# Court-Annexed Arbitration in Ten District Courts

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# Executive Summary

## Background

Ten federal district courts have mandatory programs of court-annexed, non-binding arbitration that are funded by Congress. They are

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

In 1988, Congress enacted legislation to authorize continuation of these mandatory pilot programs as well as to authorize additional pilot programs that would be voluntary. 28 U.S.C. §§ 651–658. The legislation directs that, not more than five years after enactment, the Federal Judicial Center shall submit to Congress a report on its implementation. This report is submitted pursuant to that requirement. It evaluates how well the mandatory programs have achieved their general purposes of reducing court burden and its associated costs and delays while maintaining or improving the quality of justice. More specifically, the report assesses how well the programs have 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;
- lessening the burden on the court by reducing the number of cases that require judicial attention, or by reducing the amount of attention required.

## Research design

At the request of the Administrative Office of the U.S. Courts, the Federal Judicial Center began an evaluation of the federal pilot programs in May 1985. The evaluation design, subsequently embodied as statutory requirements of the report to Congress, called for

- a description of the arbitration programs as conceived and as implemented in the judicial districts in which such programs are authorized;
- a determination of the level of satisfaction with the arbitration programs by a sampling of court personnel, attorneys, and litigants whose cases have been referred to arbitration;
- a summary of those program features that can be identified as being related to program acceptance both within and across judicial districts; and
- a description of the levels of satisfaction relative to the cost per hearing of each program.

The major research objective was to determine whether the litigants—particularly the parties—view arbitration as a form of second-class justice, an issue of concern to legislatures and courts contemplating adoption of such programs. The primary data for the evaluation were therefore the survey responses of 3,501 attorneys, 723 parties, and 62 judges indicating their perceptions of the arbitration process.

In addition to focusing on participant satisfaction, the study also examined how well the programs are addressing all of their goals. Therefore, the data we collected are organized by what they have to tell about each of the goals. It must be emphasized, however, that much of the information we present is attitudinal and therefore addresses only what those with experience with the programs believe to have been accomplished. Moreover, we do not address many other important, and still vague, questions about arbitration programs, including precisely how much time they may save litigants and the courts, or whether some other form of alternative or innovative case-management strategy might be an even better way to handle particular cases.

## Program description

### Program characteristics

The arbitration programs developed in the ten federal pilot district courts have a number of features in common.

- Particular types of cases, as specified by local rule, are mandatorily referred to the program to be heard either by a single arbitrator or by a panel of three arbitrators (lawyers who have volunteered to serve and are paid at levels specified by each district).
- Following a hearing at which each side presents its case, arbitrators issue a decision based on the merits of the case and, where appropriate, determine an award.
- Parties who are dissatisfied with the decision at arbitration then have a specified period of time to file a demand for trial de novo.
- If a demand is filed, the case goes back onto the regular docket for pretrial and trial before the judge assigned to the case.
- If a trial de novo is not demanded, the arbitration award becomes a non-appealable judgment of the court.

There are also important areas of variation that reflect each court's goals and resources as well as its local legal community.

*Types and dollar amounts of cases defined as eligible for the program (see Tables 3A and 3B, pp. 32, 33)*

Six of the pilot courts limit the types of cases eligible for the program, primarily to those involving contracts and torts. Four districts include all civil cases except agency appeals and prisoner petitions.

The dollar ceilings range from $50,000 to $150,000; six of the pilots have a $100,000 ceiling.

All limit eligibility to cases where the claim is either for money damages only or for money damages plus non-monetary claims determined by the court to be insubstantial.

Some exclude claims for punitive damages when assessing program eligibility for the program; others do not.

*Timing of the hearing (see Table 3C, p. 34)*

The pilot courts adopted periods ranging from 80 to 180 days between the time litigants are notified that a case has been referred to arbitration and the date of the hearing.

*Degree of party input to selecting the arbitrator (see Table 3E, p. 36)*

In four pilots, the clerk's office selects the arbitrator(s) and in four the parties may choose or strike names from a limited list of names selected by the clerk's office. In two of the pilots, the parties may choose from the full list of approved arbitrators.

*Number of arbitrators (see Table 3F, p. 37)*

Some pilots use a panel of three attorneys, some a single arbitrator; some specify a panel unless the parties request otherwise, and some specify a single arbitrator unless the parties request a panel.

*Arbitrator fees and hearing cost (see Table 3G, p. 38)*

Fees for individual arbitrators range from $75 to, at the time the study was done, a potential $500 per case, with approximate average per hearing costs from $125 to $300 depending on the number of arbitrators, their fees, and whether they are paid by day of hearing or per case.

*Up-front posting of fees to accompany trial de novo demands (see Table 3I, p. 40)*

Seven courts require any party who demands trial de novo to post the arbitrators' fee at the time of the demand. The fee is returned if the party betters its position at trial. In the other pilots, there is no consequence unless and until the party demanding trial de novo fails to better its position at trial.

## Composition of arbitration caseloads

The most common types of cases included in arbitration programs are diversity contract and tort cases with prayers for relief under $50,000 that involve disputes over the facts and/or value of the case (see Tables 5–7, pp. 43–46).

The proportion of the civil caseload diverted to arbitration varies from 5% to 27% (see Table 4, p. 42). Program eligibility requirements have an effect on, but do not by themselves determine, the proportion of the civil caseload diverted to arbitration (see Table 4) and the composition of the arbitration caseload (see Table 5).

### Disposition of arbitration caseloads (see Table 9, p. 49)

The majority of cases close before reaching an arbitration hearing, and over two-thirds do not return to the court's regular trial calendar.

The trial rate of the arbitration caseloads is similar across the districts, ranging from less than 1% in Eastern New York to 4% in Middle North Carolina.

De novo demand rates as a proportion of the arbitration caseload range from a low of 7% in Northern California and Eastern New York to a high of 32% in Western Michigan, nine percentage points higher than in any other district.

The low de novo rates result primarily from the low proportion of the arbitration caseload that reaches hearing rather than from frequent acceptance of an arbitration award. In eight of the ten pilot courts, over half of the arbitrations result in a demand for trial de novo. The lowest de novo demand rate (as a proportion of hearings held) was 46% in Eastern New York. Few of these cases reach trial, however.

## Goal achievement

### Providing increased options for litigants

There are parties who seek arbitration adjudications in cases that would otherwise have settled without any response from a neutrally positioned official. Arbitration programs can provide for these adjudications at an earlier time than is possible for trial adjudication.

Depending on the district, cases that are resolved by arbitration close from two to eighteen months sooner than cases resolved by trial (see Table 13B, p. 60).

Although the majority of parties in all districts exercise their option to settle before the hearing, parties also let their cases reach arbitration adjudication far more often than they permit cases to reach trial adjudication (see Table 13A, p. 60).

The fact that less than half of the arbitration awards were accepted in eight of the ten pilot courts indicates that the hearing did not give many litigants all that they wanted. Nevertheless, even most litigants in de novo demand cases found the experience useful, with majorities indicating that the award was a useful starting point for settlement negotiations and disagreeing when asked if the hearing was a waste of time (see Table 14, p. 61).

## Providing procedural fairness

Most parties and attorneys do not think that arbitration is a form of second-class justice.

Eighty-four percent of the attorneys in cases referred to arbitration said that they approved of both the concept of arbitration (see Table 21, p. 78) and the programs that were implemented in their districts (see Table 22, p. 80).

Eighty percent of the parties in cases referred to arbitration believed that the procedures used to handle their cases were fair (see Table 15, p. 64).

Eighty-one percent of the parties reported that the hearing was fair (see Table 16, p. 66). Ninety-two percent of the attorneys in arbitrated cases reported that the hearing was fair (see Table 17, p. 68).

The characteristics that define a fair hearing for parties are an opportunity to tell their side of the story and bring out all of the important facts to prepared arbitrators at a reasonable expenditure of time and money (see Table 16).

The characteristics that define a fair arbitration for attorneys are a hearing of appropriate formality at which there is enough time to present their case before impartial and prepared arbitrators, with the whole procedure resulting in time and cost savings for themselves and their clients (see Table 17).

Half of the parties (see Table 18, p. 70) and a plurality of attorneys (see Table 19, p. 71) in arbitrated cases selected arbitration as their preferred method of proceeding when asked whether, considering cost, time, and fairness, they would prefer that their case be decided by a judge, jury, or arbitration.

## Cost savings

Arbitration programs can reduce the cost of litigation and provide for a hearing on the merits at a cost that parties see as reasonable.

Majorities of attorneys in all districts reported cost savings. Highest time and cost savings were reported by lawyers in successfully arbitrated cases. Involvement in cases with no dispute over applicable law also increased the chances that attorneys would report savings (see Tables 23–25, pp. 86–88).

Cost and time savings were not reported by the majority of attorneys in cases where trial de novo was demanded (see Tables 23–25). The major-

ity of the parties in these cases, however, report that the time and money costs were reasonable (see Tables 26 and 27, pp. 90, 92).

### Reducing time to disposition

Arbitration programs can, but do not always, reduce disposition times. However, the programs do not appear to delay resolution of de novo demand cases, and parties report reasonable case-processing times.

The evidence suggests that arbitration programs in Middle Florida, Western Michigan, and Western Missouri have reduced disposition time (see Graphs 3–5, pp. 98–99), but such evidence was not present in the other new pilot courts (see Graph 1, p. 96, and Graphs 6–9, pp. 100–01).

There is only lukewarm attorney support for the suggestion that arbitration expedites settlement discussions and settlements before the hearing. A majority of attorneys in arbitrated cases that closed before the hearing agreed that referring the case to the program resulted in earlier settlement discussions (see Table 29, p. 104), but a majority also reported that the case had not settled more quickly than expected at the outset (see Table 30, p. 105).

Seventy percent of the parties in arbitration cases reported that the time required to resolve the dispute was reasonable (see Table 32, p. 108).

Parties in cases closed either before or as a result of the arbitration hearing were the most likely to agree that the time to disposition was reasonable, but even in de novo demand cases a majority responded favorably (see Table 32).

Seventy percent of the attorneys in de novo demand cases did not think that the arbitration hearing delayed resolution (see Table 31, p. 107).

### Reducing court burden

The large majority of judges in the pilot courts support their own program (see Table 33, p. 112) and agree with its particular features (see Table 34, p. 113); there is no widely held view about what characteristics constitute a good program.

Judges agree that other courts would do well to adopt arbitration programs (see Table 35, p. 114).

The strength of judges' positive attitudes toward their programs varies significantly with the strength of their agreement that arbitration reduces their caseload burden (see Tables 33 and 35). Ninety-seven percent of the judges agreed that burden was reduced, with 58% agreeing strongly (see Table 36, p. 115).

The factors that were significantly associated with judges' burden assessments were the proportion of the civil caseload that their district diverts to the arbitration program and the frequency with which arbitration cases require their attention before the hearing (see Table 36).

Neither the actual nor perceived rate of de novo demands in arbitration cases affected judges' burden reduction assessments, a finding attributed to the fact that less than a third of the arbitration caseload returns to the regular trial calendar in every pilot court.

The case least likely to return to the regular trial calendar is a U.S. plaintiff contract case in a program that provides for a longer answer-to-hearing period and a panel of arbitrators paid relatively lower fees (see Table 38, p. 126).

We do not know whether the pilot arbitration programs reduce the number of trials.

## Lessons for program developers

Although all of the pilot programs can be considered successes, some took more time than others to generate support and some were more enthusiastically embraced than others. A key to successful program planning is a full working knowledge of the local legal culture into which the program will be introduced. What attorneys are used to will influence their perceptions. Program implementation may be eased by incorporating some features of successful state programs, while a lack of experience or a history of unsuccessful state programs must be recognized as obstacles to be overcome.

It is also necessary to plan how court-annexed arbitration programs will relate to other existing alternatives and to the broader case-management practices of the court. The arbitration program in Western Michigan, which had the least favorable—although still high—approval ratings among attorneys, seems to have suffered from unfavorable comparison with a preexisting mediation program that provides for attorneys' fees sanctions if a rejected award is not bettered at trial. Here, far from finding the program a barrier to trial, the comments offered by attorneys showed dissatisfaction with the lack of meaningful sanctions for rejecting the arbitration award. There were also complaints from attorneys and parties whose cases went through both arbitration and mediation procedures.

These experiences should not be taken to mean that multiple alternatives cannot work. Northern California and Western Oklahoma, the new pilot with the highest proportion of "strongly approve" program ratings from attorneys, have successfully integrated their arbitration programs

with other forms of innovative dispute resolution by clearly designating the separate purposes of each. The key is selecting the right cases for the right forum and avoiding too many different attempts to resolve any particular case short of trial.

## Effects of and recommendations regarding program characteristics

This research found no program characteristic that either guaranteed satisfaction, or resulted in overall dissatisfaction, with arbitration, so there is no empirical basis for requiring any particular way of structuring arbitration programs. There were, however, a number of program design or implementation features that had a relatively small, but significant, influence on particular program goals (see Tables 37 and 38, pp. 124, 126).

### Program eligibility criteria

There was some evidence that tort and civil rights cases might benefit from arbitration in terms of increasing litigants' options. Since the current legislation exempts all civil rights cases from mandatory referral to arbitration, courts are advised to explore the option of arbitration with litigants in civil rights cases involving only money damages to see if they are interested in consenting to arbitration.

Arbitration programs that diverted less than 15% of the civil caseload to the program were less likely to result in a perceived reduction of court burden. Courts considering adoption of a court-annexed arbitration program should first do a thorough caseload analysis to determine which eligibility requirements will divert enough cases (at least 10%) to make the effort worthwhile, and at the same time limit the size of the program to available resources.

### Timing of the hearing

Shorter answer-to-hearing time periods were significantly associated with lawyers' reports of quicker settlements before the hearing, but also with fewer attorneys' selecting arbitration as their preferred procedure and higher probabilities that the case would both reach hearing and result in a de novo demand.

The choice of an answer-to-hearing time should depend on the primary purpose the program is to serve. If the idea is to speed settlements in the bulk of the cases that close before the hearing, short periods may assist

in this goal. Longer periods are more consistent with the goal of reducing court burden.

### Number of arbitrators

Programs that supply only one arbitrator may appear somewhat less satisfactory to the bar in general (as indicated by lower approval ratings among all attorneys), but they do not result in less satisfaction among those who avail themselves of the opportunity for a hearing, i.e., this feature had no effect on the ratings of those attorneys and parties who actually participated in an arbitration. In fact, Middle North Carolina—a one-arbitrator pilot—had the highest hearing fairness ratings among attorneys.

In programs that supply only one arbitrator, there is a higher likelihood that a case will be arbitrated and thereafter result in a de novo demand.

Courts designing arbitration programs are advised to balance the negative appearance factor associated with using only one arbitrator with the administrative and dollar costs associated with panels. They should also consider the mixed method used in five of the pilot courts, which allows for hearings by either one or three arbitrators depending on what the parties request. Mixed-model rules that specify one-arbitrator hearings unless parties request otherwise result in the large majority of hearings being conducted by one arbitrator. The reverse is true where the mixed-model rule specifies a panel unless parties request otherwise.

### Arbitrator fees

There is no evidence that higher arbitrator fees enhance the quality of arbitration programs. Higher fees should not be expected to translate into either litigant satisfaction or lesser burden on the court. Higher fees

- were negatively associated with attorneys' approval of both the concept of arbitration and the particular program;
- led fewer attorneys in arbitrated cases to select arbitration as their preferred procedure; and
- did not discourage litigants from either proceeding to arbitration or demanding trials de novo.

Courts designing arbitration programs are advised to engage in realistic discussions with their local bars to determine what fees are necessary to attract attorneys to their program, and to explore alternative non-monetary incentives to serving as an arbitrator. As examples, two of the current

pilot programs, Western Oklahoma and Western Texas, exempt arbitrators from certain Criminal Justice Act appointments.

### Participation in arbitrator selection

While litigant input to the arbitrator selection process appears to enhance the appeal of arbitration hearings, and the parties do not seem to think that the extra time it requires of them is unreasonable, the process appears cumbersome to some attorneys, creates an administrative burden on the clerk's office, and neither increases nor decreases the probability of de novo demands. Therefore, while litigant input may be beneficial in terms of increasing options, it is not likely to reduce cost or court burden.

### Mandatory vs. voluntary referral

All of the current pilot court-annexed arbitration programs mandate the referral of selected cases to arbitration, so this research does not directly address the relative merits and drawbacks of voluntary and mandatory referral. We do, however, have information that is relevant to the debate.

The current disincentives to pursue trial de novo are not seen as significant barriers to trial.

There is no evidence that litigants in cases mandatorily referred to arbitration see themselves as receiving second-class justice.

Voluntary alternative programs in other jurisdictions have been notably unsuccessful in attracting cases. Programs that do not attract cases are unlikely to have any overall effect on the cost of litigation or court burden.

Although there is a clear distinction between voluntary and mandatory programs in the authority of the court to require litigant participation, there are a number of approaches to voluntariness that may affect the level of participation (e.g., whether participants must "opt-in" or "opt-out" of the program). We recommend that districts entering the voluntary pilot programs adopt somewhat different patterns of "voluntariness" so that the programs can serve as laboratory models to assess program participation and litigant satisfaction.

## Recommendation for legislation

Congress instructed the Federal Judicial Center to include in its report "Recommendations to the Congress on whether to terminate or continue Chapter 44, or, alternatively, to enact an arbitration provision in title 28, United States Code, authorizing arbitration in all Federal district courts."

H.R. 4807 § 901(b). In light of our generally favorable findings in regard to the mandatory programs, it is recommended that the Judicial Conference of the United States propose that

- Congress enact an arbitration provision in title 28, United States Code, authorizing arbitration in all federal district courts, to be mandatory or voluntary in the discretion of the court; and
- the Federal Judicial Center continue to study and report on arbitration in courts using voluntary programs.

It is also recommended that the Judicial Conference monitor, through the Center's reports and otherwise, the continuing operation of arbitration in federal courts in order to formulate rules and policies to guide and support the program, and to develop more specific recommendations to Congress as to appropriate arbitration legislation.

# Chapter 1
# Background

## Introduction and Recommendation

The federal district courts have been experimenting with mandatory, non-binding court-annexed arbitration since 1977. In 1988, Congress enacted legislation to authorize continuation of these pilot mandatory programs as well as to authorize additional pilot programs that would be voluntary. 28 U.S.C. §§ 651–658. The legislation directs that, not more than five years after enactment, the Federal Judicial Center shall submit to Congress a report on its implementation. H.R. 4807 § 901(b).

In prescribing the features of this report, Congress incorporated the focus and design of the Center research project that was already under way, and added a requirement that the Center include "Recommendations to the Congress on whether to terminate or continue Chapter 44, or, alternatively, to enact an arbitration provision in title 28, United States Code, authorizing arbitration in all Federal district courts." This report and the recommendations it contains are submitted pursuant to that requirement.

While no courts have yet established and conducted arbitration programs under the voluntary feature prescribed by the legislation, it seems beyond question that the level of satisfaction and acceptance required to support continuance of a mandatory program would be at least as high as the level required to support a voluntary program. In light of the generally favorable findings detailed in this report on the mandatory programs, it is therefore recommended that the Judicial Conference of the United States propose that Congress enact an arbitration provision in title 28, United States Code, authorizing arbitration in all federal district courts, to be mandatory or voluntary or a combination of both in the discretion of the court. It is further recommended that the Federal Judicial Center continue to study and report on arbitration in courts using voluntary programs. And it is recommended that the Judicial Conference monitor, through these reports and otherwise, the continuing operation of arbitration in federal courts in order to formulate rules and policies to guide and support the program, and to develop more specific recommendations to Congress as to appropriate arbitration legislation.

## Status of court-annexed arbitration in the federal courts

The 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference) marked the beginning of the current interest in court-sponsored alternative dispute resolution programs to reduce cost and delay in civil litigation. Advocates believe that these programs can relieve the burden on congested court systems while improving the delivery of justice services to parties.[1]

A 1986 survey reported 458 alternative programs operating in the courts of twenty-two states and the District of Columbia.[2] Approximately 200 trial courts feature court-annexed arbitration, an alternative begun in the Pennsylvania state system in 1952.[3]

The federal courts began experimenting with mandatory court-annexed, non-binding arbitration in three districts in 1978 in response to encouragement from then Attorney General Griffin Bell. The programs in the Eastern District of Pennsylvania and the Northern District of California are still in place.[4]

A 1982 evaluation of the effect of arbitration in the first three pilot courts reported that court-annexed arbitration could reduce time from filing to disposition, that most attorneys who had experience with the program gave it favorable marks, and that this approach to dispute resolution warranted further experimentation.[5]

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1. Levin, *Court-Annexed Arbitration*, 16 J.L. Reform 537 (Spring 1983); McEwen & Maiman, *Mediation and Arbitration: Their Promise and Performance as Alternatives to Court*, in P. Dubois (ed.), The Analysis of Judicial Reform 72 (Lexington Books 1982).

2. Keilitz, Gallas & Hanson, *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, State Ct. J. 6–8 (Spring 1988). The article also points out some interesting patterns in how alternative dispute resolution programs spread, noting that the steady increase in numbers from the mid-1970s through 1983 has since slowed, and that alternative programs are operating in a very small minority of courts.

3. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 Judicature 271 (February–March 1986).

4. Eastern Pennsylvania began its program Feb. 1, 1978. The Northern California program began May 1, 1978. The third original federal pilot court was the District of Connecticut, which disbanded its program in 1982. It appears that that court preferred a pre-existing mediation program which involved essentially the same types of cases. The District of Connecticut remains very active in alternative dispute resolution, using special masters to facilitate settlement, binding and non-binding mediation and mini-trials, judicially supervised settlement conferences, and summary jury trials.

5. *See* E. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center rev. ed. 1983).

