases, 31% thought that the limit on depositions was detrimental; while 61% answered that the other limits on discovery contribute to the fair and timely disposition of limited civil cases, 27% thought that those limits were detrimental.

| Table 4-8. Attorney Assessment of Aspects of Limited Civil Procedure<br>[Remainder of respondents for each aspect indicated "don't know."] | | | |
|---|---|---|---|
| Aspect of Process | % Positive | % No Effect | % Negative |
| Simplified Pleadings (n=147) | 61% | 20% | 11% |
| No Special Demurrers (n=146) | 49% | 15% | 25% |
| Case Questionnaire (n=146) | 45% | 30% | 8% |
| Limit on Number of Depositions (n=147) | 54% | 10% | 31% |
| Limits on Other Discovery (n=147) | 61% | 7% | 27% |
| Statement of Evidence and Witnesses (n=147) | 63% | 16% | 6% |
| Testimony by Affidavit (n=145) | 50% | 17% | 13% |
| Reduced Time to Trial (n=145) | 63% | 15% | 15% |

The attorneys were asked which aspects of limited civil procedure they would favor extending to different types of unlimited civil cases. About 44% indicated that they would favor extending at least some of the limited civil procedures to unlimited civil cases. Table 4-9 indicates the percent of all attorney respondents favoring extending the listed procedures to different types of unlimited civil cases. The most favored part of limited civil procedure to extend to unlimited civil cases was the Statement of Evidence and Witnesses. The least favored was the limit on depositions. The attorneys generally were least favorable to extending limited civil procedures to tort non-PI, employment, and real estate cases.

| Table 4-9. Attorney Support for Extending Limited Civil Procedure to Unlimited Civil Cases<br>(Percentages are based on n=149 valid responses) | | | | | | | |
|---|---|---|---|---|---|---|---|
| Aspect of Process | Tort-Auto | Tort-PI | Tort-Non PI | Collection | Contract | Employment | Real Estate Non-UD |
| Simplified Pleadings | 30% | 26% | 17% | 27% | 25% | 18% | 17% |
| No Special Demurrers | 22% | 21% | 15% | 19% | 15% | 14% | 11% |
| Case Questionnaire | 24% | 23% | 19% | 21% | 20% | 17% | 17% |
| Limit on Number of Depositions | 18% | 16% | 11% | 24% | 13% | 9% | 11% |
| Limits on Other Discovery | 21% | 19% | 14% | 23% | 17% | 12% | 14% |
| Statement of Evidence and Witnesses | 32% | 32% | 26% | 29% | 28% | 26% | 23% |
| Testimony by Affidavit | 26% | 25% | 19% | 24% | 23% | 15% | 15% |

## Ability to Get Attorney Representation

Particular attention needs to be given to cases between $5,000 and $15,000. It is difficult to find an attorney who will take a case with a claim amount under $15,000, as the attorney fees would eat up most of the award. Some people take cases of this size to small claims court, forfeiting any possible amount above $5,000. Appearing pro persona in civil court is difficult, as the rules of civil procedure all apply. Two solutions to this problem might be to: (1) increase the small claims limit to include these cases, which could give rise to an even greater need for quality advice to litigants; or (2) eliminate all discovery in those cases but leave them under the rest of the limited civil rules. It may also be necessary to provide attorneys with some protection from malpractice claims if they elect to remain within the limited civil discovery rules.

One approach to increasing access to attorney representation in smaller cases that has been discussed in California and elsewhere is the "unbundling" of legal services. This entails allowing an attorney to represent a client for a limited purpose, such as appearing at a hearing, without taking on all the responsibilities of full representation. Assessing the viability of this concept is beyond the scope of this study, and we are unable to provide any guidance as to how much protection such a concept provides to attorneys. We do encourage further study of this idea.

# Section 5
# Issues of the Quality of Justice

While the present small claims and limited civil processes provide important options to litigants, the key issue for this study is whether the jurisdictional limits for those cases should be raised. The previous Section discussed how raising the jurisdictional limits could increase access to justice for litigants with small cases. This Section discusses the possible effects on the quality of justice of raising the jurisdictional limits. Most of the arguments against increasing the jurisdictional limits of small claims and limited civil cases are based on concerns that those processes provide fewer protections against erroneous decisions and thus should be reserved for smaller cases, to minimize the impact of a wrong decision against a party. This section evaluates quality of justice issues in the small claims and limited civil processes.

## SMALL CLAIMS

### Ability of Parties to Represent Themselves

Many litigants have difficulties in presenting their cases and proving their claims in small claims court, even at the present jurisdictional limits. Small claims judges, commissioners and pro tems in all three sites indicated that litigants who do not have English as their first language can be particularly disadvantaged. In addition, some litigants are simply not articulate or confident enough to present their cases coherently. Further, plaintiffs still must meet the burden of proving their cases with competent evidence, even in the context of the relaxed small claims trial.

The following open-ended comments to the attorney web survey provide examples of some of the concerns raised by attorneys with regard to self-representation in small claims court, particularly if the jurisdictional limit were to be raised.

- Too many pro per parties do not get a fair trial because there is usually a big difference between each party's knowledge of the legal procedures. [House counsel; PI practice]

- If we allow insurance representatives to advocate against pro-per parties, we cannot allow these professionals to tip the scales of justice more than $5,000 at a time. [Solo practitioner; tort and contract practice]

- Too many people are unable to handle their own representation because they are intimidated by the court system. [Solo practitioner; PI, contract and other civil practice]

- I haven't met too many plaintiffs who can accurately evaluate the value of a personal injury case. [Attorney in a law firm; tort and contract practice]

## Commissioners

The primary judicial officers not requiring a stipulation to be assigned to cases that hear small claims cases in the three counties studied in-depth are commissioners. Commissioners are subordinate judicial officers who are hired by the presiding judge of the superior court and serve at the pleasure of the court. Commissioners may exercise the same powers and duties as judges in small claims actions (Gov. Code §72190).

As full-time judicial officers assigned to hear small claims, commissioners see the full panoply of issues raised in small claims cases, and part of their job is to become knowledgeable in the areas of law likely to arise in small claims court. Further, they have the time and duty to research issues of law that arise with which they are not familiar. They are expected to be knowledgeable about consumer laws, landlord-tenant law, rent control law (if applicable), tort law and contract law. In addition, they have the courtroom experience to run trials with appropriate demeanor. As one attorney who serves as a small claims pro tem noted on the web survey:

- More and more I see cases that are complicated in nature requiring time to sort through. They involve a variety of subject matters including website design and maintenance matters involving complex contracts and issues. [Solo practitioner; collections and contract practice]

## Judges Pro Tem

In both Fresno and San Diego there is some dissatisfaction with the quality of the judges pro tem. There is a perception among judges, court staff and some attorneys that the judges pro tem do not do as good a job as the commissioners, with regard to their knowledge of the law, their understanding of what it takes to prove a case and their trial demeanor. For example, it was reported that many judges pro tem are unfamiliar with consumer protection statutes. In San Francisco, the small claims commissioner must keep up with the intricacies of the rent control law. Further, judges pro tem are generally volunteers who work pro bono, so each individual judge pro tem serves only for a small number of hours. As a result, it was reported that judges pro tem sometimes make questionable decisions.

The Fresno court has recently assigned one of the judges to oversee the judges pro tem and provide mentoring. In addition, the training of judges pro tem has been expanded and quarterly meetings instituted. If those meetings prove beneficial, the court may hold

them more often. We recommend that the court carefully follow and evaluate the success of this program in enhancing the quality of performance of the judges pro tem in small claims court.

The primary difference between volunteer judges pro tem and other court officers who hear small claims is that volunteer judges pro tem serve only infrequently, making it difficult for them to develop familiarity with the legal problems that arise in small claims cases. Further, they do not have lawyers appearing in court to educate them on the law. If California small claims courts continue to use volunteer judges pro tem, much better training is needed. Courts that need judges pro tem might consider San Francisco's approach of using fewer judges pro tem and paying them on the days that they serve so that they can serve on a more regular basis.

