Voluntary Arbitration in Eight Federal District Courts: An Evaluation

David Rauma & Carol Krafka

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Contents

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Summary

This brief report supplements *Court-Annexed Arbitration in Ten District Courts*, a 1990 statutorily mandated report by the Federal Judicial Center on mandatory court-annexed arbitration programs. A 1988 statute authorized the appropriation of funds for ten pilot mandatory arbitration programs and ten voluntary arbitration programs and required the Center to submit a report on their operation. This supplementary report provides information on eight of the ten voluntary court-annexed arbitration programs authorized by that statute.

Section 1 explains the pilot arbitration programs, the Center's statutory mandate to provide Congress with information and a recommendation about the programs' operation, and events since the Center submitted its 1990 report.

Section 2 summarizes the results of the Center's evaluation of the mandatory arbitration programs.

Section 3 describes the main elements of the eight existing voluntary arbitration programs: policies on case eligibility for arbitration; opt-in and opt-out referral systems; qualifications of and selection of arbitrators; and arbitration proceedings, including demands for trial de novo.

Section 4 summarizes data on levels of participation in the voluntary arbitration programs and demands for trial de novo. Among the findings are the following:

- Three of the four opt-out voluntary arbitration programs (but none of the four opt-in programs) had rates of participation comparable to those of the mandatory arbitration programs.
- Trial de novo demand rates in the two voluntary arbitration programs with the largest number of hearings were comparable to those of the mandatory arbitration programs.

Section 5 suggests some reasons for the generally lower participation rates in the voluntary programs as compared with the mandatory programs.

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1. Introduction

Federal courts have been experimenting with both mandatory and voluntary nonbinding court-annexed arbitration for more than fifteen years. Arbitration is one of various alternative dispute resolution (ADR) techniques that state and federal courts have begun to make available to parties in civil disputes. These techniques also include early neutral evaluation, mediation, and summary jury trials.

In nonbinding arbitration, parties to the dispute present their arguments in a formal or semiformal setting to a neutral arbitrator (or panel of arbitrators), who then delivers a decision in the case. One or more parties may choose, after the arbitration decision is announced, to go to trial rather than accept the decision. This request for trial de novo puts a case back on the court calendar, and the case proceeds as if the arbitration decision had not been made.

Mandatory arbitration programs typically require that certain categories of civil cases be placed in arbitration, although one or more parties may later demand trial de novo. In contrast, voluntary arbitration programs generally provide for arbitration only if all parties agree beforehand. As is true of mandatory programs, in voluntary programs, one or more parties may later request trial de novo.

The federal courts' experience with mandatory nonbinding court-annexed arbitration began in 1978 with Judicial Conference-authorized pilot programs in the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut.[1] An evaluation of these three programs concluded that court-annexed arbitration could reduce the time from filing to disposition; that most parties, judges, and attorneys gave arbitration favorable marks; and that there should be further experimentation with arbitration in the federal courts.[2] The number of pilot programs was expanded to ten in 1985.[3]

In 1988, Congress formally authorized the ten existing pilot courts to conduct mandatory court-annexed arbitration programs, according to rules spelled out in

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1. *See* Report of the Proceedings of the Judicial Conference of the United States, Sept. 1977, at 59. The District of Connecticut ended its pilot program in 1982.

2. E. Allan Lind & John E. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center rev. ed. 1983).

3. Report of the Proceedings of the Judicial Conference of the United States, Sept. 1985, at 53.

the legislation, and authorized the Judicial Conference to designate ten additional districts to conduct voluntary nonbinding court-annexed arbitration programs. The 1988 statute authorized appropriations for program operations and imposed a sunset date of November 19, 1993, to allow Congress to consider whether to terminate or continue the pilot programs, or to extend arbitration authorization to additional district courts.[4]

This legislation also directed the Federal Judicial Center to submit a report to Congress by November 19, 1993, on the implementation of the pilot programs. The Center was also directed to submit a recommendation as to whether Congress should terminate, continue, or expand the arbitration authority. The Center issued a report in 1990 detailing the operation of the ten mandatory arbitration programs.[5]

There were several reasons why the Center did not wait for the end of the five-year period, nor wait for data from the voluntary programs to be available, before issuing its report. First, as a practical matter, the Center wanted Congress to have the report in ample time to consider the future of the pilot programs and the future of arbitration in the federal courts. Second, the voluntary programs were slow in starting, and data about their operation would not be available in time to be reported prior to the sunset date.