Given both continued interest and many unanswered questions, in 1985 the Administrative Office of the U.S. Courts obtained funding from Congress for pilot implementation of court-annexed arbitration programs in additional courts. From eighteen applicants, eight new pilot districts were selected: Middle Florida, Western Michigan, Western Missouri, New Jersey, Western Oklahoma, Eastern New York, Middle North Carolina, and Western Texas.[6]

As the new pilots were getting under way, Congress had before it a number of bills to authorize court-annexed arbitration in some or all of the federal district courts. It was not until November 1988, however, that authorizing legislation was enacted, as title IX of the Judicial Improvements and Access to Justice Act of 1988.[7] The bill, effective May 19, 1989, authorized programs of mandatory, non-binding arbitration in the ten courts already serving as pilots, and provided that ten additional courts could adopt programs of non-binding arbitration with the consent of the parties. The ten voluntary pilots have been selected, but funding is not yet available.[8] No new program is expected to commence operations until 1991.

This report evaluates the ten mandatory court-annexed arbitration programs. It is based on the programs as they were originally implemented rather than as they have been modified to conform to program requirements set forth in the 1988 Act.[9] As none of the voluntary pilots has begun operation, an examination of the effects of voluntary participation must be deferred.

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6. The dates these districts began their programs are in Table 1 (see p. 22). Two other districts, the Northern District of Illinois and the Southern District of Texas, initially applied for funding but later withdrew their requests.

7. H.R. 4807, adding Chapter 44 to 28 U.S.C.

8. The courts are Western New York, Utah, Middle Georgia, Southern Indiana (bankruptcy court), Western Washington, Eastern Texas, Western Kentucky, Northern New York, and Western Pennsylvania. Of these, only Western Pennsylvania had previously applied for pilot status.

9. Appendix A summarizes the local rules for each district and shows later changes to each program's local rule.

## Goals of court-annexed arbitration programs

The general goals of all alternative dispute resolution programs are to reduce court burden and its associated costs and delays while maintaining or improving the quality of justice by assuring that cases receive the attention that litigants expect and deserve from the court system.

Various types of programs lumped under the rubric of alternative dispute resolution have different ways of seeking to accomplish these goals. It is important to compare court-annexed arbitration with other types of programs to define the specific objectives against which the arbitration pilots should be evaluated.

There are two methods of resolving disputes: adjudication and negotiation.[10] The outcome of an adjudication is a decision based on the application of a rule of law. The outcome of negotiation is whatever the litigants are willing to accept.[11] "Alternative dispute resolution" does not refer to a new method of resolving disputes, but rather to the involvement of different people in the resolution process or the employment of different procedures or techniques to arrive at either an adjudicated or negotiated outcome.

Once a case is filed in court, the traditional adjudicative technique is trial by judge or jury.[12] The traditional negotiation technique is bilateral settlement discussion. Court-annexed arbitration and summary jury trials are the most common forms of alternative adjudicative techniques; court-sponsored settlement conferences and court-annexed mediation are examples of alternative negotiation techniques.[13]

In the absence of an alternative procedure, most civil cases are resolved by attorney-controlled settlement. Negotiation alternatives offer neutral assistance in facilitating earlier or better settlements, either through input as to the settlement value of a case or by direct assistance in the communi-

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10. We are referring to disputes that the litigants pursue. Many cases are simply dismissed when plaintiffs fail to prosecute their claims, or end in judgment for the plaintiff when the defendant does not resist.

11. Throughout this paper, the term "party" is used to refer to a disputant excluding counsel, while "litigants" includes both parties and counsel.

12. There are many other forums for resolving disputes before filing suit, some of which have great impact on the court system because they provide remedies that must be exhausted prior to filing a case in court (e.g., arbitration under 9 U.S.C.; agency adjudications; grievance procedures). Although the use and expansion of these other forums are important topics, they are not a focus of this paper.

13. For a description of each of these programs as used in the federal courts, see D. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986).

cation process among litigants. Adjudicative alternatives offer the opportunity for an advisory judgment on the merits in lieu of settlement, without the delay and cost associated with going to trial.[14]

These differences in approach imply somewhat different goals. Alternative negotiation strategies, particularly those that rely on shuttle diplomacy between parties, often have an explicit goal of providing better settlements that will increase both parties' satisfaction with the outcome of the case and preserve ongoing relationships.[15] A collateral consequence should be reduced demands for future judicial resources because of fewer post-settlement disputes among litigants. But under adjudicative alternatives such as arbitration, there is always a loser. There, litigant satisfaction with the process is more important than maximizing both parties' satisfaction with the outcome.

Despite clear differences in what adjudicative and negotiation approaches offer, they share a number of objectives. A court should experience reduced caseload burden from any program that diverts cases from the normal processing track. Both types of alternative aim to reduce costs and delay, and strategies for accomplishing these goals can be adopted by either type of program. For example, having a date by which attorneys must be familiar with their cases is popularly assumed to be a catalyst for meaningful settlement discussions. An alternative hearing date—be it for arbitration or mediation—set relatively early in the processing of a case should stimulate earlier settlements before the hearing. Furthermore, either type of hearing can be conducted under less formal procedures than are required by the Federal Rules of Evidence, thereby saving some of the time and cost that would be involved in trial.

Regardless of specific procedures, litigants who go through any alternative process, even if they reject the result, have gained information—be it a determination on the merits, an appraisal of settlement value, or a creative settlement package—that was not available under traditional procedures. This new information should enable litigants to better predict the outcome of their cases and ensure that both sides are operating on the same information. This, in turn, may narrow the issues in controversy and spur further negotiation, thereby leading to more settlements or to shorter, more focused trials.

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14. For a discussion of the respective roles of mediators and arbitrators, see Cooley, *Arbitration vs. Mediation—Explaining the Differences,* 69 Judicature 263–69 (1986).

15. *See, e.g.,* J. H. Wilkinson (ed.), Donovan Leisure Newton & Irvine ADR Practice Book 18, 19–20 (1990).

The court-annexed arbitration programs in the federal courts are adjudicatory in outcome, are designed to intervene within the first six months of a dispute, and feature hearings with relaxed rules of evidence at the end of which an explicit award is announced.[16] Their specific goals are these:

1. To increase 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.
2. To provide litigants with a fair process.
3. To reduce costs to clients.
4. To reduce the time from filing to disposition.
5. To lessen the burden on the court by reducing the number of cases that require judicial attention, or by reducing the amount of attention required.

Although all of the pilot courts embrace these goals to some extent, they differ in which goals receive primary emphasis. For some courts, particularly those with overcrowded criminal dockets, the emphasis is on reducing court burden, with the benefits to case participants seen as a hoped-for and desirable side-effect. In others, the emphasis is reversed. These general differences in emphasis are mirrored in the specific procedures adopted by each district, described in Chapter 3.

16. Given these features, Judge Raymond J. Broderick, the spokesman for the program in the Eastern District of Pennsylvania, has suggested that the title "Speedy Civil Trials" better describes what the programs have to offer. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 62 Judicature 218 (1989). Eastern Pennsylvania, in the 1989 amendments to its local rule, changed the name of its program to "Speedy Civil Trials."

# Chapter 2
# Evaluation Study Design

At the request of the Administrative Office, the Federal Judicial Center began an evaluation of the federal pilot programs in May 1985. The evaluation design called for

1. a description of the arbitration programs as conceived and as implemented in the judicial districts in which such programs are authorized;
2. a determination of the level of satisfaction with the arbitration programs by a sampling of court personnel, attorneys, and litigants whose cases have been referred to arbitration;
3. a summary of those program features that can be identified as being related to program acceptance both within and across judicial districts; and
4. a description of the levels of satisfaction relative to the cost per hearing of each program.[17]

## Objectives

The focus of the original design, and of the congressional directive extending it, is assessment of participant satisfaction with the pilot programs, and the effect of various program characteristics on participant satisfaction. The major objective was to determine whether the litigants—particularly the parties—view arbitration as a form of second-class justice; this was a major concern of both legislatures and courts considering adoption of this alternative.

Previous research findings indicated that arbitration programs can have positive consequences. The Federal Judicial Center evaluation of the original pilot courts found that two of the three programs reduced the time from filing to disposition.[18] It also found that attorneys were satisfied

17. Recently passed legislation requires the Federal Judicial Center to conduct an evaluation covering these four points and to present recommendations to Congress on whether to terminate or continue pilot programs or, alternatively, to enact statutes authorizing all district courts to establish court-annexed arbitration. 28 U.S.C. § 903. See *supra* p.13.

18. E. Lind & J. Shapard, *supra* note 5, at 45–52.

with the procedures. The evaluations of many state programs had yielded similar positive results.[19] Given this potential for benefits, there was a need to shift toward probing for potential adverse effects of court-annexed arbitration.

Despite the focus on participant satisfaction, there is continued interest in how well the programs are addressing all of their goals. Therefore, the data we collected are organized in the chapters that follow by what they have to tell about each of the goals ennumerated on p. 18. It must be recognized, however, that, given the original focus of the research, much of the information we present is attitudinal and therefore addresses only what those with experience with the programs believe to have been accomplished. Moreover, we do not address many other important, and still vague, questions about arbitration programs, including precisely how much time they may save litigants and the courts, or whether some other form of alternative or innovative case-management strategy might be an even better way to handle particular cases.

## Procedure

### Selection of districts

At the outset, we selected the pilot courts with an eye to the evaluation objectives. Each of the eighteen districts that expressed interest was asked to submit a proposed local rule, an estimate of the number of cases that would be included in the program, and the projected annual cost of the program. The selection was made by the Administrative Office, in consultation with the Center.

One important criterion for district selection was the originality of the proposed program. Since the evaluation was aimed at assessing the impact of various design features, programs that proposed new features were preferred over those that would have duplicated the Eastern Pennsylvania or

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19. *See, e.g.,* J. Adler, D. Hensler & C. Nelson, Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program (Rand Corporation 1983); D. Hensler, A. Lipson & E. Rolph, Judicial Arbitration in California (Rand Corporation 1981). Since this project got under way, additional evaluations of court-annexed arbitration programs have been reported: C. Simoni, M. Wise & M. Finigan, *Litigant and Attorney Attitudes Toward Court-Annexed Arbitration: An Empirical Study*, 28 Santa Clara L. Rev. 543–79 (1988); R. MacCoun, A. Lind, D. Hensler, D. Bryant & P. Ebener, Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program (Rand Corporation 1988); J. Barkai, W. Richardson & G. Kassebaum, *Hawaii Court-Annexed Arbitration Evaluation Is First to Show Cost Reduction to Litigants,* 3 Practice and Perspective (Bureau of National Affairs, Inc., April 13, 1989).

Northern California experience. Anticipated size was also considered, with programs that expected fewer than fifty cases per year rejected as being too small to be instructive. Two other considerations were evidence of bar acceptance and the enthusiasm demonstrated by judges and clerks—conditions deemed important in establishing programs that would be well managed and well received. Last was operational cost; the total funding had to fall within the $400,000 allocated by Congress for the new pilot courts.

The original selection was made in November 1984. Two of the selected courts, Northern Illinois and Southern Texas, later withdrew from consideration. They were replaced with Western Oklahoma and Eastern New York. Selection was completed in June 1985.

### Data collection

Views of court personnel. To describe the operation and goals of the pilot arbitration programs, we first interviewed court personnel, either before or soon after their programs went into effect.[20] The interviews focused on the particulars of the local rule governing the program, as well as the court's expectations. We remained in close contact with the clerk's offices of the pilot districts, and requested that they keep us informed of any changes in rules or procedures.

After each program had been in effect for at least eighteen months, we surveyed all of the judges. The survey questions sought to determine judges' general satisfaction with their arbitration programs and how well they believed the programs were meeting various goals.

Tracking of cases. To describe and analyze the program experience, we followed to termination a sample of arbitration cases in each pilot district. Although the original plan was to follow a twelve-month sample of filings in each pilot court, the time period was extended in four of the ten districts to increase the sample size, or to accomodate either a slow program start or a mid-sample rule change. Table 1 on the following page shows the starting and ending dates for including newly filed cases in each district's sample of cases. A district's sample was considered ready for analysis when 95% of its cases were terminated.[21]

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20. Copies of the interview protocol, and all other data collection instruments, are on file at the Federal Judicial Center.

21. To assist the districts in reviewing their own programs, separate interim reports were prepared for each district when 95% of their sample cases had closed. Copies of the individual district reports are available on loan from the Federal Judicial Center. These evaluations

TABLE 1
Dates of Program Implementation and Case Filings
Included in the Evaluation Sample

| District | Date Program Started | Period of Case Sample | Notes |
|---|---|---|---|
| E.D. Pa. | 2/1/78 | 1/1/85–12/31/85 | |
| N.D. Cal. | 5/1/78 | 10/1/84–12/31/85 | Sample extended to fifteen months by district request. |
| M.D. Fla. | 10/1/84 | 10/1/84–9/30/85 | |
| M.D.N.C. | 1/1/85 | 1/1/85–5/31/86 | Included random assignment of cases, fully implemented June 1, 1985. Sample extended to eighteen months to include more cases. Research conducted in conjunction with Duke's Private Adjudication Center and the Rand Institute for Civil Justice. |
| D.N.J. | 3/11/85 | 3/11/85–3/31/86 | Included selected cases pending on the rule's effective date. |
| W.D. Okla. | 5/1/85 | 5/1/85–4/30/86 | |
| W.D. Tex. | 5/6/85 | 5/6/85–10/31/86 | Implemented in one division only. Sample extended because of small number of cases. |
| W.D. Mich. | 7/1/85 | 7/1/85–12/31/86 | Included some cases pending on the rule's effective date. Sample extended because of slow program start. |
| W.D. Mo. | 11/30/85 | 12/1/85–11/30/86 | |
| E.D.N.Y. | 1/1/86 | 1/1/86–12/31/86 | |

The data collected for each case included dates of filing, notification of arbitration, hearing scheduled, hearing held, award entered, trial de novo demanded, and disposition, the number of arbitrators, and the outcome of the arbitration hearing. These data were supplied to us monthly by the clerk's office in each pilot court. Although communication varied depending on each district's system of case tracking, we were notified, at mini-

describe each program in detail and report the results of the survey of the bench and case participants. The numbers reported for each district in this paper may differ slightly from those in the interim reports if either (1) surveys were received after the data for the district report were analyzed or (2) final check of consistency disclosed duplicate cases or surveys. In no instance do these differences change the nature or the significance of the results as reported in the individual district evaluations.

mum, of any case that was opened, closed, or arbitrated (i.e., had a hearing held) in a given month.[22]

Attitudes of case participants. To learn how attorneys and parties reacted to the arbitration program, we surveyed counsel of record and parties in sample cases that closed after counsel had been notified that the case was to be referred to the program.[23]

The survey sample included cases closed before the hearing, during or after the hearing without a demand for trial de novo, and after a de novo demand. The more of these procedural steps a case had taken before termination, the more information we needed. Accordingly, we used separate questionnaires for attorneys and for parties for each group of closings.

Appropriate surveys were sent after we were notified that the case had closed, regardless of the method of disposition or the point in the proceedings at which the case terminated. Excluded from surveys were cases either exempted from the program or, though terminated from the court's point of view, not actually resolved (e.g., transfers, remands). If no response was received within approximately three weeks from this first mailing, a followup survey was sent. If there was still no reply in the next three weeks, a telephone interview was conducted.[24]

Comparison data. A number of relevant questions about arbitration programs, such as how much time they save parties and the courts, or whether they reduce the trial rate, can be answered with authority only by a research strategy that employs the random assignment of a large number of cases to comparison groups.

An independently funded evaluation of the pilot program in Middle North Carolina, conducted by the Rand Corporation, called for a random assignment design in that district.[25] The Center explored the possibility of

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22. Some districts had automated arbitration case-tracking systems, which they shared, while others sent copies of relevant material. Because the districts varied in the precise data they collected for each case, the information available to us also varied somewhat from court to court. For a detailed description of the information collected, and the method of transmittal, see the individual district reports (*supra* note 21).

23. In accordance with the research agreement made with all of the pilot arbitration courts, no contact was made with attorneys or litigants until after our records indicated that the case had been terminated. This was to ensure that our research did not interfere in any way with the processing of the case. We were not given permission to survey the parties to arbitration cases in Eastern Pennsylvania.

24. In New Jersey, we were asked not to telephone parties who did not respond to the two mailed surveys.

25. The private portion of the research in Middle North Carolina was funded by the National Science Foundation, the Institute for Civil Justice, and the National Institute for

random case assignment in two other pilot courts, New Jersey and Eastern New York. After assessing the costs and benefits of such a design, and discussing the results with the court and the Administrative Office, we concluded that it would not be feasible.[26] In New Jersey, the arbitration procedures involved a combination of judicial and clerk's office discretion in the referral of cases to the program that was not conducive to implementing random assignment. In Eastern New York, the size of the control group needed to determine the effect of the program on the reduction of trials—an important, yet still unknown, potential effect of arbitration programs—was prohibitive given the relatively small size of the program. Therefore, only one of the pilot courts, Middle North Carolina, went forward with the random assignment of cases.

*Random assignment of cases in Middle North Carolina.* Middle North Carolina used a random assignment procedure under which one in every four cases deemed eligible for arbitration was assigned to a control group and handled under normal procedures. The research in Middle North Carolina consisted of two parallel studies, one by the Federal Judicial Center and one by the Rand Institute for Civil Justice (Rand) and the Duke Private Adjudication Center. The Rand study gathered information on participant attitudes that was shared with the Federal Judicial Center.[27] The results of Rand's analyses, which are based on more cases followed for a longer period of time than our own, are presented throughout this report where appropriate.[28]

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Dispute Resolution. For a description of the research design and the allocation of responsibilities among the participants, see B. Meierhoefer, Court-Annexed Arbitration in the Middle District of North Carolina 2 (Federal Judicial Center 1989) (available on loan from the Federal Judicial Center); E. Lind, Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court 15–22 (Rand Corporation forthcoming report May 1990).

26. The assessment was performed in accordance with the procedures set forth in Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (Federal Judicial Center 1981).

27. Rand either surveyed or interviewed attorneys, and interviewed all parties. Their protocols were somewhat different from the surveys sent by the Center to participants in arbitration cases in the other pilot courts. When survey results from all of the pilots are presented throughout this report, the responses from Middle North Carolina participants are included where they were asked comparable questions with the same range of possible responses; otherwise they are eliminated. Middle North Carolina is included in all analyses based on case-tracking data.

28. The forthcoming Rand Corporation report, *supra* note 25, is cited with permission from the author and the Rand Corporation's Institute for Civil Justice.

*District civil case data.* The only comparison source for the other new pilot courts was a sample of civil cases drawn from each district before and after the arbitration program began.[29]

The pre-program sample contains cases filed six months before the program began in any particular district. The post-program sample is made up of cases filed from six months to a year after program implementation. The filing dates of the cases included in the pre-program and post-program samples are shown in Table 2.

The last date for which we had closing information available was June 30, 1988, a date eighteen months from the latest filing date included in the post-program sample for any pilot court (December 31, 1986, in Eastern New York). To preserve comparability between the exposure times for the pre-program and post-program samples, all cases that were disposed of after eighteen months were treated as though they were pending as of eighteen months.

The civil cases used for these analyses were diversity tort and contract cases with dollar demands under $150,000. This group was selected so that the post-program sample would be likely to contain a substantial proportion of cases that would be eligible for arbitration.

TABLE 2
Filing Dates Defining the Pre-Program and Post-Program Sample

| Court | Filing Dates for Pre-Program Case Sample | Date Program Began | Filing Dates for Post-Program Case Sample |
|---|---|---|---|
| M.D. Fla. | 4/1/84–9/30/84 | 10/1/84 | 4/1/85–9/30/85 |
| D.N.J. | 9/1/84–2/28/85 | 3/11/85 | 9/1/85–2/28/86 |
| W.D. Okla. | 11/1/84–4/30/85 | 5/1/85 | 11/1/85–4/30/86 |
| W.D. Tex. | 11/1/84–4/30/85 | 5/3/85 | 11/1/85–4/30/86 |
| W.D. Mich. | 1/1/85–6/30/85 | 7/1/85 | 1/1/86–6/30/86 |
| W.D. Mo. | 6/1/85–11/30/85 | 11/30/85 | 6/1/86–11/30/86 |
| E.D.N.Y. | 7/1/85–12/31/85 | 1/1/86 | 7/1/86–12/31/86 |

29. Since the programs in Eastern Pennsylvania and Northern California are over ten years old, and were already compared with groups of other civil cases in the earlier Center report (E. Lind & J. Shapard, *supra* note 5), the analysis was not repeated in this evaluation. The samples for the other pilots were drawn from the Center's Integrated Database, a standard-format version of the data reported by the courts to the Administrative Office of the U.S. Courts. This database is available from the Interuniversity Consortium.

## Analysis and presentation of data

For purposes of analysis and presentation, the data were organized into subject-matter categories as follows:[30]

1. *Program characteristics:* Features that differentiate among the ten pilot arbitration programs. They include features of the local rules, such as the number of arbitrators used, litigant input to the arbitrator selection process, the timing and cost of the hearing, and disincentives to demanding trial de novo, as well as the types of cases that were included in the program.
2. *Litigant perceptions of outcome:* Survey responses to questions about participants' satisfaction with the outcome, and whether it was the outcome they expected and if it was favorable (available for all parties and for attorneys in arbitrated cases).[31]
3. *Litigant perceptions of process:* Attorney survey responses as to whether the process saved time and money, and party survey responses as to the fairness of the process, whether it was understandable and afforded them adequate control over the case, and whether its associated time and cost burdens were reasonable.
4. *Litigant perceptions of the arbitration hearing:* Survey responses to questions concerning the fairness of the hearing, arbitrator impartiality and preparedness, the adequacy of time provided to prepare and present one's case, and the formality of the hearing.
5. *Litigant characteristics:* Variables relating to the background and status of the litigants who responded to the survey questionnaires, e.g., plaintiff or defendant, type of party (private, business, other), type of representation, and prior experience (with trials for parties; with arbitration for attorneys).
6. *Attorney perceptions of the case:* Attorney survey responses as to the perceived likelihood that the case would go to trial, and of the general issues that presented barriers to settlement of the case.