## The Problem of Limited Evidence

A final issue with regard to the quality of justice in small claims court is the difficulty of determining the truthfulness of claims on the basis of the minimal evidence that is sometimes presented in a small claims court trial. The judges and judges pro tem interviewed recognized that they sometimes had to reject claims that they really believed were legitimate, due to a lack of evidence. With the need for speculation as to what really happened in some small claims cases, some attorneys were nervous about increasing the stakes and the potential damage that a wrong decision could cause to a litigant. Comments of attorneys on the web survey include the following.

- "$5,000 is enough money to change hands with no ability to determine the truthfulness of claims made without notice. Simple question, if someone wanted $10,000 from you, would you want the ability to defend yourself from last minute lies?" [Attorney in a law firm; PI, collections, contract and real property practice]

- "Too much money is at stake to have the case decided in a small claims atmosphere with its lengthy calendars, hostile litigants, and minimal evidentiary and procedural protections." [Solo practitioner; tort, collections, contract, real property and UD practice]

- "Many litigants are of limited economic means, such that $5,000 is a significant liability. $10,000 (an oft recommended number) is far too much where there is no discovery, no right to counsel, and no subpoena power." [Attorney in a law firm; tort and contract practice]

- "Small claims cases are useful for relatively modest sums, but above the current small claims limit, a judgment might be entered against an unsophisticated defendant for a sum, which could be crippling to the average person. So long as

attorneys are not allowed, the sums should be kept modest." [Attorney in a law firm; PI practice]

## LIMITED AND UNLIMITED CIVIL CASES

### Ability to Obtain Information

Attorneys interviewed indicated that an important issue with regard to the quality of justice in limited civil cases is the ability to obtain the information necessary to analyze a case for settlement and to prove a case at trial. If claim limits are raised, there may be cases falling into the limited civil jurisdiction that require additional discovery above the present statutory limits. It is possible that some more complicated cases would appear in the limited civil caseload for which additional discovery may be needed, including employment discrimination, wrongful termination, product liability, medical malpractice and construction defect. Some examples of problem cases mentioned by attorneys include the following.

- A typical construction defect case requires depositions of the project manager and supervisor, the architect, and an expert engineer familiar with each type of defect. California law requires expert testimony in these cases.

- A plaintiff in a wrongful termination case may need 3 or 4 depositions regardless of the size of the case, including the employee's immediate supervisor and supervisors up the chain of command.

- A slip and fall case typically requires 3-4 depositions, including the store manager, the employee who caused the spill, the employee who wiped it up, and a store manager to testify as to store policy.

- Intentional tort cases, such as false arrest or assault cases involving security guards, need more discovery.

In addition, personal injury cases above $25,000 or $50,000 may be different in character, involving broken bones as well as soft tissue injury and possible permanent injury and resulting partial or full disability. These cases may require more discovery, particularly by defendants, including depositions of police officers, witnesses, the treating physician, an expert witness regarding the permanency of the injury, and an accident reconstruction expert. Raising the jurisdictional limit may thus result in more motions for additional discovery in these types of cases.

Medical malpractice cases pose a special problem for the courts. First, they typically require multiple depositions, including the parties, subsequent treating physicians, and experts. If the limited civil limits were raised to a level that could bring in medical

malpractice cases, it is unlikely that one deposition would ever suffice. Second, several attorneys indicated to us that medical malpractice cases are hard to settle and tend to go to trial at a higher rate than other professional malpractice cases, for a number of reasons, including:

- they have a statutory cap of $250,000 in general damages and thus do not pose to the defendant the risk of a jackpot judgment;

- doctors have to report judgments of $30,000 or more to the state and all settlements to a national reporting system, which can affect their insurance rates;

- the issues are complicated, and negligence is hard to prove; and

- the insurance policies give doctors the right to refuse any settlement.

If the jurisdictional limit for limited civil cases were to be increased while retaining the present discovery limits, some reasonable safety valve may be needed to allow for additional discovery in these more difficult cases. California law already allows the parties to stipulate to more discovery without requiring a judge's order, if both parties can agree. Another safety valve might be to allow a party to move a case more easily to unlimited civil at any time during the period of ongoing discovery when it appears that the value of the case could exceed the limited civil limit.

Another approach suggested by a number of attorneys is to have higher discovery limits for larger limited civil cases. The following comment from the web survey proposes one possible approach.

- "Perhaps have a three-tiered system: 1st level up to $50,000 with the most limitations on discovery; 2nd level up to $100,000 with discovery not as limited (e.g., more depositions allowed); and then unlimited (over $100,000)." [Attorney in a law firm; tort non-auto and contract practice]

## Limiting Surprise at Trial Without Extensive Discovery

An important tool for lawyers in controlling the trial in limited civil cases is the Statement of Evidence and Witnesses. In essence it is used as an elimination tool, similarly to the way interrogatories are typically used, in that failure to disclose a witness or item of evidence by a party precludes that party from presenting the evidence at trial. The attorneys responding to the web survey indicated the importance of the Statement of Evidence and Witnesses in limited civil cases.

- 69% of the attorneys who had handled limited civil cases indicated that they used the Statement of Evidence and Witnesses.

- 46% of those who reported using the Statement of Evidence and Witnesses reported using it in more than 75 percent of their limited civil cases.

- 63% of all attorneys responding to the web survey indicated that the Statement of Evidence and Witnesses contributed to the fair and timely disposition of limited civil cases.

- Only 6 percent of all attorneys responding to the web survey answered that the Statement of Evidence and Witnesses was detrimental to the fair and timely disposition of limited civil cases.

- 44% of the attorneys responding to the survey indicate that they would extend some or all of the limited civil procedures to unlimited civil cases. Of those, 77% supported extending the Statement of Evidence and Witnesses to all unlimited civil cases. The Statement of Evidence and Witnesses was the aspect of limited civil procedure most selected by the attorneys to be extended to unlimited civil cases.

The reported use of the Statement of Evidence and Witnesses is consistent across the state regardless of region or size of county.

## Judicial and Attorney Attitudes Toward Taking Limited Civil Cases Seriously

Some attorneys believe that judges do not take limited civil cases as seriously as unlimited civil cases. Similarly, it is not unusual to hear attorneys refer to limited civil cases as "municipal court cases." Some attorneys thought that raising the limited civil jurisdiction would give limited civil cases more of an aura of importance. As an example, one attorney suggested:

- "Start treating the limited jurisdiction cases as if they are "real" cases, and not orphans conducted by judges having no interest in "low value" cases. Simplified procedures with a higher dollar limit would term the case as a "real" case." [Attorney in a law firm; tort non-PI, collections, contract and real property practice]

# Section 6
# Infrastructure Needs and Case Management

Changing the jurisdictional limit of either small claims or limited civil cases would have important implications for the resources required to handle the caseload. This section discusses those resource implications.

## SMALL CLAIMS

As is discussed below, it is not possible to accurately predict how much the small claims caseload might increase if the jurisdictional limit were to be raised. It can be anticipated, however, that caseloads will increase somewhat and that some larger cases will appear in small claims court. To the extent that overall small claims caseloads or the size of the claims in small claims court increase, some courts are likely to face resource difficulties. Further, the resource needs would vary around the state. Some of the likely resource needs include the following.

- In jurisdictions that make extensive use of pro tems, finding enough well qualified and adequately trained pro tems will likely be a problem.

- In jurisdictions that use commissioners, additional commissioner time will have to be funded, or in the alternative, the jurisdiction may have to begin using pro tems. There may not be enough commissioner time for cases that do not stipulate to a pro tem, and court staff in both San Diego and Fresno expect that the parties in the larger cases will refuse to stipulate to pro tems in larger percentages.

