STUDY OF ALTERNATIVE METHODS OF RESOLVING DISPUTES

Bulletin No. 91-17

LEGISLATIVE COMMISSION
OF THE
LEGISLATIVE COUNSEL BUREAU
STATE OF NEVADA

APRIL 1991

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LEGISLATIVE COMMISSION
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STATE OF NEVADA

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TABLE OF CONTENTS

Senate Concurrent Resolution No. 46—Senators Wagner, Smith, Joerg, Horn, Neal and Titus

FILE NUMBER.....

SENATE CONCURRENT RESOLUTION—Directing the Legislative Commission to conduct an interim study of alternative methods of resolving disputes.

WHEREAS, The calendar of the courts of this state have become burdened with a voluminous caseload; and

WHEREAS, Many persons desire alternatives to litigation in the traditional setting of a courtroom, such as mediation, arbitration and expedited court procedures, because of the rising costs of litigation and the growing delay in the time before litigation is resolved; and

WHEREAS, Mitigation serves as an alternative to litigation which may result in the saving of time and money in the resolution of various problems encountered by the residents of this state and would thereby serve the interests of justice; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Legislative Commission is hereby directed to conduct an interim study of alternative methods of resolving disputes; and be it further

RESOLVED, That the Legislative Commission report the results of the study and any recommended legislation to the 66th session of the Nevada Legislature.

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REPORT OF THE LEGISLATIVE COMMISSION

TO THE MEMBERS OF THE 66TH SESSION OF THE NEVADA LEGISLATURE:

This report is submitted in compliance with Senate Concurrent Resolution No. 46 of the 65th session of the Nevada Legislature which directed the Legislative Commission to study alternative methods of resolving disputes. The Legislative Commission appointed a committee to conduct the study and recommend appropriate action. The members of the committee were:

Senator Sue Wagner, Chairman
Assemblyman Matthew Q. Callister, Vice Chairman
Senator Charles W. Joerg
Senator Joseph M. Neal
Assemblyman Joseph M. McGinness
Assemblyman Gary A. Sheerin

The committee's staff from the Legislative Counsel Bureau were Kimberly A. Morgan, Principal Deputy Legislative Counsel, Donald O. Williams, Principal Research Analyst, Chris Bailey, Deputy Legislative Counsel, Debbie Crosson, Secretary and Kay Graves, Secretary.

This report contains the findings and recommendations of the committee. Considerable information was gathered during this study. That information and the minutes of the committee's meetings are on file with the Research Library of the Legislative Counsel Bureau and are available for review.

This report is transmitted to the members of the 66th session of the Nevada Legislature for their consideration and appropriate action.

Respectfully submitted,

Legislative Commission
Legislative Counsel Bureau
State of Nevada

Carson City, Nevada
April 1991

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LEGISLATIVE COMMISSION

Assemblyman John E. Jeffrey, Chairman
Assemblyman Robert M. Sader, Vice Chairman

Senator Charles W. Joerg
Senator William R. O'Donnell
Senator Raymond C. Shaffer
Senator Randolph J. Townsend
Senator John M. Vergiels

Assemblyman Louis W. Bergevin
Assemblyman Joseph E. Dini, Jr.
Assemblyman James W. McGaughey
Assemblyman Danny L. Thompson

SUMMARY OF RECOMMENDATIONS

The legislative commission's subcommittee to study alternative methods of resolving disputes approved the inclusion in its report of the following recommendations:

1. Require mandatory, nonbinding arbitration of all civil actions of $25,000 or less, incorporating disincentives to appeal, and authorize court-ordered, nonbinding arbitration in cases over $25,000. (BDR 3-264)

2. Create a system of voluntary, binding arbitration at any level of case. (BDR 3-264)

3. Require the State Bar of Nevada to establish a pool of attorneys who will act as arbitrators without compensation, allowing the court to set fees and charge for arbitration in cases of over $25,000, allowing the court to appoint other qualified persons to act as arbitrators. Additionally, direct the State Bar to offer training for the arbitrators, both attorneys and nonattorneys, administer the program and charge an administrative fee of not more than $25 a year to all persons who apply to be arbitrators, and require that rules of law be used during arbitration. (BDR 3-264)

4. Create a pilot program in Washoe County for mandatory mediation of divorce cases involving children. The mediation will involve only issues of custody and visitation. The program will be supported by an increase in filing fees assessed against both parties. The Supreme Court will assist the District Courts in setting specific guidelines for the training of mediators. Mediators' reports to the court will be limited to whether the mediation was successful or not, no other facts may be disclosed. Allow smaller counties to increase their filing fees in order to institute a similar mediation program. (BDR 1-265)

5. Urge the Supreme Court of Nevada to expand Supreme Court Rule 171 to require attorneys to discuss ADR options thoroughly with each client, e.g. advise his or her client of the methods to resolve the dispute which are available as an alternative to litigation and explain the advantages, including the possible savings of time and money and other practical considerations regarding those alternative methods. (BDR R-263)

6. Urge, by resolution, the State Bar of Nevada to inform the public about ADR programs. (BDR R-262)

7. Establish a pilot program in Clark County for a neighborhood justice center to be funded by an increase in filing fees assessed against both parties. The center will be based on the American Bar Association's program establishing "multi-door courthouses" to provide a forum for local, small-scale disputes, such as landlord/tenant problems, neighborhood disagreements and family disputes. It will also provide an information and referral network linking the justices of the peace, municipal courts, lawyer referral systems, legal aid services, district attorneys, city attorneys, district courts, ADR programs, mental health services and other governmental and private service agencies. (BDR 1-265)

8. In Clark and Washoe Counties, increase the filing fees in the district and justice courts by $5 for both the plaintiff and the respondent, and require that the increase be used, respectively, in Clark County for a neighborhood justice center and in Washoe County for a mediation center for child custody and visitation. Allow any other county to increase its fees to support the establishment of a similar program of mediation in domestic relations cases. (BDR 1-265)

9. Urge, by resolution, the Supreme Court and Judicial College to work together to establish a specialized training program in alternative dispute resolution for Nevada judges. (BDR R-261)

10. Urge, by resolution, the Supreme Court to encourage each multi-judge judicial district to utilize their judges as settlement judges whenever possible. (BDR R-266)

REPORT TO THE 66TH SESSION OF THE NEVADA LEGISLATURE BY THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY ALTERNATIVE METHODS OF RESOLVING DISPUTES

I. INTRODUCTION

Confucian thought teaches that the "optimum resolution of a dispute is achieved by moral persuasion and agreement rather than sovereign coercion." Many, many years later, after experience in the American judicial system, Abraham Lincoln gave similar advice: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser---in fees, expenses and waste of time."

In 1989, the Nevada Legislature adopted Senate Concurrent Resolution No. 46 which directed the Legislative Commission to study alternative methods of resolving disputes (ADR) without formal adjudication. The need for the study resulted from the public's concern about the rising costs of litigation, the growing congestion in the court system, the resulting delay in the time before litigation is resolved, the need to enhance the public's access to justice, and the need to strengthen the capacity of communities and neighborhoods to resolve conflicts before they reach the courts.

The Legislative Commission appointed a subcommittee of six legislators to conduct the study:

Senator Sue Wagner, Chairman
Assemblyman Matthew Callister, Vice Chairman
Senator Charlie Joerg
Senator Joe Neal
Assemblyman Mike McGinness
Assemblyman Gary Sheerin

The subcommittee held its first meeting in Carson City, its second and third meetings in Las Vegas and its final work session in Reno. The staff assigned to the subcommittee helped the members become well versed in the myriad of federal and state statutes which have been enacted on ADR and the many ADR programs in use around the country. The subcommittee received presentations from nationally recognized experts on dispute resolution, the chief justice of the Nevada Supreme Court, Nevada district judges and justices of the peace, representatives of the State Bar of Nevada, representatives of the Nevada Trial Lawyers Association, professional arbitrators and mediators, members of the Supreme Court's Task Force on Gender Bias in the Courts, and many other interested persons. In addition, the subcommittee viewed several videotapes produced by the National Institute for Dispute Resolution

which illustrated several of the different methods in use around the nation to resolve disputes without formal adjudication.

The subcommittee adopted 10 recommendations for submission to the 1991 Nevada Legislature. The conclusions and recommendations made by the subcommittee are based upon suggestions made to the subcommittee at public hearings and the experience and knowledge of the members of the subcommittee.

II. BACKGROUND AND DEFINITION OF TERMS

Disputes among people have existed since the dawn of time. There is a wide spectrum of choices of methods to resolve disputes. The earliest method used was brute force. To the victor belonged the spoils. Modified slightly, this practice lead to the royally accepted practice of "an eye for an eye" described in the Bible.[1] Society matured to trials by ordeal, backstepped to trial by dueling and finally came upon trial by jury. It took 800 years to progress from brute force to formal adjudication as the socially accepted means of resolving disputes between individual people.

Specifically, trial by jury or ADJUDICATION is the formal giving of a judgment and its entry as an official record. It is nonvoluntary and coercive, in that one party can force the other to attend. The result is binding or enforceable. A formal decision-maker is appointed. He is a neutral third party, and generally not selected by the parties. Lawyers present proof and rational arguments which are confined by the remedy requested and the pertinent laws and rules. This method affords the most due process. The decision-maker is confined by law and the evidence. There is a public forum. And in the terminology of the industry it produces a "win/lose" situation.

Though widely used, it has been suggested that formal adjudication may not always be the most effective or efficient way to resolve certain disputes. Some problems that have been raised are: (1) the cost of litigation; (2) the delay; (3) the fact that communication is limited because the parties are not talking to each other; (4) the occasional failure to resolve the real dispute (since you have to plead a recognized cause of action, it does not always resolve the real problem); and (5) the severe damage to the parties' relationship as a result of their attorneys' adversarial skills.

When the ADR movement started across the country in the 1980's, the public wondered why the court dockets were crowded even though statistics showed that 96% of the cases settle before trial anyway. The response pointed

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1 Exodus 21:24; Leviticus 24:20.

out that there has been a tremendous increase in the number of cases filed, and because there is really no incentive to get the parties together early, many of the settlements don't occur until shortly before the trial date. Thus, the docket is still full.

The jurisdictions which felt the crowded courtrooms first started looking for alternative methods of resolving the disputes. Their reasons included the quantitative perspective to reduce congestion, delay and cost. These concerns are most important to judges and legislators. They also wanted to encourage community involvement in the justice system. It is important to the survival of society as we know it for the public to maintain respect and confidence in our judicial system. Many people are reluctant to participate in the formal adjudicatory process to resolve their disputes. These alternatives will facilitate their access to a justice system they are comfortable with. Additionally, the search for alternatives was also important from the qualitative perspective. The undisputed evidence shows that ADR methods resolve disputes in ways that are more satisfying to the parties: there is a "win/win" result.

The spectrum of choices continues with arbitration; the evaluation methods of summary jury trial, mini-trial and moderated settlement conference; mediation; facilitation and conciliation; and negotiation. It is important to define some of the more widely used terms because the methods are not interchangeable. The alternative methods are like a bag of tools. Just as a wrench would not be used to fix every household problem, or sand wedge would not be used for every golf shot, every ADR method is NOT useful for every kind of dispute. It is said that "you have to fit the forum to the fight."

ARBITRATION is a voluntary process, unless it's contractual or ordered by the court or the legislature. It can be binding or non-binding. The parties usually get to choose their decision-maker. The parties advocate their own positions, it is not limited to legal arguments and the rules of evidence usually don't apply. It is a structured procedure, but is less formal than trial. There is a little less due process, but that is because the protections are not as necessary. It is usually quicker than formal court proceedings. It can be private or public. There is still a "win/lose" result, but there is some flexibility in the remedy. It is widely used in commerce and labor-management disputes, and actually dates back to the early 17th century in several communities in New England.

The neutral EVALUATION METHODS are all voluntary, relatively informal, non-binding and confidential. They provide a neutral evaluation of the case usually followed by negotiation. Particularly:

Summary Jury Trial - Lawyers present an abbreviated version of their arguments before a mock jury chosen at random from the regular jury pool.

The jury deliberates for an hour or less and returns a verdict on liability and damages. Lawyers are free to question the jury about their verdicts and are then encouraged to have another try at settlement.

Mini-trial - This method is used in high-stakes corporate litigation. After limited discovery, the attorneys present their best case before a neutral advisor and the managers of their own corporations who have authority to settle the case. The managers then enter settlement negotiations and may call upon the neutral advisor for his opinion as to how a court might decide the matter. This method resulted from the realization by top management that they are in a better position to compromise for settlement than their corporate litigators.

Moderated Settlement Conference - This method is similar to a mini-trial, but the cases are presented to a panel of three experienced attorneys. The panel of moderators evaluates the strengths and weaknesses of their cases and reports their opinion to the parties who are then better able to see the true value of their respective cases.

MEDIATION is a structured process where a third party neutral assists the disputants to reach a negotiated settlement of their differences. Mediation is generally voluntary. The important distinction to remember is that while mediators may make suggestions to the parties about possible resolutions, the mediators are not empowered, like arbitrators are, to render decisions. The parties talk to each other about their concerns (not evidence) and the parties themselves then decide how to resolve the dispute. It is usually a "win/win" resolution. This greatly increases compliance with the agreement.

Lastly, there are three other broader terms that are familiar:

CONCILIATION is a general term used to describe an informal process in which a third party tries to bring the parties to agreement by lowering tensions, improving communications, interpreting issues and providing technical assistance. Frequently, this is used in volatile conflicts where the parties are unable, unwilling or unprepared to come to the table to negotiate their differences face to face.

FACILITATION is a collaborative process where the third-party neutral functions as a procedural expert by improving the definition of issues which increases the likelihood that a consensus will be reached.

NEGOTIATION has been defined as "communication for the purpose of persuasion." There is no third party helper and the goal is to "win as much as you can."

The proponents of these alternative methods are not advocating that ADR replace adjudication entirely. There are many cases where the parties are less likely to push for a settlement. These types of cases require formal

adjudication. Some examples are: Serious criminal cases, constitutional issues, cases where there is a need for a precedent, where statutory interpretation is necessary, where there is strong public interest (such as in the "Baby M" and "Karen Quinlan" cases), where there are historical facts at issue, where a party needs to hold the government accountable, where an open, public forum is critical, where win/lose resolves the case or where the interests are aggressively protected by both parties. But for the thousands of cases that do not necessarily require formal adjudication, the subcommittee made recommendations to ensure that these alternative methods are not forgotten.

III. MANDATORY MEDIATION OF CERTAIN DOMESTIC DISPUTES

Introduction

Judges, attorneys, social workers, psychologists and other persons in related professions are united in their belief that it is in the best interest of the children of the parents who are divorcing that the issues of custody and visitation be resolved in a noncombative setting. Having the court resolve these issues only exacerbates the animosity and further deteriorates the chances of a continuing relationship between the adults. Such a relationship is necessary for the continued sharing of the responsibilities of raising the children after the divorce, because decisions regarding the medical, educational and religious needs of the children continue. Almost everyone is familiar with the tragedies which can result from hard fought courtroom scenes to determine custody and visitation. It is the children who are the real losers. In fact, a majority of the states have turned to some form of ADR in domestic relations cases, primarily mediation.[2]

Program Proposed for Washoe County

Several persons who made presentations to the subcommittee recommended the establishment in Washoe County of a domestic mediation program. It would be associated with the District Court and require the mediation of custody and visitation issues arising in divorce cases where children are involved. It was suggested that the program be supported by an increase in the fees currently charged for filing a civil lawsuit.

The Washoe County pilot program would be similar to the successful mediation program developed in Clark County several years ago which continues to benefit the residents of Clark County. Generally, the parties to a divorce will be referred to the program for assistance in cooperating and developing an agreeable plan for parenting which is in their children's best interest. If the court deems it necessary or the parties request it, the couple

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2 Meyers, S.; Gallas, G.; Hanson, R.; and Keilitz, S. (1988). Divorce Mediation in the States: Institutionalization, Use, and Assessment. State Court Journal. Fall, p. 18.

may be referred to a private mediator who is not a part of the court's program. The mediator is a disinterested party who will encourage the parties to engage in open communication, compromise and eventual resolution of the disputed issues relating to custody or visitation. The mediation is not marital counseling. No attempts would be made to reconcile the couple. If the couple is not able to develop a mutually agreeable plan with the assistance of the mediator or if serious issues exist, the court's staff may conduct an investigation. Upon receipt of the staff's recommendations, the court would make the decision for the couple.

Importance of Training Mediators

While there is a split of opinion between those who claim that domestic mediators should have backgrounds in social work and those who prefer attorneys to act as mediators, it is clear that the success of the program requires the mediators (whomever they may be) to receive basic training in mediation. Common to most mediation training is a study of conflict, its sources and the various responses to it. Techniques for building trust and cooperation, and for defusing conflict are taught. Skills for effective listening and reframing issues are practiced, as are strategies for dealing with emotions. The principles of negotiation are discussed as well as the proper sequence of the stages of mediation: defining issues, setting the agenda for the session, generating and assessing options, and closure. Because of the critical relationship between the success of such a program and the quality and training of the mediators, it was recommended to the subcommittee that specific guidelines be set for the training of domestic mediators.

Other Elements of the Program

Several experts on mediation stated that it is crucial that mediation be private and confidential. The participants must feel assured that what is said during mediation will be held in confidence. The mediation process offers an opportunity for the participants to express their emotions and interests openly in a socially acceptable manner. The assurance that the mediation process will keep those expressions confidential promotes trust and encourages honest communication. Thus, it was suggested to the subcommittee that the enabling legislation declare that all communications during the mediation sessions are confidential and prohibits the mediator and the parties from disclosing any statement made during mediation. To avoid any adverse effect from unsuccessful attempts at mediation, the mediators' reports to the court are limited to whether the mediation was successful. No other facts may be disclosed. This removes the possibility that one party or the other may be labeled as "uncooperative" if a settlement is not reached.

Financial issues, such as the appropriate amount of child support or the division of property, are <u>not</u> subject to mediation under the proposed program. While there is a split of opinion on the issue, the legislative subcommittee was

convinced that the potential "trade-offs" which typically surface in divorce negotiations, e.g. "you can have custody if you will take less alimony or child support," are not in the best interest of the child. The issues of custody and visitation should be resolved in the best interest of the child without the interference of financial concerns.

There is also a split of opinion in the dispute resolution community as to whether domestic cases which involve a history of domestic violence should be subject to mediation. In theory, mediation involves a disinterested party who facilitates communication between disputing parties who are assumed to have relatively equal bargaining power. When domestic violence is a part of the relationship, it is argued that the persuasive strength of the battered spouse is significantly reduced. Therefore, the possibility of covert coercion on the part of the abuser and the lack of voluntariness on the part of the battered spouse cause any "agreement" reached during the mediation to be questionable. On the other hand, professional mediators have argued that with specific training regarding the effects of domestic violence on domestic mediation they are usually able to avoid these problems. It is also suggested that until an impartial party investigates the allegation of domestic violence, the court is unable to determine whether the allegation was simply made to avoid the required mediation. The legislative subcommittee concluded that mediation is inappropriate in a case where domestic violence is or has been a part of the relationship.

After considering the volumes of material presented on this issue, the subcommittee decided to recommend that the Legislature:

> **Create a pilot program in Washoe County for mandatory mediation of divorce cases involving children. The mediation will involve only issues of custody and visitation. The program will be supported by an increase in filing fees assessed against both parties. The Supreme Court will assist the District Courts in setting specific guidelines for the training of mediators. Mediators' reports to the court will be limited to whether the mediation was successful or not, no other facts may be disclosed. Allow smaller counties to increase their filing fees in order to institute a similar mediation program. (BDR 1-265)**

IV. MULTI-DOOR COURTHOUSE

Introduction

Where can the average person with no legal expertise go to find help in solving a "dispute-oriented" problem? Perhaps her neighbor's weeping willow tree hangs over the fence into her yard and the branches which block most of her driveway cause a hazard. Perhaps his landlord refuses to repair the heater and winter is coming soon. Perhaps he just purchased a brand new lawnmower which fell apart the first time he used it and the store manager will not talk to him about it. Perhaps her social security checks stopped coming in the mail and she does not know who to talk to about that. Perhaps he keeps getting harassing telephone calls from a former girlfriend.

Many people with disputes such as those find their way to the local police station, to the district attorney's office, to a private attorney's office or to a social service agency. But most of the time, they do not find the right "door" to handle the problem, so they are turned away. The problem was articulated accurately by California Judge Earl Johnson in 1978:

> At present, it is almost accidental if community members find their way to an appropriate forum other than the regular courts. Since these forums are operated by a hodgepodge of local government agencies, neighborhood organizations and trade associations, citizens must be very knowledgeable about community resources to locate the right forum for their particular dispute.

In most areas, dispute-processing programs operate independently. The agencies view initial stages of intake as clerical functions. The customers suffer from long waits, uninformed intake workers and little assistance. They are unaware of the panoply of community and court services that, properly organized, might be available to them. They leave the agency frustrated, often convinced that they are victims of the bureaucracy. Their disputes have not been resolved, just postponed. This need for systematic review of resident's disputes and assignment to the appropriate forums for resolution is a key problem in the administration of justice in America.

In response, Professor Frank Sander of Harvard Law School proposed the use of experimental "Multi-Door Courthouse Dispute Resolution Centers" in which civil, quasi-legal and minor criminal disputes could be diagnosed and referred to the most appropriate dispute resolution process, including conciliation, mediation, arbitration and adjudication, or to the local welfare department, district attorney's office, social security administration or mental health agency, etc. The American Bar Association developed three experimental Centers in Tulsa, Oklahoma, Houston, Texas and Washington,

D.C. These experimental Centers have proven very successful. Many communities have created similar centers which are frequently referred to as neighborhood justice centers. Even the American Association of Retired Persons has established similar centers where senior citizens help other members of the community.

The Program Proposed for Clark County

With the tremendous population growth in Clark County and the mixture of cultural and socio-economic backgrounds, the legislative study committee recommended the establishment in Clark County of a multi-door courthouse. The proposed multi-door program would be prepared to handle an average of 3,000 persons through its intake program annually; would administer an all-inclusive mediation program handling approximately 1,000 hearings a year; would provide continuous public awareness programs; and would coordinate other services to assist the community. If it proves successful, similar programs may be established in other counties in Nevada.

Intake and Referral

In the intake and referral component, the intake specialist attempts to resolve the person's complaint during the initial contact, either through telephone discussions with the other party or by providing either or both parties additional information. If the intake specialist cannot settle the case in either of these ways, the specialist refers the person in the manner described below to the most appropriate dispute resolution mechanism available and explains the related policies and procedures. During the interview, the intake specialist examines the characteristics of the case, such as the history and dynamics of the conflict; existence of physical threat, use of weapons or possible loss of property; questions of principle or of fact; and the complexity of the issues involved. The seriousness and duration of the dispute, the intensity of the relationship between the disputing parties and the number of parties involved in the dispute are considered, as well as the person's financial status. The parties' willingness to participate actively in the resolution of the problem, and any previous attempts to resolve the problem are considered. Any possible consequences relating to their actions are also discussed during the intake interview.[3]

After clarifying the issues and analyzing the characteristics of the case, the intake specialist attempts to match the dispute with the characteristics or jurisdiction of an existing agency by considering factors such as financial eligibility requirements; the immediate availability of services; the likelihood of sanctions or financial compensation; the need to protect legal rights; the need to preserve evidence or gather witnesses; and the degree of control left to the

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3 Wolff, R., and Ostermeyer, M. (1988). Dispute Resolution Centers: Citizen Access to Justice. Texas Bar Journal. January, pp. 51-53.

referred person once the agency addresses the problem. The intake specialist and the person together determine the appropriate agency "door" or "doors" through which the problem at hand may be remedied. In short, they match the "fuss to the forum."

Mediation through Neighborhood Justice Centers

One of the "doors" in the Multi-Door Courthouse leads to a Neighborhood Justice Center or Dispute Resolution Center where trained volunteers assist community members to resolve their problems through mediation. The process often results in a mutually acceptable resolution to the problem where both sides "win."

A neighborhood dispute often begins as a small problem and grows into a large problem. Sometimes the identified problem can be litigated, but the underlying issues are rarely resolved through the adversarial system. Often the problem involves personality clashes or has its origin in such issues as cultural or racial misunderstanding or difference over property or propriety. If not resolved, neighborhood disputes tend to escalate and result in harassment, assault, theft, vandalism, or other forms of illegal, annoying or destructive behavior. Litigation may only exacerbate the problem.

Once a case has been accepted by the mediation program and both parties agree to participate, one or two trained mediators will be assigned to facilitate the parties' communication. These volunteers are selected from the community after an assessment of their interpersonal skills. Each volunteer is required to participate in a minimum number of hours of training in mediation techniques, which are taught through a combination of lecture and role playing. Upon completion of the formal training, the volunteers will work for a period with an experienced co-mediator. Continuing seminars will be offered by the dispute resolution center to improve the volunteers' skills.