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30. A technical appendix that lists all of the specific variables within each category and which were used for each analysis is on file at the Federal Judicial Center.

31. Attorneys in cases that closed before the hearing were not asked questions about case outcome. The original thinking was that an attorney would not have settled if such an outcome was not considered satisfactory. In retrospect, it would still have been interesting to get this information.

7. *Party participation in the case:* The case-related events in which parties indicated they took part, e.g., depositions, court or arbitration hearings, settlement discussions, trial.

8. *District characteristics:* Features that differentiate among the districts' general pattern of case disposition, e.g., the median times from filing to disposition of all civil cases.

Conclusions of this report are of two types; many are straightforward reports of how cases progressed and of litigant perceptions of the process and the hearing, the variables used to measure various program goals. Others rely on regression analysis of the survey responses and case events to determine what factors significantly affected the overall response on perceptions of fairness, speed, and reduction of cost and burden.[32]

The text reports only cross-tabulations of the program goal measures by those variables with which they were significantly related. For ease of presentation, the text groups independent variables into only two categories (e.g., agree or disagree) even if, as was common, the variables were entered into the regression as four-point scale ratings (e.g., strongly agree, agree, disagree, and strongly disagree).

The next two chapters provide more detailed information on program characteristics and describe the caseload experiences and case participants in the pilot programs.

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32. A full discussion of the variables entered into regression equations and how significance was determined, along with the results of all analyses, is presented in the Technical Appendix, which is on file at the Federal Judicial Center.

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# Chapter 3
# Program Characteristics

The arbitration programs developed in the ten federal pilot district courts have a number of features in common.[33] Court-annexed arbitration, unlike conventional arbitration, is neither voluntary nor binding. Particular types of cases (most commonly those involving contracts and torts) are mandatorily referred to the program; in each district, a local rule specifies the types of cases and the amount in controversy that determine program eligibility. These local rules provide that arbitration cases be heard either by a single arbitrator or by a panel of three arbitrators (lawyers who have volunteered to serve and are paid at levels specified by each district). Following a hearing at which each side presents its case, arbitrators are to issue a decision based on the merits of the case and, where appropriate, determine an award. Parties who are dissatisfied with the decision at arbitration then have a specified period of time to file a demand for trial de novo. If a demand is filed, the case goes back onto the regular docket for pretrial and trial by the judge assigned to the case. If a trial de novo is not demanded, the arbitration award becomes a non-appealable judgment of the court.

While the pilot courts have these features in common, there are some significant differences in program design that reflect each court's goals and resources as well as its local legal community. Appendix A presents a summary of each district's program characteristics as specified in their local rule.[34]

Table 3, which begins on p. 32, categorizes the pilot courts in terms of specific program features that reflect interesting differences in approach across the districts.[35] No two districts are alike along all dimensions. Although the new pilot courts relied heavily on the models set by Eastern

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33. This chapter describes the programs as they operated when the cases examined for this research went through the programs. See Appendix A for a description of how some programs have since changed.

34. Occasionally, actual practices as they developed differ somewhat from those described in the local rule. The program descriptions at Appendix A of each of the individual district reports, which are available on loan from the Federal Judicial Center, should be consulted for precise procedures.

35. The table also serves as the reference for how districts were grouped on the program characteristic variables in subsequent analyses.

Pennsylvania and Northern California—which are rarely categorized together—they have opted to combine features of those two districts' programs with ideas of their own rather than simply import one of the existing local rules. This is not surprising as the new pilots were selected in part because of the distinctiveness of their designs. It is nevertheless important because it illustrates that even courts with basically similar approaches to arbitration do not necessarily agree on specific methods.

## Program development

Most of the new pilot courts became interested in court-annexed arbitration at the urging of a judge who had heard reports of the success of such programs in Eastern Pennsylvania, Northern California, and various state systems. Personal experience with other successful alternatives also encouraged interest. Two of the new pilots courts, New Jersey and Western Michigan, are located in states with established alternative programs.[36] Western Michigan has a successful mediation program and was among the first courts to use summary jury trials. Western Oklahoma uses both magistrate-hosted settlement conferences and summary jury trials. These courts adopted their arbitration programs explicitly to increase their case-processing options.

The Missouri state system had experimented with a program to handle medical malpractice cases, but it was described by members of the court as notably unsuccessful. The programs in the rest of the new pilot courts were adopted without any expectation that their bar associations would be familiar with either court-annexed arbitration or alternatives in general.

The concept for the program in Middle North Carolina was originally presented to the court by a former clerk of court who was working with members of the Duke Law School faculty to develop alternatives to traditional court processing. This early working relationship between the law school and the court led to a unique arrangement under which the program was co-administered by the court and the law school's Private Adjudication Center for the first three years. The Adjudication Center had responsibility for assembling the arbitrator pool and administering the arbi-

36. New Jersey has a state program to arbitrate automobile negligence actions and a mediation program in Essex County. Michigan is known for its large mediation program in Wayne County, in which the federal court in the Eastern District of Michigan participates.

trator selection process, and provided research services to the court and educational services to the bar.

### Coordination with the bar

All of the new pilot courts took steps to reach out to the bar. This was particularly true where the concept of arbitration was a new idea. Two districts, Western Missouri and Western Texas, opted to implement the program in only one division, believing that a gradual, deliberate approach was the best way to alleviate concerns expressed by the bar. New Jersey and Eastern New York opted to narrow their programs by selecting relatively low dollar amounts for eligibility, recognizing that the program could be expanded if it should prove satisfactory to both bench and bar. Other districts, such as Middle Florida, Middle North Carolina, and Western Oklahoma, made special efforts to educate the bar about the upcoming program, developing written materials and speaking frequently at various bar functions. In some cases, bar association committees were asked to work with the court in the drafting of the local rule, and in no new pilot did program implementation proceed without giving the bar an opportunity to comment on the rule.

### Assembling an arbitrator pool

The first step in assembling an arbitrator pool is to set minimum qualifications. These include admission to the bar of the district court (or, in Western Texas and Middle North Carolina, membership on the faculty of a law school within the state), a certain number of years of experience as a practicing attorney (from five to ten years among the pilot courts), and, in most courts, a certification that the attorney is competent to serve. In Eastern Pennsylvania, Middle Florida, New Jersey, and Middle North Carolina, the chief judge certifies; in Eastern New York, the function is performed by the "certifying judge"; and in Western Texas, Western Missouri, and Western Michigan arbitrators must be certified by either "the court" or "the judges." New Jersey has the additional requirement that, before submission to the chief judge for final approval, applicants must first be recommended by the court's Lawyer's Advisory Committee. Northern California and Western Oklahoma require no certification.

There is a tendency for courts that provide for litigant input to the arbitrator selection process to be less stringent in their qualification requirements, believing that counsel are adequate assessors of their colleagues. It

also appears that the districts that allow for just one arbitrator per hearing had a more exacting quality review process than the others.

The initial arbitrator pools were assembled by compiling lists of attorneys who met the general eligibility requirements, in some cases culling this initial list, and requesting the selected attorney to submit an application. In all cases, the pilot courts reported that the response of the bar was exceptional. The actual size of the arbitrator pool depended on the number of hearings anticipated, the number of arbitrators per hearing, and the stringency of the qualifying process.

## Selecting program features

### Eligibility criteria

Decisions about program eligibility were based on the courts' views of what the bar would be willing to accept, the projected size and cost of the program, and assessments as to which types of cases were most likely to benefit from the program.

Six of the pilot courts limit the types of cases eligible for the program (primarily to those involving contracts and torts) (see Table 3.A). Four districts include all civil cases except agency appeals and prisoner petitions. All limit eligibility to cases where the claim is either for money damages only or for money damages plus non-monetary claims determined by the court to be insubstantial. The dollar limit for case eligibility in the pilot courts ranges from $50,000 to $150,000 (see Table 3.B). Middle North Carolina, New Jersey, Western Michigan, and Western Missouri by rule exclude claims for punitive damages when assessing case eligibility for the program; the other pilot courts do not.

TABLE 3: Special Program Features
A. Case Type Limitations for Program Eligibility

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| All Civil Cases, Limited Exceptions | • | | | • | • | | | • | | |
| Specific Types of Civil Cases Listed in Rule | | • | • | | | • | • | | • | • |

TABLE 3: Special Program Features
B. Dollar Ceiling for Program Eligibility

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| $150,000 | | | | | | | | | • | |
| $100,000 | | • | • | • | • | | • | | | • |
| $75,000 | • | | | | | | | | | |
| $50,000 | | | | | | • | | • | | |

*Note:* Northern California, Western Texas, Eastern Pennsylvania, New Jersey, Middle Florida, and Eastern New York raised their dollar ceiling since the time period covered by this study. The current ceilings are Northern California, Middle Florida, and Western Texas: $150,000; Eastern Pennsylvania and New Jersey: $100,000; Eastern New York: $75,000. New Jersey has raised its limit twice, first to $75,000 and later to the current $100,000. Except for the first New Jersey raise, these changes resulted from the anticipated consequences of changing the ceiling for diversity jurisdiction from $10,000 to $50,000.

All of the pilot courts allow for referral of cases that do not meet the eligibility criteria upon agreement of the parties. They also provide that litigants may, on motion, request exemption of their cases from the program at any time.

### Selection and referral of cases

In all of the pilot programs, the clerk's office reviews civil cases when they are filed and determines whether the case meets the arbitration program's case-type and dollar-eligibility requirements. All but two of the pilot courts have local rules stating that the dollar value of a case of an eligible type is presumed to be within the arbitration ceiling unless attorneys certify otherwise. In the others, dollar eligibility is determined from the prayer for relief.

In courts that allow the referral of otherwise eligible cases that also include claims for non-monetary relief, the case is referred to a judge or magistrate to determine whether such relief is insubstantial and the case eligible. A judicial officer is also involved in cases that become eligible by agreement of the parties or through a determination that, upon review, the case does fall within the program's parameters.

Once a case is identified as eligible, its actual referral to the program may require more or less judicial input. At one end of the spectrum are New Jersey, Western Texas, and Western Oklahoma, where the case is not referred until after the litigants have met with a judicial officer and the program is discussed. At the other end are Eastern Pennsylvania, Middle

North Carolina, Western Michigan, and Western Missouri, where the clerk's office automatically notifies the litigants of the pending referral, and the date of the hearing, when the case is at issue. Most judges in these districts limit their case selection input to reviewing and signing an official referral order about one month prior to the scheduled hearing date. In the other pilot courts, the involvement of judicial officers varies from chambers to chambers.

### Timing of the hearing

The pilot courts adopted periods ranging from 80 to 180 days between the date the last answer is received and the date of the hearing (see Table 3.C). The selection of a particular time period depended both on the normal case processing time for civil cases in the district and on whether the program was explicitly designed to shorten the discovery process or reduce disposition time.

TABLE 3: Special Program Features
C. Days Between Last Answer and Date for Hearing

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| 80 days | | | • | | | | | | | • |
| 120 days | | | | | | | • | | | |
| 150 days | • | • | | • | | | | • | | |
| 165 days | | | | | • | | | | • | |
| 180 days | | | | | | • | | | | |

### Scheduling and pre-hearing motions

Judges in the pilot courts may involve themselves in arbitration cases in any way they choose. However, the local rules of a number of districts (generally those with a primary goal of reducing court burden) provide opportunities for judges and magistrates to defer some of their normal pretrial involvement in the areas of scheduling and motions (see Table 3.D).

In four districts, the clerk's office sets the cut-off date for discovery when issue is joined in arbitration cases, thereby eliminating the necessity for judicial involvement in pre-hearing scheduling. Local rules of these districts specifically exempt arbitration cases from the Rule 16 conference.

There are also two types of provisions designed to lessen the demand on judges to decide dispositive motions (see Table 3.D). The first, adopted by four courts, specifies that motions filed after entry of the formal order appointing the arbitrators and scheduling the hearing (approximately thirty days prior to the hearing) will not stay the hearing except upon order of the judge. This provision leaves it to the individual judge whether to decide motions filed during the thirty-day window and protects the arbitration process from the filing of motions as a delaying tactic. Middle North Carolina and Western Michigan made stronger efforts to remove judicial officers from the prehearing process. Middle North Carolina's rule specifies that dispositive motions, except those relating to jurisdiction or venue, will not be ruled upon by the court and need not be filed until, and unless, a case returns to the regular trial track via a demand for trial de novo. Similarly, Western Michigan's rule specifies that no summary judgment motion will be noticed or heard prior to completion of the arbitration process.

TABLE 3: Special Program Features
D. Rules Designed to Reduce Judicial Involvement
in the Pre-Hearing Phase

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| None | | • | • | | | | • | | | • |
| Clerk's office schedules discovery cut-off date | • | | | • | • | | | | • | |
| Rulings on some dispositive motions are to be deferred | | | | | • | | | | • | |
| Rulings on some dispositive motions may be deferred | • | | | • | | • | | • | | |

Those judges who choose not to decide motions before the arbitration hearing believe that the issues raised can be presented just as well to arbitrators. Judges who routinely do resolve dispositive motions filed prior to the hearing do not think that parties will be willing to accept anything less than a final judicial decision on the legal contentions they present. Not deciding these motions could therefore result in de novo demands from liti-

gants awaiting their resolution. Furthermore, these judges believe that they may as well avoid the expense of an arbitration hearing if the case can be resolved by motion beforehand.

### Selecting the arbitrator

The pilot courts vary in the roles played by the litigants and the clerk's office in selecting an arbitrator or arbitrator panel (see Table 3.E). Courts were likely to provide for litigant input to the selection process if they believed that it helped to gain general acceptance from the bar, or if they believed that input would enhance the chances that litigants in particular cases would accept the results of the procedure. On the negative side were fears that providing for litigant input would bog down the process, thereby diminishing the chance of reducing case delay and placing an undue administrative burden on the clerk's office. The latter concern was particularly important for the large programs.

TABLE 3: Special Program Features
E. How Arbitrators Are Selected

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| By clerk | • | | | • | | • | | • | | |
| Initial party choice, limited list | | • | | | • | | • | | | • |
| Initial party choice, full list | | | • | | | | | | • | |

In four districts, choice of arbitrator(s) is the sole responsibility of the clerk's office. The New Jersey clerk's office goes about the process by a combination of random selection and matching of arbitrator expertise with the issues in dispute. In Eastern Pennsylvania and Eastern New York, the arbitrator pool is divided into attorneys who represent primarily plaintiffs, defendants, or both; one name is randomly selected from each category to form a panel of three. Western Missouri randomly selects the panel from an undifferentiated list.

Litigants are given the most control in the process in Middle North Carolina and Middle Florida, where they may select who will arbitrate their case from the complete list of certified arbitrators. In Middle North

Carolina, litigants also have the option of agreeing on an arbitrator who is not on the list. If litigants do not act within a specified time, the clerk's office makes the selection.

The other pilot courts employ a mixed model, under which the litigants may choose names (or strike them) from a short list randomly drawn by the clerk's office.

### Number of abitrators and arbitrator fees

Five districts provide for three arbitrators (but in three of these the parties may agree to fewer) and five provide for only one, but in two of these, the parties may request to proceed before a panel of three (see Table 3.F).

TABLE 3: Special Program Features
F. Specified Number of Arbitrators

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| One | | | | | • | • | | | • | |
| One (may request three) | | • | | | | | • | | | |
| Three (may agree to fewer) | | | • | • | | | | • | | |
| Three | • | | | | | | | | | • |

Decisions about the number of arbitrators were based on the courts' views of whether a panel is necessary to ensure litigant perceptions of fairness balanced against the administrative benefits of having one arbitrator (e.g., greater ease of scheduling, or ability to hold more hearings with a smaller arbitrator pool). Choices were also tied to related decisions about how much to pay arbitrators and the resources available: it is possible to pay a single arbitrator more at a lower per-hearing cost.

In deciding what arbitrators should be paid, districts evaluated both resources and what they believed was needed to attract and retain the services of top-flight lawyers. In pilot courts with other alternative federal or state programs, parity with what these programs pay their neutrals was also a consideration. Two districts, Western Oklahoma and Western Texas, offer non-monetary incentives to arbitrators by exempting them from certain Criminal Justice Act appointments.

The various combinations of number of arbitrators per hearing and what they are paid have resulted in estimated per hearing costs across the pilot courts that range from $125 to $300 (see Table 3.G).

TABLE 3: Special Program Features
G. Approximate Arbitrator Fees Per Hearing

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| $125 | | | | | | | • | | | |
| $150 | | | | | | • | | | | |
| $200 | | • | | | | | | | | |
| $225 | • | | | | | | | • | | |
| $250 | | | • | • | • | | | | | • |
| $300 | | | | | | | | | • | |

*Note:* The fees are paid by the courts, not by the parties. The approximate arbitrator fees per hearing for all districts except Eastern Pennsylvania, New Jersey, Western Michigan, and Eastern New York are estimates. The $300 estimate for Middle North Carolina comes from figures for the first year of the program provided by the clerk's office. They pay their arbitrators at an hourly rate up to a maximum of $500, since raised to $800. The estimate for districts that provide for fees per day of hearing rather than for the case (Northern California, Middle Florida, Western Oklahoma, Western Texas, Western Missouri) include a nominal $25, added to the stated arbitrator fee to account for the rare hearing that will exceed one day. The estimates for Northern California and Western Oklahoma also include consideration that the hearing fee depends on the number of arbitrators ($125 for one (since raised to $250) and $225 for three (since raised to $450) in Northern California, and $75 for one and $225 for three in Western Oklahoma). In Northern California, about two-thirds of the cases are heard by one arbitrator, and in Western Oklahoma about 80% are heard by one.

### Time from hearing to demand for trial de novo

The pilot courts allow either twenty or thirty days from the date the award is entered for any party to demand a trial de novo (see Table 3.H). The shorter time period is generally associated with programs aimed at speeding case dispositions or those in which the twenty-day time frame meshes better with the scheduling of other pretrial events in civil cases. Eastern Pennsylvania, which switched from a twenty- to a thirty-day period, did so in response to suggestions that the shorter time encouraged pro forma demands for trial de novo from attorneys who needed to keep their options open while they discussed the award with their clients.

TABLE 3: Special Program Features
H. Time from Hearing to Demand for Trial De Novo

| | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| 20 days | | | • | | | | • | | | |
| 30 days | • | • | | • | • | • | | • | • | • |

### Disincentives to demanding trial de novo

All of the pilot courts except New Jersey provide that litigants who reject the arbitration award, and then do not receive a more favorable judgment, are to pay an amount equal to the arbitrators' fees (see Table 3.I). In these circumstances, New Jersey requires payment of a flat fee of $250, more than their $150 arbitrator fee. Seven of the pilots require that the fee be posted at the time the demand is made, returnable if they receive a more favorable judgment. The purpose of the up-front posting of arbitrators' fees is to discourage frivolous de novo demands.

TABLE 3: Special Program Features
I. Financial Disincentives to Demands for Trial De Novo

| Fee to be posted with demand; forfeited if trial judgment not better than award | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| Maximum arbitrator fee of $225 | • | | | • | | | • | • | | • |
| Maximum arbitrator fee of $250 | | | | | • | | | | | |
| Flat fee of $250 | | | | | | • | | | | |

*Note:* In response to the 1988 legislation, New Jersey amended its rule to require payment of only the $150 arbitrator fee.

| Pay arbitrator fee after trial if judgment not better than award | E.D. Pa. | N.D. Cal. | M.D. Fla. | W.D. Mo. | W.D. Mich. | D. N.J. | W.D. Okla. | E.D. N.Y. | M.D. N.C. | W.D. Tex. |
|---|---|---|---|---|---|---|---|---|---|---|
| Maximum fee of $225 | | | • | | | | | | | |
| Maximum fee of $500 | | | | | | | | | • | |
| Costs (not including attorneys' fees) | | • | | | | | | | | |

*Note:* After two years of program experience, Middle Florida amended its rule to provide for the posting of the fee with the demand. Middle North Carolina has raised its fee maximum to $800 since the time period covered by this study. Northern California now has no disincentives.

# Chapter 4
# Arbitration Program Experiences

Differences in program design will result in differences in the composition of the arbitration caseloads across the pilot courts. This chapter compares the types of cases referred and the proportion of the civil caseload diverted to the ten programs, and how quickly and at what stage of the process those cases closed. The last section describes the litigants who participated in the arbitration cases.

## Caseload experiences

### Proportion of the civil caseload diverted to the arbitration process

Table 4 (see p. 42) displays the approximate proportion of the civil caseload diverted to the arbitration programs in each of the pilot courts. It compares the number of arbitration cases in the sample with the total number of civil filings during the same time period.[37]

The districts vary considerably in the proportion of civil cases diverted to arbitration, from a low of 5% in Northern California to 28% in Eastern Pennsylvania.[38] Although the variability across districts is influenced somewhat by the district's exemption practices and local rules as to eligible types of cases, these program features do not fully account for the differences. For example, Western Michigan and Western Missouri both include most types of civil cases and exclude punitive damages from a $100,000 ceiling, yet the former diverts 16% of its cases to arbitration while the latter diverts only 6%. Western Oklahoma, which restricts its program to particular types of cases and includes punitive damages in its $100,000 ceiling, diverts a larger proportion of its caseload (18%) than either of these districts. The largest proportion of civil cases is included in Eastern Pennsylvania's arbitration program, which, while including most

37. Total civil filings were taken from the Center's Integrated Civil Database. See *supra* note 29.

38. Total civil filings include many types of cases that typically require little judicial action (e.g., student loan contract cases; prisoner petitions; Social Security cases) and the proportion of such cases differs from one court to the next. The variation across districts as to the proportion of civil cases diverted to arbitration therefore does not necessarily represent the same degree of variation in the proportion of cases that would otherwise have been likely to consume significant judicial resources.

types of civil cases, restricts the dollar amount to $75,000 including punitive damages. Therefore, it is not possible to specify a general set of eligibility criteria that will ensure a program of a particular size.