Third, the statute requesting the study emphasized that the study should assess participants' satisfaction with the program. Given the voluntary nature of the arbitration programs, there was no reason to believe that litigants, attorneys, and judges would express less satisfaction with the procedural aspects of the voluntary programs than they had with mandatory program procedures. In other words, the mandatory programs were considered the baseline for gauging satisfaction with voluntary arbitration procedures.

Since the completion of the Center's report on mandatory arbitration the following events have occurred.

- The Center's Director forwarded the report to Congress on October 4, 1991, with a recommendation from the Center's Board that Congress authorize mandatory or voluntary arbitration at the discretion of the courts in all districts.

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4. 28 U.S.C. §§ 651–658.

5. Barbara S. Meierhoefer, Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center 1990).

- At its March 1993 and September 1993 meetings, the Judicial Conference recommended that Congress authorize all districts to adopt voluntary arbitration and restrict mandatory arbitration to the ten existing programs.
- In November 1993, Congress adopted and the President signed Pub. L. No. 103-192, which extended the twenty pilot districts' arbitration programs until December 31, 1994.

This report serves as a supplement to the Center's 1990 report to Congress on mandatory arbitration programs. It describes the status of the voluntary programs in operation as of April 1994 and briefly compares the experiences of the voluntary programs with the experiences of the mandatory programs. The findings reported herein are of two types. First, a comparison of the voluntary programs' features shows variations in their design. These variations are within the limits established by statute, but they may well affect decisions by litigants to go through arbitration. There are two general methods of case referral among the eight voluntary programs: opt-in programs, in which litigants must take steps to participate in the arbitration program, and opt-out programs, in which eligible cases are "placed" in arbitration initially but litigants are given ample and easy opportunity to proceed without arbitration to trial or settlement.

Second, arbitration caseloads in districts with voluntary programs are not as large on average as those in districts with mandatory arbitration programs. Opt-out programs have the largest caseloads, and these caseloads are comparable in size to those of the smallest mandatory programs. Opt-in programs have had almost no cases.

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2. The Mandatory Arbitration Programs

As noted previously, the ten mandatory arbitration programs are summarized and analyzed in an earlier report by the Federal Judicial Center.[6] The ten districts authorized to adopt mandatory arbitration programs are

Eastern Pennsylvania	Northern California
Middle Florida	Western Michigan
Western Missouri	New Jersey
Western Oklahoma	Eastern New York
Middle North Carolina	Western Texas

Program Goals

Pursuant to the statutory directive, the Center's study of mandatory arbitration assessed how the ten programs met the following goals:

- increasing options for case resolution by providing litigants in cases that normally settle with an opportunity to accept a known adjudication by a neutral third party given at an earlier time than is possible for a trial;
- providing litigants with a fair process;
- reducing costs to clients;
- reducing the time from filing to disposition; and
- lessening the burden on the court by reducing the number of cases that require judicial attention, or by reducing the amount of attention required.[7]

The research design included a description of and an assessment of arbitration programs as conceived and implemented; a determination of the level of satisfaction with arbitration in a sample of 62 judges, 3,501 attorneys, and 723 litigants whose cases were referred to arbitration; and data tracking a twelve-month sample of arbitration cases from each of the ten districts.[8]

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6. *Id.*

7. *Id.* at 5.

8. *Id.* at 2, 21–23. The sample period was extended in four districts to either increase the sample size or allow for a slow start-up of the arbitration program.