- In jurisdictions that have paid small claims advisors, the resources of the small claims advisor's office will have to be increased.

- The case mix would likely change, including an increase in cases that have difficult problems of proof, such as professional malpractice cases and personal injury cases with more serious injuries. Small claims judges and commissioners report that the single most common failure in small claims court is the inability to prove a case.

- The length of trials may increase, as litigants put more effort into cases with larger amounts at stake.

- With an increase in the claim limit, the appeal rate may also increase. The courts would have to find the judge resources to handle the increased numbers of appeals.

Perhaps the most effective way to determine the effect of raising the small claims jurisdictional limit on the caseload with any certainty is through a pilot project with detailed and rigorous data collection. While it is possible to obtain data on the caseload between $5,000 and $10,000 in some courts, as limited civil cases of $10,000 or less can be identified due to the difference in filing fee, the data do not provide a clear basis for predicting what the small claims caseload would be if the claim limit were raised to $10,000.

The data from Fresno illustrate the difficulty of estimating how the caseload might increase if the small claims limit were to be raised to $10,000. The present small claims caseload in Fresno consists of about 25% tort cases and 75% contract cases, with most of the tort cases being property damage. The average monthly limited civil filings of collection, other contract, and tort personal injury/property damage/wrongful death (PI/PD/WD) cases in the range of $5,000 to $10,000 in Fresno, based on the period from March, 2001 – December, 2001, is presented in table 6-1.

Table 6-1. Fresno Average Monthly Collection, Contract and Tort Filings Under $10,000

| Type | Filings | Percent |
|---|---|---|
| Collection | 217 | 77.2% |
| Breach of Contract | 45 | 16.0% |
| Tort PI, PD, WD | 19 | 6.8% |
| Total | 281 | 100.0% |

This is a substantially different distribution of case types from the present distribution of small claims cases. There are four reasons why it is unlikely, however, that the case mix for limited civil cases between $5,000 and $10,000 would carry over directly into the small claims court.

First, the limited civil collection caseload includes cases under $5,000 for which the plaintiff elected to sue in limited civil in order to be represented by an attorney. It is impossible to determine how many of the collection cases between $5,000 and $10,000 would also still be brought as limited civil cases even if small claims court were an option.

Second, some tort cases with real damages between $5,000 and $10,000 are already being brought as small claims cases. For example, small personal injury cases in which liability is contested are particularly difficult cases for attorneys to handle with limited discovery rules. Some attorneys will tell clients in these cases to sue in small claims court and

provide some advice on how to proceed, rather than risking taking the case as a limited civil case.

Third, some injured parties with damages above the small claims limit can't find attorneys and aren't suing. It is impossible to tell how many potential tort cases not presently a part of the limited civil caseload would be brought as small claims cases if the small claims limit were $10,000.

Fourth, the perception of the judges interviewed is that tort cases between $5,000 and $10,000 are more likely to include personal injury as opposed to just property damage. Some tort litigants with damages between $5,000 and $10,000 might thus still choose to bring their cases as limited civil, due to the added complexity of proving personal injury damages.

## LIMITED AND UNLIMITED CIVIL CASES

### Case Management Issues

The application of Fast Track varies substantially from one court to another and sometimes adds work and cost unnecessarily. In collection cases, for example, attorneys may have to personally attend a case management conference and then go to mandatory ADR for a case that would take less than an hour to try. Some courts require personal appearances for such matters as setting trial dates or hearing dates for motions, matters that should be handled by phone. As attorney respondents to the web survey put it:

- "What is economical about five status conferences between filing the case and trial? Sometimes, if you are a late calendar call number, it can take all morning to complete the status conference, not including travel time and parking costs." [Solo practitioner; broad civil practice other than personal injury and collections]

- "Cut down on the number of appearances. They are a waste of time and money. Allow cases to be set for trial with a memo to set or an at-issue memo instead of a trial setting conference. Make the ADR voluntary and set it up so it can be done without court appearances for status conferences and case management conferences. Again, these are a big waste of time and money." [Solo practitioner; collections practice]

The ability to get a case to trial also varies from one court to another. Some courts cannot guarantee that every case ready for trial will get a judge on the week of the first trial setting. In some of those courts (e.g. Fresno County) it is easier to get a limited civil case to trial, while in others (e.g. Contra Costa County) it is more difficult to get a limited civil case to trial. The differences arise due to different ways in which cases are scheduled and trial judge resources deployed.

Case management practices may become more uniform under the new and amended case management rules that became effective July 1, 2002. Nonetheless, significant variations will likely persist. Issues raised in this report should be considered when the new case management rules are reviewed starting in the fall of 2003.

## Providing Resources for Alternative Dispute Resolution

Mediation. The attorneys interviewed in all three counties were strongly supportive of mediation. Attorneys generally believed that parties would be willing to pay for a mediator. In addition, the use of Special Masters for complex cases, such as construction defect cases, was reported to be successful in helping the parties control discovery and avoid the use of multiple experts to prove a single point. On the other hand, mediation may not be useful in small personal injury cases involving certain insurers. It was suggested that insurers who are using the "Colossus" computer program to determine the value of auto personal injury cases are typically unwilling to move from the settlement number generated by the computer program.

Judicial Arbitration. The attorneys in all three sites were consistently critical of the judicial arbitration program. They viewed judicial arbitration as often being a waste of time, as typically attorneys did not prepare as fully for the arbitration hearing as for a trial and most cases in arbitration resulted in a request for a trial de novo. For example, it was reported that attorneys may choose to not bring live witnesses or experts to an arbitration hearing, to avoid having to make witnesses appear twice, once in arbitration and once at trial.

In the two counties studied with pilot mediation programs, the use of judicial arbitration has declined dramatically. This is in large part due to the push to use mediation in those courts, but also, according to attorneys in both counties, the availability of court-paid mediation. In San Diego the number of cases assigned to arbitration dropped from 1,020 in 1999 to 551 in 2000, while in Fresno the number of cases assigned to arbitration dropped from 849 in 1999 to 512 in 2000 and 470 in 2001.

Moreover, the appeal rate from arbitration awards is high. For the year 2000 in San Diego there were 338 arbitration awards filed and 277 requests for de novo trials from those awards, for an appeal rate of 82%. The appeal rate from arbitration awards in Fresno in 2001 was 83%, almost identical to the appeal rate in San Diego. There is a penalty for appealing an arbitration award and failing to improve at trial, but the attorneys whom we interviewed indicated that the penalty is rarely invoked. It should be noted that an arbitration award that is not appealed is entered as a judgment, so that some of the appeals may be taken to avoid having a judgment entered even if the appealing party settles for a similar amount.

Most of the cases in which an appeal de novo is taken from an arbitration award end up settling. In San Diego, of the 277 de novo requests in the year 2000, 21 resulted in de novo trials, for a trial rate of 7.6%. The settlement rate of about 92% for cases in which requests for de novo trials are filed is similar to the settlement rate for contested cases in the regular trial calendar.

Some attorneys reported that the arbitration hearing helped to clarify issues for settlement purposes and provided an inexpensive way to get a client to put a realistic value on a case. This helped in settlement negotiations even if a de novo request was filed.

In addition, some PI plaintiff's attorneys suggested that arbitration may be a particularly useful form of ADR in cases where liability is an issue. Further, arbitration, if done competently and taken seriously by both sides, may be a preferable forum for small personal injury plaintiffs, as it offers a forum where the rules of evidence can be relaxed. In a limited civil trial, medical records are hearsay without the doctor present. These records can be used in an arbitration hearing without having to bring in the doctor.

## Other Court Resources

Other likely implications for court resources of raising the jurisdictional limit for limited civil cases include:

- a reduction in total filing fees, assuming that the limited civil filing fee would apply to all limited civil cases;
- more motions for judges to hear for additional discovery and for reclassification of cases from limited civil to unlimited civil;
- more pro per litigants appearing in larger limited civil cases; and
- some changes in the uses of the computer files in some courts.