TABLE 4
Percentage of the Civil Caseload Diverted to Court-Annexed Arbitration
(with relevant program features displayed)

| | 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 Period | 1/85 - 12/85 | 10/84- 12/85 | 10/84– 9/85 | 1/85– 6/86 | 3/85 – 3/86 | 5/85 – 4/86 | 5/85– 10/86 | 7/85– 12/86 | 12/85– 11/86 | 1/86 – 12/86 |
| Total Civil Cases | 7,854 | 12,255 | 5,488 | 2,012 | 6,333 | 3,044 | 1,112 | 3,095 | 3,069 | 4,483 |
| Cases Identified as Arbitration - Eligible | 2,415 | 669 | 630 | 161 | 1,376 | 596 | 144 | 579 | 261 | 423 |
| Cases Exempted from Program | 321 | 26 | 46 | 30 | 201 | 40 | 34 | 82 | 77 | 43 |
| Actual Arbitration Caseload | 2,094 | 599 | 569 | 127 | 1,161 | 547 | 100 | 495 | 179 | 377 |
| Percentage of Civil Cases Diverted | 27% | 5% | 10% | 6% | 18% | 18% | 9% | 16% | 6% | 8% |
| **Relevant Program Features** | | | | | | | | | | |
| Inclusion of Most Types of Civil Cases? | yes | no | no | no | no | no | no | yes | yes | yes |
| Dollar Ceiling (in thousands) | 75 | 100 | 100 | 150 | 50 | 100 | 100 | 100 | 100 | 50 |
| Punitive Damages Excluded for Dollar Ceiling? | no | no | no | yes | yes | no | no | yes | yes | no |

*Note*: Both New Jersey and Western Michigan included pending cases in their arbitration program; the pending cases were excluded from analysis in order to preserve comparability with the other pilot courts. The figure for "all civil cases" in Western Texas is from the San Antonio office only.

## Types of cases

Nature of suit. Table 5 displays the general types of cases included in the arbitration programs in each of the pilot districts.[39] The most common case types are contracts and torts; these two groups together constitute the majority of cases identified as eligible for arbitration in all ten of the pilot courts. There are, however, substantial differences between the districts. Contract cases range from a low of 26% of the caseload in Western Michigan to 74% of the caseload in Northern California. Tort cases make up a low of 10% of the cases in Western Oklahoma and a high of 51% in New Jersey.

TABLE 5
Summary of Case Types Selected As Eligible for Arbitration

| | E.D. 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Most Civil Cases Eligible By Rule? | yes | no | no | no | no | no | no | yes | yes | yes |
| Number of Cases Identified as Eligible | 2,415 | 669 | 630 | 195 | 1,376 | 596 | 144 | 579 | 261 | 423 |
| Type of Dispute | | | | | | | | | | |
| Contract | 30% | 74% | 65% | 63% | 43% | 70% | 54% | 26% | 59% | 54% |
| Personal Injury/ Personal Property Torts | 43% | 24% | 30% | 32% | 51% | 10% | 35% | 29% | 14% | 20% |
| Other | 27% | 3% | 5% | 4% | 6% | 20% | 10% | 45% | 27% | 26% |
| Jurisdiction | | | | | | | | | | |
| U.S. Plaintiff | 4% | 13% | 7% | 2% | 2% | 12% | 20% | 4% | 29% | 5% |
| U.S. Defendant | 5% | 7% | 5% | 1% | 7 | 2% | 6% | 6% | 7% | 10% |
| Federal Question | 21% | 26% | 32% | 11% | 17% | 18% | 17% | 46% | 25% | 32% |
| Diversity | 70% | 55% | 57% | 86% | 75% | 68% | 57% | 43% | 39% | 52% |

*Note:* Middle North Carolina assigned thirty-four of the cases identified as eligible for arbitration to a control group. They are included in the case type tables, but not in any others since they did not go through the arbitration process.

39. A complete listing of the types of cases in each district's sample is presented in Appendix B.

Not surprisingly, those districts with the fewest restrictions as to case type in their arbitration eligibility criteria also have the largest proportion of cases other than contracts and torts: At least a quarter of the caseload in Eastern Pennsylvania, Western Missouri, Western Michigan, and Eastern New York falls into this "other" category. Western Michigan, at 45%, has the largest number of "other" cases, having selected more civil rights and labor cases for arbitration than the other pilots.

Jurisdiction. As shown in Table 5, in each pilot court except Western Michigan diversity cases are the most common. The Western Michigan program includes slightly more federal question than diversity cases (46% vs. 43%) and has a much larger proportion of federal question cases than the other pilots. None of the programs has more than 10% U.S. defendant cases, but at least one-fifth of the arbitration caseload in two districts—Western Texas and Western Missouri—are U.S. plaintiff cases.

Dollar demand. We do not have very precise data on the actual dollar values of arbitration cases. The primary source of information is the dollar amount that plaintiffs' counsel enter on the docket face sheet when filing the case, a value reported to the Administrative Office of the U.S. Courts. In many cases, the only entry is "more than $10,000," to meet the dollar amount required (at the time this study was done) for diversity jurisdiction of the federal courts. Furthermore, a study that looked beyond the stated demands to the actual complaints found a number of inaccuracies in the demand data (e.g., many dollar values recorded as $10,000 were actually just statements of the diversity jurisdiction floor).[40]

Because of these problems, the dollar data available from the Administrative Office statistics were supplemented by the dollar value figures on the arbitration case tracking systems maintained by the clerk's office in some of the pilot courts. Whichever figure was the most precise was used, e.g., any dollar value was used in lieu of either "more than $10,000," or an even $10,000. If both systems carried a zero or "more than $10,000" demand, the case was counted as "not available" in Table 6. Note that the proportion of arbitration cases falling in this category among the pilot courts ranges from a low of 1% in Western Oklahoma and Western Missouri to highs of 69% and 79% in New Jersey and Eastern Pennsylvania. It is not known if this represents truly different types of cases across districts, or simply different reporting or case tracking practices.

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40. A. Partridge, The Budgetary Impact of Possible Changes in Diversity Jurisdiction 38 – 39 (Federal Judicial Center 1988).

With these data difficulties in mind, Table 6 shows that the majority of arbitration cases in all districts except Middle North Carolina are valued at $50,000 or less. In Middle North Carolina, the only pilot with a dollar ceiling of $150,000, 42% of the cases identified for the program sought more than $100,000. The court closest to Middle North Carolina in this category was Western Michigan, a district with a $100,000 ceiling (excluding punitive damages) where demands in 24% of the arbitration cases were for more than $100,000. The demands, however, were not tied solely to a district's dollar ceiling. Eastern Pennsylvania and Eastern New York, both with ceilings under $100,000, had the next highest proportions of cases over $100,000 (17% and 15% respectively). Recall that in these districts, as in most others, it is the presence of an attorney certification, rather than the demand in the prayer for relief, that determines case eligibility, and that cases with larger demands may be included in the program if (1) the parties agree or (2) the judge determines that the case was originally certified at an unrealistically high amount.

TABLE 6
Dollar Demands in Cases Identified As Eligible for Arbitration

| | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of Cases Identified as Eligible | 2,415 | 669 | 630 | 195 | 1,376 | 596 | 144 | 579 | 261 | 423 |
| Dollar Value Not Available | 79% | 8% | 25% | 24% | 69% | 1% | 36% | 28% | 1% | 24% |
| Dollar value in available cases: | | | | | | | | | | |
| $0–$20,000 | 47% | 52% | 56% | 21% | 48% | 26% | 40% | 63% | 49% | 47% |
| $20,000 –$50,000 | 18% | 27% | 23% | 24% | 36% | 43% | 33% | 8% | 26% | 34% |
| $50,000–$75,000 | 17% | 10% | 11% | 9% | 5% | 15% | 5% | 3% | 8% | 3% |
| $75,000–$100,000 | 1% | 7% | 6% | 5% | 2% | 10% | 13% | 2% | 8% | 1% |
| $100,000 –$150,000 | 1% | 1% | 2% | 10% | 2% | 2% | 0% | 1% | 1% | 1% |
| $150,000 | 16% | 3% | 2% | 32% | 8% | 4% | 9% | 23% | 8% | 14% |
| Program Characteristics | | | | | | | | | | |
| Dollar Ceiling (in thousands) | 75 | 100 | 100 | 150 | 50 | 100 | 100 | 100 | 100 | 50 |
| Punitive Damages Excluded for Dollar Ceiling? | no | no | no | yes | yes | no | no | yes | yes | no |

Attorney perceptions of issues involved in the dispute. A series of questions on the attorney survey asked lawyers in cases referred to arbitration which of a number of factors they considered to have been important barriers to settlement. Among these were (1) different views as to the facts of the case; (2) different views as to the value of the case; and (3) different views as to the law applicable to the case. The attorney responses to these questions are used here to describe the nature of the underlying conflict in those cases that were actually referred to the arbitration program.[41]

Disputes over the value of the case were the most common, followed closely by disagreements as to the facts (see Table 7). Each was identified as a source of conflict in the cases of over 60% of the attorneys. Disputes over the applicable law were less common, but were identified as a source of conflict by a significant proportion of attorneys—ranging from 31% to 52% depending on the district. Not all arbitration cases, therefore, involve straightforward money or factual disputes.

TABLE 7
Attorney Perceptions of Sources of Disagreement

| Barrier to Settlement | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Different predictions of the value of the case | 70% | 66% | 70% | — | 68% | 66% | 63% | 75% | 66% | 64% |
| Different views of the facts of the case | 62% | 64% | 69% | — | 62% | 65% | 62% | 71% | 64% | 65% |
| Different views of the law applicable to the case | 31% | 42% | 44% | — | 32% | 50% | 35% | 52% | 50% | 37% |

*Note:* Entries are percentage of attorneys agreeing or agreeing strongly that factor was important. The Middle North Carolina survey did not include questions on perceived barriers to settlement.

Cases exempted from the program. All of the districts have procedures under which litigants may, by motion, petition the court to have their case exempted from the arbitration program. To ascertain if particular types of cases, initially identified as eligible for the program, are more likely than others to be exempted,[42] we analyzed the effect of nature

41. Attorneys in cases that closed prior to referral were not surveyed.

42. The percentage of exemptions by district will be slightly lower than that shown in the Table 9 category "cases removed or consolidated," a category that includes consolidations as well as removals from the program and remands to state court.

of suit, dollar demand, jurisdictional basis, and district on exemption rates (see Table 8).[43]

TABLE 8
Percentage of Cases Exempted from the Program by District, Nature of Suit, Jurisdictional Basis, and Dollar Demand

| District | Percentage Exempted |
|---|---|
| E.D. Pa. (*n* = 2,415) | 10 |
| N.D. Cal. (*n* = 669) | 4 |
| M.D. Fla. (*n* = 630) | 7 |
| M.D.N.C. (*n* = 161) | 19 |
| D.N.J. (*n* = 1,376) | 15 |
| W.D. Okla. (*n* = 596) | 7 |
| W.D. Tex. (*n* = 144) | 24 |
| W.D. Mich. (*n* = 579) | 14 |
| W.D. Mo. (*n* = 261) | 30 |
| E.D.N.Y. (*n* = 423) | 10 |

| Nature of Suit | Percentage Exempted |
|---|---|
| Contract (*n* = 3,343) | 9 |
| Tort (*n* = 2,520) | 14 |
| Labor (*n* = 335) | 10 |
| Civil Rights (*n* = 389) | 12 |
| Real Property (*n* = 121) | 13 |
| ICA (*n* = 113) | 5 |
| Other | 17 |

| Jurisdictional Basis | Percentage Exempted |
|---|---|
| U.S. Plaintiff (*n* = 465) | 14 |
| U.S. Defendant (*n* = 413) | 6 |
| Federal Question (*n* = 1,726) | 10 |
| Diversity (*n* = 4,633) | 11 |

| Dollar Demand | Percentage Exempted |
|---|---|
| Not Available (*n* = 3,436) | 14 |
| 0–$20,000 | 10 |
| $20,000–$50,000 | 6 |
| $50,000–$75,000 | 9 |
| $75,000–$100,000 | 7 |
| $100,000–$150,000 | 8 |
| Over $150,000 | 17 |

*Note: n* = all cases identified as eligible.

Regression analysis disclosed that the types of cases most likely to be exempted were those with unavailable dollar amounts (i.e., either "at least $10,000" or none) or those valued at over $150,000. These cases were probably granted exemptions when counsel returned to the court with a certification that the dollar assessment exceeded the ceiling for program eligibility. In addition, U.S. plaintiff cases, and those that fell in the "other" nature of suit category, were also more likely than others to be exempted. The case types that were least likely to be exempted were those involving

43. Findings presented in the text were selected from results obtained by regression analysis in which the dependent variable was exemption and the independent variables were program characteristics. Full details are presented at Analysis 1 of the Technical Appendix, on file at the Federal Judicial Center.

contract disputes or Interstate Commerce Act questions, and those brought under federal-question jurisdiction.

The probability of exemption was as dependent on the practices of the particular district as on the type of dispute. After controlling for case-related features, exemptions were less likely in Eastern Pennsylvania, Northern California, Middle Florida, and Western Oklahoma than in other districts, and more common in Western Missouri, Middle North Carolina, and Western Texas.

### Method of case disposition

Table 9 shows the arbitration case tracking statistics for each of the pilot courts. Although the districts vary considerably in the proportion of cases that reached hearing, that demanded trial de novo, and that closed at various stages of the arbitration process before trial, the trial rate of the arbitration caseloads is similar across the districts, ranging from less than 1% in Eastern New York to 4% in Middle North Carolina.

In all districts, the majority of cases closed prior to an arbitration hearing, and at least two-thirds of the arbitration caseload in each district terminated before returning to the regular trial calendar.[44] De novo demand rates as a proportion of the arbitration caseload range from a low of 7% in Northern California and Eastern New York to a high of 32% in Western Michigan, nine percentage points higher than in any other district.[45]

These low de novo rates result primarily from the low proportion of the arbitration caseload that reaches hearing rather than from frequent acceptance of an arbitration award. In eight of the ten pilot courts, over half of the arbitrations result in a demand for trial de novo. The lowest de novo demand rate (as a proportion of hearings held) was 46% in Eastern New York.

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44. In this section, the terms "cases" and "caseload" are used interchangeably to mean all cases identified for, and not later exempted from, the program. "Arbitrated cases" includes all those in which an arbitration hearing was held, regardless of whether it later resulted in a demand for trial de novo. "Arbitrations" and "hearings" both refer to arbitration hearings. Unless specifically modified by "closed," the terms apply to both pending and terminated cases.

45. The results from Western Michigan are often the least favorable among the pilot courts. Comments from case participants indicate that the program there may have suffered an unfavorable comparison with a preexisting mediation program that had stronger sanctions for rejecting awards not bettered at trial. Dissatisfaction was also expressed by those whose cases were subjected to both arbitration and mediation procedures.

TABLE 9
Summary of Arbitration Case Tracking Statistics

| | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Filings 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 |
| Number of Cases Identified as Eligible | 2,415 | 669 | 630 | 161 | 1,376 | 596 | 144 | 579 | 261 | 423 |
| Percentage removed or consolidated | 13 | 10 | 10 | 21 | 16 | 8 | 31 | 15 | 31 | 11 |
| Actual Arbitration Caseload | 2,094 | 599 | 569 | 127 | 1,161 | 547 | 100 | 495 | 179 | 377 |
| Number (%) | 55 | 19 | 27 | 5 | 52 | 11 | 4 | 23 | 9 | 2 |
| of pending cases | (3) | (3) | (5) | (4) | (4) | (2) | (4) | ( 5) | (5) | (3) |
| Number (%) of | 2,039 | 580 | 542 | 122 | 1,109 | 536 | 96 | 472 | 170 | 375 |
| closed cases | (97) | (97) | (95) | (96) | (96) | (98) | (96) | (95) | (95) | (97) |
| Percentage Closed: | | | | | | | | | | |
| Before referral | 48 | 59 | 45 | 34 | 55 | 57 | 40 | 28 | 25 | 61 |
| After referral, before hearing | 36 | 28 | 27 | 40 | 29 | 22 | 27 | 30 | 39 | 26 |
| After hearing, no de novo demand | 7 | 7 | 8 | 8 | 8 | 10 | 14 | 12 | 15 | 8 |
| After de novo demand before trial | 7 | 4 | 18 | 14 | 7 | 9 | 18 | 28 | 18 | 5 |
| After trial began | 3 | 1 | 2 | 4 | 1 | 2 | 2 | 2 | 4 | 1 |
| Arbitrations as a Percentage of All Cases | 17 | 14 | 30 | 26 | 18 | 22 | 35 | 43 | 36 | 14 |
| De Novo Demands as a Percentage of | | | | | | | | | | |
| All cases | 11 | 7 | 23 | 19 | 11 | 12 | 22 | 32 | 23 | 7 |
| All arbitrations | 62 | 49 | 74 | 70 | 58 | 55 | 63 | 74 | 61 | 46 |
| Trial Rate as a Percentage of | | | | | | | | | | |
| All closed cases | 3 | 1 | 2 | 4 | 1 | 2 | 2 | 2 | 3 | <1 |
| All closed arbitrations | 18 | 11 | 7 | 16 | 7 | 8 | 6 | 5 | 10 | 2 |

*Note:* The arbitration caseload figures are lower than those for program size in Table 4 because they exclude remands to state court and consolidations as well as cases exempted from the program.

## Timing of case disposition

Table 10 shows the median days from filing to disposition for the arbitration cases in each of the pilot courts. For all cases identified for, and not later removed from, arbitration, the range is from under six months in Northern California and Western Oklahoma to just under one year in Western Michigan. When cases that closed before program referral are excluded, the filing to disposition times ranged from under eight months in Western Oklahoma to over thirteen months in Western Michigan.

TABLE 10
Median Months from Filing to Termination by District

| District | Sample Cases | District | Arbitration Sample Cases Closed After Referral |
|---|---|---|---|
| E.D. Pa. (n = 2031) | 6.5 | E.D. Pa. (n = 1060) | 8.4 |
| N.D. Cal. (*n* = 580) | 5.5 | N.D. Cal. (*n* = 239) | 8.8 |
| M.D. Fla. (*n* = 541) | 8.1 | M.D. Fla. (*n* = 296) | 9.9 |
| M.D.N.C. (*n* = 122) | 8.8 | M.D.N.C. (*n* = 81) | 10.1 |
| D.N.J. (*n* = 1109) | 8.2 | D.N.J. (*n* = 503) | 12.3 |
| W.D. Okla. (*n* = 536) | 5.9 | W.D. Okla. (*n* = 229) | 7.9 |
| W.D. Tex. (*n* = 96) | 6.7 | W.D. Tex. (*n* = 58) | 8.7 |
| W.D. Mich. (*n* = 472) | 11.7 | W.D. Mich. (*n* = 338) | 13.4 |
| W.D. Mo. (*n* = 170) | 9.1 | W.D. Mo. (*n* = 128) | 10.2 |
| E.D.N.Y. (*n* = 365) | 8.1 | E.D.N.Y. (*n* = 143) | 11.2 |

The relative speed with which a district moves its referred arbitration cases also bears a loose relationship to the district's local rule provision regarding the time between last answer and the date of hearing (see Table 3.C on p. 34). The three courts that adopted time periods under 150 days fall within the lower half of the pilot courts in case processing time, while the three districts that adopted answer to hearing times in excess of 150 days fall within the upper half and account for the two longest disposition times.

## Case participants

The information we have on case participants comes from the survey of attorneys and parties who participated in cases that closed after notification of the impending referral to arbitration.

### Description of the attorney survey sample

Table 11 presents information on the number of surveys sent to and responses received from attorneys in cases that closed after having been referred to arbitration. The response rates are generally good, averaging 75% across all districts, from a low of 61% in New Jersey to a high of 88% in Northern California.[46]

Table 11 also shows some characteristics of the attorney respondents and their cases. It can be seen that the districts vary as to the percentage of responses received from those whose cases closed at various stages, but within each district the responses represent the distribution of case closings fairly well. The exceptions are Eastern Pennsylvania and Western Texas, where attorneys in cases that closed before the hearing are overrepresented at the expense of those in both categories of arbitrated cases. The survey respondents from all districts except Middle North Carolina are also evenly split between attorneys representing plaintiffs or defendants. Overall, the sample appears adequately representative of the target population, i.e., attorneys in cases that closed after referral to arbitration.

There is considerable difference across districts in the prior experience attorneys had with various forms of arbitration. The reported experience varies both with the length of time the federal program has been in place and with the presence of state arbitration programs. Eastern Pennsylvania, with the fewest attorneys reporting no experience with arbitration, is also the district where court-annexed arbitration has the longest history in both state and federal courts. Later chapters will examine whether these differences in experience, as well as which side was represented, affect attorneys' responses to other survey questions.

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46. The reasons why the response rate is considerably lower in New Jersey than in the other districts are discussed in the interim New Jersey district report, *Court-Annexed Arbitration in the District of New Jersey*, available on loan from the Federal Judicial Center. Briefly, it was often difficult to locate the attorney who handled the case because New Jersey dockets commonly listed only the name of the law firm rather than an individual attorney. Furthermore, some attorneys may have been dissuaded from responding by our simultaneous request for their client's name.