Evaluation Findings

The major findings of the evaluation can be summarized as follows:

- Most cases in these districts were settled without an arbitration hearing or a trial.
- Although a majority of arbitration hearings ended with a demand for trial de novo, most of the parties, when asked, said that they found the arbitration award a good starting point for settlement negotiations and that the hearing was not a waste of time.
- There was no evidence that attorneys and litigants thought that the arbitration hearing represented a form of second-class justice. The great majority of attorneys surveyed said that they approved of arbitration as a concept and as implemented in their districts (84%). Similarly, the great majority of litigants surveyed said that the procedures used to handle their cases were fair (80%) and that the arbitration hearing was fair (81%).
- Attorneys' reports of cost savings differed depending on whether there was a demand for trial de novo after the arbitration hearing. In cases in which no demand for trial de novo was made, a majority of attorneys in the ten districts reported cost savings (68%). In cases in which a demand for trial de novo was made, the majority of attorneys reported no cost savings (60%).
- Only three of the ten districts showed reductions in the disposition times of civil cases: Middle Florida, Western Michigan, and Western Missouri.
- Ninety-seven percent of the judges agreed that the court's caseload burden had been reduced as a result of the arbitration program.

3. The Voluntary Arbitration Programs

The ten districts authorized to adopt voluntary arbitration programs are

Arizona	Northern Ohio
Middle Georgia	Western Pennsylvania
Western Kentucky*	Western Virginia*
Northern New York	Utah
Western New York	Western Washington

Eight of these ten districts have voluntary arbitration programs, and each of these programs has been in operation for more than one year. The remaining two districts (marked with an asterisk) do not have arbitration programs.

Tables 1–3 summarize some of the salient and distinguishing features of the eight extant voluntary programs. Table 4 presents information about program participation for each of these eight districts.

The programs outlined in Tables 1–3 show a number of similarities, both to one another and to the mandatory programs. However, there are differences among the voluntary programs that may well have implications for their ability to place cases in arbitration. Some of these differences are presented below.

Case Eligibility

Table 1 describes eligibility for arbitration in terms of case type and dollar amount. The definition of an eligible case varies somewhat across the programs, although all definitions are within statutory bounds.[9] At one end of the continuum, Middle Georgia refers only specific case types to the program, and only if they are valued at less than $150,000 exclusive of punitive damages. At the other end, several districts place no restrictions on eligible case types and impose no dollar ceiling. In the middle are districts that exclude case types specified by local rule, and that may or may not place a dollar limit on case eligibility.

9. 28 U.S.C. § 652.

Table 1
Voluntary Arbitration Programs: Case Eligibility

District	Program Type	Eligible Cases	Ceiling
D. Ariz.	Opt-out	Cases with damages not in excess of $100,000[a]	$100,000[b]
M.D. Ga.	Opt-out	Contract or negotiable instrument (diversity); personal injury or property damage; Jones Act; Federal Employers' Liability Act; cases approved by the Attorney General where the U.S. is a party; Miller Act; Federal Tort Claims Act	$150,000[b]
N.D.N.Y.	Opt-in	All civil cases	None
W.D.N.Y.	Opt-in	All civil cases except forfeiture cases	None
N.D. Ohio	Opt-out	All civil cases	None
W.D. Pa.	Opt-out	All civil cases except Social Security and prisoner cases	None
D. Utah	Opt-in	All civil cases except prisoner cases and bankruptcy appeals	None
W.D. Wash.	Opt-in	All civil cases	None

a. Tax, Age Discrimination in Employment Act, Employee Retirement Income Security Act of 1974, Social Security, Title VII, class action, and prisoner cases are excluded, as are pro se litigants and cases pending on a multidistrict docket.

b. The ceiling is exclusive of punitive damages.

Referral Systems

The eight programs use one of two systems for referring cases to arbitration. The first is an "opt-in" system; the second is an "opt-out" system.

Opt-in systems

The courts in Western New York and Western Washington refer cases to arbitration through simple notification that the arbitration program is available if litigants wish to participate. Litigants can "opt in" to the program.