# Section 7
# Recommendations And Conclusion

In this section we return to the four questions that guided the research:

- Is there a continued need for different case processing tracks?
- What should be the jurisdictional scope and procedural characteristics of the different case processing tracks?
- What types of court infrastructure are required to support each of the different case processing tracks?
- How can the California courts implement changes to the current system to make an effective transition to an improved system?

## SMALL CLAIMS

Small claims court provides a needed service to litigants with cases too small to justify an attorney or a full-blown trial, providing both a simplified, inexpensive process and a short time from filing to trial. A similar need exists for cases above the present small claims limit, at least up to $10,000-$15,000. Raising small claims limits, however, may require some additional process reengineering. As a result, we recommend that pilot projects be established to test the efficacy of raising the limit to $7,500 and $10,000, but that as statewide policy the present small claims claim and filing limits be retained until the pilot projects can be evaluated. This recommendation is made in light of the proposed pilot project for cases from $5,000-$15,000 described below, which could serve as a substitute for increasing small claims limits.

Increasing the small claims limit has the potential to result in three negative effects, depending on the extent that overall small claims caseloads or the size of the claims in small claims court increase:

First, some more complex cases, with more difficult issues of proof, would likely come into small claims court. As discussed earlier, many litigants have difficulties in presenting their cases and proving their claims in small claims court at the present limits. Those difficulties would be greatly magnified for larger, more complex cases. This would raise a greater possibility of injustice in those cases.

Second, the additional caseload would strain the resources in some courts, including requiring additional competent pro tem judges and additional commissioners to handle cases that do not stipulate to a pro tem.

Third, the use of volunteer pro tem judges in larger cases, which would likely be necessary in many jurisdictions around the state, causes us concern with regard to the quality of justice. As noted above, the pro tem judges can be unpredictable and sometimes make questionable decisions. As the cases get larger, the impact of a wrong decision on the parties is greater, particularly on the plaintiffs, who have no right to appeal.

If the claim limit were to be raised, some judges and attorneys suggested that it might be desirable, for cases over $5,000, to:

- allow plaintiffs to appeal. A wrong decision can go against a plaintiff as well as a defendant, and the notion that plaintiffs have exercised a choice in selecting to sue in small claims court is really a fiction, given the difficulty in finding a lawyer to take those cases in the regular civil docket.

- allow parties to be represented by attorneys, with cases handled like a small claims appeal (e.g. simplified procedure). With no discovery allowed, an attorney might be willing to take a case of that size for a reasonable fee.

As small claims courts do provide an important service to litigants with smaller cases, and attorney representation for cases under $10,000 is difficult to obtain, we suggest that the state establish pilot projects to test the effects of increasing small claims jurisdiction to $7,500 and $10,000. Those pilot projects should include three features.

First, the courts need to improve the selection, training, monitoring and evaluation of the pro tems, to counteract their lack of time on the bench or knowledge of the types of law needed, and the absence of lawyers in court to educate them. An extensive training program for pro tem judges, including courses on contract, consumer and tort law, and some mentoring, should be a critical part of any pilot program to expand small claims jurisdiction. In fact, we believe that such a program should be instituted in all courts that use volunteer pro tems to hear small claims cases, even at present small claims limits.

Second, there should be attorney small claims advisors located at the court. Litigants need advice on court procedure, on the evidence needed to prove their claim, and on their legal rights. Law student advisors are permitted to give procedural advice but not legal advice. A licensed attorney serving as a small claims advisor may give legal advice and under California law is given immunity from malpractice claims for that advice. Locating the advisors at the court increases their availability to litigants both at filing and on trial day.

Third, the pilot programs should be evaluated by rigorous data collection, including data on case types, claim amount, real amount in controversy for cases at the upper limit, contested issues (e.g. liability vs. damages), case outcomes, types of disposition (default,

settlement, mediation, judge trial, commissioner trial, pro tem trial), appeals and outcomes of the appeals, litigant experiences in using the small claims court (e.g. seeking attorney assistance, getting advice on legal rights and what to say and present at trial, other problems), and litigant satisfaction.

Table 7-1 summarizes the advantages and disadvantages of increasing the small claims jurisdictional limit with regard to issues of access to justice and quality of justice.

Table 7-1. Advantages and Disadvantages of Raising Small Claims Limits

| Issue | Advantages | Disadvantages |
|---|---|---|
| Access to Justice | • Don't have to hire attorney<br>• Low cost<br>• Able to get to trial quickly<br>• Alternative when unable to get attorney representation or succeed pro per in civil court<br>• Provides a forum for liability cases that attorneys will not touch | • Inarticulateness of some parties<br>• Quality of advice not adequate in some courts<br>• Defendants are not as likely as plaintiffs to use advisors<br>• Plaintiffs cannot appeal |
| Quality of Justice | • Commissioners and judges are knowledgeable and competent<br>• Articulate litigants can get a fair decision<br>• Larger cases are likely to go to commissioners<br>• Some court officers hearing small claims are good at helping unrepresented parties articulate their concerns and the facts | • Uneven quality of court officers hearing small claims cases may result in poor decisions<br>• Plaintiff difficulty in understanding how to prove cases and how to present proof coherently at trial<br>• Lack of plaintiff right to appeal |

## LIMITED CIVIL JURISDICTION

The limited civil process has a clear value in providing a forum that allows attorney representation but holds down the costs of litigation by controlling discovery and streamlining the trial process. The primary weakness of the process is that it still does not reduce costs enough for the lower end of the jurisdiction to make attorney representation economical.

We recommend that the limited civil case jurisdictional limit be raised to $50,000. This could be done statewide or as a pilot project in a few counties. There was consistent support among judges and attorneys whom we interviewed for raising the limits at least to $50,000 in limited civil. There are two reasons for our recommendation.

First, the original reason for limiting discovery in cases under $25,000, that the cost of litigation in those cases would make attorney representation uneconomical, both in hourly fee cases and contingent fee cases, now applies equally to cases under $50,000. Without limits on discovery in hourly fee cases, it would be hard today to bring a case to trial for under $50,000, including attorney fees and costs. In contingent fee cases, the time spent by the attorney on the case could easily exceed the fee, making it uneconomical for the attorney to take and risk the possibility of no recovery (and thus no fee).

Second, according to the U.S. Bureau of Labor Statistics CPI Inflation Calculator, a $25,000 case in 1979, when the economical litigation project began, would be a $61,914 case in 2002.

At the same time, the judges and attorneys interviewed generally did not support raising the limited civil limit to an amount higher than $50,000, because:

- While most attorneys agreed that the complexity of a case is not totally driven by the amount in controversy, cases over $50,000 often have more extensive injuries or more complex issues requiring more discovery, particularly of expert witnesses.

- In larger cases, the defendant may be more likely to contest liability, due to the increased monetary exposure of losing.

- The exposure to a potential claim of legal malpractice for cases over $50,000 makes attorneys reluctant to give up their right to full discovery.

If the jurisdictional limit of limited civil cases is raised to $50,000, however, there may be cases falling under limited civil for which the limit of one deposition is too restrictive. We thus also recommend that a pilot project be used to test the effects of raising the number of depositions to two for cases falling between $25,000 and $50,000. In particular, the pilot should test the extent to which the extra deposition affects the cost of litigation and meets the needs of the attorneys for adequate trial preparation.