## TABLE 11
## Description of the Attorney Survey Sample

### A. Sample Size and Response Rates

| | 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. | All Districts |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Number of Surveys Returned | 601 | 422 | 510 | 211 | 393 | 353 | 84 | 454 | 222 | 160 | 3,501 |
| Response Rate | 71% | 88% | 79% | 79% | 61% | 84% | 85% | 76% | 80% | 71% | 75% |

*Note:* The survey in Middle North Carolina was conducted by Rand. Western Michigan and New Jersey included pending cases in their arbitration program; the pending participant surveys were excluded from analysis in order to preserve comparability with the other pilot courts.

### B. Characteristics of Attorney Survey Respondents and Their Cases

#### Type of Survey

| When Case Closed | 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. | All Districts |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Before Hearing | | | | | | | | | | | |
| % of surveys | 83 | 74 | 49 | 57 | 62 | 48 | 63 | 39 | 57 | 59 | 59 |
| % of caseload | 68 | 69 | 49 | 60 | 65 | 52 | 45 | 42 | 52 | 66 | |
| After Hearing,, Before De Novo | | | | | | | | | | | |
| % of surveys | 10 | 15 | 15 | 14 | 24 | 24 | 11 | 16 | 23 | 26 | 18 |
| % of caseload | 13 | 17 | 15 | 12 | 18 | 23 | 22 | 17 | 20 | 20 | |
| After De Novo Demand | | | | | | | | | | | |
| % of surveys | 7 | 12 | 36 | 29 | 14 | 28 | 26 | 45 | 20 | 14 | 23 |
| % of caseload | 19 | 14 | 36 | 27 | 18 | 25 | 33 | 42 | 28 | 14 | |

#### Side

| | 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. | All Districts |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Plaintiff | 46% | 50% | 50% | 39% | 50% | 50% | 48% | 46% | 51% | 44% | 48% |
| Defendant | 54% | 50% | 50% | 61% | 50% | 50% | 52% | 54% | 49% | 56% | 52% |

*(continued)*

TABLE 11, part B, continued

Prior Experience with Arbitration

| | 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. | All Districts |
|---|---|---|---|---|---|---|---|---|---|---|---|
| As Counsel in Arbitration Under Rule | 61% | 35% | 27% | 20% | 33% | 29% | 10% | 38% | 23% | 11% | 34% |
| As Counsel in Conventional Arbitration | 59% | 55% | 50% | 45% | 58% | 18% | 14% | 50% | 32% | 55% | 46% |
| As an Arbitrator | 62% | 19% | 35% | 17% | 52% | 11% | 10% | 35% | 12% | 29% | 33% |
| In a State Court Arbitration Proceeding | 88% | 67% | 41% | 10% | 78% | 12% | 10% | 80% | 18% | 56% | 51% |
| None | 6% | 17% | 27% | 43% | 11% | 53% | 70% | 12% | 42% | 21% | 23% |

*Note:* The "% of caseload" figures are calculated on the basis of referred cases only, as attorneys in cases that closed before referral were not surveyed.

## Description of the party survey

Table 12 (see p. 55) presents information on the number of survey responses received from parties in cases that closed after being referred to arbitration. Comparing the number of party responses with those from attorneys in the same cases, it is apparent that we were not able to contact all parties in relevant cases. The court in Eastern Pennsylvania did not give us permission to survey clients at all. In the other pilots, the procedures used to obtain the information necessary for surveying parties varied from one district to another. In Northern California and Eastern New York, we sent a letter from the court after issue was joined requesting that attorneys supply us with their client's addresses; in New Jersey, we asked the attorneys for their client's addresses on the face sheet of the survey sent when the case was closed; in the other districts, the court asked the attorneys to complete a party information sheet and forward it to us. The procedures met with varying success. Assuming that, at a minimum, we should have a client for each attorney who returned a survey, the estimated proportion of targeted parties who could actually be contacted ranged from a low of 20% in Middle Florida to highs of 89% in Middle North Carolina (which represents the proportion of attorneys who allowed Rand to interview

their clients) and 62% in Western Oklahoma. This, coupled with response rates that varied from 44% to 68%, calls into question the representativeness of the party sample.

There are signs that the data are representative, however. Except in New Jersey, attorneys were deciding whether or not to supply their clients' addresses prior to knowing the outcome of the case. We therefore believe that the incomplete sample is not biased by outcome; over one-third of the parties reported that they were not satisfied with the outcome of the case. The balance between plaintiffs and defendants is good in all districts except in Western Texas, where we had only twenty party respondents. Similarly, the distribution of respondents in cases that closed at various stages in the process reflects fairly accurately the actual case-closing stages in all but one district. The exception was Western Oklahoma, where parties in de novo demand cases are significantly over-represented at the expense of those in cases that closed before the hearing. Overall, however, the party sample appears fairly representative of the target party population along some important dimensions. Even so, we urge caution in generalizing from these data given the attorney-selection and self-selection problems evident from the proportion of parties available for survey and the response rates.

Of the parties who did report, 42% had previous civil trial experience and over half had been involved previously as a party in a civil case. Only 17% reported that they had never been a party to a civil case or participated in, or observed, a trial. Most respondents, therefore, had some experience to call on in making their survey responses.

The high proportion of parties with prior litigation experience may stem from the fact that only one-third of the respondents were private parties. The rest were corporations or individuals sued or suing in their business or public capacities. Ninety-eight percent of the parties were represented by counsel.

Table 12 also shows that just under one-third of the parties had no personal participation in any event concerning the case on which they reported. About one-third reported participating in settlement discussions, depositions, and arbitration hearings, while the number involved in court hearings or trials was considerably lower (9% and 3% respectively).

Side, type of party, type of representation, personal participation in the case, and prior litigation experience are all examined in later chapters for their effect on party views of arbitration procedures.

## TABLE 12
## Description of the Party Survey Sample

### A. Sample Size and Response Rate

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| Estimated Proportion of Target Sample Contacted | 34% | 20% | 89% | 23% | 62% | 27% | 50% | 45% | 40% | 46% |
| Number of Surveys Returned | 90 | 76 | 107 | 49 | 143 | 20 | 111 | 78 | 49 | 723 |
| Response Rate | 53% | 68% | 44% | 55% | 55% | 63% | 66% | 65% | 45% | 59% |

*Note:* Interviews in Middle North Carolina were conducted by Rand; the figure shown represents the percentage of attorneys who did not object to Rand contacting their clients. Western Michigan and New Jersey included pending cases in their arbitration program; the pending participant surveys were excluded from analysis in order to preserve comparability with the other pilot courts.

### B. Characteristics of Party Survey Respondents and Their Cases

#### Type of Survey

| When Case Closed | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| Before Hearing | | | | | | | | | | |
| % of Surveys | 63 | 40 | 52 | 65 | 28 | 55 | 39 | 46 | 51 | 46 |
| % of Caseload | 69 | 49 | 60 | 65 | 52 | 45 | 42 | 52 | 66 | |
| As a Result of Hearing | | | | | | | | | | |
| % of Surveys | 18 | 25 | 12 | 20 | 28 | 10 | 17 | 30 | 39 | 22 |
| % of Caseload | 17 | 15 | 12 | 18 | 23 | 22 | 17 | 20 | 20 | |
| After De Novo Demand | | | | | | | | | | |
| % of Surveys | 19 | 36 | 35 | 14 | 44 | 35 | 44 | 24 | 10 | 32 |
| % of Caseload | 14 | 36 | 27 | 18 | 25 | 33 | 42 | 28 | 14 | |

#### Reported Satisfaction with the Outcome of the Case

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| % Satisfied | 68 | 51 | 53 | 80 | 62 | 63 | 64 | 68 | 74 | 63 |
| % Dissatisfied | 32 | 49 | 47 | 20 | 38 | 37 | 36 | 32 | 26 | 37 |

*(continued)*

## TABLE 12, part B, continued

### Side

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| % Plaintiff | 48 | 53 | 57 | 49 | 51 | 39 | 46 | 48 | 52 | 49 |
| % Defendant | 52 | 47 | 43 | 51 | 49 | 61 | 54 | 52 | 48 | 51 |

### Type of Party

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| % Private Individual | 24 | 36 | 27 | 41 | 27 | 24 | 36 | 30 | 25 | 30 |
| % Business | 48 | 44 | 50 | 46 | 51 | 59 | 35 | 44 | 55 | 47 |
| % Other | 29 | 20 | 23 | 13 | 21 | 18 | 30 | 26 | 20 | 24 |

### Type of Representation

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| % Regular Family or Business Lawyer | 38 | 29 | 34 | 32 | 37 | 12 | 19 | 51 | 32 | 33 |
| % Insurance Company's Lawyer | 10 | 19 | 14 | 23 | 14 | 12 | 24 | 7 | 15 | 16 |
| % Other Lawyer | 50 | 49 | 52 | 43 | 46 | 71 | 56 | 39 | 51 | 49 |
| % Represented Self | 2 | 4 | 0 | 2 | 2 | 6 | 0 | 3 | 2 | 2 |

### Participation in Case

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| % Settlement Discussions | 27 | 33 | — | 27 | 46 | 10 | 35 | 30 | 33 | 34 |
| % Depositions | 31 | 36 | — | 37 | 39 | 10 | 44 | 26 | 29 | 35 |
| % Arbitration Hearing | 26 | 41 | — | 18 | 55 | 15 | 39 | 35 | 35 | 38 |
| % Court Hearing | 6 | 4 | — | 10 | 11 | 5 | 13 | 6 | 10 | 9 |
| % Trial | 1 | 4 | — | 0 | 6 | 0 | 4 | 4 | 2 | 3 |
| % None | 43 | 30 | — | 41 | 21 | 55 | 28 | 30 | 35 | 31 |

*(continued)*

TABLE 12, part B, continued

Prior Litigation Experience

| | 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. | All districts |
|---|---|---|---|---|---|---|---|---|---|---|
| % Party to Civil | 52 | 46 | — | 44 | 59 | 57 | 49 | 62 | 51 | 53 |
| % Party to Contested Divorce | 6 | 16 | — | 7 | 6 | 0 | 11 | 12 | 14 | 9 |
| % Party in Case that Went to Trial | 48 | 42 | — | 34 | 43 | 50 | 35 | 58 | 33 | 42 |
| % Witness in a Trial | 46 | 44 | — | 29 | 52 | 33 | 43 | 35 | 38 | 43 |
| % Observer of a Trial | 49 | 46 | — | 39 | 59 | 30 | 48 | 36 | 35 | 47 |
| % None | 14 | 18 | — | 31 | 11 | 20 | 14 | 19 | 29 | 17 |

*Note:* The Middle North Carolina survey did not ask parties about their prior litigation experience and did not gather case participation information in a compatible format.

## Conclusion

Across districts, the most common types of cases included in arbitration programs are diversity contract and tort cases with prayers for relief under $50,000 that involve disputes over the facts and/or value of the case. The majority of cases close prior to reaching an arbitration hearing, and over two-thirds do not return to the court's regular trial calendar. Of those cases that are arbitrated, most (a majority in eight districts, and just under half in the other two) demand trial de novo, but few reach trial.

Although these general patterns are repeated across districts, the pilot courts vary considerably in the proportion of the civil caseload diverted to arbitration, the composition of the arbitration caseload, the stage of the arbitration process at which cases close, and the speed with which they terminate. Program eligibility requirements have an effect on, but do not by themselves determine, the proportion of the civil caseload diverted to arbitration and the composition of the arbitration caseload. The time it takes to process arbitration cases across districts appears to be influenced by the timing of the arbitration hearing, and the speed of disposing of referred arbitration cases is loosely related to the district's normal case-processing time for at-issue cases.

The parties who participated in arbitration cases were relatively sophisticated. Over two-thirds were not private parties and over 80% had

some prior exposure to the justice system. Two-thirds of the parties personally participated in at least one case-related event, such as depositions, settlement discussions, hearings, or a trial.

Attorneys in arbitration cases varied widely in their previous experience with some form of arbitration, depending on the length of time the court-annexed arbitration program had been in effect in their district and the presence of alternatives in the state court system.

# Chapter 5
# Increased Options for Litigants

Advocates of arbitration argue that these programs can increase access to justice by providing litigants with more opportunity to have their cases adjudicated. We do not believe that adjudication per se is a critical element of justice. What arbitration—like other alternatives—can do is broaden the options available to litigants. Achieving this goal depends on both the attractiveness of the particular option that is offered and what other options may have been foreclosed by the alternative approach.

What options are foreclosed by the federal court-annexed arbitration pilots depends on how the program's procedures differ from those routinely available. For example, some arbitration litigants may not have access to early rulings on certain dispositive motions; other litigants may be required to adhere to a shorter discovery period that could interfere with their opportunity to reach a bilateral settlement. But in return, arbitration offers litigants an opportunity for an adjudicatory hearing, held at an earlier time than is possible for trial.

How often do parties take advantage of this opportunity? Table 13 shows the proportion of sample cases that had an arbitration hearing. On the one hand, the majority of parties in all districts exercise their option to settle before the hearing. On the other, parties also let their cases reach arbitration adjudication far more often than they permit cases to reach trial adjudication. The percentages range from 14% in Northern California to 43% in Western Michigan, and in all districts greatly exceed the proportion of all civil cases that reach trial.[47]

Arbitration programs also provide for more timely adjudicative case resolutions. Table 13 shows, for each pilot court, the median time from filing to disposition in arbitration cases that closed after the hearing without a demand for trial de novo, and the median time from filing to disposition for all civil cases that reach trial. Depending on the district, cases that are

47. The trial figures were taken from the Annual Report of the Director of the Administrative of the U.S. Courts, 1986, at 208–13. The basis for comparison is all civil cases, including those that did and did not go through arbitration procedures.

resolved by arbitration close from two to eighteen months sooner than cases resolved by trial.[48]

TABLE 13
Comparing Number and Timing of Arbitrations and Trials

A. Proportion of Cases Arbitrated and Tried

| | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| % of Arbitration Caseload Reaching Arbitration | 17 | 14 | 30 | 26 | 18 | 22 | 35 | 43 | 36 | 14 |
| % of Civil Caseload Reaching Trial | 6 | 2 | 4 | 4 | 5 | 5 | 4 | 3 | 4 | 4 |

B. Median Months From Filing to Disposition in Cases Resolved by Arbitration and by Trial

| | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Median Months From Filing to Disposition in Arbitration Cases Resolved by Hearing | 10 | 11 | 8 | 9 | 14 | 7 | 7 | 11 | 9 | 12 |
| Media Months from Filing to Disposition in All Civil Cases Resolved by Trial | 12 | 18 | 23 | 20 | 18 | 12 | 17 | 29 | 19 | 28 |

Litigants who actually went through arbitration presumably either wanted what it had to offer, viewed it as a too early interference with on-going discovery in a case not yet ripe for settlement, or saw it as a barrier to be hurdled on the way to trial. That so few cases actually went on to trial is some evidence that trial was not the ultimate objective. There are also indications that the hearing was not seen simply as an interference. If this were true, we would expect parties to refuse the arbitration award and report that the arbitration hearing was not useful. When parties in cases with de novo demands were asked if the hearing was a waste of time, two-thirds disagreed (see Table 14). The responses of attorneys in de novo de-

48. In some districts, the median time to disposition figures for the arbitrated cases in - clude the twenty- or thirty-day waiting period between entry of the arbitrator's award and entry of judgment. In programs where judgment is entered on the award and is vacated if a de novo demand is received, it does not.

mand cases were similar, with 62% disagreeing that the hearing was a waste of time.

These data indicate both that arbitration programs provide for earlier adjudications and that there are parties who seek adjudications in cases that would otherwise have terminated without any response from a neutrally positioned official. This confirms findings elsewhere that a substantial number of parties seem to want an adjudication—not merely an end to the dispute—and, to them, arbitration programs offer an attractive option.[49] Although we do not know how many arbitration litigants would have preferred to proceed under the options foreclosed (or at least postponed) by referral to the program, the random design in Middle North Carolina—a court that does not decide most dispositive motions before the arbitration hearing—found that parties in the arbitration group rated the fairness of their litigation experience more highly than did those in the control group.[50] This is some indication that the trade-off in options is considered worthwhile.

TABLE 14
Views of Participants in De Novo Demand Cases as to the Usefulness of the Hearing

A. Arbitration was a waste of time.

| Litigants in de novo demand cases | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Parties ($n$ = 166) | 15.7 | 18.7 | 38.0 | 27.7 |
| Attorneys ($n$ = 702) | 19.1 | 19.1 | 44.4 | 17.4 |

B. The arbitration award was a useful starting point for settlement discussions.

| Attorneys | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| De Novo Demand Cases ($n$ = 688) | 16.3 | 40.4 | 23.0 | 20.3 |

The fact that less than half of the arbitration awards were accepted in eight of the ten pilot courts indicates, however, that the hearing did not

49. E. Lind, R. MacCoun, P. Ebener, W. Felstiner, D. Hensler, J. Resnik & T. Tyler, The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (Rand Corporation 1989); R. MacCoun, *supra* note 19, at 73.

50. E. Lind, *supra* note 25, at 45, Table 4.6. This was one of a number of fairness-related questions asked of parties. On the others, there were no differences between the groups' responses.

give many litigants all that they wanted. Nevertheless, it may have offered some benefits of an adjudication without one of its drawbacks: losing control over the outcome of the case.[51] The availability of the option to demand trial de novo assures that the decision of whether to end the case still rests with the litigants. The hearing, however, has provided them with information about likely outcomes at trial, and the judgment may give to the winning party the feeling of vindication that comes from being told that you are right.[52] Both of these outcomes could provide a sound basis for further settlement discussions and decisions. Indeed, when asked, 57% of attorneys in de novo demand cases indicated that the award was a useful starting point for settlement negotiations.

Not all parties and attorneys, however, agreed with the majority opinion that even unsuccessful arbitrations are useful. Hearings can only be expected to generate positive results if the participants view both the hearing itself and the procedures that lead up to it as fair. These topics are discussed in detail in the next chapter.

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51. Loss of control over the outcome is an argument in favor of the desirability of settlements (see D. Provine, *supra* note 13, at 1). For further discussion of the issue of control, see E. Lind et al., *supra* note 49, at 19–20.

52. The study comparing settlement, arbitration, and trial programs found evidence to support such a "vindication"effect (E. Lind et al., *supra* note 49, at 53).

# Chapter 6
# Procedural Fairness

Do participants in cases mandatorily referred to arbitration receive, or believe they receive, a second-class justice? Since litigants can choose to settle before the arbitration hearing, and can demand a trial de novo if they are not satisfied with the outcome of a hearing, they are not deprived of access to any level of justice associated with traditional adjudicative and settlement processes. The second-class justice issue therefore depends mainly on whether litigants think that the procedures used to route their cases to the arbitration alternative are fair and whether they think the hearing is fair.

A number of the survey questions were related to the topic of fairness and second-class justice. This chapter presents parties' opinions of the fairness of the general procedures, and the views of both parties and attorneys as to the fairness of the arbitration hearing. It also reviews the choices that parties and attorneys made when asked if they would prefer that their case be decided by a judge, jury, or arbitrators and discusses the degree to which attorneys approve of court-annexed arbitration in general and as implemented in the various pilot courts.

## Party perceptions of overall fairness

Eighty percent of parties in cases referred to arbitration agreed that the procedures used to handle their case were fair (see Table 15). The response ranged from a low of 76% in Western Michigan to a high of 98% in New Jersey.

Parties' responses did not vary significantly by any of the program characteristics.[53] They were affected by party perceptions of the outcome of the case. Those who reported favorable outcomes and satisfactory outcomes gave higher fairness ratings than others, but even among those parties who were dissatisfied or received unfavorable outcomes a majority agreed that the procedures were fair. Most parties, therefore, appear able to separate procedures from outcome. Few of those with negative outcomes, however, agreed *strongly* that the procedures were fair.

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53. The Technical Appendix, on file at the Federal Judicial Center, has a description of the regression model.

TABLE 15
Party Views of Whether the Arbitration Procedures Were Fair

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents (*n* = 640) | 25.8 | 54.5 | 10.2 | 9.5 |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| N.D. Cal. (*n* = 70) | 30.0 | 54.3 | 4.3 | 11.4 |
| M.D. Fla. (*n* = 67) | 20.9 | 56.7 | 13.4 | 9.0 |
| M.D.N.C. (*n* = 107) | 39.3 | 32.7 | 13.1 | 15.0 |
| D.N.J. (*n* = 47) | 19.1 | 78.7 | 2.1 | 0.0 |
| W.D. Okla. (*n* = 131) | 26.0 | 52.7 | 13.0 | 8.4 |
| W.D. Tex. (*n* = 15) | 26.7 | 53.3 | 6.7 | 13.3 |
| W.D. Mich. (*n* = 94) | 18.1 | 57.4 | 14.9 | 9.6 |
| W.D. Mo. (*n* = 68) | 20.6 | 64.7 | 4.4 | 10.3 |
| E.D.N.Y. (*n* = 41) | 24.4 | 63.4 | 7.3 | 4.9 |

B. By Party Perceptions of Outcome

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Satisfactory Outcome? | | | | |
| Yes (*n* = 442) | 32.8 | 58.6 | 4.5 | 4.1 |
| No (*n* = 182) | 7.1 | 46.2 | 23.6 | 23.1 |
| Favorable Outcome? | | | | |
| Yes (*n* = 328) | 32.3 | 61.0 | 4.9 | 1.8 |
| No (*n* = 174) | 6.3 | 55.2 | 19.0 | 19.5 |

C. By Party Perceptions of Process

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Understanding | | | | |
| At least some (*n* = 603) | 27.0 | 55.7 | 9.0 | 8.3 |
| Little or none (*n* = 32) | 6.3 | 28.1 | 34.4 | 31.3 |
| Control Over Decision to End Case | | | | |
| At least some (*n* = 389) | 30.1 | 60.4 | 5.1 | 4.4 |
| Little or none (*n* = 191) | 14.7 | 45.0 | 20.4 | 19.9 |
| Expenditure of Personal Time | | | | |
| Reasonable (*n* = 367) | 26.4 | 63.2 | 6.5 | 3.8 |
| Unreasonable (*n* = 154) | 14.9 | 48.7 | 16.2 | 20.1 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 2, p. 6, for regression results.