An average mediation hearing lasts one to three hours. Approximately 75 to 85 percent of cases mediated in similar centers across the country result in an agreement. The written agreement or memorandum of understanding contains only those items which the disputing parties negotiated between themselves. The terms of the agreement are written in the disputing parties' words. The mediators do not resolve the dispute. They facilitate discussion, provide structure, ask questions and assist the parties in identifying issues and options.

Research has shown a high degree of satisfaction by the parties with mediated agreements. Since the contents of the agreement belong to the parties and not to the mediator, the agreement is usually perceived by both parties as fair. Follow-up interviews in similar centers in Texas indicate that 76 percent of the mediated agreements were still working (or, if limited in

application, had worked completely) 12 months after the mediation. Since the process usually only takes 8 to 10 days from start to finish, there is also satisfaction with the speed in which the disputes are resolved.[4]

Perhaps the most important point about such a program is that mediation is contagious. Disputants gain skills in interpersonal communication through their participation in mediation. The experience enhances their own ability to solve future problems. Chances are that the participant will pass along to family members the concept of resolving disputes using open communication. Perhaps he or she may even act as a mediator in future family disputes. At least, the disputant will be familiar with the services provided by the Multi-door Courthouse and will refer others who need similar assistance.

The proposed program would provide these services for little or no cost. Other states which have similar programs believe that the benefits to society as a whole and to the overcrowded and maligned justice system far outweigh the amount subsidized. A typical funding mechanism is an increase in the civil filing fees for court cases. Such an increase is included in the recommendations that the 1991 Nevada Legislature will consider.

Therefore, the subcommittee recommends that the Legislature:

Establish a pilot program in Clark County for a neighborhood justice center to be funded by an increase in filing fees assessed against both parties. The center will be based on the American Bar Association's program establishing "multi-door courthouses" to provide a forum for local, small-scale disputes, such as landlord/tenant problems, neighborhood disagreements and family disputes. It will also provide an information and referral network linking the justice courts, municipal courts, lawyer referral systems, legal aid services, district attorneys, city attorneys, district courts, ADR programs, mental health services and other governmental and private service agencies. (BDR 1-265)

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4 Wolff, R., and Ostermeyer, M. (1988). Dispute Resolution Centers: Citizen Access to Justice. Texas Bar Journal. January, pp. 51-53.

V. FINANCIAL SUPPORT FOR THE PILOT PROGRAMS

Those who recommended that the Nevada Legislature take an active role in creating new ADR programs acknowledged the fiscal requirements of those programs. Several states, such as Illinois, Michigan, New Mexico, Oregon and Texas, commit a portion of their civil filing fees to cover the costs of their ADR programs. This allows the persons who use the civil judicial system to pay for its improvement. So as not to penalize the person initiating the civil actions, it was suggested to the subcommittee that both the petitioner and the respondent be required to pay the additional fee for ADR. Assuming a $5 fee were imposed on both parties, it was estimated that Clark County would receive $332,000 annually and Washoe County would receive $127,000 annually.[5]

Therefore, the subcommittee recommends that the Legislature:

> **In Clark and Washoe Counties, increase the filing fees in the district and justice courts by $5 for both the plaintiff and the respondent, and require that the increase be used, respectively, in Clark County for a neighborhood justice center and in Washoe County for a mediation center for child custody and visitation. Allow any other county to increase its fees to support the establishment of a similar program of mediation in domestic relations cases. (BDR 1-265)**

VI. MANDATORY ARBITRATION OF CERTAIN CLAIMS

When court-annexed arbitration of civil disputes is compared to traditional adjudication of those cases, the differences are not many. In arbitration, the disputants are usually represented by counsel. The confrontation occurs in an adversarial setting. Law and evidence are presented to a neutral decision-maker. The goal is not compromise, but for one side or the other to prevail. The decision-maker conducts the proceeding and his decision is usually appealable.

The main differences are that in arbitration the proceedings are less formal and not open to the public. This allows the use of relaxed rules of evidence, broader examination of witnesses and less restrictions on argument. The result is a more flexible proceeding which usually brings resolution of the dispute in a quicker, less expensive and more satisfying manner.

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5 Memorandum from Jeanne L. Botts, Program Analyst, Fiscal Analysis Division, dated April 25, 1990. (Included as Appendix A.)

While widespread use of court-annexed arbitration is still in its formative stages, recent surveys show that courts in at least twenty-two states and the District of Columbia use arbitration programs.[6] Almost all of the programs are mandatory in nature and most apply to civil cases for money damages up to a specific threshold ranging from $6,000 (New York) to $150,000 (Hawaii). Additionally, arbitration has also been adopted in at least ten federal district courts on an experimental basis, beginning with the District Court for the Eastern District of Pennsylvania in 1978. The studies of these programs have concluded that court-annexed programs of arbitration divert most cases within the programs from the regular court calender, thus alleviating crowded court dockets. Additionally, though the results vary, arbitration programs can increase the speed of resolution, decrease the cost of resolving the dispute and increase the satisfaction of the parties when compared to cases using traditional adjudication.[7]

Regardless of the potential assistance that an arbitration program can give to Nevada's court system, it is clear that without the assistance of the Nevada judiciary such a program will not be effective. The success of arbitration hinges on successful management by the courts.[8] The subcommittee was encouraged at its February 1990 meeting by the presentation of Chief Justice C. Clifton Young which indicated that the Nevada Supreme Court had recently formed a committee to consider alternatives to traditional litigation for resolving legal disputes.

Therefore, the subcommittee recommends that the Legislature:

Require mandatory, non-binding arbitration of all civil actions of $25,000 or less, incorporating

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6 Keilitz, Susan, Gallas, G., and Hanson, R., "State Adoption of Alternative Dispute Resolution: Where Is It Today?" 12 State Court Journal 4 (Spring, 1988). (Included as Appendix B.)

7 See Deborah R. Hensler, "What We Know and Don't Know about Court-Administered Arbitration," 69 Judicature 270 (1986) (Included as Appendix C.); E. Allan Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts, (Washington, D.C.: Federal Judicial Center, 1983); Raymond Broderick, "Court-Annexed Compulsory Arbitration: It Works," 72 Judicature 217 (December/January, 1989) (Included as Appendix D.); Allan Lind, "Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court," (Rand Corporation, Institute for Civil Justice, August 1990).

8 See Hanson, Roger, Gallas, G., Keilitz, S., "The Role of Management in State Court-Annexed Arbitration," 12 State Court Journal 14 (Spring, 1988). (Included as Appendix E.)

disincentives to appeal, and authorize court-ordered, nonbinding arbitration in cases over $25,000. (BDR 3-264)

Create a system of voluntary, binding arbitration applicable to any case. (BDR 3-264)

Require the State Bar of Nevada to establish a pool of attorneys who will act as arbitrators without compensation, allowing the court to set fees and charge for arbitration in cases of over $25,000, and allowing the court to appoint other qualified persons to act as arbitrators. Additionally, direct the State Bar to offer training for the arbitrators, both attorneys and nonattorneys, administer the program and charge an administrative fee of not more than $25 a year to all persons who apply to be arbitrators, and require that rules of law be used during arbitration. (BDR 3-264)

VII. MISCELLANEOUS RECOMMENDATIONS

It is common knowledge that many people are dissatisfied with the service they receive from their attorney. The credibility of attorneys is at an all-time low. Experts attribute this fact to a misunderstanding by attorneys of what most customers really desire. The public wants information, inexpensive advice and expeditious ways to resolve conflicts. When a customer brings his problems to a lawyer, he needs holistic advice. He should be told the alternatives available and the probable consequences so he can choose his best option. Generally, persons who use ADR methods, especially with the assistance of their attorney, are satisfied with the legal process and their attorney's services.

Therefore, the subcommittee recommends that the Legislature:

Urge the Supreme Court of Nevada to expand Supreme Court Rule No. 171 to require attorneys to discuss ADR options thoroughly with each client, e.g. advise his or her client of the methods to resolve the dispute which are available as an alternative to litigation and explain the advantages, including the possible savings of time and money and other practical considerations regarding those alternative methods. (BDR R-263)

The subcommittee heard many persons remark that the Nevada justice system is performing in an admirable fashion, but that lawyers and judges are doing their work under considerable burdens. One of the reasons for that burden is the public's perception of the justice system. People with any kind of dispute tend to expect a lawyer or a judge to resolve it. But some types of disputes are simply not appropriate for a judicial resolution, and others do not warrant a lawyer's time or a judge's action. Still others may be appropriate for a business rather than a legal decision. Unfortunately, the public has come to expect more of the justice system than it was designed to accomplish. It was suggested that education of the public about ADR programs is critical to the efficient and effective use of our judicial system. If the general public is not aware of the available options, they will continue to rely on the judicial system to resolve all of their disputes.

Therefore, the subcommittee recommends that the Legislature:

Urge the State Bar of Nevada to inform the public about ADR programs. (BDR R-262)

Reno, Nevada, is the home of the world renown National Judicial College. It was suggested that since we have the College here, Nevada should have the best trained judges in the country. Even so, only a few of Nevada's judges have received training in dispute resolution other than formal adjudication. Most law schools have just recently begun teaching ADR methods, so most attorneys and judges are not intimately familiar with the myriad of alternative methods, the manner in which they are best used and the enthusiasm with which other states have grown to regard them. The Dean of the Nevada Judicial College offered to tailor a course for Nevada judges which covers dispute resolution generally, but specifically addresses whatever ADR programs are adopted for use in Nevada.

Therefore, the subcommittee recommends that the Legislature:

Urge the Supreme Court and Judicial College to work together to establish a specialized training program in alternative dispute resolution for Nevada judges. (BDR R-261)

It is important to remember that ADR methods are not intended to replace the existing judicial system. They are meant to supplement it and relieve it of the disputes which do not require formal adjudication to resolve the dispute. To ensure that the subcommittee gave every opportunity to the Nevada judiciary to participate in this study, the subcommittee, in an unusual

departure from customary practice, requested that several judicial districts allow representatives from the subcommittee to attend the monthly meetings of the district judges to hear the comments of the judges regarding the improvement of the Nevada judicial system by the use of ADR methods which are being used in other states. The judges did not have a unified opinion. The individual comments can be summarized as follows:

1. If the Legislature recommends arbitration or mediation programs, they should be attached to the court and not a separate system of private justice.

2. The justice system needs more financial support to enable it to run adequately, aside from any ADR programs. The courts are overcrowded and will not be relieved without more judges, probation officers, public defenders and other staff.

3. ADR programs will only be worthwhile if they are cheaper, quicker and more satisfying to the disputants.

4. It is probably necessary to modify Rule 16.1 of the Nevada Rules of Civil Procedure regarding early case conferences.

5. Washoe County would benefit from a program for the mediation of issues regarding child custody and visitation, like the program in existence in Clark County.

6. The jurisdiction of small claims court and justices' court could be raised, but adjustments would have to be made to increase the number of judges and courts, because those courts are already overworked.

The subcommittee heard presentations about the successful use of settlement judges in other jurisdictions.[9] This practice of designating one or two judges as judges who are always available to facilitate settlement conferences in any pending case has many advantages. It is an inexpensive procedure, cost-effective and improves the fairness of agreements where bargaining strength of the parties is unequal. Additionally, a judge who is adept at this practice can provide relief to the parties from the onus of being the "first to blink." The judge can clear out the emotional and tactical debris (puffing) and help the attorney give the client a realistic assessment of the client's case. The judge can provide an analytic focus and feedback which may be useful if the issue goes to trial. Settlement conferences in the presence of a judge fulfill the parties' expectation of decision-making and resolution of

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9 For example, courts in Arizona, Ohio, Oregon and Texas use settlement conferences as one of the major components of their respective ADR programs.

the dispute. The judge can preserve confidences and protect trial strategy while attempting settlement.

The few disadvantages which have been cited include the fact that the judge in a settlement conference is not able to assess the credibility of the potential witnesses and that confidential matters may be inadvertently disclosed. Additionally, if the judge acting as settlement judge is the same person who will preside if the matter goes to trial, it is possible that the settlement talks will taint the impartiality of the trial judge. Thus, many jurisdictions assign a judge who possesses the desire and ability to act as a settlement judge for all the cases in the district, thereby relieving the trial judges from the possibility of becoming too familiar with the details of the case to preside impartially.

Because the subcommittee found that the advantages of using settlement judges far exceed the possible disadvantages, the subcommittee recommends that the Legislature:

Urge the Supreme Court to encourage each multi-judge judicial district to utilize their judges as settlement judges whenever possible. (BDR R-266)

VIII. CONCLUSION

It is important to the survival of our society that the public maintain respect and confidence in our judicial system. Many people are reluctant to participate in the formal adjudicatory process to resolve their disputes. The Nevada justice system is performing in an admirable fashion, but the lawyers and judges are doing their work under considerable burdens. One problem is the public's perception of the justice system. A person who is involved in a dispute tends to expect a lawyer or a judge to resolve it. However, certain types of disputes are simply not appropriate for a judicial resolution and many disputes do not require formal adjudication. Many ADR programs have successfully relieved court congestion and reduced undue cost and delay. Added benefits of those programs are the increased access to justice and the increased satisfaction of the parties. Regardless of the alternatives which are made available, the Nevada Legislature and the Nevada Judiciary must work together to provide the residents of Nevada with an effective and efficient system for resolving disputes.

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X. APPEARANCES

The following people appeared before or presented written material to the committee:

Mr. Harold Albright
Nevada Trial Lawyers Association
Reno, Nevada

Ms. Jayne Bauer-Hughes, Owner
Juris-Amicus, Inc.
Sparks, Nevada

Ms. Amber Batchelor
Nevada Network Against Domestic Violence
Temporary Assistance for Domestic Crisis
Las Vegas, Nevada

Ms. Sharon Claassen
Nevada Network Against Domestic Violence
Carson City, Nevada

Ms. Thelma M. Clark
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Mobilehome Owners League of the Silver State
Las Vegas, Nevada

Mr. William Curley, Staff Attorney
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Dr. Jill Derby
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Gardnerville, Nevada

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Ms. Ruth Urban, Supervisory
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Eighth Judicial District Court
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Honorable C. Clifton Young
Chief Justice of the Supreme Court
Carson City, Nevada

XI. SUGGESTED LEGISLATION

SUMMARY--Urges Supreme Court of Nevada and National Judicial College to establish training program specifically for Nevada judges in alternative methods of resolving disputes. (BDR R-261)

SENATE CONCURRENT RESOLUTION--Urging the Supreme Court of Nevada and the National Judicial College to establish a training program specifically for Nevada judges in alternative methods of resolving disputes.

WHEREAS, In many jurisdictions there is a strong emphasis on judicial supervision of litigation and judges are being assigned the active role of guiding the progress of a case from its filing until its resolution; and

WHEREAS, As courts move from managers of litigation to managers of resolution, it is imperative that the judges of this state be knowledgeable about the various methods of resolving disputes; and

WHEREAS, Nevada is fortunate to be the home of the National Judicial College which currently offers a week-long introductory course in dispute resolution; and

WHEREAS, Nevada judges would also benefit from a shorter course which emphasizes practical training exercises specifically tailored to Nevada law and the Nevada judicial system; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That Legislature of the State of Nevada hereby urges the

Supreme Court and the National Judicial College to work together to establish a specialized training program for the judges of Nevada in alternative methods of resolving disputes in Nevada; and be it further

RESOLVED, That copies of this resolution be prepared by the Secretary of the Senate and transmitted forthwith to the Chief Justice of the Supreme Court and the Dean of the National Judicial College.

SUMMARY--Urges State Bar of Nevada to inform public about alternative methods of resolving disputes. (BDR R-262)

SENATE CONCURRENT RESOLUTION--Urging the State Bar of Nevada to inform the public about alternative methods of resolving disputes.

WHEREAS, The State Bar of Nevada is a public corporation that governs the legal profession in this state, subject to the approval of the Supreme Court; and

WHEREAS, Even though alternative methods of resolving disputes that serve the best interests of the public and the court system have been used nationwide for several years, many people are unaware of these alternatives to litigation; and

WHEREAS, The judiciary and the other members of the legal profession share the responsibility to ensure the delivery of quality legal services to the public as well as ready access to fair and impartial forums that assist in the efficient resolution of disputes; and

WHEREAS, More than 25 bar associations in the United States sponsor activities to educate the legal profession and the public about alternative methods of resolving disputes, their appropriate use and availability; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Legislature of the State of Nevada hereby urges the

State Bar of Nevada to sponsor an ongoing program of education to inform the public about the existence of and uses for alternative methods of resolving disputes; and be it further

RESOLVED, That copies of this resolution be prepared by the Secretary of the Senate and transmitted forthwith to the President of the State Bar of Nevada and the Chief Justice of the Nevada Supreme Court.

SUMMARY--Urges Supreme Court of Nevada to require lawyers to discuss alternative methods of resolving disputes with clients. (BDR R-263)

SENATE CONCURRENT RESOLUTION--Urging the Supreme Court of Nevada to require lawyers to discuss alternative methods of resolving disputes with their clients.

WHEREAS, Guiding clients to a satisfactory resolution of their disputes is the heart of the practice of law; and

WHEREAS, Derek Bok, President of Harvard University has stated:

> Over the next generation, I predict that society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time; and

WHEREAS, The fact that alternative methods for resolving disputes have proven to be efficient and equitable methods for resolving various claims is not always known by nonlawyers who mistakenly believe that litigation is the only viable option for resolving disputes; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Supreme Court of Nevada is hereby urged to expand the Supreme Court Rules governing the legal profession to require a lawyer to discuss with his clients the methods of resolving disputes which are available alternatives to litigation; and be it further

RESOLVED, That a copy of this resolution be prepared and transmitted forthwith by the Secretary of the Senate to the Chief Justice of the Supreme Court.

SUMMARY--Authorizes arbitration of all civil actions and requires arbitration of certain civil actions. (BDR 3-264)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State or on Industrial Insurance: No.

AN ACT relating to arbitration; authorizing arbitration of all civil actions; requiring arbitration of certain civil actions; requiring the establishment of a program of volunteer arbitrators; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *Except as otherwise provided in NRS 38.215, all civil actions for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed $25,000, must be submitted to nonbinding arbitration in accordance with the provisions of this chapter.*

Sec. 3. *1. The State Bar of Nevada shall establish and administer a program to provide trained volunteers to act as arbitrators.*

2. The program must require and provide training in arbitration for attorneys and other volunteers.

3. The State Bar of Nevada may:

(a) Charge each person who applies for training as an arbitrator an application fee of not more than $25 per year.

(b) Charge a fee to cover the cost of the training programs.

Sec. 4. NRS 38.215 is hereby amended to read as follows:

38.215 1. Except as otherwise provided in subsection 2, all civil actions for damages for personal injury, death or property damage arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the State of Nevada and the amount in issue does not exceed **[**$15,000,**]** *$25,000,* must be submitted to arbitration, in accordance with the provisions of NRS 38.015 to 38.205, inclusive.

2. Subsection 1 does not apply to civil actions within the jurisdiction of the district court of a judicial district in which a program of mandatory arbitration is in effect.

Sec. 5. NRS 38.255 is hereby amended to read as follows:

38.255 1. **[**Upon petition by the district court of any judicial district or on its own initiative, the**]** *The* supreme court **[**may**]** *shall* adopt rules which provide guidelines for the establishment by a district court of a **[**voluntary or mandatory program for the arbitration of civil actions.**]** *:*

(a) Mandatory program for the arbitration of civil actions pursuant to section 2 of this act.

(b) Voluntary program for the arbitration of civil actions if the cause of action arises in the State of Nevada and the amount in issue exceeds $25,000.

(c) Voluntary program for the use of binding arbitration in all civil actions.

2. The rules must provide that the district court of any judicial district [may establish a program pursuant thereto,] *:*

(a) Shall establish programs pursuant to paragraphs (a), (b) and (c) of subsection 1, subject to the limitations of the budgets of the counties within the jurisdiction of the court.

(b) May set fees and charge parties for arbitration if the amount in issue exceeds $25,000.

3. The rules must exclude the following from any program of mandatory arbitration:

(a) Actions in which the amount in issue, excluding attorney's fees, interest and court costs, is more than [$15,000,] *$25,000* or less than the maximum jurisdictional amounts specified in NRS 4.370 and 73.010;

(b) Class actions;

(c) Actions in equity;

(d) Actions concerning the title to real estate;

(e) Probate actions; and

(f) Appeals from courts of limited jurisdiction.

4. The rules must include [guidelines] *:*

(a) Guidelines for the award of attorney's fees and the costs of the arbitration [and] *;*

(b) Disincentives to appeal; and

(c) Provisions for trial upon the exercise by either party of his right to a trial anew after the arbitration.

Sec. 6. This act becomes effective on January 1, 1992.

SUMMARY--Creates pilot programs in certain counties for mediation of certain issues in domestic relations cases and establishment of neighborhood justice center. (BDR 1-265)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State or on Industrial Insurance: No.

AN ACT relating to alternative methods of resolving disputes; requiring the establishment of a program of mandatory mediation of certain issues in domestic relations cases in certain counties; requiring the establishment of a neighborhood justice center in certain counties; requiring the collection in larger counties of an additional fee for the filing of civil actions and responses thereto for the support of certain programs; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 3 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In a county whose population is more than 100,000 and less than 400,000, the district court shall establish by rule approved by the supreme court a program of mandatory mediation in cases which involve the custody or

visitation of a child. A district court in a county whose population is 100,000 or less may establish such a program in the same manner.

2. The program must:

(a) Require the impartial mediation of the issues of custody and visitation and any other nonfinancial issue deemed appropriate by the court.

(b) Allow the court to exclude a case from the program for good cause shown, including a showing of a history of child abuse or domestic violence by one of the parties, ongoing private mediation or residency of one of the parties out of the jurisdiction of the court.

(c) Provide standards for the training of the mediators assigned to cases pursuant to the rule, including but not limited to:

(1) Minimum educational requirements;

(2) Minimum requirements for training in the procedural aspects of mediation and the interpersonal skills necessary to act as a mediator;

(3) A minimum period of apprenticeship for persons who have not previously acted as domestic mediators;

(4) Minimum requirements for continuing education; and

(5) Procedures to ensure that potential mediators understand the high standard of ethics and confidentiality related to their participation in the program.

(d) Prohibit the mediator from reporting to the court any information about the mediation other than whether the mediation was successful or not.

(e) Establish a sliding schedule of fees for participation in the program based on the client's ability to pay.

(f) Provide for the acceptance of gifts and grants offered in support of the program.

(g) Allow the court to refer the parties to a private mediator for assistance in resolving the issues.

3. The costs of the program must be paid from the account for dispute resolution in the county general fund. All fees, gifts and grants collected pursuant to this section must be deposited in the account.

4. The district court in any county which has established a program pursuant to this section shall submit a report to the director of the legislative counsel bureau for distribution to each regular session of the legislature on or before March 1 of each odd-numbered year. The report must include a summary of the number and type of cases mediated and resolved by the program during the previous biennium, the fees collected by the program and any gifts or grants received by the court to support the program. The report must also contain suggestions for any necessary legislation to improve the effectiveness and efficiency of the program.

5. This section does not prohibit a court from referring a financial or other issue to a special master or other person for assistance in resolving the dispute.

Sec. 2. Chapter 4 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In a county whose population is 100,000 or more, the justice of the peace shall, on the commencement of any action or proceeding in the justices' court for which a fee is required, and on the answer or appearance of any defendant in any such action or proceeding for which a fee is required, charge and collect a fee of $5 from the party commencing, answering or appearing in the action or proceeding. These fees are in addition to any other fee required by law.

2. On or before the first Monday of each month, the justice of the peace shall pay over to the county treasurer the amount of all fees collected by him pursuant to subsection 1 for credit to an account for dispute resolution in the county general fund. The money in that account must not be used for purposes other than the program established pursuant to section 1 or 8 of this act.

3. The board of county commissioners of any other county may impose by ordinance an additional filing fee of not more than $5 to be paid on the commencement of any action or proceeding in the justices' court for which a fee is required and on the filing of any answer or appearance in any such action or proceeding for which a fee is required. On or before the fifth day of each month, in a county where this fee has been imposed, the justice of the peace shall account for and pay over to the county treasurer all fees collected during the preceding month pursuant to this subsection for credit to an account for dispute resolution in the county general fund. The money in the account must be used only to support a program established in accordance with section 1 of this act.

Sec. 3. NRS 4.080 is hereby amended to read as follows:

4.080 No other fees [shall] *may* be charged by justices of the peace than those specifically set forth in [NRS 4.060, nor shall] *this chapter, nor may* fees be charged for any other services than those mentioned in [those sections.] *this chapter.*

Sec. 4. NRS 4.100 is hereby amended to read as follows:

4.100 1. On the 1st Mondays of January, April, July and October, the justices of the peace who receive fees [under] *pursuant to* the provisions of NRS 4.060 *and section 2 of this act* shall make out and file with the boards of county commissioners of their several counties a full and correct statement under oath of all fees or compensation, of whatever nature or kind, received in their several official capacities during the preceding 3 months. In the statement they shall set forth the cause in which, and the services for which, such fees or compensation were received.