The court in Northern New York issues a notification of the program and invitation to participate to litigants in selected cases. This court has engaged in extensive bar-outreach efforts to bring notice of the program to potential users. Judges in this district also discuss the availability of arbitration with litigants at a scheduled pretrial conference.

Utah's voluntary arbitration program uses a slightly different opt-in referral system. Litigants in eligible cases must file a certificate indicating whether they wish to be referred to the court's ADR program, of which voluntary arbitration is one option.

Opt-out systems

The other system for referral is more aggressive: The court automatically places all eligible cases in the arbitration program, from which litigants can "opt out." The courts in Arizona, Middle Georgia, Northern Ohio, and Western Pennsylvania have adopted this approach. In the first three districts, parties must move to opt out within twenty days of referral to the program; if they do not, they are considered to have consented to placement in arbitration. Western Pennsylvania has a somewhat more liberal policy, in which parties have an opportunity to opt out either within ten days of the defendant's answer or upon motion filed prior to the appointment of the arbitrator.

Arbitrators and the Arbitration Process

Table 2 describes features of the arbitrators and the arbitration process. Some programs provide for a panel of three arbitrators, some provide for a single arbitrator, and some leave the choice to the parties. The arbitrators are lawyers who meet qualification standards set by the court and who are willing to serve on the case for a prescribed fee. In Western Pennsylvania, for example, attorneys consider such service a form of pro bono work, and the court has a list of several hundred eligible arbitrators. Assignment of arbitrators is typically accomplished either by the parties reaching consensus on a nomination or by the random drawing of names from a qualified pool of potential arbitrators (often with the opportunity for parties to strike names).

Table 2
Voluntary Arbitration Programs: Arbitrators and Arbitration Process

District	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Timing of Hearing	Place of Hearing	Arbitrator's Authority to Grant Continuances
D. Ariz.	Random selection	1	$250 per hearing, plus expenses	Within 30 days of appointment of arbitrator	Any agreed-upon location	None, but court may grant a continuance of up to 90 days if hearing cannot be held within 30 days
M.D. Ga.	Random selection	1	$250 per day, plus mileage	Within 90 days of appointment of arbitrator	U.S. courthouse	None, but court may grant a continuance for good cause
N.D.N.Y.	Nominated or by random selection	3 or 1[a]	$250 per day for one arbitrator or $100 per arbitrator for panel members, plus expenses	Within 5 months after answer is filed	Any agreed-upon location	None, except in extraordinary circumstances; court may grant a continuance for good cause
W.D.N.Y.	Nominated or by random selection	3 or 1[a]	$250 per day for one arbitrator or $100 per arbitrator for panel members, plus expenses	Within 180 days after last answer is filed	Any agreed-upon location	None, except in extraordinary circumstances

District	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Timing of Hearing	Place of Hearing	Arbitrator's Authority to Grant Continuances
N.D. Ohio	Random selection of 5, with strikes by parties to arrive at final number	3 or 1[a]	$250 per day for one arbitrator or $100 per arbitrator for panel members	Within 30 days of appointment of arbitrator(s)	Any agreed-upon location	Arbitrator(s) may grant one continuance for not more than 30 days from initial hearing date; court may grant additional continuances for good cause
W.D. Pa.	Nominated or by random selection	3 or 1[a]	$250 per day for one arbitrator or $100 per arbitrator for panel members, plus expenses	Approximately 150 days after answer is filed	U.S. courthouse	None, except in extraordinary circumstances
D. Utah	Nominated or by random selection of 12, with 4 strikes by each party and final selection by clerk from remaining names	3 or 1[a]	$250 per day for one arbitrator or $100 per arbitrator for panel members, plus expenses	Within 120 days of prehearing conference with arbitrator(s)	U.S. courthouse	Arbitrator(s) may reschedule hearing within 30 days of original hearing date
W.D. Wash.	Nominated or selected by clerk	1	$250 per day, plus expenses	Within 180 days of filing of answer	U.S. courthouse or a location selected by arbitrator	None

a. If they agree, the parties can choose to present their case before a single arbitrator.