Parties were also more likely to report fair procedures if they understood what was going on, believed they had control over the decision to end the case, and thought that their expenditures of personal time were reasonable. Note that the reasonableness of the delay and dollar cost associated with the case were not related to overall perceptions of fairness. The fairness ratings were also unaffected by party characteristics or personal participation in the case.

In only one group of reporting parties—those who did not understand what was going on in the case—did less than a majority view the procedures as fair. Fortunately, a lack of understanding was rare, reported by only 5% of the survey sample (thirty-two parties). This high rate of understanding may reflect the relative sophistication of this party sample: Over half had previously either participated in or observed a trial.

It is possible that these fairness ratings, although high, could still be less favorable than views parties might hold about regular procedures. The random design experiment in Middle North Carolina, however, found that parties in arbitration cases gave higher ratings to the fairness of their litigation experience than did parties in the control cases, and that there were no differences between the groups on other fairness-related questions.[54]

## Fairness of the arbitration hearing

Eighty-one percent of the parties in arbitrated cases, and 92% of the attorneys, agreed that the arbitration hearing was fair (see Tables 16 and 17). Not only were attorneys more likely than parties to agree that the hearing was fair, they were also more likely to agree strongly (39% vs. 28%).

### Factors associated with party views

At least two-thirds of the parties in all districts agreed that the arbitration hearing was fair, up to a high of 94% of those from Middle North Carolina (see Table 16). The differences across districts were not statistically significant.

No program characteristics were significantly related to party reports of the fairness of the hearing. Outcome measures were related, with satisfied parties more likely to say that the hearing was fair. In addition, those who reported reasonable cost and personal time expenditures were more

54. E. Lind, *supra* note 25, at 44–47.

TABLE 16
Party Views of Whether the Hearing Was Fair

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents (*n* = 353) | 28.3 | 53.0 | 11.3 | 7.4 |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| N.D. Cal. (*n* = 28) | 28.6 | 53.6 | 7.1 | 10.7 |
| M.D. Fla. (*n* = 40) | 17.5 | 50.0 | 15.0 | 17.5 |
| M.D.N.C. (*n* = 49) | 65.3 | 28.6 | 2.0 | 4.1 |
| D.N.J. (*n* = 17) | 11.8 | 70.6 | 17.6 | 0.0 |
| W.D. Okla. (*n* = 100) | 26.0 | 55.0 | 14.0 | 5.0 |
| W.D. Tex. (*n* = 7) | 14.3 | 71.4 | 0.0 | 14.3 |
| W.D. Mich. (*n* = 55) | 21.8 | 58.2 | 16.4 | 3.6 |
| W.D. Mo. (*n* = 37) | 18.9 | 62.2 | 5.4 | 13.5 |
| E.D.N.Y. (*n* = 20) | 25.0 | 55.0 | 15.0 | 5.0 |

B. By Party Perceptions of Outcome

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Satisfactory Outcome? | | | | |
| Yes (*n* = 189) | 34.9 | 59.3 | 4.8 | 1.1 |
| No (*n* = 123) | 4.9 | 52.8 | 23.6 | 18.7 |

C. By Party Perceptions of Process

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Cost Requirements | | | | |
| Reasonable (*n* = 177) | 29.9 | 55.9 | 9.6 | 4.5 |
| Unreasonable (*n* = 115) | 11.3 | 57.4 | 17.4 | 13.9 |

D. By Party Perceptions of the Hearing

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Arbitrator Preparation | | | | |
| Prepared (*n* = 218) | 30.7 | 63.3 | 5.0 | 0.9 |
| Not Prepared (*n* = 80) | 1.3 | 40.0 | 35.0 | 23.8 |
| Were All Facts Brought Out? | | | | |
| Yes (*n* = 222) | 28.8 | 64.0 | 4.5 | 2.7 |
| No (*n* = 81) | 4.9 | 37.0 | 35.8 | 22.2 |
| Opportunity to Tell Story? | | | | |
| Yes (*n* = 285) | 33.7 | 58.2 | 4.9 | 3.2 |
| No (*n* = 62) | 4.8 | 27.4 | 41.9 | 25.8 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 3, p. 7, for regression results.

likely to give higher ratings. As with party views of overall fairness, a majority of those who were negative on the outcome and cost variables still found the hearings fair.

More influential than outcome or cost was what went on at the hearing itself. Significantly lower fairness ratings came from parties who did not understand what was going on, who believed that the arbitrator was unprepared, who did not think that the important facts were brought out, and who did not believe they had a good opportunity to tell their side of the story. These perceptions, however, were not common among this party sample. Ninety-five percent reported at least some understanding of what was happening, 82% agreed that they told their story, and 73% believed that the arbitrator was prepared and that all of the facts were brought out.

In sum, the characteristics that define a fair hearing for parties are an opportunity to tell their side of the story and bring out all of the important facts to prepared arbitrators at a reasonable expenditure of time and money. This general picture is unaffected by program characteristics, party characteristics, or party participation in a trial of the case.

### Factors associated with attorney views

Across districts, attorneys' agreement that the hearing was fair varied from 81% in Eastern New York to 98% in Middle North Carolina (see Table 17). These differences were not statistically significant.

Attorneys' responses to the question of hearing fairness form a picture similar to that presented by the parties. Program characteristics were unrelated to attorneys' ratings of hearing fairness, but both satisfaction with the outcome and receiving an outcome that was anticipated led to higher ratings. Like parties, attorneys were most strongly influenced by their perceptions of the hearing itself and the burden entailed by the process.

The characteristics that define a fair arbitration for attorneys are a hearing of appropriate formality at which there is enough time to present their case before impartial and prepared arbitrators, with the whole procedure resulting in time and cost savings for themselves and their clients. Hearing formality was the only hearing variable that did not influ-

ence the views of both groups of litigants: attorneys, unlike parties, are attuned to the degree of formality at the hearing.[55]

TABLE 17
Attorney Views of Whether the Hearing Was Fair

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents (*n* = 1,296) | 39.4 | 52.8 | 5.2 | 2.6 |

A. Attorney Perceptions of Basic Fairness

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| E.D. Pa. (*n* = 103) | 42.7 | 47.6 | 8.7 | 1.0 |
| N.D. Cal. (*n* = 102) | 38.2 | 54.9 | 3.9 | 2.9 |
| M.D. Fla. (*n* = 252) | 35.3 | 56.7 | 6.0 | 2.0 |
| M.D.N.C. (*n* = 83) | 71.1 | 26.5 | 1.2 | 1.2 |
| D.N.J. (*n* = 131) | 40.5 | 54.2 | 4.6 | 0.8 |
| W.D. Okla. (*n* = 181) | 38.1 | 53.6 | 5.5 | 2.8 |
| W.D. Tex. (*n* = 29) | 31.0 | 62.1 | 0.0 | 6.9 |
| W.D. Mich. (*n* = 261) | 36.8 | 55.9 | 4.2 | 3.1 |
| W.D. Mo. (*n* = 92) | 40.2 | 51.1 | 6.5 | 2.2 |
| E.D.N.Y. (*n* = 62) | 24.2 | 56.5 | 9.7 | 9.7 |

B. By Attorney Perceptions of Outcome

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Satisfactory Outcome? | | | | |
| Yes (*n* = 836) | 48.0 | 49.4 | 2.0 | 0.6 |
| No (*n* = 432) | 22.0 | 60.0 | 11.3 | 6.7 |
| Expected Outcome? | | | | |
| Yes (*n* = 760) | 47.0 | 49.6 | 2.4 | 1.1 |
| No (*n* = 430) | 20.5 | 62.8 | 10.9 | 5.8 |

*(continued)*

55. Other studies of party perceptions, including Rand's evaluation of the federal pilot program in Middle North Carolina, have found that the formality of the proceedings does influence party perceptions. The Middle North Carolina findings indicated that corporations were more likely to be satisfied with formal proceedings, whereas private parties liked less formal hearings (E. Lind, *supra* note 25, at 51). We ran the regression analyses separately for private parties and corporations, and found that perceptions of whether or not the hearing was too formal were not significantly related to the hearing fairness ratings for either group. This does not, however, address the question of whether private parties and corporations differ in their views of what constitutes inappropriate formality.

TABLE 17, continued

C. By Attorney Characteristics

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Experience as Arbitrator? | | | | |
| Yes ( *n* = 433) | 42.7 | 51.5 | 3.7 | 2.1 |
| No ( *n* = 833) | 37.0 | 54.3 | 6.0 | 2.8 |

D. By Attorney Perceptions of the Process

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Attorney time savings? | | | | |
| Yes ( *n* = 650) | 42.0 | 51.4 | 4.5 | 2.2 |
| No ( *n* = 539) | 31.7 | 58.1 | 6.9 | 3.3 |
| More or Less Client Time | | | | |
| Less ( *n* = 609) | 42.7 | 53.7 | 3.3 | 0.3 |
| More ( *n* = 543) | 30.6 | 56.7 | 7.9 | 4.8 |
| Cost savings? | | | | |
| Yes ( *n* = 640) | 43.0 | 53.3 | 3.1 | 0.6 |
| No ( *n* = 526) | 31.2 | 55.5 | 8.6 | 4.8 |

E. By Attorney Perceptions of the Hearing

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Adequate Formality | | | | |
| Yes ( *n* = 1,124) | 39.8 | 54.4 | 4.3 | 1.6 |
| No ( *n* = 82) | 2.4 | 56.1 | 23.2 | 18.3 |
| Arbitrator Preparation | | | | |
| Prepared ( *n* = 1,067) | 44.3 | 52.4 | 2.3 | 0.9 |
| Not Prepared ( *n* = 213) | 13.6 | 55.9 | 19.7 | 10.8 |
| Arbitrator Partiality | | | | |
| Impartial ( *n* = 1,062) | 40.5 | 55.7 | 2.9 | 0.8 |
| Not Impartial ( *n* = 141) | 11.3 | 46.8 | 24.8 | 17.0 |
| Adequate Time at the Hearing? | | | | |
| Yes ( *n* = 1,181) | 41.6 | 53.3 | 3.6 | 1.4 |
| No ( *n* = 97) | 12.4 | 45.4 | 24.7 | 17.5 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 4, p. 8, for regression results.

## Litigant selection of arbitration

If arbitration is considered by litigants to be a lower form of justice, we would expect case participants familiar with the programs to opt for another way of proceeding with their cases if given a choice. This was not

the case. We asked attorneys in all cases, and parties in arbitrated cases, whether, considering time, cost, and fairness, they would prefer to have their cases decided by a judge, a jury, or by arbitration. Exactly half of the parties selected arbitration outright, with an additional 12% saying that it would make no difference (see Table 18). The judge was the next most common selection, chosen by 22% of the parties, followed by juries, which were selected by 17%.

TABLE 18
Party Selection of Their Preferred Decision Maker

| | Judge | Jury | Arbitration | Makes no Difference |
|---|---|---|---|---|
| All Respondents (*n* = 305) | 22.0 | 17.0 | 49.5 | 11.5 |

A. By District

| | Judge | Jury | Arbitration | Makes no Difference |
|---|---|---|---|---|
| N.D. Cal. (*n* = 28) | 28.6 | 10.7 | 53.6 | 7.1 |
| M.D. Fla. (*n* = 41) | 14.6 | 24.4 | 51.2 | 9.8 |
| D.N.J. (*n* = 15) | 13.3 | 13.3 | 46.7 | 26.7 |
| W.D. Okla. (*n* = 95) | 20.0 | 16.8 | 56.8 | 6.3 |
| W.D. Tex. (*n* = 7) | 14.3 | 42.9 | 42.9 | 0.0 |
| W.D. Mich. (*n* = 60) | 31.7 | 16.7 | 36.7 | 15.0 |
| W.D. Mo. (*n* = 38) | 21.1 | 18.4 | 42.1 | 18.4 |
| E.D.N.Y. (*n* = 21) | 19.0 | 4.8 | 61.9 | 14.3 |

B. By Party Perceptions of Process

| | Judge | Jury | Arbitration | Makes no Difference |
|---|---|---|---|---|
| Expenditure of Personal Time | | | | |
| Reasonable (*n* = 195) | 14.9 | 12.3 | 61.5 | 11.3 |
| Unreasonable (*n* = 100) | 36.0 | 26.0 | 26.0 | 12.0 |

C. By Party Participation in the Case

| | Judge | Jury | Arbitration | Makes no Difference |
|---|---|---|---|---|
| Participated in Hearing? | | | | |
| Yes (*n* = 216) | 19.0 | 18.1 | 52.8 | 10.2 |
| No (*n* = 81) | 32.1 | 14.8 | 39.5 | 13.6 |

*(continued)*

TABLE 18, continued

D. By Party Perceptions of the Hearing

| | Judge | Jury | Arbitration | Makes no Difference |
|---|---|---|---|---|
| Hearing Was Fair? | | | | |
| Yes (*n* = 223) | 17.9 | 9.0 | 59.6 | 13.5 |
| No (*n* = 59) | 32.2 | 45.8 | 15.3 | 6.8 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 5, p. 9, for regression results.

For attorneys in arbitrated cases (the group comparable to the party sample), arbitration was the choice of 37%—a plurality—of the respondents (see Table 19). Fewer attorneys than parties preferred arbitration, being more likely than parties to select juries or to say that it would make no difference. Just under one-quarter of both attorneys and parties selected the judge.

TABLE 19
Attorney Selection of Their Preferred Decision Maker:
Arbitrated Cases Only

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| All Respondents (*n* = 1,183) | 22.8 | 24.3 | 37.4 | 15.5 |

A. By District

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| E.D. Pa. (*n* = 98) | 17.3 | 11.2 | 54.1 | 17.3 |
| N.D. Cal. (*n* = 98) | 25.5 | 16.3 | 49.0 | 9.2 |
| M.D. Fla. (*n* = 254) | 24.4 | 28.7 | 32.3 | 14.6 |
| D.N.J. (*n* = 141) | 16.3 | 22.0 | 47.5 | 14.2 |
| W.D. Okla. (*n* = 170) | 22.9 | 21.8 | 34.7 | 20.6 |
| W.D. Tex. (*n* = 27) | 7.4 | 40.7 | 40.7 | 11.1 |
| W.D. Mich. (*n* = 244) | 24.6 | 35.7 | 23.8 | 16.0 |
| W.D. Mo. (*n* = 87) | 26.4 | 12.6 | 46.0 | 14.9 |
| E.D.N.Y. (*n* = 64) | 29.7 | 15.6 | 39.1 | 15.6 |

(*continued*)

TABLE 19, continued

B. By Program Characteristics

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Arbitrator Fees | | | | |
| $150 (*n* = 141) | 16.3 | 22.0 | 47.5 | 14.2 |
| $200 (*n* = 268) | 23.9 | 19.8 | 39.9 | 16.4 |
| $225 (*n* = 162) | 22.2 | 13.0 | 48.1 | 16.7 |
| $250 (*n* = 612) | 24.0 | 29.7 | 31.2 | 15.0 |
| Input to Arbitrator Selection Process? | | | | |
| Yes (*n* = 793) | 23.7 | 28.2 | 32.5 | 15.5 |
| No (*n* = 390) | 21.0 | 16.2 | 47.4 | 15.4 |
| Jurisdiction | | | | |
| U.S. Plaintiff (*n* = 59) | 11.9 | 10.2 | 55.9 | 22.0 |
| U.S. Defendant (*n* = 69) | 31.9 | 17.4 | 43.5 | 7.2 |
| Federal Question (*n* = 331) | 27.8 | 23.9 | 34.1 | 14.2 |
| Diversity (*n* = 715) | 20.7 | 26.3 | 36.8 | 16.2 |

C. By Attorney Perceptions of Outcome

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Satisfactory Outcome? | | | | |
| Yes (*n* = 732) | 18.3 | 15.8 | 47.8 | 18.0 |
| No (*n* = 401) | 31.9 | 39.7 | 18.7 | 9.7 |

D. By Attorney Perceptions of Process

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Attorney time savings? | | | | |
| Yes (*n* = 639) | 15.2 | 17.1 | 52.9 | 14.9 |
| No (*n* = 522) | 31.8 | 32.8 | 19.0 | 16.5 |
| More or Less Client Time | | | | |
| Less (*n* = 597) | 15.2 | 16.8 | 53.8 | 14.2 |
| More (*n* = 528) | 31.6 | 32.4 | 20.3 | 15.7 |

E. By Attorney Perceptions of the Hearing

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Hearing Was Fair? | | | | |
| Yes (*n* = 1040) | 21.4 | 22.9 | 39.6 | 16.0 |
| No (*n* = 92) | 41.3 | 38.0 | 13.0 | 7.6 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 6, p. 10, for regression results.

When the responses of attorneys in all cases are considered, the plurality—43%—selected arbitration, with an additional 15% saying that it would make no difference (see Table 20). Note that the proportion of all attorneys who selected arbitration is somewhat higher than that found among the attorneys who actually participated in an arbitration hearing.

TABLE 20
Attorney Selection of Their Preferred Decision Maker: All Cases

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| All Respondents (*n*=2,987) | 22.7 | 19.5 | 43.1 | 14.7 |

A. By District

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| E.D. Pa. (*n*=572) | 15.7 | 11.7 | 61.5 | 11.0 |
| N.D. Cal. (*n*=389) | 28.5 | 11.6 | 47.6 | 12.3 |
| M.D. Fla. (*n*=493) | 28.2 | 26.4 | 32.5 | 13.0 |
| D.N.J. (*n* =368) | 18.8 | 17.4 | 47.6 | 16.3 |
| W.D. Okla. (*n* =326) | 22.1 | 19.3 | 39.3 | 19.3 |
| W.D. Tex. (*n*=74) | 10.8 | 33.8 | 40.5 | 14.9 |
| W.D. Mich. (*n*=410) | 24.4 | 33.2 | 23.9 | 18.5 |
| W.D. Mo. (*n* =204) | 24.0 | 15.7 | 43.1 | 17.2 |
| E.D.N.Y. (*n* =151) | 26.5 | 12.6 | 47.7 | 13.2 |

B. By Program Characteristics

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Number of Arbitrators by Rule | | | | |
| 1 only (*n* =778) | 21.7 | 25.7 | 35.1 | 17.5 |
| 1 or 3, or 3 only (*n*=2,209) | 23.0 | 17.2 | 45.9 | 13.8 |
| Party Input to Arbitrator Selection Process? | | | | |
| Yes (*n*=1,692) | 25.4 | 23.6 | 35.5 | 15.5 |
| No (*n*=1,295) | 19.2 | 14.1 | 53.1 | 13.7 |
| Days from Answer to Hearing | | | | |
| 80 (*n* =567) | 25.9 | 27.3 | 33.5 | 13.2 |
| 120 (*n* =326) | 22.1 | 19.3 | 39.3 | 19.3 |
| 150 (*n* =1316) | 22.0 | 12.4 | 53.0 | 12.6 |
| 165 (*n* =410) | 24.4 | 33.2 | 23.9 | 18.5 |
| 180 (*n* =368) | 18.8 | 17.4 | 47.6 | 16.3 |

*(continued)*

TABLE 20, continued

C. By Attorney Characteristics

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Prior Experience | | | | |
| State ADR program ($n$ = 1,740) | 19.6 | 21.0 | 46.1 | 13.2 |
| None ($n$ = 672) | 22.2 | 18.9 | 41.4 | 17.6 |

D. By Attorney Views of the Case

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Case Involved Dispute as to: | | | | |
| Applicable law ($n$ = 1,201) | 28.7 | 20.2 | 38.2 | 12.8 |
| Value ($n$ = 2,008) | 22.4 | 21.5 | 42.1 | 14.0 |
| Applicable facts ($n$ = 1,907) | 23.4 | 20.2 | 41.2 | 15.1 |

E. By Attorney Perceptions of Process

| | By a Judge | By a Jury | By Arbitration | Makes No Difference |
|---|---|---|---|---|
| Attorney time savings? | | | | |
| Yes ($n$ = 1,745) | 15.5 | 14.3 | 57.8 | 12.4 |
| No ($n$ = 1,172) | 32.8 | 27.1 | 21.8 | 18.3 |
| More or Less Client Time | | | | |
| Less ($n$ = 1,726) | 16.1 | 14.7 | 56.1 | 13.1 |
| More ($n$ = 911) | 32.8 | 28.1 | 23.4 | 15.7 |
| Cost savings? | | | | |
| Yes ($n$ = 1,779) | 15.7 | 14.1 | 57.0 | 13.3 |
| No ($n$ = 1,095) | 33.6 | 28.5 | 207 | 17.2 |

*Note:* Although the effect of days from answer on choice of method is not apparent from the figures reported in the tables, regression analysis uncovered a statistically significant association after controlling for other program features.

See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 8, p. 11, for regression results.

## Factors associated with party views

Arbitration was the choice of the majority of parties in four pilot courts, and in all districts the proportion of respondents selecting arbitration was greater than or equal to the next most common choice (see Table 18). Except in Western Texas, where the seven respondents divided one, three, and three among judge, jury, and arbitration respectively, a clear majority either opted for arbitration or said that it would make no difference.