2. [Nothing in this section shall be so construed as to] *This section does not* require personal attendance in filing statements, which may be transmitted by mail or otherwise directed to the clerk of the board of county commissioners.

Sec. 5. NRS 4.140 is hereby amended to read as follows:

4.140 All fees prescribed in NRS 4.060 [shall be payable] *and section 2 of this act must be paid* in advance, if demanded. If a justice of the peace [shall not have] *has not* received any or all of his fees, which [may be] *are* due him for services rendered by him in any suit or proceedings, he may have execution

therefor in his own name against the party [or parties] from whom they are due, to be issued from the court where the action is pending, upon the order of the justice of the peace or court upon affidavit filed.

Sec. 6. Chapter 19 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In a county whose population is 100,000 or more, the county clerk shall, on the commencement of any civil action or proceeding in the district court for which a filing fee is required, and on the filing of any answer or appearance in any such action or proceeding for which a filing fee is required, charge and collect a fee of $5 from the party commencing, answering or appearing in the action or proceeding. These fees are in addition to any other fee required by law.

2. On or before the first Monday of each month the county clerk shall pay over to the county treasurer the amount of all fees collected by him pursuant to subsection 1 for use in a program established in accordance with section 1 or 8 of this act.

3. The board of county commissioners of any other county may impose by ordinance an additional filing fee of not more than $5 to be paid on the commencement of any civil action or proceeding in the district court for which a filing fee is required and on the filing of any answer or appearance in any such action or proceeding for which a filing fee is required. On or before the fifth day of each month, in a county where this fee has been imposed, the

county clerk shall account for and pay over to the county treasurer all fees collected during the preceding month pursuant to this subsection for credit to an account for dispute resolution in the county general fund. The money in the account must be used only to support a program established in accordance with section 1 of this act.

Sec. 7. Chapter 48 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A meeting held to further the resolution of a dispute may be closed at the discretion of the mediator.

2. The proceedings of the mediation session must be regarded as settlement negotiations, and no admission, representation or statement made during the session, not otherwise discoverable or obtainable, is admissible as evidence or subject to discovery.

3. A mediator is not subject to civil process requiring the disclosure of any matter discussed during the mediation proceedings.

Sec. 8. Chapter 244 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In a county whose population is more than 400,000, the board of county commissioners shall establish a neighborhood justice center. The center must be closely modeled after the program established by the American Bar Association for multi-door courthouses for the resolution of disputes.

2. The center must provide, at no charge:

(a) A forum for the impartial mediation of minor disputes including, but not limited to, disputes between landlord and tenant, neighbors, family members, local businesses and their customers, governmental agencies and their clients.

(b) A system of providing, information concerning the resolution of disputes and the services available in the community.

(c) An efficient and effective referral system which assists in the resolution of disputes and otherwise guides the client to the appropriate public or private agency to assist in the resolution of the particular dispute, including referrals to the justices of the peace, municipal courts, lawyer referral systems, legal aid services, district attorney, city attorneys, district courts, mental health services, other alternative methods of resolving disputes and other governmental and private services.

3. The center must be supported from the money in the account for dispute resolution in the county general fund and any gifts or grants received by the county for the support of the center.

4. The board of county commissioners shall submit a report to the director of the legislative counsel bureau for distribution to each regular session of the legislature on or before March 1 of each odd-numbered year. The report must include a summary of the number and type of cases mediated, referred and resolved by the center during the previous biennium. The report must also contain suggestions for any necessary legislation to improve the effectiveness and efficiency of the center.

Sec. 9. 1. This act becomes effective on July 1, 1991.

2. The amendatory provisions of this act expire by limitation on June 30, 1995.

3. The programs required to be established pursuant to sections 1 and 8 must be operational on or before January 1, 1992.

SUMMARY--Urges Nevada Supreme Court to encourage district judges to take active role in achieving negotiated settlement of cases. (BDR R-266)

SENATE CONCURRENT RESOLUTION--Urging the Nevada Supreme Court to encourage district judges to use the various techniques available to assist in achieving negotiated settlements.

WHEREAS, Although statistics from the American Bar Association indicate only 4 percent of the filed civil cases are tried by a jury while 96 percent of the cases are settled, litigants incur needless expense and courts experience crowded dockets because most cases are not settled until they are "on the court house steps," immediately before the jury trial is scheduled; and

WHEREAS, The strict rules of evidence, which limit the information that may be considered, usually cause the verdict in a trial to be less satisfying and just than would be the result of a freely negotiated settlement which allowed consideration of all issues and facts actually affecting the parties' dispute; and

WHEREAS, In many jurisdictions there is a strong emphasis on judicial supervision of litigation and judges are assigned the task of guiding cases to negotiated settlement; and

WHEREAS, A settlement conference is a judicially supervised and flexible procedure in the litigation process that combines elements of active judicial administration, sound case management and negotiation for the purpose of

ending a lawsuit by compromise and settlement whenever appropriate; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Legislature of the State of Nevada hereby urges the Nevada Supreme Court to encourage the district judges of this state to be trained in the various techniques used to achieve negotiated settlements; and be it further

RESOLVED, That each district judge be encouraged to take an active role in achieving negotiated settlements; and be it further

RESOLVED, That each multi-judge judicial district be encouraged to assign one or more of its judges to act specifically as a settlement judge for the cases pending in that district; and be it further

RESOLVED, That a copy of this resolution be prepared by the Secretary of the Senate and transmitted forthwith to the Chief Justice of the Supreme Court.

XII. APPENDICES

APPENDIX A

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
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April 25, 1990

MEMORANDUM

TO: Don Williams, Principal Research Analyst
Research Division

FROM: Jeanne L. Botts, Program Analyst
Fiscal Analysis Division

SUBJECT: Estimates of Proposed Civil Action Fee by County

On the attached worksheet are estimates of revenue to be generated within each county from the $5.00 fee proposed to be assessed against each party in civil actions (generally $10.00 per case) to fund pilot projects in alternative methods of resolving disputes. Annually, Clark County might expect to collect $332,000 and Washoe County could anticipate collecting $127,000 for pilot projects.

Estimates of revenue from civil actions at the district court level are based upon an average of deposits of civil action fees made by each county to the state general fund over the last two fiscal years. Estimates of revenue to be collected from civil actions at the justice court level are less reliable since the state is not currently collecting civil action fees from those courts. I telephoned the justice courts in Washoe and Clark counties to find the number of civil actions filed annually; however, estimates for other counties are based upon each county's proportion of deposits of civil action fees collected at the district court level in relationship to the number of civil actions for which fees were collected in justice courts in Washoe and Clark.

Total fees from the fifteen smaller counties are estimated to be less than $56,000; therefore, it is not likely projects will be started in any but the two most populated counties.

If you need more information, please call.

jlb Civil Action Fee/nm
RESEARCH
cc: Kim Morgan

Estimates of Revenue for Alternative Dispute Resolution Projects to be Generated from Increasing Civil Action Fees

By County	DISTRICT COURT LEVEL: * FY 87-88	FY 88-89	2-Year Average	No. of Cases	(1) Estim. Fees at $10/case	Percent of Total	JUSTICE COURT LEVEL** Estim. No. of Cases	(2) Estim. Fees at $10/case	TOTAL FEES ESTIMATED (1)+(2)
Clark	$588,384	$583,328	$585,856	18,308	$183,080	64.17%	14,940	$149,400	$332,480
Washoe	$215,774	$240,580	$228,177	7,131	$71,305	24.99%	5,590	$55,900	$127,205
Other Counties:									
Carson City	$14,400	$16,160	$15,280	478	$4,775	1.67%	386	$3,863	$8,638
Churchill	$4,128	$4,256	$4,192	131	$1,310	0.46%	106	$1,060	$2,370
Douglas	$43,008	$25,942	$34,475	1,077	$10,773	3.78%	872	$8,715	$19,489
Elko	$18,880	$12,768	$15,824	495	$4,945	1.73%	400	$4,000	$8,945
Esmeralda	$830	$170	$500	16	$156	0.05%	13	$126	$283
Eureka	$416	$264	$340	11	$106	0.04%	9	$86	$192
Humboldt	$5,088	$4,000	$4,544	142	$1,420	0.50%	115	$1,149	$2,569
Lander	$1,056	$1,312	$1,184	37	$370	0.13%	30	$299	$669
Lincoln	$1,396	$838	$1,117	35	$349	0.12%	28	$282	$631
Lyon	$7,998	$8,201	$8,100	253	$2,531	0.89%	205	$2,048	$4,579
Mineral	$2,564	$2,592	$2,578	81	$806	0.28%	65	$652	$1,457
Nye	$5,536	$4,925	$5,231	163	$1,635	0.57%	132	$1,322	$2,957
Pershing	$1,162	$768	$965	30	$302	0.11%	24	$244	$546
Storey	$1,113	$516	$815	25	$255	0.09%	21	$206	$460
White Pine	$4,064	$3,540	$3,802	119	$1,188	0.42%	96	$961	$2,149
Subtotal Other Counties	$111,639	$86,252	$98,946	3,092	$30,920	10.84%	2,501	$25,013	$55,934
Total All Counties	$915,797	$910,160	$912,979	$28,531	$285,306	100.00%	23,031	$230,313	$515,619

* District court cases calculated from actual deposits to the state general fund of civil action fees.

** Justice court estimates calculated from actual number of cases in two largest counties last year and proportional estimates for other counties.

23-Apr-90

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APPENDIX B

State Court Journal

Volume 12, Number 2 Spring 1988

FEATURES

DEPARTMENTS

The *State Court Journal* is published quarterly by the National Center for State Courts for those interested in judicial administration. Subscription price in the U.S. for one year is $24. Individual copies are $6. Address all correspondence about subscriptions, undeliverable copies, and change of address to the Publications Coordinator, *State Court Journal*, National Center for State Courts, 300 Newport Avenue, Williamsburg, VA 23187-8798. ISSN: 0145-3076.

The artwork on pages 4 and 14 is by Susan B. Rutter, a graphic artist and illustrator living in Newport News, Virginia.

State Adoption of Alternative Dispute Resolution

Where Is It Today?

Susan Keilitz • 'Geoff Gallas • Roger Hanson

The adoption of innovative programs over time can be plotted on a graph as a J-curve. At first, a few pioneers conduct pilot programs. These programs are represented at the base of the curve. If these initial experiments are positive and are effectively presented to others, a few more adopt and refine the initial experiments, and the curve rises somewhat, but the programs remain largely ignored by the rest of the population, which may be skeptical, immersed in day-to-day responsibilities, or engaged in other experiments or reforms. These other efforts may be related to the innovation or they may address other concerns. After the refined experiments prove successful, the total population realizes their impact. The innovation—now a tested program—is then adopted by the larger group. The adoption rate increases exponentially, forming the rising stem of the J-curve.

This view of the diffusion of innovation is both a useful description and a policy guide regarding the adoption of alternative dispute resolution (ADR) programs. The guidance comes in the form of questions that ADR practitioners and court administrators can ask to illuminate their circumstances. Where do we stand on the J-curve? Are we at the beginning of the process—the base of the curve—where uncertainty exists about whether ADR's promised benefits can be achieved? Are we refining an experimental and innovative product, with the adoption curve rising only gradually? Or, in fact, are ADR programs well on their way to reaching the larger population, with the rate of adoption swiftly rising?

EDITOR'S NOTE: *This research was supported by a grant from the National Institute for Dispute Resolution (NIDR). The views expressed in this article are those of the authors and do not necessarily represent the policies of NIDR.*

Susan Keilitz is a staff attorney with the National Center for State Courts. Dr. Geoff Gallas is director of research and special services with the National Center for State Courts. Dr. Roger Hanson is currently a visiting scholar with the National Center. Ternon Burton, a student at the Marshall-Wythe School of Law, College of William and Mary, helped conduct the survey upon which this article is based.

Proponents of ADR have made strong claims about how the efficiency and quality of justice might be improved by processing disputes outside the adversarial arena of the court: mediated settlements are longer lasting than court decisions, disputants have greater access to justice; long court delays are avoided; disputants can assess the strengths and weaknesses of their cases more realistically; disputants feel that their claims have been adequately addressed by ADR procedures.[1] If ADR fulfills these promises, it will be widely adopted and provide substantial benefits for the courts and the public. Widespread adoption will turn ADR into a proven innovation and a proven innovation into settled and meritorious policy.

The claim is frequently heard that alternative dispute resolution programs have grown substantially and extended widely into the state courts.

On the other hand, if ADR benefits the courts only marginally, the ADR movement will slow, or worse, ADR will be used extensively and will replace an established process with an imperfect and inadequate substitute.

ADR is intended to overcome deficiencies in the justice system and provide a superior, more-accessible process than traditional court processes. Therefore, its level of acceptance should be measured by comparing the number and nature of jurisdictions that have adopted ADR to the total number of jurisdictions that *could* adopt ADR.

How far has the alternative dispute resolution movement penetrated the 2,253 state courts of general jurisdiction and 13,231 state courts of limited jurisdiction in the United States? Previously, Deborah Hensler estimated that court-annexed arbitration programs operated in 200 trial courts.[2] If her estimate is correct, then the number of courts with arbitration programs is still very small, and we are clearly in the pioneering stage with much more innovation, experimentation, and refinement yet to come.

The claim is frequently heard that alternative dispute resolution programs have grown substantially and extended widely into the state courts. Statistics on the total number of programs nationwide are generally cited as evidence of this diffusion pattern.[3] Furthermore, nationwide figures are interpreted as a sign that alternative dispute resolution programs are meeting an unfulfilled need.[4] Yet, despite the fact that the number of programs nationwide has increased in a relatively short period of time, it is important to examine the diffusion of ADR programs in the court in reference to the total potential field of adoption.

Through survey research supported by the Conference of State Court Administrators (COSCA) and funded by the National Institute for Dispute Resolution (NIDR), we have charted the ADR movement's progress state by state and within the states where it has taken hold. These data, gathered from all fifty states and the District of Columbia, help to put various statements about the spread of alternative dispute resolution into perspective: How many states have programs? In states where programs exist, do they encompass almost all, most, some, or a few jurisdictions? Does program eligibility tend to target a full or limited range of cases?

This article will explore these questions. After describing our survey's methodology and findings, we draw some broad conclusions about where the ADR movement is today and what sorts of issues need examination and greater resolution before the diffusion process can accelerate.

Survey design

In 1986 the Conference of State Court Administrators (COSCA), seeing the

need for court managers to have a clearer picture of the extent to which individual states had adopted ADR programs, formed a committee on alternative dispute resolution (known as the ADR Committee).[5] COSCA charged the ADR Committee with analyzing the growth, use, acceptance, and effects of ADR programs.

Because no study had fully reported the extent of ADR adoption in the state courts, the ADR Committee decided first to survey each state court administrative office for a list and description of all ADR programs operating in each state. Two considerations led the ADR Committee to reason that the state court administrator's familiarity with ADR programs would serve as a barometer of the influence the ADR movement has in individual state court systems. First, in states where court administration is for the most part centralized, state court administrators should be aware of all court-related programs because the administrators would likely have played a major role in any decisions to introduce ADR. Second, because most ADR programs rely, at least in part, on the courts for referrals or require some cooperation with the court, organizations or agencies wishing to initiate ADR programs would most likely contact the state court administrator's office at some point in their planning process.

In January 1987, COSCA members were mailed a questionnaire soliciting information about the number, identity, and characteristics of court-annexed arbitration and other ADR programs in their states. Court-annexed arbitration was distinquished from other ADR programs because at the time of the survey, court-annexed arbitration had experienced a growth spurt, and state court administrators had become particularly interested in its promise and effects.[6]

Follow-up phone calls were made to each state that had identified ADR programs. The questionnaire and follow-up calls were designed to capture the following information about ADR programs in each state:

- type(s) of ADR programs;
- jurisdictions in which programs operate;
- when and by whom the programs were initiated;
- citations to authorizing statutes or court rules;
- types of cases eligible for the programs;
- whether program participation is mandatory or voluntary;
- descriptive materials and evaluation studies that could be made available; and
- whether the program was considered exemplary.

To complete the picture of the number and characteristics of ADR programs, the *American Bar Association Dispute Resolution Directory 1986-87* and other sources were reviewed.[7] The discussion of the survey findings and the conclusions drawn below are based on all of these information sources.

Table 1
Characteristics of State Court-Annexed Arbitration Programs

State	Dollar Limits	Case Types	Statewide	Mandatory
Arizona	Varies	Civil		X
California	$50,000	Civil	X	X
Colorado	$50,000	Civil		X
Connecticut	$15,000	Civil		
District of Columbia*	No Limit			
District of Columbia*	$50,000	Civil		X
Delaware	$30,000	Civil		X
Florida	No Limit	Civil		
Georgia	$25,000	Civil		X
Hawaii	$150,000	Torts		X
Illinois	$15,000	Civil		X
Louisiana	$2,000	Small Claims	X	
Michigan	No Limit	Civil		
Minnesota	$50,000	Civil		X
Nevada	$3,000	Motor Vehicle Damage		X
New Hampshire	No Limit	Civil		
New Jersey	$15,000	Automobile Torts	X	X
New York	$6,000	Civil	X	X
North Carolina	$15,000	Civil		X
Ohio	Varies	Civil		Varies
Oregon	$15,000	Civil		X
Pennsylvania	$20,000	Civil	X	X
Washington	$25,000	Civil		X

*The District of Columbia has both a mandatory and a voluntary program.

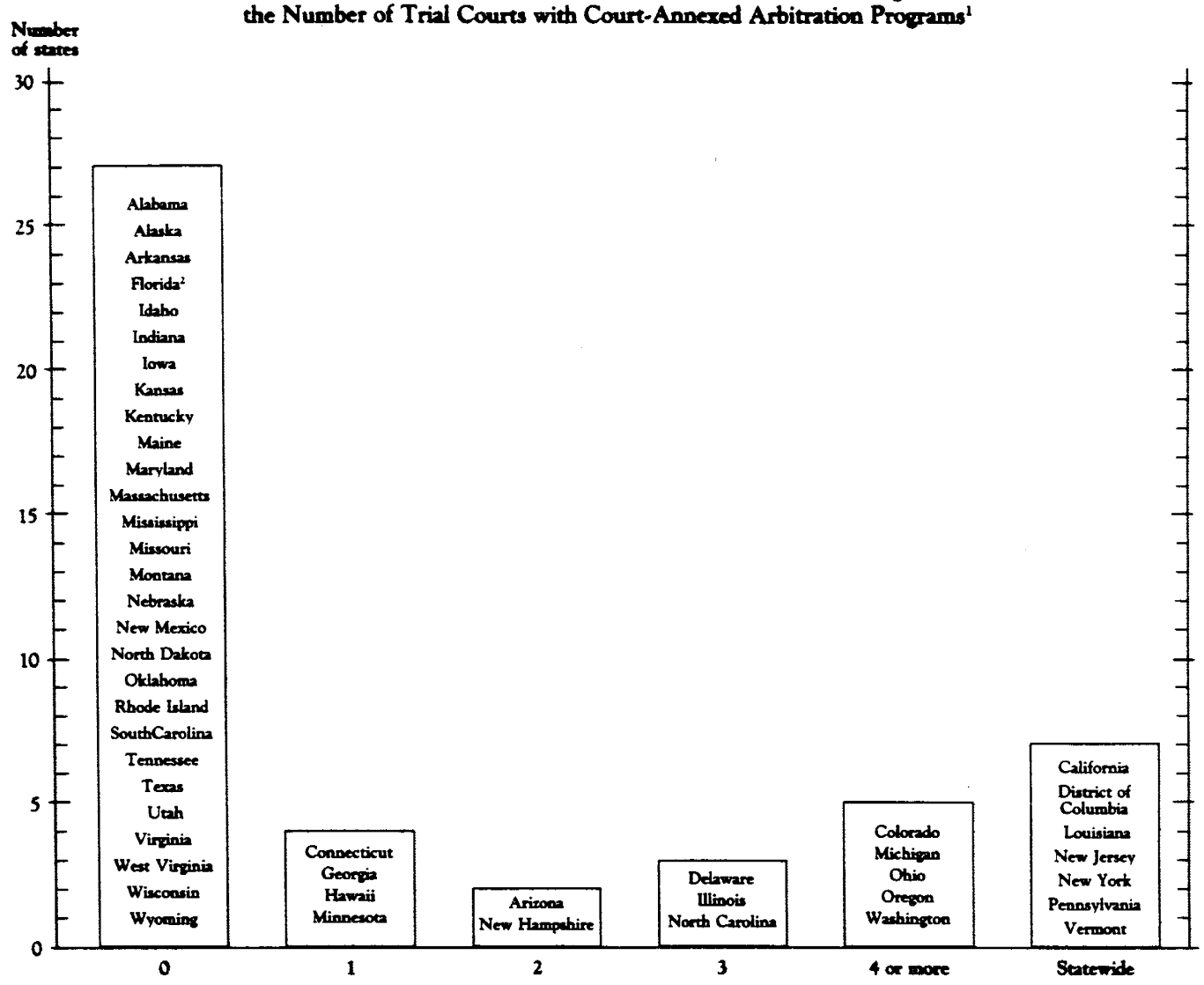
Findings

State court administrators in forty-four states, the District of Columbia, and Puerto Rico reported 458 operating alternative dispute resolution programs.[8] The types of ADR programs ranged from mandatory, court-annexed arbitration and mediation programs to statutory provisions for discretionary referral processes. The type of cases that the various ADR programs treat include minor criminal and some felony charges and many types of civil disputes. As discussed below, court-annexed arbitration and other ADR processes are concentrated in a few states; most states with court-annexed arbitration do not have statewide programs, and where court-annexed arbitration is statewide, limits on dollar amounts and case types restrict the scope of the programs.[9]

ADOPTION OF COURT-ANNEXED ARBITRATION

The survey indicated that court-annexed arbitration programs operate in courts in twenty-two states and the District of Columbia.[10] **Table 1** lists the states with court-annexed arbitration programs, including program dollar limits, eligible cases, whether the programs operate statewide, and whether the programs are mandatory. Programs are mandatory in nineteen of twenty-three jurisdictions programs, and most programs apply to civil cases for money damages up to speci-

Table 2
Distribution of States and the District of Columbia According to the Number of Trial Courts with Court-Annexed Arbitration Programs[1]



1 The number of states does not equal 51 because South Dakota's arbitration program is an appellate settlement program and Nevada's motor vehicle damage program is seldomly used.

2 Florida's legislature authorized court-annexed arbitration after the survey was completed.

fied limits. The upper limits on mandatory programs range from a low of $6,000 in New York to $150,000 in Hawaii, but most upper boundaries lie somewhere between $15,000 and $50,000. New Hampshire's mandatory program has no limits. A few court-annexed arbitration programs are voluntary. For example, the District of Columbia has a voluntary arbitration program and an experimental, one-year mandatory program for cases up to $50,000; California and Minnesota allow the parties to stipulate to submit their case to arbitration regardless of the amount in controversy.

In several states, court-annexed arbitration programs operate for only particular types of civil cases. For example, Louisiana has a voluntary program for small claims under $2,000, and the Vermont legislature has authorized voluntary arbitration of medical malpractice claims. A Nevada statute mandates arbitration of claims of $3,000 or less for damage involving motor vehicles, and the South Dakota Code allows voluntary appellate settlement conferences for workers compensation, domestic relations, and money judgement cases as well as administrative appeals. In addition to its mandatory

arbitration program, Delaware operates an arbitration program for matters related to family law.

Although court-annexed arbitration programs operate in nearly half the states, the adoption of court-annexed arbitration programs has been by no means uniform, and program characteristics vary widely across the states. One striking observation is that program adoption tends to encompass a limited percentage of jurisdictions in each state. As **Table 2** illustrates, six states (California, Louisiana, New Jersey, New York, Pennsylvania, and Vermont) and the District of Columbia have programs operating statewide; five states (Arizona, Delaware, Georgia, Minnesota, and New Hampshire) have programs in only one or two jurisdictions; and two states (North Carolina and Illinois) have experimental programs underway or planned in only three counties.

Court-annexed arbitration has been adopted statewide in four highly populated states, but in many large states, such as Texas and Massachusetts, the process is not used at all. A few large cities (Phoenix, Atlanta, and Minneapolis) have programs, but in other major metropolitan areas (for example, Chicago and Boston) court-annexed arbitration has not been employed. This irregular pattern of adoption in large cities is well illustrated in Colorado. There, an experiment has just begun with programs in eight jurisdictions, but Denver and Colorado Springs, which have the state's two largest court caseloads, are not included.