At the arbitration hearing, each side presents its case under relaxed rules of evidence. The arbitrators issue a decision based on the merits of the case and determine an award. As Table 2 shows, the timing of the hearing varies somewhat across districts, but all hearings fall within the time frame specified by statute: no later than 180 days after the filing of an answer.[10] Authority to grant continuances is typically retained by the judge, although arbitrators in several districts have limited authority to grant them. Most programs provide for a hearing in the U.S. courthouse; this setting adds a degree of formality to the proceedings, which attorneys in the mandatory study indicated was an important feature of the process.[11]

Demands for Trial de Novo

After the parties are informed of the arbitration decision, the award is given to the clerk and sealed until the period for filing of trial de novo demands expires. Table 3 presents information about these post-hearing procedures. Litigants dissatisfied with an arbitration decision have, by statute, thirty days in which to file a demand for trial de novo.[12] Northern Ohio extends this period to sixty days for the United States when the United States is a party. If a demand for trial de novo is filed, the case is returned to the regular docket for trial by the assigned judge, and the case then proceeds to termination and receives no special procedural treatment because it was in arbitration. If a trial de novo is not demanded, the arbitration award becomes a nonappealable judgment of the court after expiration of the filing period.

10. 28 U.S.C. § 653(b).
11. Meierhoefer, *supra* note 5, at 67.
12. 28 U.S.C. § 655(a).

Table 3
Voluntary Arbitration Programs: Demands for Trial de Novo

District	Period for Requesting Trial de Novo	Potential Disincentives to Request Trial de Novo
D. Ariz.	30 days after the ruling	1. Demanding party forfeits court fees if trial award is less than 10% more favorable. 2. Demanding party pays attorneys' fees if trial award is less than 10% more favorable. 3. Court may sanction one or both parties for failure to participate in arbitration in a meaningful way, including the striking of any demand for trial de novo.
M.D. Ga.	30 days after the ruling	None
N.D.N.Y.	30 days after the ruling	1. Demanding party forfeits court fees if trial award is not more favorable. 2. Demanding party pays attorneys' fees if trial award is not more favorable. 3. Court may sanction one or both parties for failure to participate in arbitration in a meaningful way.
W.D.N.Y.	30 days after the ruling	None
N.D. Ohio	30 days after the ruling; 60 days for the U.S. when it is a party	1. Demanding party forfeits arbitrator fee if trial award is less than 10% more favorable. 2. Demanding party may be assessed court costs if trial award is less than 10% more favorable *and* the court determines that the demand for trial de novo was in bad faith.
W.D. Pa.	30 days after the ruling	Court may sanction one or both parties for failure to participate in arbitration in a meaningful way, including the striking of any demand for trial de novo.
D. Utah	30 days after the ruling	None
W.D. Wash.	30 days after the ruling	Demanding party may be assessed court costs if trial award is less than 10% more favorable *and* the court determines that the demand for trial de novo was in bad faith.

All courts automatically grant demands for trial de novo. However, five of the eight programs contain possible disincentives to demand trial de novo (see Table 3). In four of these districts—Arizona, Northern New York, Northern Ohio, and Western Washington—a trial de novo requester who fails to receive a more favorable judgment at trial may be required, at the court's discretion, to pay court costs. The courts in Arizona and Northern New York can also require any requester who fails to receive a more favorable judgment to pay the attorneys' fees incurred by the opposing party during the trial. The courts in Arizona, Northern Ohio, and Western Washington define "more favorable" to mean that the trial award must be at least 10% greater than the arbitration award. In Arizona and Western Pennsylvania, the court may sanction one or both parties for failing to participate in arbitration in a meaningful way; sanctions may include striking any demand for trial de novo. Whether these possible sanctions have operated as disincentives to either participation in arbitration or requests for trial de novo is not known.