No program or party characteristics were related to parties' preferences as to decision maker. Neither were party perceptions of the outcome. The three factors that were associated with an increased likelihood of selecting arbitration were the reasonableness of the personal time requirements, the perceived fairness of the arbitration hearing, and personal participation in the hearing.[56] Favorable responses on these factors were associated with choice of arbitration by at least half of the parties. Among parties who had not participated in the hearing, a plurality still chose arbitration, but unfavorable responses on the other two factors led to the selection of another alternative by a plurality of respondents. The judge was selected most frequently (36%) by parties who thought they had to spend an unreasonable amount of time on the case, with juries and arbitration each the choice of 26% of these parties. Litigants least favorably disposed toward arbitration were those who were involved in an arbitration hearing they thought was unfair: 46% of them chose juries, 32% chose judges, and only 15% chose arbitration. As noted in the previous section, however, few parties (20%) reported unfair arbitration hearings.

### Factors associated with the views of attorneys in arbitrated cases

Across districts, there were only three departures from the general pattern of selection of arbitration by a plurality of attorneys (see Table 19). In Eastern Pennsylvania, arbitration was selected by an outright majority of 54%, while in Western Texas, arbitration and the jury were each selected by 41%. In Western Michigan, a plurality of 36% selected the jury, with 25% choosing the judge and 24% arbitration.

Unlike parties in arbitrated cases, attorneys in cases that reached hearing were influenced by a number of program characteristics. Although arbitration was selected by a plurality of attorneys in all groupings, it was a more common choice in programs that (1) do not allow litigant input into the arbitrator selection process, (2) do not require that arbitrator fees be posted with any demand for trial de novo, and (3) pay their arbitrators relatively lower fees. In all districts but New Jersey, the amount of the disincentive to demand a trial de novo is tied to arbitrators' fees; it is therefore not possible to disentangle statistically the effects flowing from disapproval of high fees and those flowing from potential costs of an unsuccess-

56. Some of the pilot programs do not require that parties attend the hearing. Furthermore, in some of the survey sample cases there were multiple parties not all of whom personally attended.

ful appeal. We suspect that it is the potential cost of an unsuccessful de novo demand that leads to less favorable responses.

For both attorneys and parties in arbitrated cases, savings of personal time were related to a preference for arbitration and cost savings were not. The conduct of the hearing was influential in the selections of both groups of litigants. Attorneys' choices were significantly related to their satisfaction with the outcome, while parties' choices were not (compare Tables 18 and 19). This counters the common assumption that parties' perceptions of process are more likely to be influenced by case outcome than are attorneys' perceptions.

### Factors affecting the views of attorneys in all cases

As with the selections by those who were actually involved in an arbitration hearing, all attorneys were more likely to choose arbitration if the process saved time (see Table 20). Cost savings, which were not significantly related to the choices of attorneys in arbitrated cases, were related to the preferences of all attorneys. Since the difference in the two analyses was the inclusion of attorneys in cases that settled before the hearing, it is possible that litigants for whom cost is a primary concern are more likely to be in this group.

Of the program characteristics, only the negative impact of input into the arbitrator selection process was carried over to the full sample. Two other features were related to choice of decision maker, however. First, programs that allow for a longer period of time between filing of an answer and the hearing generated more favorable results. It is not surprising that this factor would emerge as more important when the responses analyzed included those from attorneys in cases that closed before the hearing, as they should be more sensitive to the adequacy of the time for negotiation before the hearing. Participating in a program that allows for more than one arbitrator was also positively related to the responses of attorneys in all cases. Recall, however, that the actual number of arbitrators hearing a case did not influence either the choice of arbitration or the hearing fairness ratings of attorneys who actually had a hearing.

Perceptions of the issues involved in the case were also important to the group of all attorneys. Arbitration was selected less frequently by those who identified a dispute over applicable law as a barrier to settlement in the case on which they reported. While this comports with the speculation that cases with legal issues are less suitable for arbitration, note that the relationship results from a difference in the size of the plurality of attorneys

who selected arbitration rather than from a plurality selection of another option.

## Attorney approval of court-annexed arbitration

Another indication of satisfaction with arbitration programs is the level of approval expressed by the bar. Attorneys in all cases referred to arbitration were asked if they approved of court-annexed arbitration programs in general, and of the particular program adopted in their district. Eighty-four percent responded positively to both questions (see Tables 21 and 22).

### Approval of the concept

There were significant differences among the responses of attorneys from the various districts, but, in each, large majorities of attorneys approved the concept of court-annexed arbitration (see Table 21). The range was from 74% in Western Michigan to 94% in New Jersey. The largest proportion of attorneys strongly supporting the concept was from Eastern Pennsylvania, where court-annexed arbitration programs are long-time features of both the state and federal courts.

A number of program characteristics were significantly related to attorneys' approval ratings. Higher ratings came from lawyers in programs that do not provide for litigant input into the arbitration selection process, those that allow for a hearing before a panel of three arbitrators, and those that pay their arbitrators relatively lower fees. The jurisdictional basis of the case was also influential, with attorneys in U.S. defendant cases giving somewhat lower ratings and those in diversity cases giving generally higher ratings.

Attorneys' approval ratings were also affected by their perceptions of the process; specifically, by whether the program had accomplished a number of its objectives in the case on which they reported. Attorneys who agreed that the referral to arbitration led to a faster settlement and saved their clients time and money gave higher approval ratings than did attorneys who did not report these benefits. Furthermore, those lawyers who expected at the outset of the case that trial was more likely gave higher approval ratings than did those who had thought trial was less likely.

TABLE 21
Attorney Approval of Court-Annexed Arbitration in General

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| All Respondents (*n* = 3,293) | 28.1 | 55.8 | 11.3 | 4.9 |

A. By District

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| E.D. Pa. (*n* = 595) | 45.4 | 47.4 | 5.0 | 2.2 |
| N.D. Cal. (*n* = 409) | 32.5 | 49.6 | 12.5 | 5.4 |
| M.D. Fla. (*n* = 495) | 21.6 | 54.5 | 16.2 | 7.7 |
| M.D.N.C. (*n* = 176) | 28.4 | 52.3 | 15.3 | 4.0 |
| D.N.J. (*n* = 386) | 30.1 | 63.7 | 4.9 | 1.3 |
| W.D. Okla. (*n* = 348) | 28.2 | 60.3 | 8.3 | 3.2 |
| W.D. Mich. (*n* = 436) | 10.6 | 63.3 | 19.0 | 7.1 |
| W.D. Tex. (*n* = 79) | 20.3 | 59.5 | 13.9 | 6.3 |
| W.D. Mo. (*n* = 215) | 24.7 | 56.3 | 12.1 | 7.0 |
| E.D.N.Y. (*n* = 154) | 22.7 | 57.8 | 10.4 | 9.1 |

B. By Program Characteristics

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| Number of Arbitrators by Rule | | | | |
| 1 only (*n* = 998) | 21.2 | 61.5 | 12.9 | 4.3 |
| 1 or 3, or 3 only (*n* = 2,295) | 31.0 | 53.2 | 10.6 | 5.1 |
| Input to Arbitrator Selection Process? | | | | |
| Yes (*n* = 1,943) | 23.2 | 56.5 | 14.5 | 5.9 |
| No (*n* = 1,350) | 35.1 | 54.7 | 6.7 | 3.5 |
| Arbitrator Fees | | | | |
| $150 (*n* = 386) | 30.1 | 63.7 | 4.9 | 1.3 |
| $200 (*n* = 757) | 30.5 | 54.6 | 10.6 | 4.4 |
| $225 (*n* = 749) | 40.7 | 49.5 | 6.2 | 3.6 |
| $250 (*n* = 1225) | 18.1 | 58.3 | 16.3 | 7.3 |
| $300 (*n* = 176) | 28.4 | 52.3 | 15.3 | 4.0 |
| Jurisdiction | | | | |
| U.S. Plaintiff (*n* = 204) | 28.9 | 51.5 | 14.2 | 5.4 |
| U.S. Defendant (*n* = 159) | 26.4 | 48.4 | 12.6 | 12.6 |
| Federal Question (*n* = 813) | 26.7 | 56.0 | 11.8 | 5.5 |
| Diversity (*n* = 1,986) | 28.9 | 56.4 | 10.7 | 4.0 |

*(continued)*

TABLE 21, continued

C. By Attorney Characteristics

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| Side | | | | |
| Plaintiff (*n*=1,566) | 31.4 | 53.9 | 10.0 | 4.7 |
| Defendant (*n* =1,711) | 24.8 | 57.7 | 12.4 | 5.1 |
| Prior Experience | | | | |
| In binding arbitration (*n*=1,561) | 28.8 | 52.3 | 12.6 | 6.3 |
| As arbitrator (*n*=1,111) | 33.8 | 53.3 | 8.7 | 4.2 |
| None (*n*=805) | 25.1 | 59.8 | 11.7 | 3.5 |

D. By Attorney Views of the Case

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| Expected trial was likely? | | | | |
| Yes (*n* = 1,665) | 30.7 | 54.1 | 10.5 | 4.7 |
| No (*n* = 1,421) | 24.8 | 58.2 | 11.8 | 5.3 |

E. By Attorney Perceptions of Process

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| More or Less Client Time | | | | |
| Less (*n* = 1,799) | 34.9 | 57.3 | 5.9 | 1.9 |
| More (*n* = 944) | 18.6 | 52.2 | 19.3 | 9.9 |
| Cost Savings? | | | | |
| Yes (*n* = 1,853) | 36.6 | 56.6 | 4.9 | 1.9 |
| No (*n*=1,141) | 14.4 | 55.2 | 20.7 | 9.7 |
| Case Settled More Quickly Than Anticipated? | | | | |
| Yes (*n* = 1,168) | 34.0 | 56.8 | 7.3 | 2.0 |
| No (*n* = 1,705) | 24.6 | 55.2 | 13.5 | 6.6 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 8, p. 12 for regression results.

In addition, attorney characteristics were influential. Plaintiffs' counsel were more favorable than defense counsel, and the attorneys' prior experiences had a bearing as well. Counsel who had served as arbitrators gave higher approval ratings than others, while those reporting prior experience with binding arbitration were less positive. It is not known if some attorneys in this latter group prefer binding arbitration to the non-binding

court-annexed variety, or if a previous bad experience with binding arbitration led to less favorable ratings of any type of arbitration program.

Exploration of the factors that are related to attorneys' approval ratings should not, however, obscure the fact that large majorities of all groups approve of court-annexed arbitration (see Table 21). Note, however, that between the choices of "strongly approve" and "approve," the less enthusiastic simple approval is more common.

TABLE 22
Attorney Approval of Their Specific Arbitration Program

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| All Respondents ($n$=3,062) | 26.7 | 56.8 | 11.7 | 4.8 |

A. By District

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| E.D. Pa. ($n$=587) | 43.4 | 49.9 | 5.3 | 1.4 |
| N.D. Cal. ($n$=402) | 30.8 | 51.7 | 11.4 | 6.0 |
| M.D. Fla. ($n$=480) | 21.3 | 55.2 | 16.5 | 7.1 |
| D.N.J. ($n$=382) | 26.2 | 67.3 | 5.2 | 1.3 |
| W.D. Okla. ($n$=344) | 30.5 | 57.0 | 9.9 | 2.6 |
| W.D. Tex. ($n$=79) | 16.5 | 58.2 | 19.0 | 6.3 |
| W.D. Mich. ($n$=425) | 9.6 | 60.7 | 21.2 | 8.5 |
| W.D. Mo. ($n$=212) | 22.2 | 58.0 | 12.7 | 7.1 |
| E.D.N.Y. ($n$=151) | 20.5 | 61.6 | 9.9 | 7.9 |

B. By Program Characteristics

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| Number of Arbitrators by Rule | | | | |
| 1 only ($n$=807) | 17.5 | 63.8 | 13.6 | 5.1 |
| 1 or 3, or 3 only ($n$=2,255) | 30.0 | 54.3 | 11.0 | 4.7 |
| Input to Arbitrator Selection Process | | | | |
| Yes ($n$=1,730) | 22.3 | 56.2 | 15.3 | 6.2 |
| No ($n$=1,332) | 32.5 | 57.5 | 7.0 | 3.0 |
| Arbitrator Fees | | | | |
| $150 ($n$=382) | 26.2 | 67.3 | 5.2 | 1.3 |
| $200 ($n$=746) | 30.7 | 54.2 | 10.7 | 4.4 |
| $225 ($n$=738) | 38.8 | 52.3 | 6.2 | 2.7 |
| $250 ($n$=1,196) | 17.0 | 57.9 | 17.6 | 7.5 |

*(continued)*

TABLE 22, continued

C. By Attorney Characteristics

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| Side | | | | |
| Plaintiff ($n$ = 1,476) | 29.7 | 54.3 | 11.4 | 4.6 |
| Defendant ($n$ = 1,571) | 23.6 | 59.4 | 11.9 | 5.1 |
| Prior Experience | | | | |
| Binding arbitration ($n$ = 1,464) | 27.0 | 54.3 | 12.5 | 6.1 |
| Arbitrator ($n$ = 1,067) | 32.0 | 54.7 | 9.3 | 4.0 |
| None ($n$ = 704) | | | | |

D. By Attorney Views of the Case

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| Expected Trial was Likely? | | | | |
| Yes ($n$ = 1,637) | 29.2 | 54.7 | 11.4 | 4.7 |
| No ($n$ = 1,397) | 23.6 | 59.3 | 12.2 | 5.0 |

E. By Attorney Perceptions of Process

| | Strongly Approve | Approve | Disapprove | Strongly Disapprove |
|---|---|---|---|---|
| More or Less Client Time | | | | |
| Less ($n$ = 1,776) | 33.3 | 58.7 | 6.3 | 1.7 |
| More ($n$ = 932) | 17.4 | 51.6 | 20.7 | 10.3 |
| Cost Savings? | | | | |
| Yes ($n$ = 1,827) | 34.9 | 57.6 | 5.5 | 2.0 |
| No ($n$ = 1,120) | 13.8 | 55.1 | 21.7 | 9.5 |
| Case Settled More Quickly Than Anticipated? | | | | |
| Yes ($n$ = 1,147) | 32.6 | 56.8 | 8.5 | 2.0 |
| No ($n$ = 1,681) | 23.3 | 56.7 | 13.6 | 6.4 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 9, p. 13, for regression results.

## Approval of the specific programs

The responses across districts for specific program approval were like the findings reported for attorneys' approval of the concept. Although there were significant differences across districts, the large majority of attorneys in all districts approved of their specific programs (see Table 22).

Furthermore, the results of the analysis of program approval were almost identical to those for concept approval. With the exception of the jurisdictional basis of the case (which was not related to program ap-

proval), all of the factors that influenced approval of the concept of arbitration were also related, and in the same way, to program approval.

## Conclusion

Most parties and attorneys do not think that arbitration is a form of second-class justice. Eighty-four percent of the attorneys in cases referred to arbitration said that they approved of both the concept of arbitration and the programs that were implemented in their districts. Eighty percent of the parties in cases referred to arbitration believed that the procedures used to handle their cases were fair. Eighty-one percent of the parties and 92% of the attorneys in arbitrated cases reported that the hearing was fair. In the clearest evidence, half of the parties in arbitrated cases, and a plurality of attorneys, selected arbitration as their preferred method of proceeding when asked whether, considering cost, time, and fairness, they would prefer that their case be decided by a judge, jury, or arbitration.

There were no significant relationships between the parties' ratings and any particular program characteristics, and few between the program characteristics and the attorneys' ratings. The program characteristic that was most frequently found to be significantly related to attorneys' perceptions was litigant participation in the arbitrator selection process. Lawyers from programs that provide for litigant input gave lower approval ratings of both the concept of arbitration and their specific program, and were less likely to opt for arbitration when asked if they preferred to have their case decided by a judge, jury, or arbitration. Perhaps this feature was more likely to have been built into programs that were initially less popular. Or it may be that the opportunity to select the arbitrator makes the process seem less like a court proceeding, and therefore less fair. Or it may be simply that the increased work involved in selecting arbitrators outweighs any benefits that may derive from increased involvement. Saving time for themselves and their clients is a very important consideration for attorneys, consistently related to all measures of their satisfaction with court-annexed arbitration programs.

Another influential program factor was the number of arbitrators. Attorneys from districts that allow for just one arbitrator had less favorable ratings of the concept of arbitration and of their particular program, and they were less likely to select arbitration as the preferred method of handling their cases. The choices and hearing fairness ratings by attorneys in arbitrated cases were not influenced by the actual number of arbitrators who heard their cases, however. The negative effect of rules that provide

for only one arbitrator may therefore stem from their appearance rather than their actual operation. Indeed, the district with the highest percentage of attorneys reporting a fair hearing was Middle North Carolina, where the program provides only one arbitrator.

Higher arbitrator fees also led to lower attorney approval ratings, and less chance that lawyers in arbitrated cases would select arbitration as their preferred procedure. This probably has to do with how much it costs to proceed with the case beyond the hearing.

Another finding relevant to program planning is that parties who participated in the arbitration hearing were more likely than others to select arbitration as their preferred method of decision making. When considered along with the features that lead to perceptions of hearing fairness, it appears that programs should encourage parties to attend the hearing, and, once there, to provide them with a chance to present their case fully.

The differences attributable to these program factors, however, were differences of degree rather than of kind. Large majorities of all attorney groups formed on the basis of program characteristics approved of arbitration in general, supported the programs as developed in their districts, and agreed that the hearing was fair; pluralities selected arbitration when asked to choose between judges, juries, and arbitration. No program factor affected any of the party perceptions. There is, therefore, nothing in these findings to suggest that any particular program characteristic leads to an overall lack of program acceptance. There are, however, other goals that arbitration programs strive to achieve.

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# Chapter 7
# Cost Savings

Some believe that traditional litigation is so costly that it has essentially priced litigants in smaller-dollar cases out of the trial market. Most arbitration programs seek to cut down on litigant cost by streamlining the discovery process before the hearing, providing for an adjudication with relaxed rules of evidence, and promoting settlement or narrowing the issues for trial in cases not resolved as a result of the hearing.

There is good evidence that arbitration programs can reduce costs. The Rand survey of attorneys in Middle North Carolina asked counsel about the private litigation costs in arbitration and control cases that reached issue. Total costs and fees, adjusted for demand, averaged $19,972.76 in the arbitration group and $25,047.36 in the control group for an average saving of 20%.[57]

Since no other pilot used a random design, we cannot compare costs directly in the other districts. We did, however, ask attorneys their opinion of whether savings were achieved and parties whether they viewed their time and money costs as reasonable.

## Attorney views of savings

Of the surveyed attorneys, 60% reported that their arbitration program saved them time, 62% agreed that the cost was less, and 65% said that the referral to arbitration saved their clients time (see Tables 23, 24, and 25). After controlling for other factors, the responses across the pilot courts are not significantly different. In each district except Western Michigan, a majority of the attorneys reported that the arbitration procedures saved time and money. In Western Michigan, a majority reported cost savings, but said that neither they nor their client saved time. This is because Western Michigan has the highest de novo rate, and over 60% of the attorneys in de novo demand cases did not attribute any savings to the program. This contrasts sharply with the views of those in cases that closed before the hearing, at least 60% of whom reported savings of all

57. E. Lind, *supra* note 25, at 37–38. The Rand report also examined the public costs of the program, at 39–41.

types, and with the favorable reports of at least 75% of the attorneys in successfully arbitrated cases.

TABLE 23
Attorney Views of Whether Arbitration Saved Them Time

| | Yes | No |
|---|---|---|
| All Respondents ($n$=3,087) | 59.5 | 40.5 |

A. By District

| | Yes | No |
|---|---|---|
| E.D. Pa. ($n$=591) | 65.8 | 34.2 |
| N.D. Cal. ($n$=400) | 63.8 | 36.3 |
| M.D. Fla. ($n$=497) | 60.0 | 40.0 |
| D.N.J. ($n$=379) | 58.0 | 42.0 |
| W.D. Okla. ($n$=344) | 59.3 | 40.7 |
| W.D. Tex. ($n$=79) | 54.4 | 45.6 |
| W.D. Mich. ($n$=434) | 47.2 | 52.8 |
| W.D. Mo. ($n$=211) | 62.6 | 37.4 |
| E.D.N.Y. ($n$=152) | 59.9 | 40.1 |

B. By When the Case Closed

| | Yes | No |
|---|---|---|
| Before Hearing ($n$=1,844) | 62.6 | 37.4 |
| As a Result of Hearing ($n$=550) | 74.5 | 25.5 |
| After De Novo Demand ($n$=693) | 39.2 | 60.8 |

C. By Program Characteristics

| | Yes | No |
|---|---|---|
| Input to Arbitrator Selection Process? | | |
| Yes ($n$=1,754) | 57.3 | 42.7 |
| No ($n$=1,333) | 62.4 | 37.6 |
| Number of Arbitrators by Rule | | |
| One only ($n$=813) | 52.3 | 47.7 |
| Three provided for ($n$=2,274) | 62.1 | 37.9 |

D. By Attorney Perceptions of the Case

| | Yes | No |
|---|---|---|
| Dispute Over Applicable Law Barrier to Settlement? | | |
| Yes ($n$=1,255) | 55.2 | 44.8 |
| No ($n$=1,766) | 63.0 | 37.0 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 10, p. 14, for regression results.