The scope of court-annexed arbitration programs is also limited by the limits on dollar amounts and case types that many states have established. **Table 3** presents selected characteristics of statewide arbitration programs. It shows that five of the six states that have shown a strong commitment to court-annexed arbitration by implementing statewide programs have not set jurisdictional limits at a level sufficient to cast the widest net. In New York, although all civil cases are covered by arbitration, upper monetary limits ($6,000) are the lowest of all mandatory arbitration programs in the country. New Jersey's automobile arbitration program, which handles personal injury claims not exceeding $15,000 for noneconomic losses arising from automobile negligence, was only recently expanded to include nonautomobile torts in several counties. Louisiana's arbitration program applies only to small claims cases under $2,000, and Vermont's program covers only medical malpractice claims. Finally, Pennsylvania's court-annexed arbitration initiative, although the country's oldest and most well known, limits program eligibility to civil cases involving $20,000 or less.

Table 3
Characteristics of Programs in States with Statewide Alternative Dispute Resolution Programs

State	Dollar Limit	Types of Cases	Selection
California	$50,000	All Civil	Mandatory
District of Columbia	$50,000	All Civil	Mandatory
Louisiana	$2,000	Small Claims	Voluntary
New Jersey	$15,000	Automobile *(noneconomic losses)*	Mandatory
New York	$6,000	All Civil	Mandatory
Pennsylvania	$20,000	Tort, Contract	Mandatory
Vermont	No Limit	Medical Malpractice	Voluntary

Generally, in states where program limits are higher, programs have not been implemented statewide. For instance, Minnesota's only mandatory court-annexed arbitration program has a $50,000 limit (although an experimental voluntary program has no limits), and New Hampshire's program, which operates in only two counties, sets no monetary limits. Hawaii's program, which covers personal injury and property damage torts, has the highest monetary limit at $150,000. California, which recently raised its statewide judicial arbitration program limits to $50,000, is an exception to this pattern.

In summary, the use of court-annexed arbitration tends to be concentrated in a small number of more-populated states. Only a few states have implemented programs statewide, and those programs have been designed to deal with only a limited portion of the court's caseload. Hence, the distribution of court-annexed arbitration adoption among the states suggests that its acceptance is tentative.

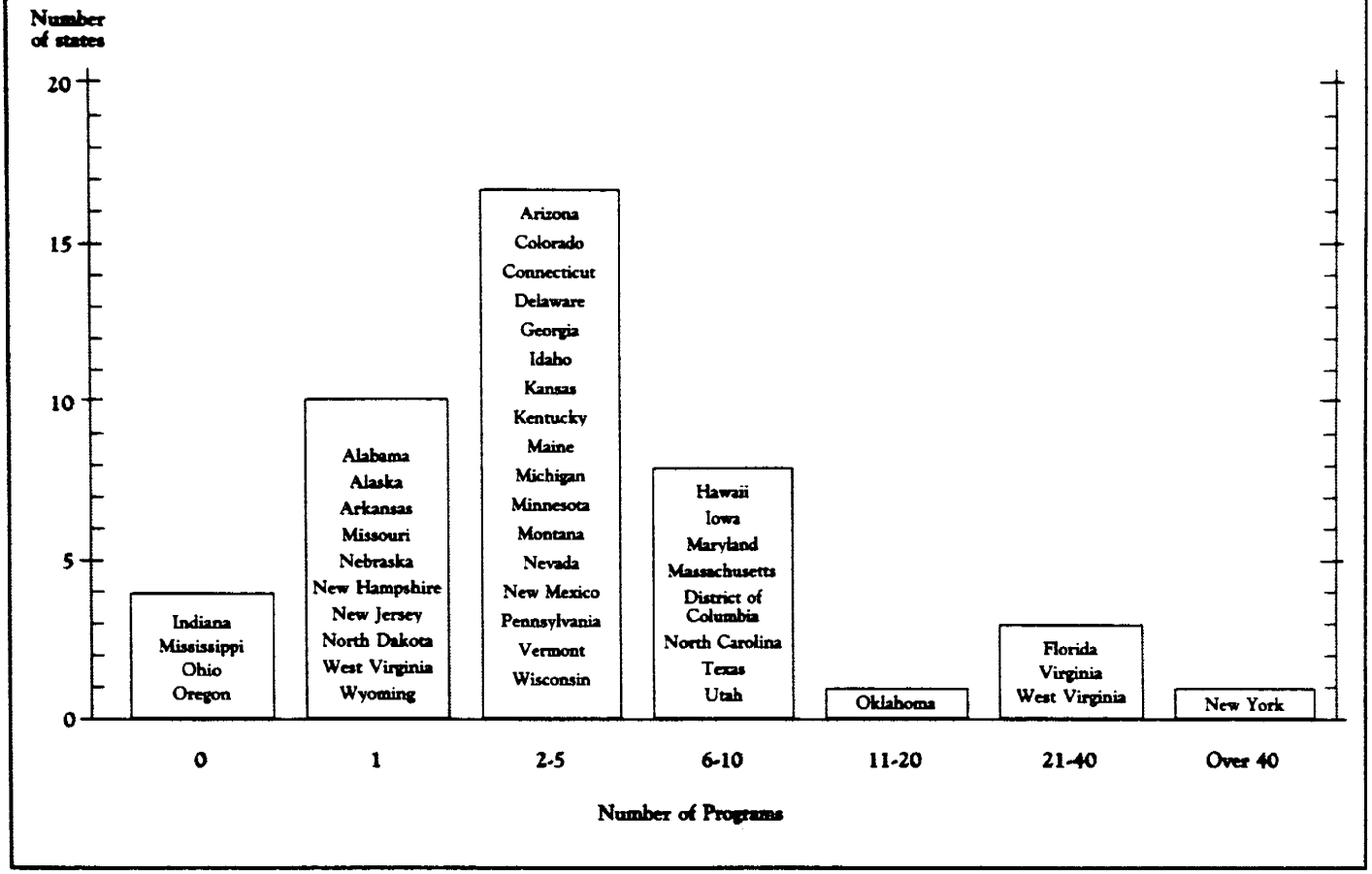
USE OF OTHER ADR PROGRAMS

All but ten state court administrators identified some type of alternative dispute resolution program other than court-annexed arbitration operating in their state. A total of 306 such programs were reported, the bulk of which were mediation programs. The range of cases mediated include domestic relations, contracts, small claims, motor vehicle, environmental disputes, misdemeanors, juvenile delinquency, neighborhood conflicts, and consumer-merchant, farmer-creditor, landlord-tenant, and employer-employee conflicts. Other reported ADR methods were pretrial settlement, summary jury trials, and medical malpractice screening.

As we noted above, the *ABA Dispute Resolution Directory* provided additional information regarding the extent of ADR adoption and program characteristics. By combining our survey findings with the programs profiled in the *ABA Dispute Resolution Directory*, we estimate that the total number of ADR programs, excluding court-annexed arbitration, is 500.[11] Although this number initially suggests that the ADR movement is a growth industry, a different picture emerges when one examines changes in the number of new ADR programs. According to one researcher, after steady growth since 1975, the number of new programs began to drop off in 1984 and had declined to a total of five in 1985.[12] The *ABA Dispute Resolution Directory*, published in 1986, indicates that only seventeen ADR programs had been initiated in the year and a half prior to publication, whereas fifty-eight programs began operations during the preceding eighteen months.[13]

Reports of national statistics about ADR programs also fail to support the

Table 4
Distribution of States According to Number of ADR Programs Reported in Survey
(Court-Annexed Programs Not Included)



conclusion that ADR is being widely adopted across the country. As is the case with court-annexed arbitration, not all states have embraced ADR programs to the same degree. For example, of the 279 ADR programs profiled in the *ABA Dispute Resolution Directory*, 118, or 42 percent, were concentrated in four states (California, Florida, Massachusetts, and New York). As **Table 4** indicates, our survey also found high concentrations of programs in a few states (e.g., Florida, New York, Oklahoma, and North Carolina) and relatively few programs in the majority of states. This lack of uniform adoption comes as no surprise given the diversity of state judicial systems, the varying economic and social conditions of the states, and the differences in the size of the population. Notwithstanding the inherent demographic diversity among the states, however, differences in ADR adoption across the states cannot be explained by demographics alone.[14]

For example, population size clearly does not account for differences in the level of ADR adoption. As reviewed above, most ADR programs profiled in the *ABA Dispute Resolution Directory* are in only four states. These states, California, New York, Florida, and Massachusetts, rank first, second, fourth, and twelfth respectively in population. However, many other states with higher populations than Massachusetts have relatively few ADR programs.

On the other hand, some states with moderate or small populations have considerable ADR activity. Hawaii, for example, has five mediation programs and two ADR research programs in addition to its mandatory court-annexed arbitration program. Maryland reported eight ADR programs in our survey, and the District of Columbia's multi-door courthouse offers six ADR programs. Finally, in Minnesota, whose population ranks twentieth, eighteen ADR programs operate in addition to a court-annexed arbitration program in Hennepin County (Minneapolis).

The distinction between urban and rural environments also does not serve as a reliable predictor of ADR adoption. Chicago, for example, reportedly has only one ADR program—a neighborhood justice center, which, according to the *ABA Dispute Resolution Directory*, scheduled 200 cases and, of those, mediated only 85. Boston, on the other hand, has five ADR programs, while Miami, with two programs that resolve neighborhood disputes, falls between Chicago and Boston in the number of programs. One of Miami's programs, the Citizen's Settlement Program, schedules 1900 cases annually and mediates 700. And while many rural states have little ADR activity, in North Carolina and Oklahoma, two

predominantly rural states, major ADR initiatives are under way.

While, for most types of cases, the adoption of ADR programs has been tentative and uneven, ADR programs appear to have found widespread acceptance in the domestic relations arena. Twenty-seven states, the District of Columbia, and Puerto Rico operate ADR programs for domestic relations cases (family, child custody, and divorce). Several of the domestic relations programs are mandatory, and some states have implemented programs statewide or in several jurisdictions.

In brief, the diffusion of ADR programs other than court-annexed arbitration does not present a clear pattern. Nearly all states have at least one ADR program, although some states have considerably more ADR activity than others. This sort of diffusion suggests that the ADR movement is in its developmental stages.

Where is the ADR movement today?

In some jurisdictions, to be sure, the use of alternative processes to resolve disputes has taken a firm hold or become institutionalized. Pennsylvania, for example, has had a long and successful experience with court-annexed arbitration. California has steadily extended and expanded its once experimental judicial arbitration program. Florida, Massachusetts, Minnesota, New York, and North Carolina all have established extensive systems for resolving disputes outside the courts.

The extent of ADR adoption, as demonstrated by the number of ADR programs, provides some indication of the success of alternative processes in fairly and efficiently resolving disputes. While some states have embraced ADR, many others have followed the path of cautious adoption of ADR. The high concentration of ADR programs in a few states, the slowed growth of ADR adoption, and the low ratio of ADR programs to courts suggest that the ADR movement is in the formative stage of its development, that is, at the base of the J-curve.

The responses to our survey together with the *ABA Dispute Resolution Directory* and Deborah Hensler's 1986 tally of court-annexed arbitration programs have some implications for the ADR movement.[15]

In our survey, some state court administrative offices reported the existence of many ADR programs at the local court level but explained that they did not monitor or keep track of these programs. Some were unaware of a few programs, while others reported no programs even though several operate in their states. This lack of supervision and information about existing state ADR programs at the highest level of court administration indicates to us that the proponents of the ADR movement and state court administrators have yet to establish a close working relationship. In our view, such a relationship must be forged before ADR can meet its potential as a complement to traditional litigation.

> . . . the movement is poised for a second generation of programs that will refine and improve ADR processes.

State court administrators are in a position to generate state-level support for new program ideas. Their support may be in the form of providing direct financial aid, providing coordination and administrative services, or merely acknowledging an idea's value and encouraging its support by others. Hence, as with any proposed innovation in the state courts, state court administrators *can* influence the development of ADR. While they cannot always independently secure federal, state, private, or local funds for ADR programs, they can introduce and promote such support. State court administrative offices can facilitate the institution and refinement of ADR programs by collecting and disseminating information about local programs; at a minimum, they can endorse the efforts of local court administrators and others to experiment with new ADR programs. Without acceptance of ADR by state court administrators, widespread adoption of ADR processes will be slowed or perhaps even stopped. It is also clear that the needed support will not be given without more information about whether ADR works, how it works, and what it actually costs.

The current lack of a close working relationship between ADR advocates and state court administrators reflects a wait-and-see attitude among many court administrators. This attitude exists because those who would introduce ADR have yet to demonstrate its overall value and thereby convince court administrators that it can benefit operations in their court or their state.

Part of the promise of the ADR movement is that alternative processes are more flexible and expedient and, therefore, more adaptable to the needs of the disputants than court adjudication, with its procedural and evidentiary rules and often long delays. The early growth of community dispute resolution programs as well as court-annexed programs suggests that alternative processes are also highly transferable from one jurisdiction to another. ADR processes no doubt possess these qualities in some measure, but the high concentration of programs in a few states, the low level of diffusion elsewhere, and the lack of comprehensive ADR information at the state level of court administration indicate that the flexibility, adaptability, and transferability of ADR has yet to be demonstrated persuasively.

In sum, our research suggests that the adoption of ADR is hovering around the base of the J-curve. As others have suggested, the movement is poised for a second generation of programs that will refine and improve ADR processes.[16] In order for this second generation of programs to lift ADR adoption higher on the J-curve, ADR proponents must fortify their relationship with the administrators of the judicial systems they seek to enhance. This relationship can be strengthened with solid information about ADR's benefits—information that is effectively communicated to court administrators. scj

NOTES

1. See, e.g., Craig A. McEwen and Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent," 18 *Law and Society Review* 11 (1984); Jay Folberg and Alison Taylor, *Mediation* (Jossey-Bars: San Francisco, 1984); Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986); Thomas Lambros, "The Summary Jury Trial—An Alternative Method of Resolving Disputes," 69 *Judicature* 286 (1986); Jane W. Adler, Deborah R. Hensler, and Charles E. Nelson, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, (Santa Monica, Calif.: The Rand Corporation [1983]; Stephen Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution* (Little, Brown and Co.: Boston, 1985).

2. Deborah Hensler. "What We Know and Don't Know About Court-Administered Arbitration," 69 *Judicature* 307 (1986).

3. Ibid.

4. Daniel McGillis. *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986).

5. The members of the COSCA Committee on Alternative Dispute Resolution are Carl F. Bianchi (chair), Samuel Conti, Robert Duncan, Franklin E. Freeman, Thomas J. Lehner, J. Denis Moran, Larry Polansky, Arthur H. Snowden, and Janice Wolf. The committee members do not necessarily subscribe to the views expressed in this article.

6. Most court-annexed arbitration programs require civil cases under a specified amount, usually between $15,000 and $25,000, to be submitted first to an arbitration procedure. Litigants who are not satisfied with the arbitration award may appeal and receive a trial *de novo*. Consequently, if large percentages of litigants reject the arbitration award and seek a new trial, case backlogs will not have been reduced and more, rather than fewer, court resources will have been spent on cases sent to arbitration.

7. *American Bar Association Dispute Resolution Directory 1986-1987* (Washington, D.C.: American Bar Association Special Committee on Dispute Resolution. 1986).

8. The *ABA Dispute Resolution Directory* reports programs in five of the remaining six states. Mississippi is the only state with no ADR programs reported in either the *ABA Dispute Resolution Directory* or our survey.

9. Complete, detailed findings are available upon request from the National Center for State Courts, 300 Newport Avenue, Williamsburg, Va., 23187-8798.

10. Florida, Alaska, and New Mexico are not included in this count of court-annexed arbitration programs. Alaska and New Mexico have statutory authority for court-annexed arbitration programs but have not implemented any such programs. The Florida legislature authorized voluntary court-annexed arbitration after our survey was conducted.

11. This figure is an estimate because there is considerable overlap between the *ABA Dispute Resolution Directory* and our survey, and we were not able to determine in every case whether a particular program reported in our survey was the same program profiled in the *ABA Dispute Resolution Directory*.

12. Daniel McGillis. *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986).

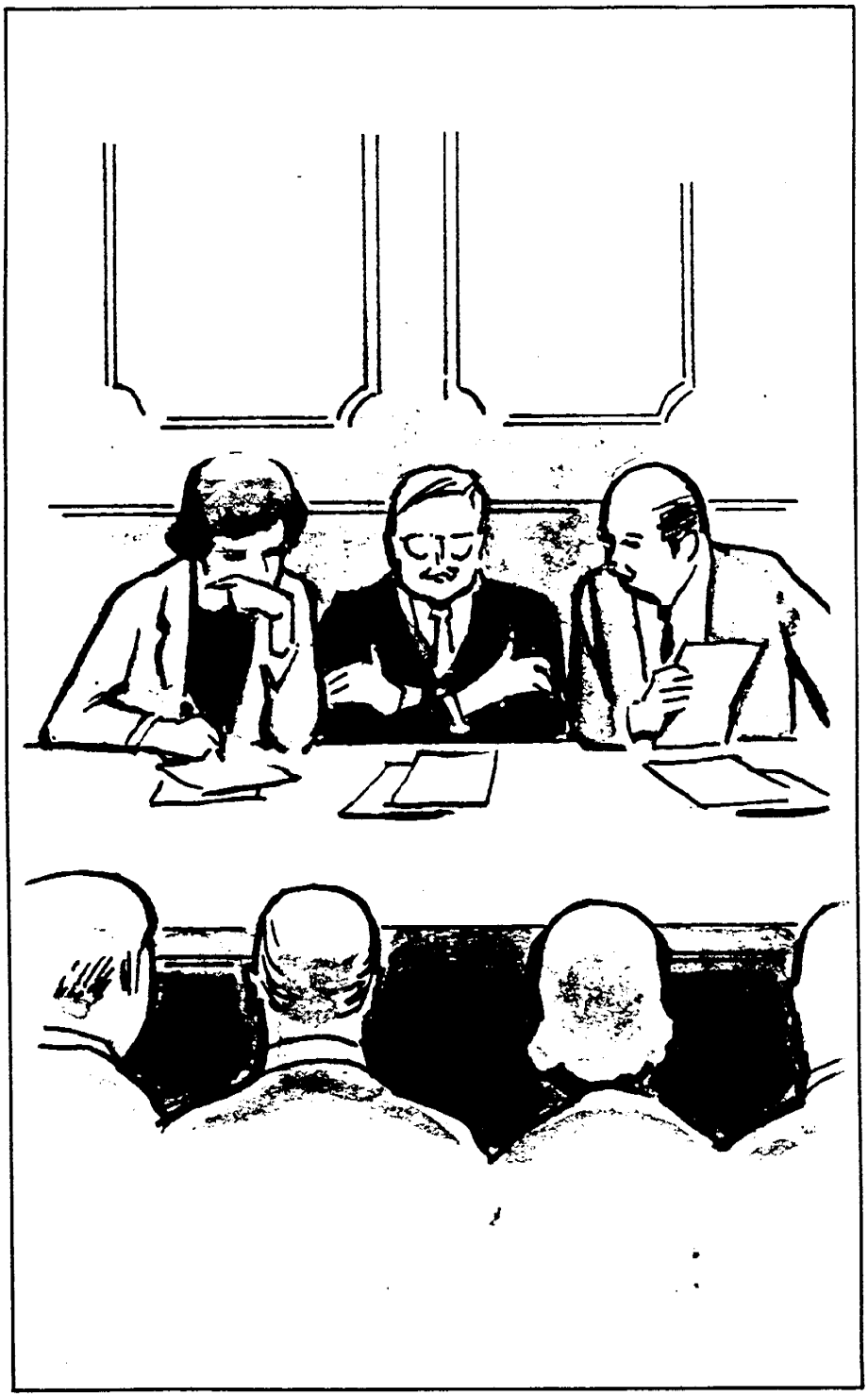
13. Another indication that the absolute number of ADR programs may not reflect the complete and correct extent of adoption is the rate at which the programs are used. The *ABA Dispute Resolution Directory* illustrates this point: 119 of the 279 U.S. programs it profiles have annual caseloads of 500 or less. In an evaluation of dispute resolution alternatives, Jessica Pearson reports that voluntary mediation programs do not attract large numbers of disputants and that attrition rates are high. See Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication," 7 *The Justice System Journal* 420 (1982). This apparent reluctance on the part of disputants to take their grievances to an alternative forum suggests that individuals have not embraced ADR in proportion to the number of reported programs.

14. ADR's diffusion has not been stymied by a lack of publicity. The vast literature on ADR programs and COSCA's interest in finding out more about how they work demonstrate that the existence of ADR is widely known.

15. Deborah Hensler's article (cited above) incorporates information from a series of studies on court-annexed arbitration programs conducted by The Rand Corporation's Institute for Civil Justice. These studies have charted the growth and characteristics of court-annexed arbitration programs, evaluated the effect of these programs on court systems, and measured the attitudes of litigants and attorneys who participate in the programs.

16. See Peter B. Edelman, "Institutionalizing Dispute Resolution Alternatives," 9 *The Justice System Journal* 2 (1984); James J. Alfini, "Alternative Dispute Resolution and the Courts: An Introduction," 69 *Judicature* 5 (1986).

APPENDIX C



What we know and don't know about court-administered arbitration

by Deborah R. Hensler

69.

Over the past decade, interest in alternative dispute resolution has increased enormously. Initially, attention focused on establishing alternative forums, such as neighborhood justice centers, outside the court system. Proponents of such alternatives believed that they would relieve pressure on the criminal and civil justice systems, while providing a qualitatively better form of dispute processing—one that would be more reflective of community norms and better tailored to the needs of individual disputants. Although many communities now have community-based dispute resolution programs, the available evidence suggests that most disputants do not seek out these programs on their own.[1]

In recent years, as the dispute resolution movement has acquired legitimacy, attention seems to have shifted to the use of alternative dispute resolution procedures within the court system. Most of these alternatives provide some sort of arbitral or mediative process, diverting particular classes of cases from the regular trial court calendar while retaining administrative control over them. Some legislatures view the establishment of such alternatives primarily as a means of reducing judicial workload, and hence, reducing the demand for new judgeships. Judges and court administrators frequently view them as components of a differentiated strategy for caseload management, in which specific categories of cases are assigned to different treatments. Lawyers may view the alternatives as a means of clearing the trial calendar for "more important" litigation. Public and private interest groups may regard alternative dispute resolution procedures as a means of saving litigants' time and money, while perhaps providing a better quality of justice. Just what is meant by "better quality" is often unclear.

Despite the attention that the dispute resolution movement has drawn, there has been little systematic study of its outcomes. It is difficult to determine how much implementation there is to back up the rhetoric, what types of procedures have been established, and what has resulted from different approaches. Thus, it is difficult for policymakers to decide whether they should adopt any of the available approaches and to determine how to design a specific procedure to

maximize its potential for producing benefits to the courts, lawyers and litigants.

Since 1979, the Institute for Civil Justice (ICJ) at the Rand Corporation has been engaged in a program of research on a particular alternative dispute resolution procedure, *court-administered arbitration*, that many court officials and lawyers feel has particular promise for civil lawsuits. In the course of this research we have monitored the spread of court-administered arbitration programs, evaluated the effects of implementing programs, and studied the implications of alternative program designs. Our work has encompassed systematic surveys of court officials, case studies of specific programs, surveys of lawyers' and litigants' attitudes toward court arbitration, and technical assistance to local court officials involved in designing or modifying court programs. This article describes what we have learned to date, and what questions remain to be answered.

A profile

Court-administered arbitration programs may be established by statute, by supreme court rule, or by local court rule. However established, all programs authorize trial courts to require arbitration of civil damage suits that fall within a specified jurisdictional limit, as a precondition for placing those suits on the trial calendar. Arbitration results in a verdict that has the force of a court judgment. If any of the parties is dissatisfied with the verdict, however, he or she may reject it and request that the case be calendared for a trial *de novo*. In many programs, appellants who request *de novo* trials are required to reimburse the court for the arbitrators' fees; in addition, in some programs, court costs and attorney fees may be levied on unsuccessful appellants. Such fees are intended to discourage frivolous appeals.

Court-administered arbitration is neither voluntary nor binding.

In all court-administered arbitration programs, cases assigned to arbitration are heard by one or more private attorneys or retired judges who volunteer to serve as arbitrators. Usually, attorneys' time is provided, at least in part, *pro bono*, since they typically receive only a small honorarium for their participation. Arbitration hearings are private, informal, and usually quite brief, the proceedings are generally not recorded, and relaxed rules of evidence prevail. In particular, in lieu of witnesses, medical and other reports are usually sufficient as evidence. In some programs only limited discovery is permitted prior to the hearing. Before they begin the hearing, some arbitrators may ask the parties if they would like assistance in attempting to settle the case, but once a hearing begins, arbitration proceeds as an adjudicative process. The facts of the dispute are heard, albeit in an abbreviated fashion, and the litigants are usually present and may testify. The neutral third party(ies) deliberates and issues a verdict, usually within a few days.