4. Participation in the Voluntary Arbitration Programs

The Federal Judicial Center's evaluation of mandatory arbitration programs yielded comprehensive information about the volume of arbitration cases in the pilot districts and participants' views of the mandatory arbitration programs.[13] The evaluation of the voluntary programs is more limited in scope than the evaluation of the mandatory programs, owing to the relative paucity of caseload data and to a decision by the Center to forgo the collection of questionnaire data from participants.

The lack of caseload data stems primarily from two factors. First, the programs in general have had small arbitration caseloads. Second, as was true with the mandatory programs, a large proportion of arbitration-track cases settle before reaching the hearing stage, and cases terminating at early stages of the process are not representative of cases terminating later. In fact, the decision to forgo collecting questionnaire data was based on an early assessment of the caseload numbers and an expectation that participant satisfaction with voluntary programs would equal or exceed the high levels of satisfaction with mandatory programs. As a result, the analysis of the voluntary arbitration programs focuses on the arbitration caseload and demands for trial de novo, revealing a number of interesting patterns among the voluntary programs and in comparison with patterns for the mandatory programs.

The reported data for each district represent cumulative totals from the implementation of each district's program through April 30, 1994. Consequently, districts' reporting periods differ in length, ranging from thirteen months for Utah to thirty-six months for Northern New York. Table 4 shows, for each district:

- the total number of civil case filings during the reporting period;
- among districts with opt-out programs, the number of cases referred to arbitration;
- among districts with opt-out programs, the number of cases exempted, opting out, or transferred to another district;

13. Meierhoefer, *supra* note 5.

- the number of cases in the arbitration caseload;
- the number of hearings held;
- the number of arbitration awards entered as judgments of the district court; and
- the number of demands for trial de novo after arbitration hearings.

Table 5 contains similar information on the ten mandatory programs, taken from the Federal Judicial Center's earlier report on mandatory arbitration.[14] This information can serve as a counterpoint to the information in Table 4. However, any comparisons between the mandatory and voluntary arbitration programs should be treated with caution, in light of the inherent differences between the two types of programs.

Arbitration Eligibility and Arbitration Caseloads

The number of arbitration-eligible cases is difficult to identify in districts that use opt-in referral systems. In several of these districts, all civil cases, or all notified civil cases, are potentially eligible (see Table 1). In opt-in districts with specific eligibility criteria, unless the parties request and are accepted into an arbitration program, case eligibility is not established. Arbitration-eligible cases are easier to identify in the opt-out programs; typically, cases are evaluated by the clerk's office in order to establish eligibility for referral to the program. Among the four districts with opt-out programs, cases initially referred to arbitration during the reporting period represented less than 1% of all civil cases filed in Northern Ohio, 8% of all civil cases in Western Pennsylvania, 9% of all civil cases in Arizona, and 14% of all civil cases in Middle Georgia.

Between one-third and one-half of the cases identified as arbitration-eligible in opt-out programs elected to opt out. As indicated in Table 4, between 34% and 55% of eligible cases left the arbitration programs in Arizona, Middle Georgia, Northern Ohio, and Western Pennsylvania. Among the mandatory programs, Western Missouri lost the greatest proportion of cases through exemption from the arbitration program—31% of the eligible cases were exempted.[15]

As for the actual arbitration caseload, districts using an opt-out referral system had the largest percentage of cases from the civil caseload participating in arbitra-

14. *Id.* at 42, 49.
15. *Id.* at 49.

tion. After exemptions, the opt-out program in Arizona had 4% of the court's civil caseload, Western Pennsylvania had 5%, and Middle Georgia had 8%. Among the four districts with opt-out programs, Northern Ohio had the smallest proportion of its caseload in the arbitration program—less than 1%—probably because the court offers an array of alternative dispute resolution programs that includes early neutral evaluation, mediation, arbitration, and summary jury trial. These program options may well have affected the number of cases for which arbitration was considered the optimal, or even a desirable, ADR method.[16]

In contrast, few civil cases participated in the opt-in programs. In terms of raw numbers, Northern New York's program had the largest caseload—four cases during the three years of its reporting period; Western New York had only one case during the seventeen months of its reporting period. In terms of their overall caseloads, none of the opt-in districts had more than 1% of their civil caseloads participating in the arbitration program.