Table 7-2 summarizes the advantages and disadvantages of increasing the limited civil jurisdictional limit with regard to issues of access to justice and quality of justice.

| Table 7-2. Advantages and Disadvantages of Raising Limited Civil Limits | | |
|---|---|---|
| Issue | Advantages | Disadvantages |
| Access to Justice | • Protects against abuse of discovery<br>• Reduces costs by streamlining the process<br>• Provides an economical forum for a larger number of cases<br>• Limiting attorney work may make attorneys more willing to take cases between $25,000 and $50,000 | • Still requires attorney representation, as succeeding pro per is very difficult<br>• Attorneys often will not file PI cases as limited civil cases due to award cap<br>• Motions for additional discovery can be expected and will add cost |
| Quality of Justice | • Processes exist to substitute for discovery<br>• Raises the perceived importance of limited civil cases | • May not be able to get adequate information for settlement or trial in some cases<br>• A broader range of cases may need additional discovery |

## CASES UNDER $15,000: A PILOT PROCESS

The most difficult cases for obtaining legal representation and access to the courts are the cases with amounts in controversy between $5,000 and $15,000. Under the present California three-track civil system, those cases are too low in value to pursue economically with an attorney. At the same time those cases are still subject to the full panoply of civil procedure, and the amount at risk is great enough that most litigants would be ill advised to pursue them pro per. We have already advised against raising the small claims limits to include those cases, as the potential for injustice is too great, especially to plaintiffs.

We suggest a new process for cases other than unlawful detainer cases with an amount in controversy under $15,000, with an award cap of $15,000, to be tested first as a pilot project in one or more jurisdictions. The new process would provide an alternative to the limited civil process. As the process described below may raise constitutional issues with regard to the right to a jury trial, we suggest that it operate as a voluntary alternative to and in concurrent jurisdiction with the present small claims and limited civil processes.

The pilot project would have the following characteristics:

- simplified notice pleading as in small claims cases;
- an answer required of the defendant;

- provision for a Statement of Evidence and Witnesses, with the same effect as in the present limited civil procedure, on request by either party;
- no additional discovery permitted;
- simplified trial procedure such as is followed in small claims court;
- attorneys permitted at trial;
- all trials before a judge or commissioner;
- no jury trials; and
- appeal on the record.

Our proposal to incorporate the Statement of Evidence and Witnesses into the pilot project is based on both our attorney interviews and the results of the attorney web survey. The one aspect of the present limited civil procedure that is viewed as most valuable by the attorneys in California is the provision for the Statement of Evidence and Witnesses. Once Statements of Evidence and Witnesses are exchanged, each party is precluded from presenting any evidence or witness at trial that is not included in its Statement of Evidence and Witnesses. Attorneys are thus using the Statement of Evidence and Witnesses to limit the evidence that the opposing side can present at trial. The availability of this provision should thus make the attorneys more comfortable with the limits on discovery.

A major concern for attorneys in cases with limited discovery is exposure to claims of malpractice if the attorney fails to uncover an important fact due to the limited discovery. Some attorneys are even reluctant to file certain cases as limited civil cases under present limited civil procedure. As part of the pilot project, then, it may also be desirable to provide immunity from malpractice liability based on the failure to remove the case from the limited process. This would likely require legislative action.

The cases that fall in this range will likely include: (1) cases that are presently filed as limited civil cases in that range; and (2) cases that are presently filed as small claims cases at the upper limit of $5,000, as it is likely that most of those cases have actual damages higher than $5,000. While obtaining data on cases between $10,000 and $15,000 is difficult, as noted earlier it is possible to obtain case data on limited civil cases $10,000 or less, as the filing fee changes for cases over $10,000. Table 7-3 presents the average monthly filings in Fresno County for limited civil cases $10,000 or less other than unlawful detainer cases and a typical month's filings for small claims cases at the maximum amount of $5,000.

| Table 7-3. Average Monthly Civil Caseload For Cases between $5,000 and $10,000 | | | | |
|---|---|---|---|---|
| Case Type | Present Limited Civil Cases | $5,000 Small Claims Cases | Total | Percent |
| Collection | 217 | 0 | 217 | 65.8% |
| Breach of Contract | 45 | 16 | 61 | 18.5% |
| Tort PI, PD, WD | 19 | 25 | 44 | 13.3% |
| Other | 8 | 0 | 8 | 2.4% |
| Total | 289 | 41 | 330 | 100.0% |

It is likely that the caseload for cases under $15,000 will be closer to the percentage breakdown for cases under $10,000 than to the percentage breakdown for cases between $10,000 and $25,000. One of the more problematic types of limited civil cases for discovery needs, personal injury, should thus be only a minor part of the caseload for the proposed pilot project.

## THE DESIRABILITY OF PILOT PROJECTS

We recommend that any substantial changes to the present civil process, including changes in small claims, limited civil and unlimited civil cases, be made first on a pilot project basis, and that all changes be rigorously evaluated. We make this recommendation for two reasons.

First, there is likely to be substantial variation among counties in the effects of changes. This suggests a "go slow" approach with careful consideration given to infrastructure needs of individual counties as changes are implemented.

Second, the effects that changes in small claims or limited civil jurisdiction will have on attorney tactics, decisions as to where to file cases, and strategies for settlement are impossible to predict. As a result, it is not possible to predict the effects of jurisdictional changes on the caseloads of the three tracks merely by looking at present caseload data.

We found a substantial variation in the handling of small claims and limited civil cases among the three counties that we studied in-depth in this project. This suggests that statewide changes in procedures and jurisdictional limits are likely to have very different effects in different counties around the state. Further, the extent and nature of the variation cannot be easily categorized into patterns based on county size or region of the state. For example, we heard of substantial differences in procedures and uses of resources between neighboring counties in the Central Valley and in the San Francisco Bay area.

The variation appeared to be due to several factors that played out in different combinations:

- differences in where the counties are with regard to unification, particularly in merging the judges and the case management practices of the former superior court and municipal court;

- differences in resources available, including judges, commissioners, pro tems, small claims advisors, and alternative dispute resolution options;

- differences in case management practices and approaches to implementing civil Fast Track rules;

- differences in jury awards and their effects on the tactics of attorneys and insurance companies;

- differences in caseload mix; and

- differences in local legal culture.

## CONCLUSION

We believe that California's attempt to reduce the costs of litigation for smaller cases is one that should be continued. At the same time, we recognize that statewide changes in procedures and jurisdictional limits can cause confusion and can have very different effects in different counties around the state, due to differences in resources, case management practices, jury awards and local legal cultures. We thus recommend that any substantial changes to the present civil process be made first on a pilot project basis, and that all changes be rigorously evaluated.

# Appendix A
# California Attorney Questionnaire on Limited Civil Cases

The Judicial Council and the California Law Revision Commission are conducting a joint study on civil procedure in unified courts. Many procedural differences between limited (municipal court) civil cases and unlimited (superior court) civil cases were retained even after trial court unification. This study is examining whether these differences should continue, whether some simplified procedures should be applied to all cases or certain kinds of cases (and if so which ones), and whether the current jurisdictional limits are still appropriate.

1. Bar Number:_____

**QUESTIONS ABOUT YOU AND YOUR PRACTICE**

2. Please describe your current practice type. *(Check one)*
(n=159)
45.9% Solo practitioner
35.2% Practitioner in a law firm
6.3% House counsel
4.4% Government attorney
5.0% Legal Aid attorney
3.1% Other

3. If you practice in a law firm, how many attorneys, including you, work in the firm. *(Check one)*
(n=88)
47.7% 5 attorneys or fewer
36.4% 6-25 attorneys
4.6% 26-40 attorneys
11.4% More than 40 attorneys

4. If you serve as house counsel, what is the institution's type of business? *(Check all that apply)*
(n=17) Multiple response question, thus total percentage may exceed 100%.
5.9% Finance/banking
41.2% Insurance
— Industrial/manufacturing
23.5% Real estate
— Technology
35.3% Other

5. In what counties do you normally practice? *(Check all that apply)*
(n=158) Multiple response question, thus total percentage may exceed 100%.