Although court-administered arbitration shares many features with other alternative dispute resolution procedures, it is distinguished from them in several important ways. Unlike private commercial arbitration, court-administered arbitration is neither voluntary nor binding. Unlike a traditional mediator, the arbitrator is not trying to help the disputants fashion a mutually agreeable compromise. And unlike most judicial settlement conferences, there is a true hearing of the case and an opportunity for litigants to participate in that hearing.

The spread of arbitration

The first court-administered arbitration program was established in 1952, in Philadelphia, by amending an 18th century statute that provided for the referral of trial cases to arbitrators. By the 1960s, similar arbitration programs had been established in courts across Pennsylvania, and word of their success in resolving small money damage suits had spread outside the state's limits.[2] In the early 1970s, as many trial courts were struggling to find ways of dealing with sharply increasing civil caseloads, a number of states adopted mandatory arbitration programs patterned after Pennsylvania's.

More recently, during the late 1970s and early 1980s there was a third wave of program adoption. By December 1984, 16 states had authorized mandatory court-administered arbitration programs.[3] A national conference on court-administered arbitration, sponsored by the National Institute of Dispute Resolution in May 1985, may have given further impetus to this recent wave of adoptions; by October 1985, two additional states had passed legislation authorizing mandatory arbitration programs (Illinois and North Carolina).

Early interest in court-administered arbitration was confined to the state court systems. But in 1978, the federal courts decided to experiment with mandatory arbitration in three district courts. Following the formal completion of the experiment, one of the three courts discarded its program while the remaining two maintained theirs. In 1984, under Public Law 98-411, Congress appropriated $500,000 of fiscal year 1985 funds to support a new arbitration initiative in the federal district court system. The new funds are being used to mount mandatory arbitration "demonstrations" in eight districts, bringing the total number of federal courts with authorized systems to ten. Table 1 lists the states and federal district courts that have authorized mandatory court-administered arbitration programs to date.

Once established, arbitration programs have tended to spread within regions from one state to another, and within states from one jurisdiction to another. Table 1 indicates what we learned about the status of local arbitration programs in the course of our last national survey. Based on this information, we estimate that court-administered arbitration programs now exist in approximately 200 of the country's trial courts.

Court-administered arbitration pro-

This article is based in part on a presentation delivered by the author to the First National Conference on Court-Administered Arbitration, sponsored by the National Institute for Dispute Resolution, May, 1985.

1. Merry and Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

2. Adler, Hensler, and Nelson, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (Santa Monica, CA: The Rand Corporation, 1983).

3. Ebener and Betancourt, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (Santa Monica, CA: The Rand Corporation, 1985).

Table 1 Mandatory court-annexed arbitration programs

Jurisdiction	Program title	Authorization	Earliest date authorized	Current scope
State courts				
Alaska	Arbitration of Small Claims	State Law—A.S. 09 43.190	1972	Never implemented; jurisdictional limit too low to make program useful
Arizona	Arbitration of Claims	State Law—A.R.S. 12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law—C.C.P. 1141.10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law—Conn. Statutes 52-549N	1983	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(c)	1984	Program began statewide in mid-1984
Illinois	Mandatory Arbitration	State Law—C.C.P. Ch. 110 Part 10A	1985	Rule drafting underway
Michigan	Mediation	Supreme Court Rule (except Wayne County Court): General Court Rule 316	1978	Operational in 28 of 55 circuit courts
Minnesota	Judicial Arbitration	State Law—Minn. Statutes 484.73	1984	Experimental implementation in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law—N.R.S. 38.215-245	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damage cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law—Laws of N.J. Ch.358	1983	Statewide implementation
New Mexico		Supreme Court Rule	1984	Awaiting funding
New York	Alternative Dispute Resolution by Arbitration	State Law 22 N.Y.C.R.R. Part 28	1970	Operational in 31 counties, including New York City
North Carolina	Court-ordered Arbitration	State Enabling Act	1985	Pilot program authorized in 3 districts
Ohio	Varies by county	Local Judicial Rules— Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law—Ch. 670 Oregon Laws	1983	Operational in 9 counties
Pennsylvania	Compulsory Arbitration	State Law—Pa. Con. Stat. Ann. Title 42 7101	1952	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law—R.C.W. Ch.7.06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
Federal district courts				
California—Northern Dist.	Court-annexed Arbitration	Local Rule—Rule 500	1978	Ongoing program
Florida—Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Michigan—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Missouri—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
New Jersey	Court-annexed Arbitration	Local Rule	1985	Operational
New York—Eastern Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by January 1986
North Carolina—Middle Dist.	Court-annexed Arbitration	Local Rule—Part VI Rules of Practice and Procedure	1984	Operational
Oklahoma—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Pennsylvania—Eastern Dist.	Court-annexed Arbitration	Local Rule—Civil Procedure 8	1978	Ongoing program
Texas—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational

Source: Ebener, and Betancourt, **Court-Annexed Arbitration: The National Picture** (Santa Monica, CA: The Rand Corporation, 1985); updated to January 1, 1986.

grams have also expanded by extending their case jurisdiction: typically, the first arbitration program(s) within a state is established with a monetary jurisdictional limit in the neighborhood of $15,000; over time the limits are increased to $25,000 or more. In recent years, the initial jurisdictional limits of programs have been set higher, especially in the federal district courts. Figure 1 shows the change in monetary jurisdictional limits across courts from 1979 to 1985.

Program objectives

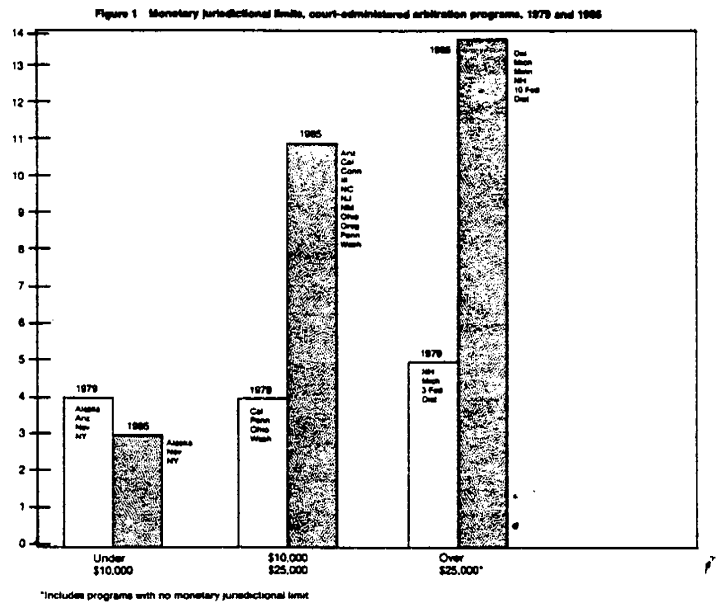
Whatever their historical origins, most court-administered arbitration programs now share the following objectives:

- Reduce congestion on the civil trial calendar by diverting and disposing of cases through arbitration;
- Reduce (or stabilize) court costs by reducing judicial time spent on the civil caseload;
- Reduce time to disposition by providing an expedited process for arbitration-eligible cases and by removing these cases from the trial queue, thereby reducing time to trial for other cases;
- Reduce litigation costs for parties;
- Improve access to court for diverse users by reducing the time and expense required and by providing a simpler and, perhaps, fairer form of dispute resolution.

Supporters of court-administered arbitration programs do not generally expect to change case outcomes. Instead, the distribution of outcomes prevailing prior to establishing an arbitration program is frequently viewed as the benchmark for assessing arbitration's effect on equity, and a program is viewed as successful if it does not perceptibly alter that distribution to the advantage or disadvantage of any of the major participants in the system.

Evaluating effectiveness

As in the case of other "court reforms" there has been no comprehensive attempt to evaluate court-administered arbitration programs' effectiveness in meeting these objectives. During the past five years, however, the ICJ has conducted evaluations of arbitration programs in California, Pittsburgh (Allegheny County) and Bucks County, Pennsylvania, and Burlington and Union Counties in New Jersey that shed considerable



light on the issue.[4] The empirical data from these studies suggest that court-administered arbitration can contribute significantly to reducing court congestion, costs and delay and to diminishing the financial and emotional costs of litigation for parties. But the data also indicate that arbitration's ability to fulfill this potential is critically dependent on program design and implementation decisions, and on lawyers' responses to arbitration, and that arbitration cannot, by itself, be depended upon to "solve" all of the problems that characterize contemporary civil litigation.

Reducing court congestion. In both California and Pittsburgh, about 60 per cent of civil money suits (including personal injury, property damage and contract disputes) are diverted to arbitration; in Bucks County the percentage is closer to 90 per cent. The percentage of cases diverted by any particular program is dependent on the program's eligibility rules, the proportion of cases that are eligible under those rules and the procedures that are used for determining eligibility. Some state program rules permit so few cases to be diverted to arbitration that local jurisdictions have been reluctant to invest resources in program implementation. Some assignment procedures provide incentives and opportunities for parties and their lawyers to bypass arbitration and obtain placement on the trial calendar. And in every court it is possible for arbitration cases to appear on the court's trial calendar after arbitration is completed, as a result of the trial *de novo* process.

It is clear, however, that it is possible for any court to develop rules and procedures that will result in the diversion of a substantial fraction of its civil money suits and it is likely (as we shall see below) that most of these cases can be permanently diverted. Policymakers should note, though, that a court's total civil damage caseload may only represent a modest fraction of its overall caseload, which will generally include many criminal cases, family law cases, equitable disputes, and other matters. As long as arbitration is considered appropriate only for civil damage suits, and only for the lower-value cases among these,[5] it may ease court congestion but cannot eliminate it.

Reducing court costs. Cost savings due to arbitration depend on three factors: how much the court would spend on arbitration-eligible cases in the absence of an arbitration program, how much it costs to administer the arbitration program itself, and how many cases require court attention after arbitration. Unfortunately, most courts cannot provide reliable data on all three factors, making estimation of savings due to arbitration extremely problematic.

The best data available relate to program administration costs. These generally have two components: costs to process cases (determining eligibility, notifying parties of assignment to arbitration, selecting arbitrators to hear specific cases, etc.) and fees to arbitrators. How much it costs to administer an arbitration program depends critically on program design and implementation decisions. California's statutory requirement that the court assess whether a case is eligible for arbitration placed a new burden on judges' time. In addition, a complex procedure that provides for the parties' attorneys to participate in arbitrator selection adds to the tasks that must be carried out by the program's administrative staff. An honorarium of $150 per day paid to the single arbitrator who hears each case further drives up the cost of the program. A recent Judicial Council report estimated that the cost to process a case through arbitration in California in Fiscal Year 1982 was about $123 for each case assigned to the program, and about $299 for each case actually heard by an arbitrator.[6] These estimates do not include the cost of judge time allocated to determining arbitration eligibility.

In Pittsburgh, when the plaintiff's attorney files a case, he or she is asked whether it is eligible for arbitration. If it is declared eligible, the court clerk automatically assigns it to the program and schedules a hearing date for it. Arbitrators are assigned to hear cases on the day of the hearing, using a pragmatic approach to achieve a roughly random assignment. Three-person panels hear each case, but in a single day they are likely to hear four or five cases. Although each arbitrator is paid $100 per day, the average arbitrator fee per case works out to about $65. When

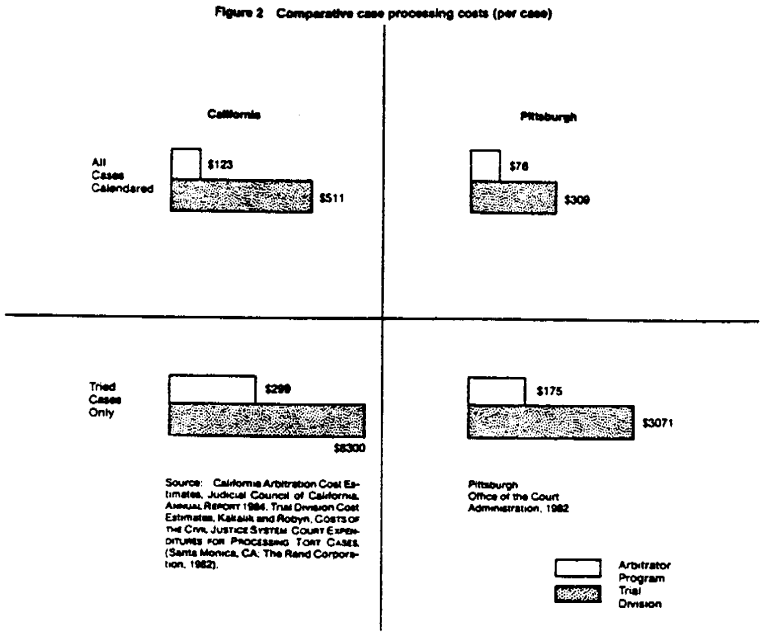
4. The California study, conducted during the first year of program implementation, focused on arbitration's potential for cutting congestion, court costs and delay (Hensler, Lipson, Rolph, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (Santa Monica, CA: The Rand Corporation, 1981)). The Pittsburgh study focused on the effects of arbitration on litigants (Adler et al., *supra* n. 2). Bucks County is one of three sites in an on-going ICJ study of litigants' perceptions of "procedural justice." Burlington and Union Counties were pilot sites for the New Jersey arbitration program; the ICJ collaborated with the Administrative Office of the New Jersey Court in designing and analysing surveys of lawyers and litigants (see Hensler, REFORMING THE CIVIL LITIGATION PROCESS: HOW COURT ARBITRATION MAY HELP (Santa Monica, CA: The Rand Corporation, 1984)).

5. This assumption is being challenged in some locales which are considering broader jurisdiction for arbitration programs.

6. Judicial Council of California, ANNUAL REPORT, 1984.

fee reimbursements from appellants are taken into account, this amount is reduced even further. The average cost to process a case diverted to arbitration in Pittsburgh in 1982 was about $76 for each case assigned to the program, and about $175 for each case heard.[7]

Figure 2 compares the costs of processing arbitration cases to the costs of processing non-arbitration cases that remain on the civil trial calendar. In the upper section of the figure, we see the cost differential between the average per case processing costs for California and Pittsburgh. In the lower section, we have broken out the costs of those cases "tried" (either by arbitrators or jury). These comparisons suggest that, overall, arbitration offers a three- to five-fold savings over traditional civil case processing. The difference in the average cost to "try" a case in arbitration and the average cost to try a case before a jury is many times greater.



The cost differentials shown in Figure 2 may be deceptive, however, if a substantial fraction of the arbitrated cases turn up on the trial calendar thereafter, as a result of *de novo* appeals. It is reasonable to assume that cost savings will be substantial where appeal rates are low, and smaller or non-existent where they are high. (Indeed, one can imagine situations in which arbitration programs would actually increase the net costs of processing civil cases.)[8]

Across the country, *de novo* appeal rates vary substantially from program to program. In California, the rate of appeal has been running in the neighborhood of 50 per cent. In the older Pennsylvania programs it ranges between 15 per cent and 25 per cent of all cases heard, and some court administrators elsewhere report even lower appeal rates.[9] But the majority of appealed cases in all jurisdictions settle without trial. In California, a Judicial Council docket study in a sample of four Superior Courts found that the rate of trial after arbitration was about seven per cent.[10] In Pittsburgh, the ICJ found that three-quarters of all cases that were appealed settled without trial.[11] It is an open question whether the costs to courts of disposing of these *de novo* appeals generally outweigh the savings attributable to arbitration.

Expediting disposition. Success in expediting cases through arbitration depends on formal program rules and informal implementation practices. When courts want to use arbitration to speed case disposition, when they have the resources available to process cases efficiently, when they are not unduly constrained by statutory or other formal limits on the speed of disposition, and when attorneys cooperate in making the program work, arbitration can result in speedy case disposition.

In California, we found that arbitration's effectiveness in reducing time to disposition was constrained by the availability of judge time to assess case value, by statutory requirements that established relatively lengthy time intervals for different stages of the process, by the practice of placing administrative control over the hearing process in the arbitrators' hands, and by the lack of court resources to monitor the arbitrators' performance in carrying out these responsibilities. As a result of these factors, we found that in some courts arbitration did little to expedite case resolution, while in others it *increased* time to disposition. Time to disposition by arbitration varied between nine months and more than three years.

In Pittsburgh, on the other hand, the practice of scheduling cases for arbitration at the time of filing, a policy of encouraging all active bar members, regardless of type or length of experience, to serve as arbitrators, and a centralized form of program administration combine to expedite case processing. The average time to reach arbitration hearing in Pittsburgh is three months from the filing date; awards are decided immediately after the hearings and sent to the parties at the close of business each hearing day. Other Pennsylvania courts have achieved similar results: in Philadelphia in recent years cases have reached arbitration hearings within eight months of filing. In Bucks County, cases are heard within four months of the filing of a certificate of readiness.

Whether speeding cases through arbitration actually reduces the time to disposition for cases on the regular trial calendar is still an open question. The factors that affect time to disposition generally are so complex and so difficult to measure that there has yet to be an empirical analysis of the connection between expediting arbitration cases and expediting regular jury trial cases.

Reducing costs to litigants. Some supporters of court-administered arbitra-

7. Cost information for 1982 provided to the author by Mr. Charles Starrett, Allegheny County Court Administrator.

8. Hensler et al., *supra* n. 4, at 62-67.

9. In most programs, 25 to 50 per cent of the cases assigned to arbitration settle before the hearing date. Thus, the per cent of appeals as a fraction of all cases assigned to the program may be as little as 5 to 10 per cent.

10. *Supra* n. 6, at 9.

11. *Supra* n. 2, at 46.

tion assume that it will produce substantial cost savings for litigants. Our research suggests that such savings are possible, but whether they are realized depends on the behavior of lawyers in response to arbitration.

Individual plaintiffs' costs to litigate generally have three components: the value of their own time spent on the process, lawyers' fees, and expert witness and other direct expenses. In Pittsburgh and New Jersey we found that litigants on average spent 1 to 1½ days preparing for and participating in arbitration hearings. As might be expected given liberal evidentiary requirements, they spent less than $50 on expert witness fees and other direct expenses.

Lawyers' fees were by far the largest component of litigants' expenses. Plaintiffs in Pittsburgh either had a traditional contingent fee arrangement with their lawyer (typically paying one-third the amount obtained in arbitration or settlement) or paid a flat fee to the lawyer (usually $250) for preparing the case and representing them at the hearing. Lawyers offering flat fee arrangements to clients usually conducted a high volume arbitration practice, representing several different clients at hearings in the course of a single morning. This type of practice was made possible by the brief duration of the hearings (45 minutes on average) and tightly-administered hearing schedule. Efficient use of attorney time was also reflected in hourly rate defense costs of approximately $400 per arbitrated case.

In California and New Jersey, on the other hand, most plaintiff and defense lawyers have apparently not changed their billing practices as a result of arbitration.[12] Thus, any cost savings due to the streamlined arbitration procedure may be passed on to defendants, who are usually billed on an hourly rate basis, but not to plaintiffs who retain lawyers on a contingent fee basis.[13]

Even if fee arrangements are not substantially revised litigants on both sides should save when their cases are arbitrated rather than tried, because they will generally spend less of their own time in arbitration than at trial, and they will pay less in expert witness fees and other direct expenses. In the absence of arbitration programs, however, most civil money damage suits are not tried, but settled. The difference between litigants' costs to arbitrate cases and their costs to settle these cases is not yet known.[14] Current ICJ research comparing litigants' outcomes when different modes of disposition are used may shed some light on this question.

Access to justice

When considering the adoption of court-annexed arbitration programs, some policymakers assume that litigants must benefit from the provision of a rapid, inexpensive form of dispute resolution. Others, however, are concerned that arbitration, with its abbreviated procedures and rapidly decided outcomes, will provide "second-class" justice. Our study of court arbitration in Pittsburgh systematically examined what litigants obtain from the program and how they feel about it. We investigated the pattern of program usage, the distribution of arbitration awards, and the role of the appeals process. We also measured litigants' satisfaction with arbitration, and, in particular, their views of the fairness of the arbitration procedure. More recently, we have been able to replicate some of these analyses among New Jersey and Bucks County litigants.

Based on the results of these analyses, we have concluded that court-administered arbitration delivers generally acceptable outcomes and is viewed by most individual litigants as a fair way of resolving civil disputes. Attorneys sometimes demur at court arbitration's departure from traditional trial norms, but most view arbitration as an acceptable procedure for resolving smaller civil damage suits.

Program usage. In Pittsburgh, we found that the program was used by a diverse set of litigants, with a broad range of disputes involving money. Arbitrated cases included consumer disputes (sometimes brought by the consumer, sometimes brought by a business person seeking payment), contract disputes, automobile and other property damage cases, and personal injury cases. The amount of money involved in these cases was generally less than $5000. (At the time of our study the jurisdictional limit in Pittsburgh was $10,000.) The types of disputants included private citizens, small and large businesses, and public agencies. Our Bucks County sample was limited to personal injury cases, although the program handles all money damage suits worth $20,000 or less. Preliminary data analyses in Bucks indicate that arbitration litigants are a cross-section of that county's population.

Case outcomes. About 80 per cent of the Pittsburgh plaintiffs whose cases we sampled obtained some amount of compensation from the arbitrators. Burlington County, New Jersey pilot program data indicate a similarly high level of plaintiff victories. Of course, in both Pittsburgh and Burlington many plaintiffs obtained lower awards than the amount they originally claimed. In Pittsburgh, there was some variation in the relative success of plaintiffs (i.e. award amount compared to prayer) but we could find no evidence that any particular class of litigants or suits is disadvantaged by arbitration. The only exception in this finding regards *pro se* litigants: surprisingly numerous in Pittsburgh, these litigants appeared to be systematically disadvantaged when they faced represented opponents.

Outcomes of appeals. About 25 per cent of the arbitrated cases in our Pittsburgh sample were appealed, but most of the appealed cases were settled without further court intervention. After examining the outcomes of settlement and trial after appeal, we concluded that the appeal mechanism serves its intended purpose as a corrective device for individual arbitration errors or misjudgments, while preserving the pattern of outcomes delivered by the arbitrators. We also concluded that the costs of appealing were rarely worth the mone-

12. It may be that volume arbitration practices of the sort we observed in Pittsburgh take many years to develop.

13. Insurance company representatives frequently assert that lengthy court calendars increase their transaction costs for small cases. If arbitration reduces time to disposition for these cases, these defendants may obtain additional cost savings as a result.

14. In many jurisdictions, plaintiff lawyers charge a somewhat lower contingent fee for settling a case rather than trying it, for example, 33 per cent compared to 40 per cent. In California and perhaps elsewhere plaintiff lawyers may treat the arbitration hearing as a trial, charging the same percentage of the amount won if a case is arbitrated as they would if it had been tried. Since many cases that reach arbitration hearings formerly would have been settled, plaintiffs could actually be paying *increased* fees with the advent of arbitration. Of course, if outcomes at arbitration are significantly better for plaintiffs then plaintiffs might nevertheless obtain a net benefit.

tary gain obtained post arbitration.

Litigants' perceptions. We have now measured litigant satisfaction with arbitration programs in four different jurisdictions, with substantially different program rules. In each jurisdiction, the overwhelming majority of individual litigants whom we surveyed were quite satisfied with the program. Although winners are generally more satisfied than losers, a majority of the latter are at least somewhat satisfied with the program. This high level of satisfaction is apparently attributable to litigants' satisfaction with the arbitration *procedure* itself. We have found that most individual litigants have a simple definition of what constitutes a fair dispute resolution procedure: they want an opportunity to have their cases heard and decided by an impartial third party. In courts that offer an arbitration alternative, unlike most metropolitan courts in which an expensive and time-consuming trial is the only alternative to settlement, litigants with small suits are accorded this opportunity. Most find it a fair process.

Program design variations

As should be clear from the discussion above, although all court-administered arbitration programs share certain key features, program design varies substantially. Even within a state, where all programs are operating under the same authorizing statute, there may be considerable variation from jurisdiction to jurisdiction. Typically, programs are designed in part through legislative decisionmaking (with inputs from state judicial councils or court administrative offices, from the bar, and from other lobbying organizations) and in part through the formal court rulemaking process. Often special bench and bar committees are established locally as well to draft rules of local program operation.

Historically, there was a tendency for these groups to fashion new programs after previously established programs in neighboring states and jurisdictions. Now that information about program design is more readily available, the process of program design may be somewhat more systematic. But ensuring that a program is acceptable to key constituencies—lawyers, insurance companies, public advocates—is still a key component of program design. Our evaluation research suggests that there are many ways of designing court-administered arbitration programs to meet their objectives.

ICJ researchers have identified a small number of key decisions that must be made in designing and implementing court-administered arbitration programs. We discuss the range of options open to policymakers and administrators in making these decisions, and their implica-

The coming evolution in court-administered arbitration

by Robert Coulson

Prophets have enjoyed a lackluster record in recent years. Nevertheless, I am prepared to forecast that court-administered arbitration programs will flourish in both state and federal court systems and that they will change in fundamental ways, and for the better.