Table 5 shows that between 5% and 27% of the civil caseloads in the districts with mandatory arbitration programs were referred to arbitration. Of the eight voluntary programs, three of the opt-out programs—Arizona, Middle Georgia, and Western Pennsylvania—had participation rates close to or within this range; the other five districts had participation rates smaller than those of the mandatory arbitration programs.

Arbitration Hearings and Demands for Trial de Novo

Table 4 displays the number of arbitration hearings held as of April 30, 1994. Western Pennsylvania has had 103 arbitration hearings, the largest number of hearings across all of the voluntary districts. Demands for trial de novo were made after 59% of these hearings. Middle Georgia has had 88 arbitration hearings, and demands for trial de novo were made after 69% of them. The program in Arizona has been in operation for a shorter period of time and has had 35 cases go to an arbitration hearing. Demands for trial de novo were made after 20% of these hearings. Figures for the remaining districts are so small that they must be viewed with caution.

16. During 1993, for example, of the 408 cases in Northern Ohio that participated in some form of ADR, 7 went into the arbitration program.

Table 4
Court-Annexed Arbitration Caseloads in Voluntary Programs

	Opt-In Programs				Opt-Out Programs			
	N.D.N.Y.	W.D.N.Y.	D. Utah	W.D. Wash.	D. Ariz.	M.D. Ga.	N.D. Ohio	W.D. Pa.
Filing from:	5/91	12/92	3/93	8/92	2/92	8/91	1/92	7/91
To:	4/94	4/94	4/94	4/94	4/94	4/94	4/94	4/94
Date program began	4/15/91	12/1/92	3/1/93	8/1/92	2/1/92	8/8/91	1/1/92	7/1/91
Total civil cases filed[a]	5,020	2,304	1,518	4,667	7,526	2,956	14,737	8,884
Civil cases referred to arbitration (%)	n/a	n/a	n/a	n/a	665 (9%)	418 (14%)	24 (< 1%)	719 (8%)
Referred cases exempted, opting out, transferred (%)	n/a	n/a	n/a	n/a	369 (55%)	189 (45%)	9 (38%)	245 (34%)
Arbitration caseload	4	1	4	3	296	229	15	474
Percentage of civil cases in arbitration	< 1%	< 1%	< 1%	< 1%	4%	8%	< 1%	5%

	Opt-In Programs				Opt-Out Programs			
	N.D.N.Y.	W.D.N.Y.	D. Utah	W.D. Wash.	D. Ariz.	M.D. Ga.	N.D. Ohio	W.D. Pa.
Cases settled before hearing[b]	1	0	1	3	185	108	8	242
Arbitration hearings	3	1	0	0	35	88	4	103
Arbitration awards entered as court judgments[c]	1	0	0	0	28	16	2	30
De novo demands after arbitration hearings (%)	2 (67%)	1 (100%)	0	0	7 (20%)	61 (69%)	2 (50%)	61 (59%)
Cases pending[d]	0	0	3	0	76	44	3	135

a. Total civil filings were determined through the Center's Integrated Civil Database, a standard-format version of the data reported by the courts to the Administrative Office of the U.S. Courts. Information for the period 10/1/93 through 4/30/94 was obtained from the Administrative Office of the U.S. Courts.

b. Cases settled include cases settled or dismissed prior to the arbitration hearing.

c. Awards entered consist of cases for which the 30-day period for requesting trial de novo has expired without a demand for trial de novo.

d. Cases pending include cases awaiting expiration of the 30-day period for requesting trial de novo.