| | | | | | |
|---|---|---|---|---|---|
| 22.1% | Alameda | 13.3% | Marin | 12.7% | San Mateo |
| 1.9% | Alpine | 1.3% | Mariposa | 7.0% | Santa Barbara |
| 3.1% | Amador | 3.8% | Mendocino | 17.7% | Santa Clara |
| 7.0% | Butte | 5.7% | Merced | 5.1% | Santa Cruz |
| 2.5% | Calaveras | 1.9% | Modoc | 2.5% | Shasta |
| 3.1% | Colusa | 1.3% | Mono | 1.3% | Sierra |
| 19.0% | Contra Costa | 8.9% | Monterey | 3.2% | Siskiyou |

| | | | | | |
|---|---|---|---|---|---|
| 1.9% | Del Norte | 4.4% | Napa | 7.0% | Solano |
| 6.3% | El Dorado | 5.0% | Nevada | 8.9% | Sonoma |
| 8.9% | Fresno | 33.5% | Orange | 8.2% | Stanislaus |
| 2.5% | Glenn | 10.0% | Placer | 5.1% | Sutter |
| 4.4% | Humboldt | 1.9% | Plumas | 1.9% | Tehama |
| 1.9% | Imperial | 27.2% | Riverside | 1.9% | Trinity |
| 1.3% | Inyo | 15.2% | Sacramento | 7.0% | Tulare |
| 9.5% | Kern | 4.4% | San Benito | 1.9% | Toulumne |
| 4.4% | Kings | 25.3% | San Bernardino | 14.6% | Ventura |
| 2.5% | Lake | 19.6% | San Diego | 7.6% | Yolo |
| 1.9% | Lassen | 20.9% | San Francisco | 5.1% | Yuba |
| 56.3% | Los Angeles | 8.2% | San Joaquin | | |
| 3.8% | Madera | 5.0% | San Luis Obispo | | |

6. Please describe the types of law you practice. *(Check all that apply)*
(n=159) Multiple response questions, thus total percentages may exceed 100%.

| | | | |
|---|---|---|---|
| 51.6% | Tort-auto | 31.5% | Real property (except unlawful detainer) |
| 57.9% | Tort – other personal injury | 25.2% | Unlawful detainer |
| 45.9% | Tort – not personal injury | 17.0% | Probate |
| 26.4% | Collections | 13.2% | Family |
| 50.9% | Contracts (other than collections) | 12.6% | Criminal |
| 22.6% | Employment | 2.5% | Juvenile |
| 31.5% | Other (please specify) | | |

7. Do you represent parties in limited civil cases? (n=157)
(n=157)

| | | | |
|---|---|---|---|
| 83.4% | Yes *(Continue with Q8)* | 16.6% | No *(Skip to Q11)* |

8. On average, how many new limited civil cases do you handle per month? *(Check one)* (n=133)
(n=133)

| | |
|---|---|
| 42.1% | Less than one new case per month |
| 34.6% | 1-3 new cases per month |
| 12.0% | 4-6 new cases per month |
| 1.5% | 7-10 new cases per month |
| 8.3% | More than 10 new cases per month |
| 1.5% | Don't know/not sure |

9. Below is a list of limited civil case types. For each case type, please record what proportion of your limited civil practice that case type represents. The percentages should add up to 100%.

_____% Tort – Auto
_____% Tort – other personal injury
_____% Tort – not personal injury
_____% Collections
_____% Contracts (other than collections)
_____% Employment
_____% Real property

_____% Unlawful detainer

_____% Other civil

100% TOTAL

10. What percentage of your limited civil cases are reclassified as unlimited civil? *(Check one)*

(n=125)

81.6% Less than 1 percent
15.2% 1-10 percent
1.6% 11-25 percent
— 26-50 percent
0.8% 51-75 percent
0.8% More than 75 percent

11. Are you familiar with the Economic Litigation Procedures for limited civil cases (Code of Civil Procedure §§90-100)?

(n=153)

94.1% Yes 5.9% No

12. If you file cases on behalf of plaintiffs in which there may be some ability to choose between limited and unlimited jurisdictions, what factors most influence your decision to file a case as a limited civil case rather than as an unlimited civil case? *(Check all that apply)*

(n=145) Multiple response question, thus total percentages may exceed 100%.

30.3% This question does not apply to my situation
38.6% Cost is minimal because of Economic Litigation Procedures
27.6% Judge would be likely to reclassify case as limited civil if it were filed as unlimited civil
31.0% Filing fee is lower
18.6% Trial date is earlier
2.8% Request of client
20.7% Simpler pretrial and trial procedures not related to Economic Litigation Procedures are available (e.g., local rules or local practices)
13.8% Other

13. If you file cases on behalf of plaintiffs in which there may be some ability to choose between limited and unlimited jurisdictions, what factors most influence your decision to file a case as an unlimited civil case rather than as a limited civil case? *(Check all that apply)*

(n=144) Multiple response question, thus total percentages may exceed 100%.

27.8% This question does not apply to my situation
42.4% Absence of limits on discovery
18.8% Not cost effective to file cases under $25,000
30.6% Defendant (and/or its carrier) will not take seriously a limited civil case
54.2% To avoid limit on recovery if later discovered facts support damages in excess of $25,000
17.4% Judges hearing unlimited cases are more knowledgeable and experienced
14.6% Quality of trials is better in unlimited civil
25.7% Judges tend to take unlimited cases more seriously than limited civil cases
8.3% Other

***If you represent parties in limited civil cases other than unlawful detainer, please answer the following questions. Otherwise, skip to Question 38.***

**QUESTIONS ABOUT THE CASE QUESTIONNAIRE**

14. Do you, on behalf of plaintiffs, use the Case Questionnaire (CCP §93) in your limited civil cases? (n=121)

    36.4% Yes *(Continue with Q15)* 63.6% No *(Skip to Q18)*

15. In what percentage of the limited civil cases in which you represent plaintiffs do you use the Case Questionnaire? *(Check one)*

    (n=64)

    40.6% Less than 1 percent
    14.1% 1-10 percent
    7.8% 11-25 percent
    9.4% 26-50 percent
    11.0% 51-75 percent
    17.2% More than 75 percent

16. What are your reasons for using the Case Questionnaire? *(Check all that apply)*

    (n=45) Multiple response question, thus total percentages may exceed 100%.

    66.7% Reduces the amount of discovery needed
    68.9% Provides early information about opposing party's case
    48.9% Provides early information about insurance coverage
    55.6% Provides information for later discovery
    42.2% Helps in assessing the value of the case
    26.7% Other

17. Generally, how useful is the information in the Defendant's Case Questionnaire in preparing your case? *(Check one)*

    (n=47)

| Not at all useful | 2 | 3 | 4 | Very Useful |
|---|---|---|---|---|
| 19.2% | 31.9% | 36.2% | 10.6% | 2.1% |

18. If there are limited civil cases for which you do not use the Case Questionnaire, please indicate your reasons for not using it. *(Check all that apply)* (n=118)

    (n=118) Multiple response question, thus total percentages may exceed 100%.