As discussed in the accompanying article by Deborah Hensler, mandatory court-annexed arbitration programs for relatively small civil disputes have been a major, recent reform in the American civil justice system. As news of this experiment percolates through the judicial community, court after court has been contemplating the installation of some such alternative dispute resolution system. Numerous judicial conferences on the subject have been scheduled in recent years where advocates for court arbitration have argued that this is an idea whose time has come.[1] Indeed, I am one of those enthusiasts.

My experience with the voluntary processes of the American Arbitration Association, moreover, convince me that evolutionary pressures will inevitably change the structure of these court programs. Similar pressures have influenced the various rules and procedures of the AAA.

The primary influence, as would be expected, will come from the bar. At present, lawyer-arbitrators on court-annexed panels have been willing to serve as volunteers or for whatever nominal fee may have been established by local court rule or by the legislature. There will be steady pressure to increase such fees. Some of the programs have already had to raise the level of compensation.[2] When the arbitrators are paid several hundred dollars per case or some amount that covers their overhead approaching their normal professional billing rate, the cost of such programs must increase, perhaps becoming prohibitive.

At that point, there will be pressure on courts to use a single arbitrator, rather than the panel of three. Such a change may also be required to accommodate to the impediment that some busy lawyers will no longer be willing to serve as arbitrators on matters which they regard as relatively trivial, below their level of expertise. (Many civil disputes being arbitrated under these programs require the arbitrators to put a price on personal or property damages and do not require sophisticated legal skills.) Thus, both economic and professional factors will nudge such programs towards using a single arbitrator.

Another tendency is likely to present itself. Now, arbitrators are instructed to evaluate the case. They are warned not to attempt to mediate a settlement. That instruction seems sound because the program uses a rotating panel of lawyers, most of whom do not have mediation skills.

But as lawyer-arbitrators become experienced with these programs, and particularly when they serve frequently as sole arbitrators, they may become activists. Rather than serving as relatively passive arbitrator-evaluators, they may participate more actively in settlement negotiations—in effect, becoming mediators. In part, this may occur because they are encouraged to do so by the parties' attorneys.

Our experience with somewhat sim-

1. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 247 (1982); Salem, *The Alternative Dispute Resolution Movement: An Overview*, 40 ARBITRATION J. 9 (Sept. 1985).

2. *Court-Annexed Arbitration in the State Trial Court System*, Statement by Deborah R. Hensler, Institute for Civil Justice, The Rand Corporation, prepared for Senate Judiciary Committee Subcommittee on Courts, February 1, 1984, at 7.

tions for program outcomes, in a manual entitled *Introducing Court Arbitration: A Policymaker's Guide.*[15] Below I briefly summarize this material, highlighting the most significant design features.

What cases should be eligible for the program? Most programs are limited to money damage suits that fall below a specified dollar amount. The higher a program's jurisdictional limit, the greater the proportion of the caseload that may be diverted from the trial calendar, and the greater the potential for reducing congestion on that calendar.

Who should determine eligibility? In the normal court routine, the court does not attempt to determine the dollar value of a suit, and the plaintiff's own assessment has a strategic purpose, which raises questions about its accuracy. If court personnel assess case value, they can be assured of diverting most eligible cases to arbitration, but the time they must take to do so increases court costs. If litigants (e.g., the plaintiff's attorney) assess eligibility, a considerable number of cases may evade the program[16] and be placed on the trial list, but the court will be spared additional expense.

What qualifications should be required of those who volunteer to serve as arbitrators? If arbitrators are required to have extensive and/or specialized experience (e.g., at least five years of personal injury trial experience), then they are more likely to deliver awards that are satisfactory to other practitioners. But the candidate pool will be limited, and the supply of arbitrators may therefore be insufficient to hear cases in a timely fashion. If qualifications are loose, the supply will be greater but the decisions may be less acceptable, leading to more appeals for trial.

How many arbitrators should decide a case? If only one arbitrator is required to hear each case, it will be easier to administer the program and easier to meet the demand for volunteer arbitrators. But attorneys may be more inclined to question the decision of a single arbitrator, leading to a higher rate of appeal. If three or five arbitrators are required, the task of administering the program will be greater, and the per case costs for arbitrator fees may be more, but practitioners may be more inclined to accept the arbitration outcome.[17]

Who should select the arbitrators to hear each case? If the attorneys have

15. Rolph, INTRODUCING COURT ARBITRATION: A POLICYMAKER'S GUIDE (Santa Monica, CA: The Rand Corporation, 1984).

16. Plaintiffs' attorneys may bypass arbitration because they wish to delay setting a value on the claim, because they want to send a signal to the defense regarding the strength of their position, or because they object to the program per se.

17. Multiple-arbitrator panels are often constructed to represent plaintiff and defense perspectives, which may lead to greater acceptance of their decision.

ilar programs in the private sector indicates that trial attorneys, when selecting between binding arbitration and professional mediation, select mediation more than 75 per cent of the time. This observation is based on our experience with thousands of cases where representatives of the AAA have been authorized by insurance companies to offer that option to claimant attorneys.[3]

True, the setting is somewhat different in a court program. AAA representatives are offering the choice of binding arbitration before an experienced trial attorney or mediation with a trained, professional lawyer-mediator. Nevertheless, the preference expressed by claimant attorneys towards mediation appears consistently throughout the United States.

If a similar preference becomes reflected in court-administered programs where attorneys are offered the choice between arbitration (evaluation) or mediation, the courts may be persuaded to provide mediation as an option. Then, they may need to identify lawyers who are qualified and prepared to serve as mediators. Perhaps a selected group of lawyers will require specific training in mediation skills.

In my recent book, *Professional Mediation of Civil Disputes,*[4] I suggested that the creation of a profession of Certified Public Mediators would offer lawyers an alternative career, in addition to providing the courts with an attractive, off-budget, auxiliary service. If my expectation about the evolution of court-administered arbitration is accurate, mediation programs will appear in the courts in coming years. If lawyers prefer mediation, as our experience in the private sector would indicate, there is no reason for courts not to offer that service.

Many members of the bar are acquiring experience and training as mediators and are looking for fields in which to practice those skills.[5] Mediation is the sleeping giant of alternative dispute resolution. Again, AAA experience would confirm that notion. In cases actually mediated under the AAA's insurance alternative dispute resolution program, nine out of 10 are settled. This compares favorably with the settlement record of court-administered arbitration programs.

Moreover, the quality of the mediation process is better than court-administered arbitration where the award is based on a perfunctory presentation by the parties and an evaluation by a panel of three non-specialized lawyers. In mediation, the parties have an opportunity to discuss the issues at their leisure, reaching an agreement that reflects a mutually acceptable compromise. The clients themselves are more involved in mediation than they would be in an arbitration hearing.

I believe that court-administered arbitration programs will evolve inevitably towards mediation. The mediators will be lawyers who have become specialists in dispute resolution. They will operate under the overall supervision of the local courts. This will constitute one long step towards a new profession of Certified Public Mediators. □

3. American Arbitration Association ADR Insurance Program caseload statistics for October 1, 1984 through October 31, 1985.

4. Coulson, PROFESSIONAL MEDIATION OF CIVIL DISPUTES (New York: American Arbitration Association, 1984).

5. American Bar Association, Special Committee on Alternative Means of Dispute Resolution. ALTERNATIVE DISPUTE RESOLUTION: WHO'S IN CHARGE OF MEDIATION? (Washington, D.C.: 1982).

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some say in the selection, they may be more inclined to accept the award, but providing for attorney participation may require a cumbersome and time-consuming process. If the court is in charge of assigning the arbitrators, the process may be expedited but litigant and attorney satisfaction may decrease.

Where should the hearings be held? If they are held outside the courthouse, there is no need to set aside space for them, and litigants will be spared the possible emotional strain of coming into court. But it will be more difficult for the court to monitor the scheduling of hearings, and the arbitrators may grow lax in adhering to the court's guidelines for timely disposition. If the hearings are held in the courthouse, court personnel can maintain control over the schedule and the litigants may be more inclined to feel they have had their "day in court." Rather than moving cases "out of the courthouse," however, the court will simply have set up another specialized division to resolve cases.

Should there be a financial disincentive for appeal? If there is no disincentive, the rate of appeals may be so high as to wipe out any reductions in the size of the trial list due to case diversion. If the disincentive is too high, achieving political acceptance of the program will be difficult, and the disincentive itself may ultimately be declared an unconstitutional burden on the right to trial.

Who should fund the arbitration program? If a legislature requires courts to adopt the program, perhaps the state should pay for the additional administrative expenses. (Traditionally, most trial court expenses are borne by county governments.) But if the program effectively reduces trial court workload, the court should experience savings in the trial division that it can divert to supporting the arbitration program and it may, over the long run, actually experience a reduction in total court costs. Alternatively, if arbitration provides litigants with a more expeditious and less expensive means of resolving their disputes, perhaps they should pay a special arbitration fee to support the program. If the court requires such a payment, however, it is put in the perhaps questionable position of charging litigants with small-value suits a higher fee to file their cases than is charged for filing higher-value, trial-bound cases.

Necessary information

With the multiplication of research monographs and conferences on court-administered arbitration, judicial policymakers may find themselves in the position of having more assistance in designing and implementing programs than they can handle. But it is too early to conclude that we understand the full ramifications of instituting mandatory arbitration requirements. As pressure from legislatures and interest groups to adopt and expand arbitration mounts, I believe we need to give more attention to answering the following questions.

What kinds of cases are not good candidates for arbitration? As jurisdictions become comfortable with arbitration, there is often a move to expand the jurisdictional limits of a program, either by incorporating new kinds of cases, or raising the monetary limits on money damage suits, or both. Is it sensible to subject all kinds of civil suits to mandatory court arbitration? In my conversations with court officials and practitioners, I frequently ask: "What kinds of cases do you think are inappropriate for arbitration?" The usual reply is that some cases are simply too complicated to be amenable to a streamlined process: they require extensive discovery, briefing of the issues and the full panoply of a court trial. Complicated cases, I am told, occur with some frequency among smaller value monetary claims and there are simple cases in which large amounts of money are at stake. Should we relegate all small cases to alternative dispute resolution mechanisms, while preserving more expensive traditional procedures for big stakes cases whether or not they "need" them? We need to do more hard thinking, and perhaps some careful experimentation, regarding this question.

What factors affect decisions to appeal? Most judicial policymakers feel that some financial disincentives are necessary to discourage frivolous appeals from arbitration but that it is improper (and probably infeasible) to require that litigants pay substantial amounts of money as a precondition for appeal. We know very little about how the average litigant decides whether to appeal, or indeed whether the lawyer or the litigant plays the primary role. Where appeal rates from arbitration are low, we tend to assume that most litigants find the arbitration verdicts roughly acceptable; instead, they may simply decide that they have no other option but to "lump it."[18] Institutional litigants presumably assess the costs of appeal somewhat differently; even if these costs outweigh the amount at stake in the individual case, they may take appeals as a matter of policy, in order to "keep the system honest"—that is, operating in a fashion that is acceptable to them. Understanding the role of appeals in the arbitration litigation process is important to understanding the equity implications of instituting mandatory arbitration programs.

How does arbitration affect settlement? Much of the discussion and research about arbitration focuses on differences between arbitration and trial, but most cases that are currently arbitration-eligible have little or no likelihood of being tried. The real significance of instituting arbitration may lie in its effects on the settlement process. How does arbitration affect lawyers' and insurers' negotiation strategies? How does it affect the timing of settlements? Perhaps most important, how does it affect settlement outcomes? We need to focus more attention on these questions as well.

How does arbitration affect the practice of law? Finally, underlying all these questions is perhaps the most important of all, how does arbitration affect what lawyers do? Lawyers in many jurisdictions are understandably wary of arbitration programs. Some believe mandatory arbitration represents a small but dangerous step away from the right to jury trial. Some see it as moving further in the direction of production line litigation that is the antithesis of the individually-crafted form of lawyering that they learned at school. Underlying many lawyers' discomfort with arbitration is a concern about its impact on their fees. How lawyers modify their behavior in the light of arbitration may ultimately determine the future of this form of alternative dispute resolution. □

18. Felstiner, Abel, and Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 Law & Soc'y Rev. 631 (1980-81).

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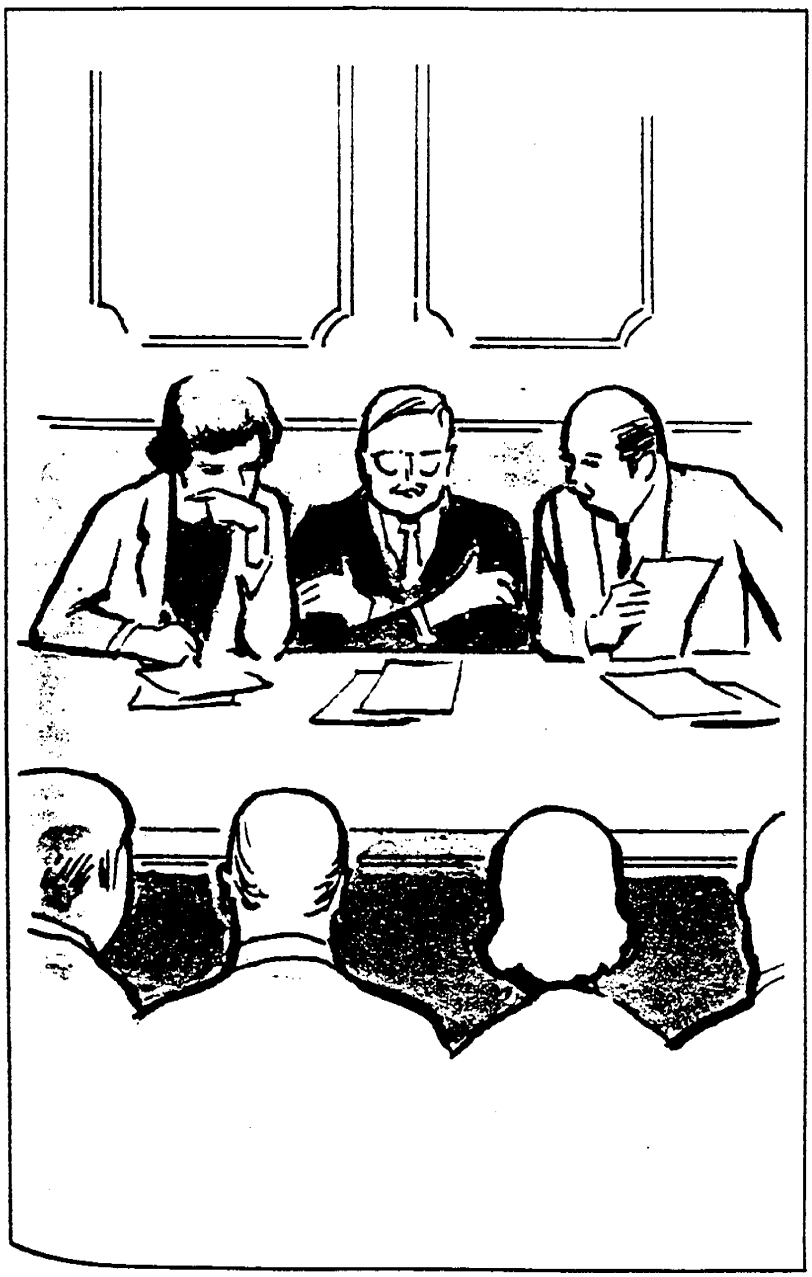
APPENDIX D

Court-annexed compulsory arbitration: it works

Experience shows that court-annexed compulsory arbitration is providing litigants with a speedier and less expensive alternative to the traditional trial. Congress recently enacted legislation mandating the evaluation of court-annexed arbitration to determine whether it should become an integral part of the federal judicial system.

by Raymond J. Broderick



In his 1984 Year-End Report on the Judiciary, Chief Justice Warren Burger referred to court-annexed compulsory arbitration as "a program whose time has come."[1] The experiment, commenced in the U.S. District Court for the Eastern District of Pennsylvania in February 1978, proves that it works well in the federal court. It is providing litigants with a speedier and less expensive alternative to the traditional courtroom trial. It is relieving our courts of the heavy burden of the constantly increasing civil caseloads, particularly since the advent of the Speedy Trial Act and the new Sentencing Guidelines for criminal cases.

The history of arbitration in our state courts and the success of the experimental programs in our federal courts make it apparent that now is the time to consider making court-annexed compulsory arbitration an integral part of our federal judicial system so that it will become available to all our U.S. district courts. A step in that direction has taken place. Title IX of the *Judicial Improvements and Access to Justice Act*, recently enacted by Congress, amends Title 28 of the United States Code by inserting a new chapter, "Chapter 44 Arbitration." This legislation provides statutory authorization for programs of court-annexed arbitration in 20 U.S. district courts.

A major impetus for the initiation of programs of court-annexed compulsory arbitration in the federal courts has been the ever-increasing civil caseloads. The number of civil cases filed annually in U.S. district courts has increased seven-

1. Burger, *1984 Year-End Report on the Judiciary* 15.

tice system in the Eastern District of Pennsylvania.

Since the program was initiated in February 1978, 17,006 of the 71,588 civil cases filed during the past 129 months were placed in the arbitration program (24 per cent of the civil case filings).[36] Of the 17,006 civil cases placed in the arbitration program, 15,779 cases have been terminated.[37] Only 388 of the 17,006 civil cases placed in the program over the past 129 months have required a trial *de novo*.[38] In other words, only about 2 per cent of the 17,006 cases placed in the arbitration program over the past 129 months required the traditional courtroom trial.[39]

Only about 2 per cent of the 17,006 cases arbitrated in the past 129 months required a trial *de novo*.

The success of the court-annexed arbitration program is attested to by the fact that in October 1984, the bar associations of the ten southeastern counties of Pennsylvania (comprising the Eastern District of Pennsylvania) urged the court to expand its arbitration program to include all civil cases in which money damages only were being sought in an amount not exceeding $100,000. It was generally agreed that there should be some limitation on the amount in controversy. It was conceded that in cases where money damages only are being sought, the amount in controversy should be limited to an amount which might make it economically unfeasible for litigants to demand a trial *de novo*. The savings to the litigants, as well as to the courts, is not realized whenever the amount in controversy encourages the losing party to demand a trial *de novo*. It was therefore determined to limit the amount in controversy to $75,000 in order to avoid the possibility of making the arbitration program just one more layer of litigation.

The local rule was amended, effective January 1, 1985, mandating compulsory arbitration for all civil cases in which money damages only are being sought in an amount not exceeding $75,000, excluding social security and prisoners' civil rights cases.[40] Prior to this amendment, the arbitration program was limited to civil cases wherein money damages only of $50,000 or less were being sought, and the action was (1) for injury or death of a seaman; (2) based on a negotiable instrument or a contract; (3) for personal injury or property damage; or (4) under the Federal Employers Liability Act.[41] Also prior to this amendment, in cases where the United States was a party, only actions brought under the (1) Federal Tort Claims Act, (2) Longshoremen and Harbor Workers Compensation Act, (3) Miller Act or (4) Federal Crime Insurance Act were required to be arbitrated.[42] Since this expansion of the arbitration program in January, 1985, almost 30 per cent of the civil cases filed in the Eastern District of Pennsylvania are being placed in the arbitration program.[43]

For the most part, the program is administered by the clerk of the court. When the plaintiff files his or her complaint, the local rule provides that damages are presumed to be *not* in excess of $75,000 unless counsel certifies otherwise.[44] The court may set aside any certification by counsel if it finds that the damages are not likely to exceed $75,000.[45]

Immediately after the answer is filed, the attorneys receive a notice from the clerk advising them of the date for the trial before the arbitrators and also notifying them that discovery must be completed within 120 days.[46] The clerk schedules the trial before the arbitrators for a day certain, usually a date about five months after the answer is filed.[47]

The local arbitration rule specifically provides that in the event a party files a motion for judgment on the pleadings, summary judgment or similar relief, the case may not be arbitrated until the court has ruled on the motion.[48] The rule further provides that the filing of any such motion after the judge has signed the order appointing the arbitrators will not stay the arbitration trial unless the judge specifically so orders.[49] Furthermore, an application for leave to join an additional party is deemed untimely unless it is filed before the court signs the order appointing the arbitrators.[50] The court appoints the three arbitrators who will preside at the trial about 30 days prior to the date scheduled for the arbitration trial.[51] The court's order appointing the arbitrators authorizes them to change the date of the arbitration trial provided the trial is commenced within 30 days of the scheduled date.[52] Any continuance beyond this 30-day period must be approved by the court.[53]

Although the Federal Rules of Evidence are designated as guides for the admissibility of evidence at the arbitration trial, copies or photographs of exhibits must be marked for identification and delivered to opposing counsel at least ten days prior to the trial.[54] The panel must receive the exhibits in evidence without formal proof unless counsel has been notified at least five days prior to the trial that his or her opposite counsel intends to raise an objection concerning the authenticity of the exhibit.[55] The arbitration trial is not recorded unless a party at his or her own expense arranges for the recording and transcription.[56] All arbitration trials take place in a courtroom in the federal courthouse.[57]

At the trial *de novo*, neither the fact that the case was tried before the arbitra-

36. Statistics prepared by Michael E. Kunz, clerk of court of the U.S. District Court for the Eastern District of Pennsylvania as of June 30, 1988.
37. *Id.*
38. *Id.*
39. *Id.*
40. E.D. Pa. Civ. P. 8.3.A.
41. E.D.Pa. Civ. P. 49. Local rule 49 was recodified and is now local rule 8.
42. *Id.*
43. Kunz, *supra* n. 36.
44. E.D. Pa. R. Civ. P. 8.3.C. If the amount in controversy exceeds $75,000 the parties may voluntarily submit the dispute to the arbitration process. E.D. Pa. R. Civ. P. 8.3.B.
45. *Id.*
46. E.D. Pa. R. Civ. P. 8.4.(a).
47. *Id.*
48. E.D. Pa. R. Civ. P. 8.4.(c).
49. *Id.*
50. E.D. Pa. R. Civ. P. 22.
51. Procedure adopted by clerk of the U.S. District Court for the Eastern District of Pennsylvania
52. E.D. Pa. R. Civ. P. 8.5.(a).
53. *Id.*
54. E.D. Pa. R. Civ. P. 8.5.(e).
55. *Id.*
56. E.D. Pa. R. Civ. P. 8.5.(f).
57. E.D. Pa. R. Civ. P. 8.5.(a).

tion panel, nor the arbitrators' award is admissible.[58] However, testimony given at the arbitration trial may be used to impeach the credibility of a party or witness.[59] The arbitrators' award is entered on the docket immediately after it is filed, although the award itself is not placed in the official court file.[60] In the event that no demand for a trial *de novo* is filed, the arbitration clerk prepares a judgment for the judge's signature attached to which is the arbitrators' award.[61] If a demand for a trial *de novo* is filed, the arbitration clerk retains the arbitrators' award in a separate file in order to make certain that the arbitrators' award is not considered at or before the traditional courtroom trial.[62]

The arbitrators

There are approximately 1,200 lawyers certified to preside at the arbitration trial.[63] In order to qualify for certification, the lawyer must be admitted to practice before the court, be a member of the bar for at least five years, and be determined by the chief judge of the court to be competent to preside at the trial.[64] An application to become an arbitrator is carefully considered not only by the chief judge, but, at his request, by all the other judges of the court. Furthermore, any complaints received concerning the performance of an arbitrator are considered by all the judges.

Over the past 129 months of the operation of the arbitration program, the judges have not hesitated, on occasion, to censure or remove an arbitrator for failure to adhere to the standards required for all judges. Most lawyers who have been certified as arbitrators regard their certification as evidence of their performance of a worthwhile service to the community and the judicial system, and

A panel of three arbitrators has been well-received by the bar.

the fact that they receive only $75 for each arbitration trial is considered by them as a recognition that it is a pro bono service.

Three arbitrators are appointed to preside at each trial.[65] They are randomly selected by the clerk of court.[66] At the time of certification, each arbitrator states his or her primary area of practice and the clerk endeavors to assure that each panel of three arbitrators consists of one lawyer whose practice is primarily representing plaintiffs, another whose practice is primarily representing defendants, and a third whose practice does not fit either category.[67] The panel selected by the clerk of court is scheduled for a trial date several months in advance.[68] However, it is not until the judge signs the order designating the arbitrators who will preside at the arbitration trial (approximately 30 days prior to the trial) that counsel learn the identity of the panel members and the panel members become aware of the three cases which have been assigned to them for trial.[69]

A panel of three arbitrators has been well-received by the litigants and the bar. It has alleviated the fear of some litigants that one arbitrator might in some way be biased against their cause. Having three arbitrators, who usually represent a cross-section of the community, provides a trial which has all of the advantages of a jury and a non-jury trial.