Table 5
Court-Annexed Arbitration Caseloads in Mandatory Programs

	E.D. Pa.	N.D. Cal.	M.D. Fla.	M.D.N.C.	D.N.J.	W.D. Okla.	W.D. Tex.	W.D. Mich.	W.D. Mo.	E.D.N.Y.
Filing from:	1/85	10/84	10/84	1/85	3/85	5/85	5/85	7/85	12/85	1/86
To:	12/85	12/85	9/85	6/86	3/86	4/86	10/86	12/86	11/86	12/86
Total civil cases filed	7,854	12,255	5,488	2,012	6,333	3,044	1,112	3,095	3,069	4,483
Arbitration caseload	2,094	669	630	161	1,376	596	144	579	261	423
Percentage of civil cases in arbitration	27%	5%	10%	6%	18%	18%	9%	16%	6%	8%
Arbitration hearings as a percentage of arbitration cases	17%	14%	30%	26%	18%	22%	35%	43%	36%	14%
De novo demands as a percentage of arbitration cases	62%	49%	74%	70%	58%	55%	63%	74%	61%	46%
Trial rate as a percentage of arbitration cases	18%	11%	7%	16%	7%	8%	6%	5%	10%	2%

Note: Data for this table were taken from Table 4 and Table 9 in Barbara S. Meierhoefer, Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center 1990).

The figures for the mandatory arbitration programs in Table 5 suggest that demands for trial de novo in the two voluntary programs with the largest numbers of hearings—Middle Georgia and Western Pennsylvania—fall within the range established by the mandatory programs. In the mandatory programs, most of the cases in which a demand for trial de novo was made settled after the hearing and before going to trial.[17] Comparable trial information is not available on arbitration cases in the voluntary programs, but there is no reason to believe that every demand for trial de novo in these programs actually results in a trial.

17. Meierhoefer, *supra* note 5, at 49.

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5. Conclusions

The results of this report can be summarized briefly. The four districts with voluntary arbitration programs that rely on an opt-in referral system have had only a small number of cases participate in arbitration. In contrast, three of the four voluntary programs that use an opt-out referral system—Arizona, Middle Georgia, and Western Pennsylvania—have rates of participation that are roughly on a par with rates among the mandatory programs. The other program with an opt-out referral system—Northern Ohio—has a much lower participation rate, but it also offers other ADR programs that may draw cases that might otherwise go to arbitration.

Reasons for the low rates of participation in opt-in programs cannot be ascertained from the available caseload data. However, we can suggest several possible reasons. Attorneys in courts with opt-in programs may fear that placing a case in arbitration could be construed as a sign of weakness. Some attorneys may want a jury trial as soon as possible, without having to go through the arbitration program. Alternatively, attorneys may avoid asking for an arbitration program that will purportedly cut the time to disposition in a case in which delay serves the interests of the client. Of course, these latter two reasons also could be used to explain decisions to opt out of arbitration as well as to not opt in. Attorneys may also be reluctant to request placement in a new and untried program, and given the consistent, low rates of participation in these programs, that reluctance may persist over time. Finally, many attorneys may still be largely unaware of arbitration as an alternative.[18]

Features of the opt-in programs specifically or voluntary programs more generally may have functioned as disincentives to participate, such as the possibility of a penalty for demanding trial de novo and then failing to receive a "more favorable" award. However, these possible disincentives, listed in Table 3, seem to bear no relationship to either program type or participation rates. The data are inconclusive, and therefore this explanation cannot be ruled out, but it seems unlikely to account for the differences between opt-in and opt-out programs.

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18. This explanation does not hold for Northern New York, which engaged in extensive bar-outreach programs to publicize the arbitration program and inform attorneys about its potential benefits.

Whatever the reason for the low levels of participation in opt-in voluntary programs, their small number of cases relative to both the opt-out voluntary programs and the mandatory programs argues against the claim that these programs have any aggregate effect on the cost of litigation or on court burden.

Although there are no data on attorney or litigant satisfaction with voluntary arbitration programs, the high levels of satisfaction among attorneys and litigants in mandatory arbitration programs suggest that satisfaction with voluntary programs should be at least as high. One would expect attorneys and litigants to express at least as much satisfaction with a process that parties have chosen and that preserves their right to trial de novo.