    23.7% This question does not apply to my situation
    26.3% Responding party rarely answers all questions
    44.9% Answers provided are generally inadequate and vague
    38.1% Responses are not helpful enough to justify the burden of preparing the Plaintiff's Case Questionnaire
    17.0% Other means of discovery are cheaper
    14.4% In many cases, no discovery is necessary
    5.9% My practice does not represent plaintiffs in limited civil cases
    12.7% Other

19. Have you ever been required to respond as defendant's counsel to requests for Case Questionnaires (CCP §93) in limited civil cases?
(n=129)
31.0% Yes *(Continue with Q20)* 69.0% No *(Skip to Q22)*

20. In what percentage of your limited civil cases in which you represent defendants have you been required to complete a Case Questionnaire? *(Check one)*
(n=52)
34.6% Less than 1 percent
30.8% 1-10 percent
19.2% 11-25 percent
5.8% 26-50 percent
1.9% 51-75 percent
7.7% More than 75 percent

21. Generally, how useful is the information in the Plaintiff's Case Questionnaire in preparing your case? *(Check one)*
(n=49)

| Not at all useful | 2 | 3 | 4 | Very useful |
|---|---|---|---|---|
| 28.6% | 32.7% | 28.6% | 6.1% | 4.1% |

**QUESTIONS ABOUT DISCOVERY**

22. Do you believe the restrictions on discovery in limited civil cases hinder your ability to discover relevant evidence sufficient to analyze your case for settlement?
(n=129)
40.3% Yes 59.7% No

23. In what percentage of your limited civil cases would you estimate you file a motion for additional discovery (CCP §95)? *(Check one)*
(n=127)
59.8% Less than 1 percent
26.0% 1-10 percent
6.3% 11-25 percent
7.1% 26-50 percent
— 51-75 percent
0.8% More than 75 percent

24. If it were easier to obtain additional discovery, would you represent parties in limited civil cases more often? *(Check one)*
(n=130)
10.0% Yes, definitely
20.0% Yes, probably
40.0% No
30.0% Don't know/not sure

## QUESTIONS ABOUT THE STATEMENT IDENTIFYING WITNESSES & EVIDENCE

25 Do you use the Request for Statement Identifying Witnesses and Evidence (CCP §96) to obtain information from opposing parties?
(n=128)
68.8% Yes *(Continue with Q26)* 31.2% No *(Skip to Q29)*

26 In what percentage of your limited civil cases do you serve a Request for Statement Identifying Witnesses and Evidence? *(Check one)*
(n=96)
9.4% Less than 1 percent
13.5% 1-10 percent
11.5% 11-25 percent
6.3% 26-50 percent
13.5% 51-75 percent
45.8% More than 75 percent

27. For what reasons do you use the Request for Statement Identifying Witnesses and Evidence? *(Check all that apply)*
(n=92) Multiple response question, thus total percentages may exceed 100%.
90.2% Increases efficiency of trial preparation
43.5% Facilitates settlement
19.6% Other

28. Generally, how useful is the information in the Statement Identifying Witnesses and Evidence in preparing your case? *(Check one)*
(n=92)

| Not at all useful | 2 | 3 | 4 | Very useful |
|---|---|---|---|---|
| 1.1% | 13.0% | 34.8% | 29.4% | 21.7% |

29. If there are limited civil cases for which you do not serve a Request for Statement Identifying Witnesses and Evidence, why do you not use it? *(Check all that apply)*

(n=110) Multiple response question, thus total percentages may exceed 100%.
39.1% This question does not apply to my situation
31.0% The opposing party would be likely to serve a Request and responding to it would be burdensome
23.6% Not cost effective to use
18.2% Other

30. Have you ever been required to respond to a Request for Statement Identifying Witnesses and Evidence (CCP §96) in limited civil cases?
(n=124)
65.3% Yes *(Continue with Q31)* 34.7% No *(Skip to Q32)*

31. In what percentage of your limited civil cases have you been required to respond to a Request for Statement Identifying Witnesses and Evidence? *(Check one)*
(n=91)
22.0% Less than 1 percent
27.5% 1-10 percent
12.1% 11-25 percent
12.1% 26-50 percent
15.4% 51-75 percent
11.0% More than 75 percent

**QUESTIONS ABOUT PREPARED TESTIMONY OF WITNESSES**

32. Do you submit prepared testimony of witnesses in limited civil trials (CCP §98)?
(n=128)
29.7% Yes *(Continue with Q33)* 70.3% No *(Skip to Q35)*

33. In what percentage of cases that go to trial do you submit prepared testimony of witnesses? *(Check one)*
(n=56)
39.3% Less than 1 percent
14.3% 1-10 percent
10.7% 11-25 percent
8.9% 26-50 percent
12.5% 51-75 percent
14.3% More than 75 percent

34. Why do you use prepared testimony of witnesses in limited civil trials? *(Check all that apply)*
(n=44)
81.8% Cost savings
68.2% Convenience
47.7% Control of what is presented at trial
40.9% Speedier trial
15.9% Other

35. Why do you not use prepared testimony of witnesses in some or all of your limited civil trials? *(Check all that apply)*
(n=117)
23.1% This question does not apply to my situation
21.4% Preparation of testimony is not cost-effective
70.1% Live testimony is more persuasive
12.0% Other

**QUESTIONS ABOUT ECONOMIC LITIGATION PROCEDURES**

36. Have you ever filed a motion to withdraw a limited civil case from Economic Litigation Procedures under CCP §91(c)?
(n=129)
9.3% Yes *(Continue with Q37)* 90.7% No *(Skip to Q38)*

37. In what percentage of your limited civil cases would you estimate you file a motion to withdraw from Economic Litigation Procedures? *(Check one)*
(n=22)

68.2% Less than 1 percent
27.3% 1-10 percent
— 11-25 percent
4.6% 26-50 percent
— 51-75 percent
— More than 75 percent

38. For each of the Economic Litigation Procedures and other factors listed below, please indicate whether you believe the factor currently contributes to or is detrimental to the fair and timely disposition of limited civil cases. Use the following scale to record your answers. *(Circle one number for each factor)*

*Scale*
5 = Contributes to the fair and timely disposition of cases
4 = Somewhat contributes to the fair and timely disposition of cases
3 = No effect
2 = Somewhat detrimental to the fair and timely disposition of cases
1 = Detrimental to the fair and timely disposition of cases
0 = Don't Know/No Opinion

| | Contributes | Somewhat contributes | No effect | Somewhat detrimental | Detrimental | Don't know |
|---|---|---|---|---|---|---|
| a. Simplified pleadings (CCP §92) (n=147) | 37.4% | 23.1% | 19.7% | 6.1% | 4.8% | 8.8% |
| b. No Special Demurrers (CCP §92) (n=146) | 38.4% | 11.0% | 15.1% | 12.3% | 12.3% | 11.0% |
| c. Case Questionnaire (CCP §93) (n=146) | 17.8% | 27.4% | 30.1% | 2.7% | 5.5% | 16.4% |
| d. Limit on Number of Depositions (CCP §94) (n=147) | 30.6% | 23.8% | 9.5% | 17.0% | 13.6% | 5.4% |
| e. Limit on other Discovery (CCP §94) (n=147) | 32.0% | 29.3% | 7.5% | 15.7% | 11.6% | 4.1% |
| f. Statement of Evidence and Witnesses (CCP §96) (n=147) | 30.6% | 32.7% | 15.7% | 4.1% | 2.0% | 15.0% |
| g. Testimony by Affidavit (CCP §98) (n=145) | 27.6% | 22.8% | 17.2% | 11.0% | 2.1% | 19.3% |
| h. Reduced Time to Trial (n=144) | 43.1% | 19.4% | 15.3% | 11.1% | 4.2% | 6.9% |

39. Using the scale below, please rate how satisfied your clients are with the Economic Litigation Procedures? *(Check one)*
(n=146)

| Very dissatisfied | Dissatisfied | Neither satisfied nor dissatisfied | Satisfied | Very satisfied | Don't know | Not Applicable |
|---|---|---|---|---|---|---|
| 1.4% | 6.9% | 37.7% | 18.5% | 6.2% | 20.6% | 8.9% |

8.1% Not applicable because I do not represent clients in limited civil cases

40. Would you be in favor of raising the jurisdictional limit for limited civil cases? *(Check one)*
(n=151)

39.7% Yes *(Continue with Q41)*
23.8% Yes, but it depends on the limit amount *(Continue with Q41)*
36.4% No *(Skip to Q42)*

41. To what amount would you favor increasing the jurisdictional limit for limited civil cases? *(Check one)*

(n=96)

65.6% $50,000
16.7% $75,000
14.6% $100,000
3.1% Other

42. Are you in favor of extending Economic Litigation Procedures to unlimited civil cases? (*If you favor extending only some Economic Litigation Procedures, or you favor extending them to only some unlimited civil case types, you should answer "yes"*.)

(n=149)

43.6% Yes *(Continue with Q43)* 56.4% No *(Skip to Q44)*

43. For each case type in the grid below, please check all the Economic Litigation Procedures you would favor extending to unlimited civil cases.