After the trial

Immediately after the arbitration trial, the panel makes an award, e.g. "Award in favor of defendant" or "Award in favor of plaintiff in the amount of $__ against (naming one or more defendants)."[70] The panel is instructed that it should not file findings of fact, conclusions of law, or opinions of any kind.[71] The panel is also instructed that there is to be no indication as to whether the decision is or is not unanimous.[72] The award becomes a final judgment unless within 30 days of the filing of the award either the plaintiff, the defendant or both demand a "trial *de novo*."[73] There is no appeal.[74]

Upon the filing of a demand for trial *de novo*, the case proceeds as if it had never been tried before the arbitration panel.[75] After the filing of the demand for trial *de novo*, the case is placed on the trial list of the judge to whom the case had originally been assigned and every effort is made by the judges to make certain that the trial *de novo* is scheduled for the earliest possible date. The party who demands a trial *de novo* (except the United States) must pay to the clerk of the court the $75 fee paid to each member of the arbitration panel, a total of $225.[76] However, any party may petition the court to proceed *in forma pauperis*, and in the event the court signs an *in forma pauperis* order, the $225 fee need not be paid.[77]

The arbitration fees are deposited with the clerk of court and are returned to the party demanding the trial *de novo* only in the event that the party receives a final judgment, exclusive of interest and costs, more favorable than the arbitrators' award.[78] In the event the party demanding the trial *de novo* does not receive a final judgment more favorable than the arbitrators' award, the arbitrators' fees deposited with the clerk of court are forfeited to the United States.[79]

Evaluation

The experiment in the Eastern District of Pennsylvania has been evaluated periodically over the past ten years.[80] A most

58. E.D. Pa. R. Civ. P. 8.7.(c).
59. *Id.*
60. Procedure adopted by clerk of the U.S. District Court for the Eastern District of Pennsylvania.
61. *Id.*
62. *Id.*
63. Kunz, *supra* n. 36.
64. E.D. Pa. R. Civ. P. 8.1.
65. E.D. Pa. R. Civ. P. 8.4.(b).
66. *Id.*
67. *Id.*
68. E.D. Pa. R. Civ. P. 8.4.(b).
69. E.D. Pa. R. Civ. P. 8.4.(c).
70. E.D. Pa. R. Civ. P. 8.6.
71. Instructions to members of panel by clerk of court.
72. *Id.*
73. E.D. Pa. R. Civ. P. 8.6., 8.7.
74. E.D. Pa. R. Civ. P. 8.6.
75. E.D. Pa. R. Civ. P. 8.7. It should be emphasized that the trial is in no sense an appeal because the task of the court is not to examine the proceedings below to see whether they are tainted by error, but rather to undertake a fresh determination of facts and applicable law as it would in any case before it for the first time.
76. E.D. Pa. R. Civ. P. 8.7.
77. *Id.*
78. *Id.*
79. *Id.*
80. *See e.g.* Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (Jan. 1983). Levin & Golsah, *Alternative Dispute Resolution in the Federal District Courts*, 37 U. OF FLA. L. REV. 29 (1985); Levin, *Court-Annexed Arbitration*, 16 U. MICH. J. L. REF. 537 (Summer 1983); Lind & Shapard, *supra* n. 32; Nejelski & Zeldin, *supra* n. 14.

comprehensive study has just been completed by Barbara Meierhoefer, senior research associate at the Federal Judicial Center.[81] Her report, which analyzes the first eight years of the program, concludes that it is "considered a success, accepted by the bench and bar."[82] To ascertain the judges' thoughts concerning the court's arbitration program, interviews with judges were conducted in the summer of 1985, followed by a mail survey in September 1986. In responding both during the interviews and to the survey, all the judges rated the arbitration program a success. As stated in the report, "there is essentially no dissent from the view that the program is effective for judges, lawyers and litigants.... All either agreed or strongly agreed that other courts would do well to introduce court-annexed arbitration."

Confirmation of the acceptance of the arbitration program by the Philadelphia bar is found in the survey of some 600 attorneys whose cases had been assigned to the program. Ninety-three per cent of the respondents either approved or strongly approved of the arbitration program. Indeed, 61 per cent named arbitration as their preferred procedure when asked if they preferred cases "of this type" to be decided by a judge, a jury, or arbitration. Over 60 per cent of the attorneys stated that they spent less time, and that the cost to their clients was less, when the case was referred to arbitration rather than proceeding to the traditional courtroom trial. Beyond the reported savings in time and money, more than 90 per cent of the attorneys believed that the arbitration procedures were fair and impartial. Moreover, 100 per cent of the 152 arbitrators who were surveyed stated that they either approved or strongly approved of the arbitration program. The report concludes that, "the court-annexed arbitration program in the Eastern District of Pennsylvania continues to be extremely well-received by the vast majority of the members of the bar involved in [the arbitration program] as both counsel and arbitrators."

The report also observes that the success of the program is attributable to the willingness of the attorneys to serve as arbitrators and the fact that the program is well-administered by the clerk's office.[83] It also points out that it is the "availability of this opportunity to present the facts of a case to a neutral third party—at an earlier date and without the time and expense that accompany a traditional trial—that provides the basis for believing that arbitration programs can serve to broaden access to the justice system."[84]

Of all the evaluations, however, the statistical summary prepared on a monthly basis by Michael Kunz, the Clerk of the Court, presents the most persuasive analysis confirming the success of the program.[85] As noted earlier, the most convincing statistic is the fact that during the ten years and nine months of the program, only 388 of the 17,006 cases placed in the court's arbitration program have required a trial *de novo*.[86] In other words, only about 2 per cent of the 17,006 cases placed in the arbitration program required the traditional courtroom trial.[87] During this same period, 8 per cent of the civil cases that were *not* placed in the arbitration program required the traditional courtroom trial.[88] The median time from the date an answer to the complaint is filed to the trial before the arbitration panel was five months in 1987, whereas the median time from the date the answer was filed to the trial for all other civil cases during 1987 was 11 months.[89]

In the early years of the arbitration program in the Eastern District of Pennsylvania there were indications that a few attorneys might have been using the program solely for the purpose of discovery and not as an opportunity for a trial on the merits.[90] After a decision of the court denying a defendant's demand for trial *de novo* on the ground that the defendant failed to participate in good faith at the arbitration trial, the court amended its local rule to specifically provide that if a party fails to participate in the arbitration process in a meaningful manner, the court may deny that party's demand for trial *de novo*.[91] Since this amendment to the local rule, there has been no indication that the parties are using the arbitration trial as a discovery device.

Court-annexed compulsory arbitration in ten U.S. district courts

In addition to the Eastern District of Pennsylvania, there are programs of court-annexed compulsory arbitration in nine other U.S. district courts: Northern District of California; Middle District of Florida; Middle District of North Carolina; District of New Jersey; Western District of Oklahoma; Western District of Missouri; Western District of Texas; Western District of Michigan; and Eastern District of New York. The program in the Northern District of California has been in operation for more than ten years, having been initiated in 1978.

In 1984, the Administrative Office of the U.S. Courts obtained funding from Congress to initiate programs of court-annexed compulsory arbitration in additional district courts. Notification of the availability of funds for arbitration programs was sent to all district court chief judges in September 1984 and 17 of them responded that their court was interested in participating. Eight district courts were selected for experimental programs. Thus, at the present time court-annexed compulsory arbitration programs are operating in only 10 of the 94 U.S. district courts.

Each of the ten courts has a local rule defining the cases eligible for arbitration. These local rules of court specify the type of cases and the limitation as to the dollar amount in controversy. Although none of the ten programs are identical, they are substantially similar in providing that a party who is dissatisfied with the arbitration award has a specified time (20 or 30 days) to file a demand for trial *de novo* and in the event a demand for trial *de novo* is filed, the case is then placed on the trial list for the traditional courtroom trial. In the event a trial *de novo* is not demanded, the arbitration award becomes a final judgment. Figure 1 illustrates some of the differences in the programs of court-annexed arbitration in the ten district courts.

81. Meierhoefer, COURT-ANNEXED ARBITRATION IN THE EASTERN DISTRICT OF PENNSYLVANIA (Federal Judicial Center, DRAFT, March 1988).
82. *Id.* at 1.
83. *Id.* at 2.
84. *Id.* at 2.
85. *See supra* n. 36.
86. *Id.*
87. *Id.*
88. Statistical Reports, Clerk's Office, U.S. District Court for the Eastern District of Pennsylvania.
89. *Id.*
90. Kurland, SPECIAL FEDERAL ARBITRATION PROJECT EVALUATION 16 (Federal Arbitration Subcommittee, Philadelphia Bar Association, 1980).
91. New England Merchants National Bank v. Hughes, 556 F.Supp. 712 (E.D. Pa. 1983); E.D. Pa. R. Civ. P. 8.5.(c).

Figure 1 **Court-annexed compulsory arbitration in ten U.S. district courts**

Court	Types of cases	Dollar ceiling	Number of arbitrators	Selection of arbitrators	Arbitrators fee paid on trial de novo demand returned if judgment betters award	Arbitrator fee paid if after trial de novo judgment does not better award
E.D.PA since 2/1/78	All civil (some exceptions)	$75,000	3	Clerk of court	$225	
N.D.CA since 5/1/78	Limited	$100,000	1 (may request 3)	Party choice from limited list		$225
M.D.FL since 10/1/84	Limited	$150,000	3	Party choice from complete list	$225	
M.D.NC since 1/1/85	Limited	$150,000	1	Party choice from complete list		$400-600
D.NJ since 3/11/85	Limited	$75,000	1	Clerk of court	$250	
W.D.OK since 5/1/85	Limited	$100,000	1 (may request 3)	Party choice from limited list	$225	
W.D.MO since 7/1/85	All civil (some exceptions)	$100,000	3	Clerk of court	$225	
W.D.TX since 11/1/85	Limited	$100,000	3	Party choice from limited list	$225	
W.D.MI since 12/31/85	All civil (some exceptions)	$100,000	1	Party choice from limited list	$250	
E.D.NY since 1/1/86	All civil (some exceptions)	$50,000	3	Clerk of court	$225	

Although the Federal Judicial Center is currently in the process of preparing a final report evaluating the arbitration programs in the ten district courts, its Second Interim Report notes the following:[92]

- The large majority of judges from six courts who have had at least 18 months of experience with court-annexed arbitration support their program, believe that it has reduced their caseload burden, and would recommend that other courts consider adoption of similar programs. This finding holds across the six districts even though they vary in their specific approaches to program implementation.
- The large majority of attorneys who had been notified that their cases were to be arbitrated support both the concept of arbitration in general and the program as implemented in their district. Except for those involved in hearings from which *de novo* demands were filed, the majority reported that referring the case to arbitration saved their and their clients' time, and saved their clients money. The majority of attorneys who responded to our surveys gave high marks to the procedures associated with arbitration. Although smaller majorities were involved, this overall approval of the procedures held true for those who were not satisfied with the outcome as well as those who were.
- The majority of litigants in cases where the parties had been notified of the arbitration referral believed that the procedures associated with the arbitration process were fair. While more of those who were satisfied with the outcome responded favorably, than those who were not, the majority of litigants who were dissatisfied with the outcome still agreed that the procedures were fair. Further, the majority of litigants in cases that were actually arbitrated chose the arbitrator over either a judge or jury as their preferred resolver of the dispute.
- The overwhelming majority of arbitrators who responded to our survey approved of both arbitration in general and of the court-annexed program implemented in their district.

It therefore appears that the data so far collected shows a high degree of satisfaction with the programs of court-annexed compulsory arbitration now operating.

Some criticisms

Although court-annexed compulsory arbitration is regarded by many as one of the better alternatives to the traditional courtroom trial, there are some who have not enthusiastically embraced it. For instance, Judge Richard A. Posner of the Seventh Circuit appears to consider court-annexed compulsory arbitration as a procedure designed solely to increase the likelihood of settlement.[93] As pointed out, compulsory arbitration was not designed solely to produce a settlement. There is no question that court-annexed compulsory arbitration does expedite a settlement in that the trial does take place at a much earlier date than the traditional courtroom trial, and it is generally recognized that trial expedites settlement.

As pointed out by Professor A. Leo Levin, "[t]o make court annexed arbitration little more than a mechanism for achieving settlement is to run the risk of diminishing its effectiveness in terminating cases and of reducing litigant satisfaction with the process."[94] Arbitrators do not conduct a settlement conference. As a matter of fact, arbitrators appointed in the Eastern District of Pennsylvania are specifically instructed not to discuss settlement and are admonished that factfinders should not participate in settlement discussions.[95] The primary purpose of the arbitration program is not to produce a settlement, but rather to make our judicial system accessible to those litigants who cannot afford the high cost of the traditional courtroom trial and who desire an earlier resolution of their dispute.

Judge Posner also states that "[t]he biggest objection to court-annexed arbitration is its cost... because, as in ordinary arbitration, witnesses testify. It is a full trial before the real trial and it is hard to see that as reducing the net costs of dispute resolution."[96] This observation ignores the fact that only a few cases assigned to the court-annexed compulsory arbitration program require the traditional courtroom trial. As pointed out, only 2 per cent of the cases in the program have been tried a second time.[97] Furthermore, the net amount paid to arbitrators over the 129 months in the Eastern District of Pennsylvania has been $662,632, which is less than $42 per case terminated in the program.[98] The total fees paid to jurors in connection with the 331 civil jury trials held during the fiscal year 1987 in the Eastern District of Pennsylvania was $538,384 which

92. Meierhoefer, DESCRIPTION OF COURT ANNEXED ARBITRATION IN TEN PILOT FEDERAL DISTRICT COURTS (Second interim Report) (Federal Judicial Center, February 1987).

93. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (Spring 1986). *See also* Posner, THE FEDERAL COURTS—CRISIS AND REFORM (Cambridge, MA: Harvard University Press, 1985).

94. Levin, *supra* n. 80.

95. "Guidelines to Arbitrators," U.S. District Court, Eastern District of Pennsylvania.

96. Posner, THE SUMMARY JURY TRIAL: SOME CAUTIONARY OBSERVATIONS, 35 (Yale Law School, Program in Civil Liability, Working Paper #37, Sept. 1985).

97. *See supra* n. 36.

98. *Id.*

amounts to $1,627 paid for each civil jury trial during the period.[99] The three arbitrators are paid a total of $225 ($75 each) for each arbitration trial. In addition, the arbitration program saves the cost of a court reporter. Although it appears that court-annexed compulsory arbitration provides considerable savings to the government, its primary purpose is not to reduce cost to the government, but to provide relief to those litigants who cannot afford the high cost of the traditional courtroom trial.

There has been some criticism of the court-annexed compulsory arbitration program on the ground that it is not possible for litigants to obtain an opinion in a case where the parties desire a written opinion establishing a legal precedent.[100] It is interesting to note that over the past 129 months of the program, 5,693 of the 17,006 cases that were terminated in the arbitration program were terminated by a court order on the basis of a dispositive motion.[101] The termination of a case by dispositive motion is generally accompanied by a written opinion.

Recommendations of the Judicial Conference

For several years, the Judicial Conference of the United States has vigorously supported legislation which would provide statutory authorization for the experimental programs of court-annexed arbitration presently in operation in the ten U.S. district courts and authorize such programs for additional district courts. As Judge Elmo B. Hunter, then chairman of the Committee on Court Administration of the Judicial Conference of the United States, pointed out in his testimony before the House Subcommittee on September 23, 1987:

> This [bill] would provide for the first time express statutory authority for arbitration programs in the Federal courts, including the current pilot projects. The pattern of ever-increasing workloads in the past two decades has greatly concerned the Judicial Conference. As Congress has expanded the jurisdiction of the courts, the courts have found it necessary to experiment with alternative forms of dispute resolution. Arbitration is one such alternative strongly supported by the Judicial Conference.[102]

On March 18, 1988, Judge Elmo B. Hunter, again speaking on behalf of the Judicial Conference of the United States, testified before the Senate Subcommittee on Courts and Administrative Practice as follows:

> [This bill] would provide express statutory recognition of a decade of pilot arbitration activities and expand the program to potential participation by every district.... [T]he Judicial Conference proposed this program, which would be flexible and experimental in nature, authorized but largely unfettered by statutory restrictions, and in accordance with guidelines and procedures prescribed by the Judicial Conference of the United States.[103]

Judge Hunter concluded his testimony by stating, "We pledge to work with this Subcommittee and its staff to attain the most effective Federal arbitration program possible."[104]

The new legislation

Legislation authorizing experimental programs of court annexed arbitration finally became a reality on November 19, 1988, when the President signed into law the *Judicial Improvements and Access to Justice Act*. Title IX of this Act amends Title 28 of the U.S. Code by inserting a new chapter. "Chapter 44 Arbitration," the provisions of which become effective 180 days after enactment.[105] The Act contains a repealer which provides that Chapter 44 shall remain in effect for only five years.[106]

Chapter 44 specifically provides that the ten U.S. district courts which currently have programs of court-annexed arbitration may authorize by local rule the use of arbitration in any civil action, including an adversary proceeding in bankruptcy.[107] These ten courts are specifically authorized to refer to arbitration any civil action where the parties consent and may require referral of any civil action if the relief sought consists only of money damages not in excess of $100,000, exclusive of interest and costs.[108] The district court may presume that damages are not in excess of $100,000 unless counsel certifies that damages exceed that amount.[109]

The legislation provides, however, that without the consent of the parties the ten courts currently operating arbitration programs may not refer to arbitration actions based on an alleged violation of a right secured by the Constitution of the United States or actions in which jurisdiction is based in whole or in part on 28 U.S.C. §1343 (civil rights actions).[110]

The Act also authorizes the initiation of arbitration programs in ten additional U.S. district courts as approved by the Judicial Conference of the United States.[111] It appears, however, that the arbitration programs authorized for these ten additional courts are limited to such civil actions (including adversary proceedings in bankruptcy) where the parties have consented to arbitration.[112]

Each district court authorized to operate an arbitration program must provide by local rule a procedure for exempting from arbitration either *sua sponte* or upon motion of a party any case in which the objectives of arbitration would not be realized (a) because the case involves complex or novel legal issues, (b) because legal issues predominate over factual issues or (c) for other good cause.[113]

The legislation mandates that the arbitration hearing shall begin within the period specified by the district court but in no event later than 180 days after the filing of an answer, except that the arbitration hearing shall not, in the absence of the consent of the parties, commence until 30 days after the disposition by the district court of any motion to dismiss the complaint, motion for judgment on the pleading, motion to join necessary parties or a motion for summary judgment provided the motion was filed dur-

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99. *1987 Grand and Petit Juror Service in the United States District Courts* A-25 (Administrative Office of the U.S. Courts, Nov. 1987).
100. *See supra* n. 90.
101. *See supra* n. 36.
102. Prepared statement of Elmo B. Hunter, chairman, Committee on Court Administration of the Judical Conference of the United States Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives on the Court Reform and Access to Justice Act of 1987, 7-8 (Sept. 23, 1987).
103. Prepared statement of Judge Elmo B. Hunter and Judge Richard M. Bilby on behalf of the Judicial Conference of the United States before the Subcommittee on Courts and Administrative Practice. Committee on the Judiciary, United States Senate on the Judicial Branch Improvements Act of 1987, 8 (March 18, 1988).
104. *Id.*
105. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §907.
106. *Id.* at §906.
107. *Id.* at §651.
108. *Id.* at §652(a)(1).
109. *Id.* at §652(a)(2).
110. *Id.* at §652(b).
111. *Id.* at §658(2).
112. *Id.* at §652(a)(1).
113. *Id.* at §652(c).

ing the time period specified by the court.[114] The 180-day and the 30-day periods may, however, be modified by the court for good cause shown.[115]

The Act requires that the arbitration award must be filed with the clerk of the court promptly after the conclusion of the arbitration hearing. A request for a trial *de novo* must be filed within 30 days of the filing of the arbitration award.[116] If no request for trial *de novo* is filed within 30 days, the award becomes the final judgment of the court and the judgment shall have the same force and effect as a judgment of the court, except that it shall not be subject to review in any other court by appeal or otherwise.[117] The district court may by rule allow for inclusion of costs as part of the arbitration award.[118] Each district court must provide by rule that the arbitration award shall not be made known to any judge who might be assigned the case except as necessary to assess costs or attorney fees after final judgment.[119]

Upon the filing of a demand for trial *de novo* the action must be restored to the court's calendar at the place it would have occupied if it had not been referred to arbitration and must be treated for all purposes (including any right to jury trial a party may have had) as if it had not been arbitrated.[120] It is also provided that the court shall not admit at the trial *de novo* any evidence that there has been an arbitration proceeding, the amount of the award or any other matter concerning the conduct of the arbitration proceeding, unless the evidence would otherwise be admissible pursuant to the Federal Rules of Evidence, or the parties have otherwise stipulated.[121]

The legislation authorizes the court to provide by rule that in any trial *de novo* the arbitration fees may be taxed as costs against the party making the *de novo* demand or require the party making the *de novo* demand (except the United States) to deposit a sum equal to the arbitrators' fees as "advance payment" of such costs unless that party has been permitted to proceed *in forma pauperis*.[122] However, in the event the party demanding trial *de novo* obtains a final judgment more favorable than the award, or the court determines that the demand for trial *de novo* was made for good cause, the arbitrators fees shall be returned, otherwise the fees are forfeited to the Treasury of the United States.[123] Such a rule must also provide that no penalty for demanding trial *de novo*, other than the arbitrators' fees as set forth above, may be assessed by the court.[124] In the event the arbitration proceeded by consent of the parties, the district court may assess costs as provided in 28 U.S.C. §1920 and reasonable attorney fees against the party demanding trial *de novo* if such party fails to obtain a judgment, exclusive of interest and costs, which is substantially more favorable than the arbitration award and the court determines that the party's conduct in seeking the trial *de novo* was in bad faith.[125]

The Act requires the district court to establish standards for the certification of arbitrators[126] and authorizes the court to determine the compensation of the arbitrators,[127] subject, however, to any limit set by the Judicial Conference of the United States.[128] Pursuant to regulations prescribed by the Administrative Office of the U.S. Courts, a district court may reimburse arbitrators for actual transportation expenses.[129]

The Judicial Conference of the United States is authorized to develop model rules relating to procedures for arbitration, but no model rule may supersede any provision of Chapter 44 or any law of the United States.[130]

Finally, the Act requires the director of the Administrative Office of the U.S. Courts to include in the annual report of the office statistical information concerning the implementation of Chapter 44.[131] Not later than five years after the enactment of this legislation, the Federal Judicial Center, in consultation with the director of the Administrative Office of the U.S. Courts, is required to submit to Congress a detailed report on Chapter 44 including a recommendation on whether to terminate or continue the program, or to enact an "arbitration provision in title 28, U.S. Code, authorizing arbitration in all federal district courts."[132]

Although Chapter 44 will require the ten U.S. district courts which presently operate programs of court-annexed arbitration to make some modifications to their local rules, the legislation is a welcome recognition by Congress that court-annexed arbitration makes the federal judicial system more accessible to those persons unable to afford the high cost of the traditional courtroom trial.

Conclusion

Court-annexed compulsory arbitration is making justice in the U.S. district courts more accessible to those who are unable to afford the high cost of a traditional courtroom trial. It is also providing litigants with a speedier resolution of their disputes. Furthermore, the additional burdens imposed on the district courts by the Speedy Trial Act for criminal cases and the new Sentencing Guidelines mandate the adoption of programs such as court-annexed compulsory arbitration if we are to continue the efficient operation of our federal judicial system. Court-annexed compulsory arbitration is one of the better alternatives, although certainly not the only one, to the traditional courtroom trial for those civil cases where money damages only are being sought in an amount which makes the cost of a traditional courtroom trial economically unfeasible. The history of its successful operation in many state courts and the success of the experimental programs in our federal courts is convincing evidence that the time has come to consider making court-annexed compulsory arbitration an integral part of our federal judicial system. □

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114. *Id.* at §653(b).
115. *Id.*
116. *Id.* at §655(a).
117. *Id.* at §654(a).
118. *Id.* at §654(c).
119. *Id.* at §654(b).
120. *Id.* at §655(b).
121. *Id.* at §655(c).
122. *Id.* at §655(d)(1)(A) & (B).
123. *Id.* at §655(d)(3).
124. *Id.* at §655(d)(4).
125. *Id.* at §655(e).
126. *Id.* at §656(a).
127. *Id.* at §657(a).
128. *Id.*
129. *Id.* at §657(b).
130. *Id.* at §902.
131. *Id.* at §903(a).
132. *Id.* at §903(b)(5).

APPENDIX E

The Role of Management in State Court-Annexed Arbitration

Roger Hanson • Geoff Gallas • Susan Keilitz

According to proponents of alternative dispute resolution, many of the problems linked to traditional court processes can be reduced by introducing viable options to these traditional processes. Alternatives permit individuals to shape the final resolution of their conflict and to avoid the psychological, temporal, and financial costs associated with court procedures. Furthermore, when disputants participate more directly in creating the agreements that resolve their disputes, the agreements last longer than court orders.[1]

One of the most important developments in the alternative dispute resolution (ADR) movement is court-annexed arbitration, a method by which courts refer some portion of their caseload to another forum for third-party resolution. Court-annexed arbitration is used for cases in which money damages fall within a certain range, generally between $10,000 and $50,000. An arbitrator (or group of arbitrators) meets with the parties and, after hearing the evidence and testimony, renders an award. If accepted, the award is binding. Parties not accepting the award may appeal and seek a court trial *de novo*.

Despite the fact that twenty-three states and the District of Columbia now use some kind of arbitration program,[2] its widespread adoption is still at the formative stage. This is because in several of those jurisdictions, arbitration has been introduced only in selected trial courts to deal with particular types of cases, and not necessarily in courts with the largest caseloads.[3]

It is fair and accurate to say that pressing questions about court-annexed arbitration are being asked in nearly all states. In most of the twenty-four jurisdictions where court-annexed arbitration is in place, the questions being asked are whether to expand arbitration by broadening eligibility, to extend it to more trial courts, or to modify its structure and process.

In the remaining twenty-seven states, the questions revolve around whether to even introduce court-annexed arbitration. North Carolina, for example, is currently comparing court processing and arbitration as part of a pilot project, and Colorado recently initiated an experimental arbitration program in eight trial courts. This wait-and-see approach to court-annexed arbitration suggests that states view the process not as a proven idea simply awaiting implementation but as an innovation that is yet to be proven.

One of the most important developments in the alternative dispute resolution (ADR) movement is court-annexed arbitration . . .

One manifestation of this ambivalence toward arbitration is the Conference of State Court Administrators' (COSCA) expression of interest in the topic. Instead of fully endorsing arbitration and urging its rapid establishment, COSCA passed a resolution supporting a more systematic inquiry.[4] This article responds to the concerns behind that resolution. State court administrators, who must advise judges and legislators on whether to introduce, expand, or institutionalize court-annexed arbitration, want to know what has been learned from past experience with this procedure. Is it a promising innovation? What makes for an effective arbitration program? How can it be best organized?

Interestingly, some prominent researchers are in striking disagreement as to what has been learned. For example, research performed by Rand's Institute on Civil Justice suggests that state court-annexed arbitration has made considerable progress in achieving its main objectives. In contrast, others argue that the Rand research lacks evidence of either arbitration's effectiveness or its ineffectiveness.[5]

The purpose of this essay is threefold. First, to suggest that there is a middle ground between these opposite views. Reviewing the literature on state court-annexed arbitration, we conclude that something is known about arbitration's relationship to the pace, cost, and quality of dispute resolution but that methodological shortcomings limit the generalizations that we can make when drawing on available research.

A second objective is to draw attention to the crucial role of management in the process of dispute resolution. Past evaluations of arbitration have neglected management's role in affecting the pace, cost, and quality of both court processing and arbitration.

And finally, we point out that the significance of management in shaping the success of court-annexed arbitration is consistent with the proposition that organization is essential to court reform in general.

Why isn't more known about court-annexed arbitration?

This review will synthesize prior research about the connection between court-annexed arbitration and key outcomes, such as the pace, cost, and quality of dispute resolution. The complex issue of quality is broken down into participant satisfaction, integrity, access, and fairness. By seeing how research findings fit into this scheme rather than merely summarizing each study, we place what is known into a broader context and highlight the questions that remain unanswered.

PACE OF DISPUTE RESOLUTION

One of the common objectives of court-annexed arbitration is to reduce the time

EDITOR'S NOTE: *This article was written with support from the National Institute for Dispute Resolution (NIDR) and the Large Trial Court Capacity Increase Program funded by the Bureau of Justice Assistance (BJA). The views expressed in this article are those of the authors and do not necessarily represent the policies of NIDR or BJA.*

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from case filing to disposition. Hensler (1986) paints a mixed picture of what arbitration actually accomplishes. In Pittsburgh, arbitrated cases move faster than those on the regular court calendar, while in some California jurisdictions arbitrated cases move slower. These observations are tentative, however, because they are not based on rigorous comparisons between arbitration and court processing.[6]

An experimental research design should be used to draw the most valid conclusions comparing the pace of court cases to arbitrated cases. That sort of design involves the comparison of a randomly assigned group of arbitrated cases with a randomly assigned control group of court cases. By establishing equivalent experimental and control groups and varying only the forum of resolution, the effects of extraneous factors are screened out. Observable differences in the pace of resolution can then be related logically to the presence or absence of arbitration.

Where random assignment is not possible, researchers can approximate the experimental/control group design by comparing matched samples of cases adjudicated before and after the introduction of court-annexed arbitration. If arbitration is working as intended, there should be a positive change in the pace of dispute resolution between the two samples. However, this approach also requires researchers to examine cases which remain on the court calendar because they are not eligible for arbitration. Past research has not taken this step.

Arbitration may deal with its assigned cases expeditiously, but only by drawing attention away from the rest of the court's caseload. Judges do not rid their calendars simply by referring cases to arbitration; they or their representatives must monitor and review arbitration cases. Additionally, judges and court staff must still resolve arbitration cases requesting trials *de novo*.

As prior studies have demonstrated, the introduction of an innovation also requires a considerable portion of the time and attention of the chief judge and court manager to keep the implementation process moving forward.[7] All of these factors consume the time and resources available for handling cases not referred to arbitration. Hence, it is possible that the pace of arbitration may be swift, but the rest of the court's caseload may suffer. Hensler admits that the question of a serious, negative side effect of arbitration on the remaining court calendar is open, which means that more thorough analyses are called for in the future.[8]

COST OF DISPUTE RESOLUTION

Any thorough study of the cost of dispute resolution must consider both the cost to the parties and the cost to the court. Hensler's survey of what is and is not known about state court-annexed arbitration reveals a major void in our knowledge about costs to the parties. Hensler reports on the amount of time the parties spend and what fees they pay to their lawyers for arbitrated cases, but she presents no time or cost data on comparable court cases. She correctly observes that any reduced fees to the parties depends in part on the attorneys' billing structures and their willingness to pass along savings to their clients. However, the primary question of whether there is any savings for attorneys to pass on to their clients remains unanswered.[9]

> . . . the pace of arbitration may be swift, but the rest of the court's caseload may suffer . . .

Hensler compared the expenditure per case of all cases referred to arbitration with all those remaining in the court system to determine the cost of arbitration to the court. In both California and Pittsburgh, the per-case cost of arbitration was lower. She also compared the cost of all cases that actually went to an arbitration hearing with those court cases that went to trial and found that the per-case cost of arbitration was lower.

For at least three reasons, however, these positive results should be taken with a note of caution. First, the lower cost estimates do not reflect any time that the court spends in monitoring or reviewing arbitrated cases. Second, as Hensler recognizes, information is lacking on the ultimate resolution of arbitration appeals, which, like trials, consume a disproportionately large share of the court's available resources compared to cases that do not go to trial. The cost of appeals, of course, must be charged against arbitration. Consequently, because these cost factors have been omitted, the total cost of arbitration is underestimated by an unknown amount.

Third, one should avoid drawing broader conclusions than are warranted from per-case cost figures. These figures measure the relative *efficiency* of court processing versus arbitration. Efficiency is calculated for court processing and arbitration separately by dividing equivalent resources (e.g., personnel) by the number of cases in each respective forum. However, even if arbitration has a lower per-case cost, this efficiency does not translate into a cost savings to the court. To reach conclusions about cost savings, we need to know how arbitration affects the allocation and distribution of court resources. After arbitration is introduced, what adjustments, if any, are made in the number and assignment of judges, staff, and other personnel? Does the court shift resources out of the civil division because some cases are now being arbitrated? If cases are siphoned off for arbitration, do the judges spend more time on complex civil cases? Or is the efficiency associated with arbitration simply absorbed with no change in resource allocations by the court? These sorts of questions need to be addressed before conclusions about cost savings can be reached.

QUALITY OF DISPUTE RESOLUTION

One of the most complex issues in the study of law and society is the quality of legal services. From our perspective, quality in the context of court-annexed arbitration encompasses four key components: (1) participant satisfaction, (2) integrity, (3) access, and (4) fairness.

Participant satisfaction. Concerning participant satisfaction, positive assessments by parties who have gone through an arbitration process are among the most heralded findings. Hensler reports that the overwhelming majority of arbitration participants, including those who lost their disputes, are satisfied with the procedure. Hensler's positive findings corroborate an earlier review of participants' reactions to mediation programs.[10]

Despite these affirmative judgments from the users of arbitration, some questions are still outstanding.[11] In a more strict comparison of parties in experimental (arbitration) and control (court processing) groups, if members of the two groups are asked to rate arbitration or court processing on a common scale, how would the ratings compare? Moreover, would the ratings vary according to the nature of the case, the length of time taken to resolve the dispute, the mode of disposition, the winning or losing side, and so forth?

The basis for the positive evaluations by the users of arbitration also needs to be clarified. Are there identifiable facets of arbitration that predict high or low satisfaction? Are these facets subject to manipulation? Answers to these questions are needed to determine what specific procedures or particular values should be incorporated into the design, implementation, and management of arbitration programs.

Integrity. The integrity of the dispute resolution process reflects the degree to which parties adhere to agreed-upon arbitration awards, settlements, or court orders. Noncompliance with these agreements signals that the process is marked by miscommunication, misunderstanding, or misrepresentation. The failure to render services, to pay damages, or to discharge other obligations imposes a deprivation on one of the parties. Finally, the inability to execute arbitration awards or court judgments calls into question the authoritative nature of the arbitration or court process.

Although there is very little information on the relative integrity of state court-annexed arbitration, this dimension has been explored by McEwen and Maiman in the related area of small claims mediation.[12] They find that parties to mediation are twice as likely as their court counterparts to fully live up to their obligations. This startling difference is one of the reasons some policymakers are attracted to small claims mediation despite intellectual criticisms of it.[13]

However, compliance is not an either/or distinction; compliance may be partial. In sorting out the relative importance of several factors influencing the degree of compliance, McEwen and Maiman find that the type of arena in which the dispute was resolved does not have an independent impact on the likelihood of compliance. Other factors are even more powerful influences. McEwen and Maiman find that compliance is inversely and most strongly related to the size of the award: the larger the award, the lower the degree of compliance. Hence, it remains to be seen whether state court-annexed arbitration, where the dollar amounts in controversy are much larger than in small claims, has an impact on compliance.

The fairness of dispute resolution processes is of universal concern . . .

Access. Access to justice is a value arbitration offers to disputants because it presumably is more rapid and less expensive. The meaning of access is not, however, altogether obvious. If it is *assumed* that arbitration is as fair or fairer than court processing and so more closely approximates the ideal of due process, then the level of its use is an appropriate indicator of access. That assumption begs the question, however. The critics of ADR make the opposite assumption; they maintain that arbitration provides second-class justice partially because of its reputed speed. This contrary assumption calls into question, of course, the validity of program use as a measure of access to justice.

Although access to justice is inextricably bound to notions of fairness, both the proponents and the critics of ADR might agree that the parties' ability to make their claims known and understood by the court (or the arbitrators) is an essential component of access. For this reason, we believe it is fruitful to frame the issue of access in terms of factors such as the parties' views of whether they are able to present their claims, whether their ultimate goals are taken into account, and whether the process is orderly. If they have counsel, their beliefs as to whether their attorneys are able to be prepared, make effective arguments, and answer questions posed by the court (or the arbitrators) are relevant issues.

Hensler reports that most participants in state court-annexed arbitration believe that this process allows them the opportunity to be heard and to have their decisions rendered by an impartial third party. While this information is pertinent in a general way to our notion of access, it is important to recognize that Hensler's observation is not based on any relevant comparison. It is not based on a comparative assessment between arbitration and court processing by the parties in arbitration. It also is not based on a comparison of the judgments by parties in arbitration with equivalent judgments by parties in courts. Hence, there is a need to build on Hensler's work and to design a more-complete set of measures of access.

Fairness. The fairness of dispute resolution processes is of universal concern. Even if a given route to resolving a dispute is clearly the shortest or the most efficient, a lack of fairness is sufficient in itself to warrant the search for a different path. Although the emphasis is commonly placed on the procedural notion of fairness, we believe that decisions rendered by a process are equally important to any assessment of its fairness.

The appropriateness of analyzing decisions in dispute resolution arises from the debate over who is and who is not disadvantaged by the choice of dispute resolution forums. Generally, the proponents of alternatives to court processing claim that greater parity in the bargaining strength

and power of both parties is achieved outside the court arena. Critics contend that it is precisely the parties with the least resources, the lesser skills, who are the most dispossessed, who are the least successful when disputes are resolved by some alternative process.

One contribution that research can make to this debate is clarifying the various claims. While the proponents contend, for example, that parties with less clout tend to do better in arbitration than in court, the question is, how much better? Do these parties simply increase their chances of winning, or do they emerge as the prevailing party in at least a majority of the disputes? Do the advantages of mediation for less-powerful parties hold true in arbitration, which is a more adversarial process than mediation?

On the other hand, do the critics contend that parties with less clout do even worse in arbitration than they would do in court? Or is it that the critics see the parties with the least clout as not doing any better than before? Part of any future research agenda should be to determine if the attributes of the parties (such as race, gender, occupation, income, and type of legal representation) are associated with variations in the patterns of awards, settlements, or court orders.

In summary, court-annexed arbitration has been found in some instances to be an improvement over court processing. Some applications of court-annexed arbitration have been linked to more-expeditious, more-efficient, and more-satisfying dispute processing. Yet, our review has shown that court-annexed arbitration is not always superior, and in some instances is inferior, to court processing. If court-annexed arbitration is not a magic bullet guaranteeing faster, cheaper, and fairer dispute resolution, then other factors are influencing arbitration's success. These other factors deserve attention if arbitration is to realize its maximum potential.

Management: The forgotten variable

A search of different studies reveals one consistent finding—the success of arbitration hinges on its administration.[14] Simply stated, loosely structured programs, lax enforcement of deadlines, and tolerance of inefficiencies are believed to contribute to slow and ineffective arbitration processes.

These observations have gone somewhat unrecognized because they are *post hoc* conclusions based on examinations strictly of arbitration programs rather than explicit and controlled comparisons between the management of arbitration and court processing. Nevertheless, these observations raise the larger issue of the role of management as a key variable in shaping dispute resolution.

We know from court-related research that the management of litigation affects the pace at which cases are resolved.[15] However, the mere referral of cases to arbitration may not expedite the court's remaining caseload. In theory, siphoning off cases to arbitration, with the corresponding reduction in court congestion, should improve the pace of litigation for the remaining cases. Yet recently completed research on case processing time in eighteen jurisdictions indicates that arbitration does not necessarily speed the processing of cases that remain on the court's docket.[16] Nine of the courts in this study, including four of the fastest and three of the slowest, had mandatory arbitration programs for at least a portion of their civil caseloads. Moreover, the fast courts were observed to have effective leadership, performance standards, monitoring of performance against standards, and tight control over case processing. According to the researchers' conclusions, management determines the efficiency of case processing. Court-annexed arbitration, in and of itself, does not have an impact.

On the basis of that inquiry, one can infer that the positive results attributed to arbitration actually arise because of the increased attention given to case processing. Heightened concern, even without the establishment of arbitration programs, might produce similar positive effects. This argument has considerable support. For example, evaluations of delay reduction programs have found that the greatest decrease in case-processing time occurs before the implementation of delay reduction procedures. The explanation is that greater interest in and a greater focus on case processing among judges and court staff are sufficient to move cases more promptly.[17] A judge or court administrator, therefore, may reasonably believe that if attention and resources are aimed at court processes, the improvements are likely to be similar to those achieved by creating an alternative to court processing. In fact, that inference may be behind COSCA's resolution calling for research on alternative dispute resolution.

Looking beyond

Based on our understanding of the literature, future research should examine the extent to which different approaches to management affect the pace, cost, and quality of dispute processing. For example, arbitration may be a more-efficient and rapid method of resolving cases than court processing because the court fails to apply its own rules and fails to exercise adequate control over litigation. On the other hand, when a court monitors case processing, its management approach may be transferred to the arbitration process, as Mahoney *et al.* posit is the case in four speedy, well-managed courts.[18] Consequently, the two dispute resolution processes may function in much the same way because of the common management framework.

The vital role of management in the study of court-annexed arbitration relates to the larger issue of court reform. The history of planned change is studded with examples of ideas that are discussed but never introduced, experiments that begin but are only partially implemented or never institutionalized. Some scholars have commented that one of the most important ingredients in the successful introduction of new policies is organization.[19] Unless programs to implement policies are structured in such a way that they can deliver the intended services, the prospects of positive results are dim. We would like to add to that proposition the parallel idea that management is essential to successful reform. When reforms are monitored in terms of performance, adjusted, and kept on track, they have a chance of succeeding. This is no prescription as to what is the most potent reform, but it is a necessary condition underlying the execution of any idea. Because dedicated management takes so much time, it supports Arthur T. Vanderbilt's adage that reform is not for the short winded. sc

1. See Lon Fuller, "Mediation—Its Forms and Functions," 44 *Southern California Law Review* 305 (1971); Richard Danzig, "Toward the Creation of a Complementary Decentralized System of Criminal Justice," 26 *Stanford Law Review* 1 (1978); Laura Nader and Linda Singer, "Dispute Resolution in the Future: What are the Choices?" *California State Bar Journal* 281 (1976); Frank E. A. Sander, "Varieties of Dispute Processing," 70 *Federal Rules Decisions* 79 (1976); Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law and Society Review* 95 (1974); Earl Johnson *et al.*, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (Williamsburg, Va.: National Center for State Courts, 1977); Phillippe Nonet and Philip Selznick, *Law and Society in Transition* (New York: Harper and Row, 1978); David Aaronson *et al.*, *The New Justice: Alternatives to Conventional Criminal Adjudication* (Washington, D.C.,: Institute for Advanced Studies in Justice, The American University, 1977); Paul Wahrhaftig, "Citizens Dispute Resolution: A Blue Chip Investment in Community Growth," *1978 Pretrial Services Annual Journal* (1978); Stephen Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution*, (Boston: Little, Brown and Co., 1985).

2. In early 1987, the National Center for State Courts surveyed all state court administrators to determine the extent of alternative dispute resolution activities, including court-annexed arbitration, in the states. For a discussion of this survey, see Susan Keilitz, Geoff Gallas, and Roger Hanson, "State Adoption of Alternative Dispute Resolution," *State Court Journal*, 12 No. 2, (Spring 1988).

3. See Keilitz, Gallas, and Hanson, *supra*. Other reasons ADR adoption can be said to be still in the formative stage are that some programs have low ceilings on the dollar amounts in controversy (e.g., $6,000 in New York) while other programs are restricted to certain case types (small claims in Louisiana; family law in Delaware, medical malpractice in Vermont, motor vehicle cases in Nevada, and automobile property and medical damages in New Jersey). Whereas this does not suggest that arbitration has negative consequences, it does indicate that its full potential has yet to be realized.

4. The members of the COSCA Committee on Alternative Dispute Resolution include Carl F. Bianchi (chair), Samuel Conti, Robert Duncan, Franklin E. Freeman, Thomas J. Lehner, J. Denis Moran, Larry Polansky, Arthur H. Snowden, and Janice Wolf. Although the committee members do not necessarily subscribe entirely to the views expressed in this article, they have supported a closer analysis of court-annexed arbitration's effects on the efficiency and quality of the administration of justice. In our opinion, their actions indicate that pressing questions about arbitration's consequences remain unanswered.

5. For the point of view that court-annexed arbitration has made considerable progress in achieving its goals, see Deborah R. Hensler, "What We Know and Don't Know About Court-Administered Arbitration," 69 *Judicature* 307 (1986). (Hensler's article is a synthesis of two detailed studies in which she participated: see Jane W. Adler, Deborah R. Hensler, and Charles E. Nelson, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, [Santa Monica, Ca.: Rand Corporation 1983]; and Deborah R. Hensler, Albert J. Lipson, and Elizabeth S. Rolph, *Judicial Arbitration in California: The First Year*, [Santa Monica, Ca.: Rand Corporation, 1981].) For the opposing viewpoint, see James J. Alfini and Richard W. Moore, "Court-Annexed Arbitration: A Review of the Institute for Civil Justice Publications," 12 *Justice System Journal* 260, (1987). Parallel work on federal court-annexed arbitration does not reconcile disagreement surrounding state court-annexed arbitration. (E. Allan Lind and John E. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* [Washington, D.C.: Federal Judicial Center, 1983].) The federal court research, based on a study of three programs, places arbitration's effectiveness in some doubt. Arbitration was successful in only two of the three jurisdictions, and where there was the strongest evidence of its success, the program was abandoned. Although other federal courts are now experimenting with arbitration, the results are not yet in.

6. A similar picture of arbitration emerged from the Federal Judicial Center's study of three federal district courts; arbitrated cases terminated earlier in the District of Connecticut and the Eastern District of Pennsylvania, but later in the Northern District of California. (See Lind and Shapard, *supra*.)

7. See, for example, Alexander B. Aikman, Mary E. Elsner, and Frederick G. Miller, *Friends of the Court: Lawyers as Supplemental Judicial Resources* (Williamsburg, Va.: National Center for State Courts 1987). The acute need for someone to spend large amounts of time and energy to resolve inevitable obstacles to implementation is a general phenomenon. Eugene Bardach's theory of policy change develops the notion that someone must adopt the role of an extremely dedicated "fixer" to keep innovations from unraveling. See Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law* (Cambridge, Mass.: MIT Press, 1979).

8. Related research compares the pace of court cases with those handled by the American Arbitration Association (AAA) in five states. It concludes that arbitrated cases "tend" to be faster in reaching termination (i.e., arbitration is faster for tort and contract cases but not in all states for both types). (See Herbert M. Kritzer and Jill K. Anderson, "The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts," 8 *The Justice System Journal* 6 [1983].) This evidence lends support to the claim that court-annexed arbitration is faster, but it is more suggestive than conclusive. It is based on extremely small numbers of cases per state, typically less than 40 arbitrated cases and less than 100 state court cases. Additionally, the comparison is contaminated because the stakes are reported to be higher in the AAA cases than in the state court cases.

9. Cost to the parties may, in fact, prove to be higher in arbitration. Kritzer and Anderson (*supra*, p. 17) recommend that "one should not turn to arbitration if the goal is to save processing costs (lawyers' fees); if anything, the AAA may be a little more expensive."

10. Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication," 7 *The Justice System Journal* 420 (1982).

11. Hensler's study lacks data on arbitration users' views of case processing. Her data describe reactions strictly to arbitration rather than judgments between arbitration and adjudication. Without any comparison, the reported high level of satisfaction is not strong evidence of arbitration's advantage. Whereas the lack of comparative assessments is the case in many other studies (see Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* [Washington, D.C.: National Institute of Justice, 1986], pp. 53-74), that larger void accentuates the need for more rigorous tests of satisfaction in regard to court-annexed arbitration.

12. Craig A. McEwen and Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance through Consent," 18 *Law and Society Review* 11 (1984).

13. See James McKenna, review of *Justice Without Law?* by Jerold Auerbach, 68 *Judicature* 45 (1984).

14. See Hensler (1986), Kritzer and Anderson, (1983), and Lind and Shapard (1983), *supra*.

15. See American Bar Association Action Commission to Reduce Court Cost and Delay, *Attacking Court Costs and Delay* (Washington, D.C.: American Bar Association, 1984); Steven Flanders, *Case Management and Court Management in United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977); Ernest C. Friesen, "Cures for Court Congestion," 23 *The Judges' Journal* 5 (1984); Larry L. Sipes, "Where Do We Go From Here?" 23 *The Judges' Journal* 45 (1984); Maureen Solomon, *Caseflow Management in the Trial Court* (Chicago: American Bar Association Commission on Standards of Judicial Administration, American Bar Association, 1974).

16. Barry Mahoney *et al.*, *Caseflow Management and Delay Reduction in Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, 1988).

17. John Paul Ryan, Marcia T. Lipsetz, Mary Lee Luskin, and David Neubauer, "Analyzing Delay Reduction Programs: Why Do Some Succeed?" 65 *Judicature* 58 (1981). After the pre-implementation stage and delay reduction procedures are in place, the pace of litigation tends to improve in a more uniform manner. Fewer cases fall through the cracks or inadvertently take a long time to resolve after the procedures are in place. Consequently, meaningful change is achieved with the introduction of new procedures despite the dramatic change that occurs in the gestation period.

18. General jurisdiction trial courts in Phoenix, Arizona; Dayton, Ohio; Portland, Oregon; and Cleveland, Ohio, all have mandatory arbitration programs and are relatively fast courts.

19. Malcolm Feeley and Austin Sarat, *The Policy Dilemma* (Minneapolis: University of Minnesota Press, 1981).