*Directions for completing grid*: For each case type, place an "x" on the row for each Economic Litigation procedure that you would be in favor of extending to unlimited civil cases. For example, if you are in favor of limiting discovery and the number of depositions for collections and contracts cases only, you would place an "x" on the rows "Limit on Depositions" and "Limit on Discovery" under the column headings "Collections" and "Contracts (other than Collections)."

| | **Tort—Auto** *(n=59)* | **Tort—Personal Injury** *(n=61)* | **Tort—Not Personal Injury** *(n=50)* | **Collections** *(n=51)* | **Contracts (other than Collections)** *(n=58)* | **Employment** *(n=44)* | **Real Estate (other than UD)** *(n=42)* |
|---|---|---|---|---|---|---|---|
| **Simplified Pleadings (CCP §92)** | 74.6% | 63.9% | 52.0% | 78.4% | 64.0% | 61.4% | 61.9% |
| **No Special Demurrers (CCP §92)** | 55.9% | 50.8% | 46.0% | 56.9% | 40.0% | 47.7% | 40.5% |
| **Case Questionnaire (CCP §93)** | 61.0% | 57.4% | 56.0% | 62.8% | 51.7% | 59.1% | 61.9% |
| **Limit on Depositions (CCP §94)** | 45.8% | 39.3% | 34.0% | 70.6% | 34.5% | 29.6% | 38.1% |
| **Limit on Discovery (CCP §94)** | 54.2% | 45.9% | 42.0% | 68.6% | 44.8% | 40.9% | 50.0% |
| **Statement of Evidence & Witnesses (CCP §96)** | 81.4% | 78.7% | 78.0% | 84.3% | 72.4% | 86.4% | 83.3% |
| **Testimony by Affidavit (CCP §98)** (n=44) | 66.1% | 60.7% | 58.0% | 70.6% | 58.6% | 52.3% | 54.8% |

44. What suggestions do you have for extending certain kinds of simplified procedures to civil cases over $25,000? (n=59)

65 responses from 59 attorneys (n=65)

35.4% Case management: policies & procedures (e.g., limit on depositions, special interrogatories, demurrers)
16.9% Case management practices (e.g., give ability to move to unlimited during discovery, get rid of fast track appearances, give attorneys more control)
15.4% This should not be done
6.2% Case management: time (e.g., speedier trial dates, set up tracking of cases)
26.2% Other (e.g., raise jurisdictional limit, make litigation economically viable)

45. What comments or recommendations (not included in the above grid) do you have regarding Economic Litigation Procedures or the jurisdictional limit for limited civil cases? (n=42)

47 responses from 42 attorneys (n=47)

23.4% Case management policies and procedures (e.g., abolish limits on discovery, remove required verification of pleadings, all appeals should be to district)
17.0% Increase the jurisdictional limits
12.8% Case management practices (e.g., introduce a fast track system for non-jury matters, group smaller cases together, limit status conferences)
6.4% Increase ADR options
6.4% Cost issues (e.g., eliminate reporter fees, more reasonable fees for subpeoned material)
6.4% Time issues (e.g., allow 6 months before initial status conference)
27.6% Other (e.g., create automated system to track cases, make it easier for pro pers)

46. Would you be in favor of raising the jurisdictional limit for small claims cases? *(Check one)* (n=147)

46.9% Yes *(Continue with Q47)*
26.5% Yes, but it depends on the limit amount *(Continue with Q47)*
26.5% No *(Skip to Q48b)*

47. To what amount would you favor increasing the jurisdictional limit for small claims cases? *(Assume plaintiffs will still have the option of filing the case as a regular limited civil case rather than filing it in small claims court.) (Check one)*
(n=112)

16.1% $7,500
66.1% $10,000
7.1% $25,000
10.7% Other

48. a. Why are you <u>in favor</u> of increasing the jurisdictional limit in small claims cases? (n=98)

<u>108 responses from 98 attorneys (n=108)</u>

61.1% Because there is no need for an attorney in these cases and it is not economical for the client to have an attorney or for the attorney to handle the case
14.8% Case processing issues (e.g., would help unclog the courts; would result in fewer filings)
10.2% Because the jurisdictional limit is too low now
7.4% Because it would increase access to the courts (e.g., increase access to low income litigants, give the general public a forum to be heard, gives plaintiffs added flexibility)
6.5% Other

b. Why are you <u>not in favor</u> of increasing the jurisdictional limit in small claims cases? (n=36)

<u>37 responses from 36 attorneys (n=37)</u>

37.8% Do not want to expand problems that already exist for small claims cases (e.g., no proper representation, no jury trial)
18.9% Because the limit is all right as it is. No need to increase it.
16.2% Case processing (e.g., will clog the courts, case questionnaire is not enforced)
27.0% Other

# Appendix B
# Judge and Court Staff Interview Protocol

The interviews of judges and court staff in the three sites investigated the following questions.

- How are the general civil cases and limited civil cases handled administratively, including special dockets, special judge assignments, administrative defaults, different appeal processes, etc.?

- Who hears small claims cases and small claims appeals?

- How often are results reversed on appeal in small claims cases?

- What use is being made of the procedural shortcuts in the limited civil procedure, especially the Statement of Evidence and Witnesses and Testimony by Affidavit?

- How often do you get motions to move a case from limited civil to general civil or vice versa and why and how often do you grant or deny those motions?

- What is working well and what isn't in each of the three tracks, especially with regard to:

    (1) case management;
    (2) the need for continuances;
    (3) the ability of the parties to reach settlement;
    (4) costs and delay for the litigants; and
    (5) judicial workloads?

- What is your assessment of:

    (1) the quality of attorney performance in limited vs. general civil cases; and
    (2) the quality of trials and quality of justice in all three tracks?

- Are there any types of cases that you think are not appropriate for limited civil treatment regardless of the size of the claim?

- What are your recommendations for changes and how to implement them, including:

    (1) changes in the discovery limits in limited civil or general civil;
    (2) changes in the claim limits for small claims or limited civil;
    (3) exclusion of certain case types from limited civil?

- How adequate is the present infrastructure and what additional infrastructure will be needed to support the tracks and your recommended changes, including:

    (1) Planning, policy-formation and direction;
    (2) Budgeting;
    (3) Staffing and training;
    (4) Management, communications and coordination;
    (5) Performance monitoring;
    (6) Technology (including data and MIS); and
    (7) Facilities and equipment.

# Appendix C
# Attorney Interview Protocol

The interviews of attorneys in the three sites investigated the following questions.

- What is working well and what isn't in the limited civil process and the general civil process?
- How do your clients view the limited civil process as compared to the general civil process?
- What types of cases do you bring to each type of process?
- What cases will you not take?
- How do the discovery limits help or hinder you, with regard to:

    1. The cases you will take?
    2. Your ability to gather information for settlement purposes?
    3. Your overall ability to represent your clients using limited civil procedures?

- To what extent does the limited civil procedure help you reduce fees and costs for your clients?
- What use do you make of the Case Questionnaire and the Statement of Evidence and Witnesses?
- What is the effect of the award cap in the limited civil procedure on your decision to file as case as a limited civil case?
- What is the value of judicial arbitration? mediation?
- What recommendations do you have for changes in the jurisdictional limits of small claims and limited civil? Other changes?
- What infrastructure will be needed to support each track and your recommended changes?
- What recommendations do you have for implementing changes?

# Appendix D
# Litigant Interview Protocol

The interviews of litigants in small claims cases investigated the following questions:

- What parts of the process were you able to understand or not able to understand?
- What difficulties did you face in prosecuting or defending your case?
- Did you talk to an attorney? What assistance did the attorney give you?
- What parts of the process did you think were fair or unfair?
- Did you think the outcome in your case was fair? Why or why not?
- Overall, how satisfied were you with the way your case was handled, and why?