TABLE 24
Attorney Views of Whether Arbitration Reduced Costs

| | Yes | No |
|---|---|---|
| All Respondents (*n* = 3,038) | 61.7 | 38.3 |

A. By District

| | Yes | No |
|---|---|---|
| E.D. Pa. (*n* = 578) | 68.2 | 31.8 |
| N.D. Cal. (*n* = 399) | 62.9 | 37.1 |
| M.D. Fla. (*n* = 491) | 62.7 | 37.3 |
| D.N.J. (*n* = 368) | 63.9 | 36.1 |
| W.D. Okla. (*n* = 335) | 61.8 | 38.2 |
| W.D. Tex. (*n* = 79) | 53.2 | 46.8 |
| W.D. Mich. (*n* = 424) | 50.9 | 49.1 |
| W.D. Mo. (*n* = 211) | 63.5 | 36.5 |
| E.D.N.Y. (*n* = 153) | 56.9 | 43.1 |

B. By When Case Closed

| | Yes | No |
|---|---|---|
| Before Hearing (*n* = 1,828) | 66.0 | 34.0 |
| As a result of the hearing (*n* = 523) | 75.5 | 24.5 |
| After De Novo Demand (*n* = 687) | 39.6 | 60.4 |

C. By Program Characteristics

| | Yes | No |
|---|---|---|
| Input to Arbitrator Selection Process? | | |
| Yes (*n* = 1,728) | 59.3 | 40.7 |
| No (*n* = 1,310) | 64.9 | 35.1 |

D. Attorney Perceptions of the Case

| | Yes | No |
|---|---|---|
| Dispute Over Applicable Law Barrier to Settlement? | | |
| Yes (*n* = 1,233) | 56.9 | 43.1 |
| No (*n* = 1,742) | 65.6 | 34.4 |
| Expected Case Would Go To Trial? | | |
| Likely (*n* = 1,622) | 62.9 | 37.1 |
| Unlikely (*n* = 1,386) | 60.1 | 39.9 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 11, p. 15, for regression results.

TABLE 25
Attorney Views of Whether Their Clients Spent More or Less Time as a Result of the Arbitration Process

| | Much More | Somewhat More | Somewhat Less | Much Less |
|---|---|---|---|---|
| All Respondents (*n*=2777) | 6.6 | 28.0 | 47.7 | 17.6 |

A. By District

| | Much More | Somewhat More | Somewhat Less | Much Less |
|---|---|---|---|---|
| E.D. Pa. (*n*=528) | 5.1 | 17.4 | 54.5 | 22.9 |
| N.D. Cal. (*n*=353) | 5.1 | 27.2 | 55.5 | 12.2 |
| M.D. Fla. (*n*=463) | 8.9 | 31.1 | 42.1 | 17.9 |
| D.N.J. (*n*=318) | 3.5 | 22.0 | 55.3 | 19.2 |
| W.D. Okla. (*n*=321) | 6.9 | 35.5 | 37.1 | 20.6 |
| W.D. Tex. (*n*=71) | 4.2 | 31.0 | 46.5 | 18.3 |
| W.D. Mich. (*n*=395) | 9.4 | 43.0 | 36.5 | 11.1 |
| W.D. Mo. (*n*=189) | 6.3 | 22.2 | 55.0 | 16.4 |
| E.D.N.Y. (*n*=139) | 9.4 | 20.1 | 50.4 | 20.1 |

B. By When Case Closed

| | Much More | Somewhat More | Somewhat Less | Much Less |
|---|---|---|---|---|
| Before Hearing (*n*=1,581) | 3.5 | 21.9 | 55.9 | 18.7 |
| As a Result of Hearing (*n*=521) | 6.0 | 16.7 | 48.2 | 29.2 |
| After De Novo Demand (*n*=675) | 14.5 | 51.1 | 28.1 | 6.2 |

C. By Program Characteristics

| | Much More | Somewhat More | Somewhat Less | Much Less |
|---|---|---|---|---|
| Party input to Arbitrator Selection Process? | | | | |
| Yes (*n*=1,603) | 7.5 | 34.1 | 42.9 | 15.5 |
| No (*n*=1,174) | 5.4 | 19.8 | 54.3 | 20.5 |

D. By Attorney Characteristics

| | Much More | Somewhat More | Somewhat Less | Much Less |
|---|---|---|---|---|
| Prior Experience | | | | |
| In case under rule (*n*=981) | 6.7 | 30.8 | 47.8 | 14.7 |
| In binding arbitration (*n*=1,311) | 8.0 | 27.0 | 47.1 | 17.8 |
| As arbitrator (*n*=938) | 5.7 | 25.2 | 48.8 | 20.4 |
| None (*n*=619) | 6.1 | 29.2 | 45.6 | 19.1 |

*(continued)*

TABLE 25, continued

E. By Attorney Perceptions of the Case

| | Much More | Somewhat More | Somewhat Less | Much Less |
|---|---|---|---|---|
| Applicable Law Barrier to Settlement? | | | | |
| Yes ($n$ = 1,166) | 8.7 | 31.6 | 44.7 | 15.0 |
| No ($n$ = 1,567) | 5.2 | 25.1 | 50.2 | 19.5 |
| Lack of Trust Barrier to Settlement? | | | | |
| Yes ($n$ = 772) | 10.5 | 33.2 | 42.6 | 13.7 |
| No ($n$ = 1,954) | 5.1 | 25.7 | 50.1 | 19.0 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 12, p. 16, for regression results.

Two factors consistently related negatively to attorney reports of time and money savings. The first is participation in a program that provides for litigant input to the arbitrator selection process. This finding supports the speculation in the conclusion of Chapter 6 that attorneys view this feature as somewhat burdensome. The second factor was that attorneys who perceived disputes about applicable law as an important issue in the case were less likely to report cost reduction. The effect of both of these factors, however, was only to limit the size of the majority that reported savings.

While arbitration programs can achieve savings, they are realized in cases that do not return to the regular pretrial process (approximately two-thirds of the arbitration caseload). There is no evidence that litigants in de novo demand cases perceive that arbitration programs save them either time or money. Recall, however, that another purpose of arbitration programs is to provide an opportunity for adjudication in smaller dollar cases that might otherwise have settled. It is possible that some of those who opt for arbitration will spend more money than they would have if they settled, but still much less than if they went to trial. What may be important is whether parties believe that the time and money was well spent.

## Party perceptions of reasonable cost

We asked parties in cases referred to arbitration if their dispute was resolved at a reasonable cost and required a reasonable amount of their personal time. Sixty-five percent reported that costs were reasonable and 71%

indicated that resolving the case took a reasonable amount of their time (see Tables 26 and 27).

At least half of the parties from each of the pilot courts responded favorably to these two questions. The percentage agreeing that the cost was reasonable ranges from under 60% in Western Texas, Western Michigan, and Eastern New York to over 70% in New Jersey and Western Missouri; the ranges for reasonable time are from 65% in Western Oklahoma and Western Michigan to 80% in New Jersey. The differences across districts remain significant after controlling for other factors.

Parties' responses also differ depending on the stage at which their cases closed, with those in de novo demand cases less likely to report reasonable time and cost expenditures. However, 54% of parties in cases where trial de novo was demanded still reported that the cost was reasonable, and 59% reported that they spent a reasonable amount of their personal time.

No program characteristics relate to party reports of reasonable cost and personal time expenditures, nor are any party characteristics influential. What did affect parties' ratings were satisfaction with the outcome and their views of the process, specifically whether it was understandable and afforded them some control over the decision to end the case.

TABLE 26
Party Views of Whether Costs Were Reasonable

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents (*n*=521) | 11.9 | 52.8 | 20.5 | 14.8 |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| N.D. Cal. (*n*=72) | 18.1 | 43.1 | 23.6 | 15.3 |
| M.D. Fla. (*n*=66) | 13.6 | 50.0 | 15.2 | 21.2 |
| D.N.J. (*n*=42) | 4.8 | 73.8 | 16.7 | 4.8 |
| W.D. Okla. (*n*=131) | 16.0 | 49.6 | 18.3 | 16.0 |
| W.D. Tex. (*n*=13) | 7.7 | 46.2 | 23.1 | 23.1 |
| W.D. Mich. (*n*=88) | 4.5 | 53.4 | 29.5 | 12.5 |
| W.D. Mo. (*n*=68) | 11.8 | 61.8 | 16.2 | 10.3 |
| E.D.N.Y. (*n*=41) | 9.8 | 48.8 | 22.0 | 19.5 |

*(continued)*

TABLE 26, continued

B. By When Case Closed

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Before Hearing (*n* = 209) | 12.4 | 58.9 | 17.7 | 11.0 |
| As a Result of Hearing (*n* = 138) | 13.8 | 55.1 | 15.9 | 15.2 |
| After De Novo Demand (*n* = 174) | 9.8 | 43.7 | 27.6 | 19.0 |

C. By Party Views of Outcome

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Outcome Satisfaction | | | | |
| Satisfied (*n* = 329) | 15.5 | 63.8 | 13.4 | 7.3 |
| Not Satisfied (*n* = 181) | 5.0 | 33.7 | 33.1 | 28.2 |

D. By Party Views of Process

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Understanding | | | | |
| At least some (*n* = 484) | 12.6 | 53.3 | 20.7 | 13.4 |
| Little or none (*n* = 31) | 0.0 | 41.9 | 22.6 | 35.5 |
| Control Over Decision to End Case | | | | |
| At least some (*n* = 304) | 15.1 | 58.6 | 17.8 | 8.6 |
| Little or none (*n* = 161) | 5.6 | 41.6 | 25.5 | 27.3 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 13, p. 17, for regression results.

TABLE 27
Party Views of Whether Personal Time Requirements Were Reasonable

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents ($n$ = 538) | 11.5 | 58.6 | 17.8 | 12.1 |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| N.D. Cal. ($n$ = 73) | 16.4 | 54.8 | 17.8 | 11.0 |
| M.D. Fla. ($n$ = 68) | 11.8 | 57.4 | 17.6 | 13.2 |
| D.N.J. ($n$ = 45) | 11.1 | 68.9 | 15.6 | 4.4 |
| W.D. Okla. ($n$ = 130) | 14.6 | 50.8 | 22.3 | 12.3 |
| W.D. Tex. ($n$ = 15) | 6.7 | 60.0 | 6.7 | 26.7 |
| W.D. Mich. ($n$ = 94) | 3.2 | 61.7 | 20.2 | 14.9 |
| W.D. Mo. ($n$ = 70) | 12.9 | 65.7 | 11.4 | 10.0 |
| E.D.N.Y. ($n$ = 43) | 11.6 | 60.5 | 16.3 | 11.6 |

B. By When Case Closed

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Before Hearing ($n$ = 220) | 12.3 | 63.6 | 13.6 | 10.5 |
| As a Result of Hearing ($n$ = 139) | 14.4 | 60.4 | 14.4 | 10.8 |
| After De Novo Demand ($n$ = 179) | 8.4 | 50.8 | 25.7 | 15.1 |

C. By Party Views of Outcome

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Outcome Satisfaction | | | | |
| Satisfied ($n$ = 342) | 14.9 | 63.7 | 14.6 | 6.7 |
| Not Satisfied ($n$ = 184) | 4.9 | 50.0 | 23.9 | 21.2 |

D. By Party Views of Process

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Understanding | | | | |
| At least some ($n$ = 502) | 12.2 | 59.8 | 16.9 | 11.2 |
| Little or none ($n$ = 30) | 0.0 | 40.0 | 30.0 | 30.0 |
| Control Over Decision to End Case | | | | |
| At least some ($n$ = 317) | 15.8 | 61.8 | 16.7 | 5.7 |
| Little or none ($n$ = 164) | 3.7 | 54.3 | 17.1 | 25.0 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 14, p. 18, for regression results.

Note that neither the number of events in which parties participated nor their participation in any particular type of event was related to how they assessed the reasonableness of the time and money spent. More important was understanding why they were there, maintaining control, and eventually coming to a satisfactory outcome.

## Conclusion

Arbitration programs can reduce the cost of litigation and provide for a hearing on the merits at a cost that parties see as reasonable. Majorities of attorneys in all districts reported cost savings. Highest time and cost savings were reported by lawyers in successfully arbitrated cases. Involvement in cases with no dispute over applicable law also increased the chances that attorneys would report savings.

An important caveat to the conclusion of time and cost savings is that none were reported by the majority of attorneys in cases where trial de novo was demanded. The majority of the parties in these cases, however, report that the time and money costs were reasonable.

Program characteristics failed to show significant relationships to parties' perceptions of the reasonableness of their time and money expenditures, but this was not so with lawyers. Attorneys from courts that provide for party input to the arbitrator selection process were less likely to report any time or money savings. The impact of this feature was of degree rather than kind, however, with majorities of all groups of attorneys reporting that savings were achieved.

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# Chapter 8
# Reducing Time to Disposition

The Center's previous evaluation of three federal court-annexed arbitration programs found that arbitration programs can, but do not necessarily, decrease the time from filing to disposition. A random design found that disposition time was reduced in the District of Connecticut.[58] A before–after design indicated that disposition time was reduced in Eastern Pennsylvania, but found no indication of time reduction in Northern California.[59] The differences were attributed to Northern California procedures that gave arbitrators more control over the scheduling—and adjournment—of the arbitration hearing. (Northern California has since changed its rules to return more calendar control of arbitration cases to the court.)

This chapter presents the time to disposition results of the random assignment experiment in Middle North Carolina (described at p. 24) and of the pre-program to post-program comparison in the other new pilot courts. It also discusses the views of attorneys as to whether the program led to earlier settlements and the views of parties as to whether the disposition time was reasonable.

## Disposition time in the Middle District of North Carolina

Of the new pilot courts, only Middle North Carolina employed a random design. Both the Federal Judicial Center and Rand's analysis of the arbitration and control group data found no significant difference between the groups in the time from filing to disposition.[60] Graph 1 compares the time to termination distributions for the arbitration and control cases. Notice that more control cases terminate during the first few months after filing.

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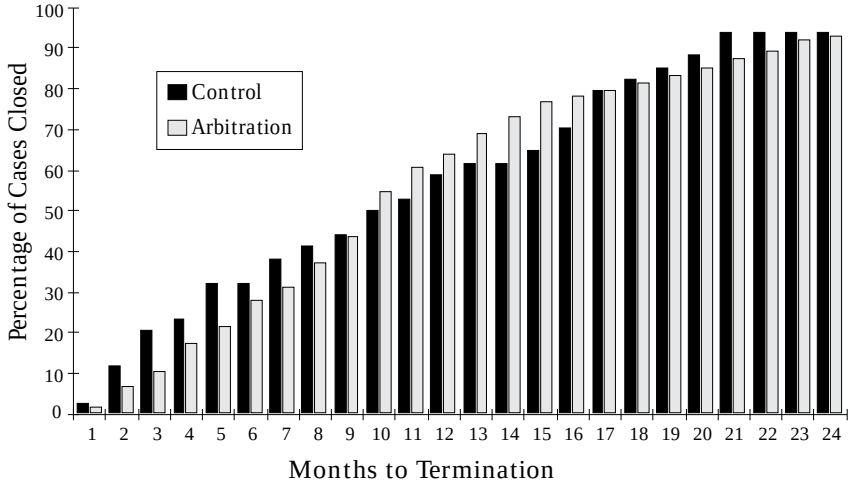
58. E. Lind & J. Shapard, *supra* note 5, at 47.

59. *Id*. at 48–51.

60. E. Lind, *supra* note 25, at 41–43; B. Meierhoefer, *supra* note 25, at 19. The Center report analyzed the data two ways, one based on the groups as originally assigned (the statistically preferred method) and one that excluded "arbitration" cases that were exempted from the program. In the less rigorous second analysis, there was a significant difference from filing to disposition after controlling for the time from filing to issue (a period significantly longer for arbitration cases than for control cases). This was based almost entirely, however, on the much shorter period between issue and entry of a pretrial order for the arbitration cases.

The arbitration caseload then begins to terminate at a faster rate, and the proportion of closed arbitration cases surpasses that of control cases in the tenth month after filing. The two distributions then even out seven months later. One reason that the arbitration cases closed more slowly than the controls in the early months is that significantly fewer of them closed before issue was joined. This could indicate that the arbitration program in Middle North Carolina is encouraging the pursuit of some cases that otherwise might have been dropped.[61]

GRAPH 1
Cumulative Proportion of Arbitration and Control Cases Closed in Middle North Carolina, by Months to Termination




## Disposition time in the other new pilot courts

For the other new pilots, the question of whether their arbitration programs reduced the time from filing to disposition was addressed by comparing disposition times in samples of civil cases that were filed before and after the effective date of program implementation.[62]

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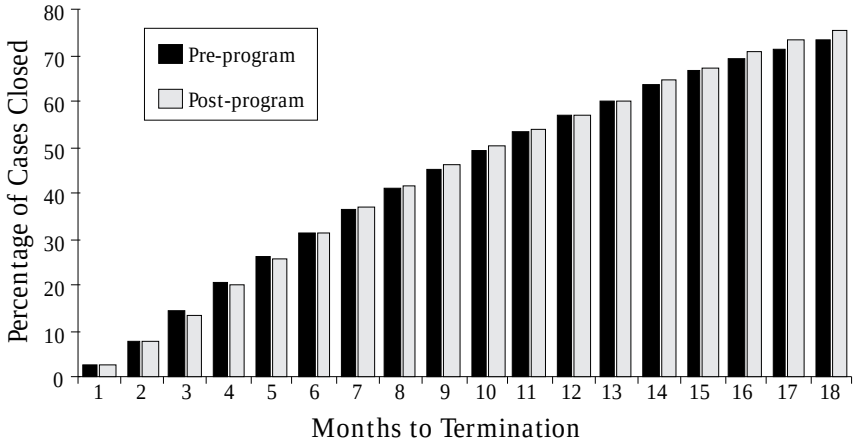
61. E. Lind, *supra* note 25, at 34.

62. This replicates the approach taken by Lind and Shapard ( *supra* note 5) to assess reduction in disposition time in Eastern Pennsylvania and Northern California. Here, however, our "post" sample began six months after program implementation because some of the pro-

This is a weak method for addressing the impact of arbitration on disposition time. The higher the proportion of civil cases diverted to the arbitration program, the more likely the post-program sample contains a significant proportion of arbitration cases, hence the higher likelihood that any impact due to the program will be uncovered by the analysis (see Table 28 on p. 102). Furthermore, factors other than introduction of the program could contribute to any differences. Therefore, findings based on these data should be viewed as suggestive rather than definitive.

Graphs 2 through 9 display the cumulative percentage of cases closed from one to eighteen months after filing for the pre-program and post-program samples. As can be seen from Graph 2, which combines the data from the seven new pilot courts analyzed by this method, there is very little difference overall in the speed with which the two samples terminated. This indicates that speedier dispositions are not an automatic benefit of arbitration programs.

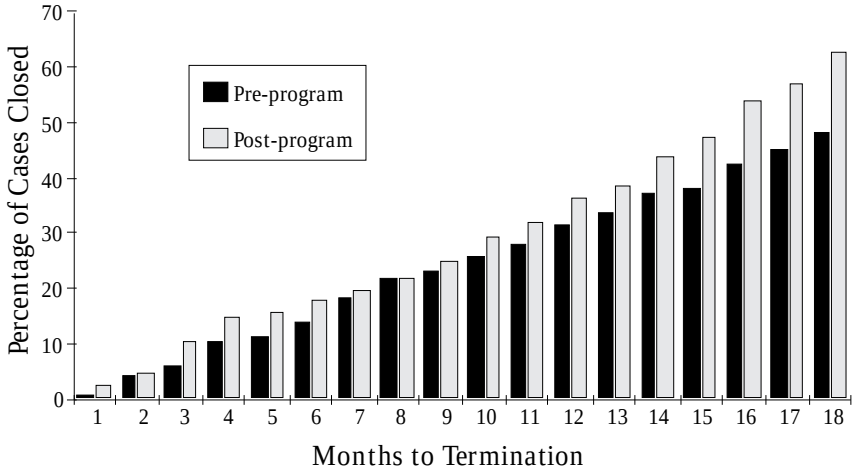
GRAPH 2
Cumulative Proportion of Cases Closed By Months to Termination in New Pilot Courts (Except Middle North Carolina): Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration




grams got off to a slow start. See pp. 23–25 *supra* for a discussion of the use of random designs and the specific criteria used to select the pre-program and post-program samples.

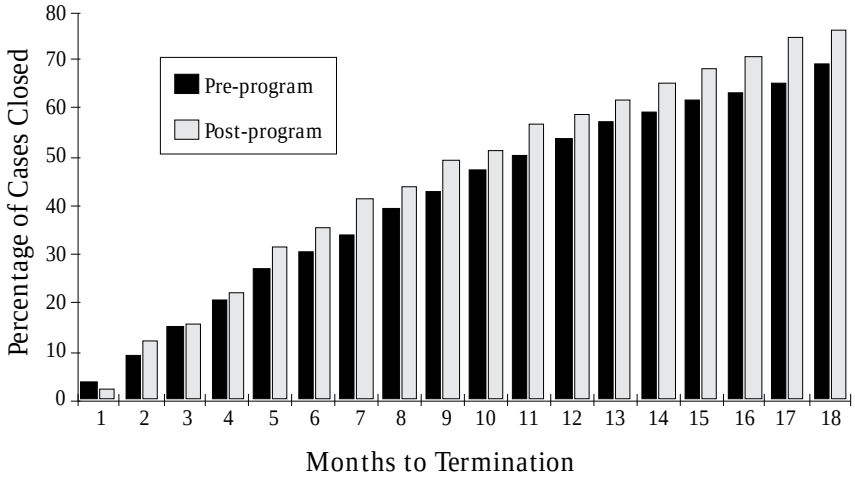
The arbitration programs do appear to have reduced the disposition time in Western Michigan (see Graph 3), where the post-program sample terminates faster than the pre-program sample throughout the eighteen-month period, and in Middle Florida (see Graph 4), where the post-program cases show a faster rate of termination throughout the eighteen-month period after the first month. Arbitration also seems to speed terminations in Western Missouri after the sixth month (see Graph 5).[63] The slower start for the post-program cases in Western Missouri is similar to the pattern in Middle North Carolina.

GRAPH 3
Cumulative Proportion of Cases Closed By Months to Termination in Western Michigan: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration

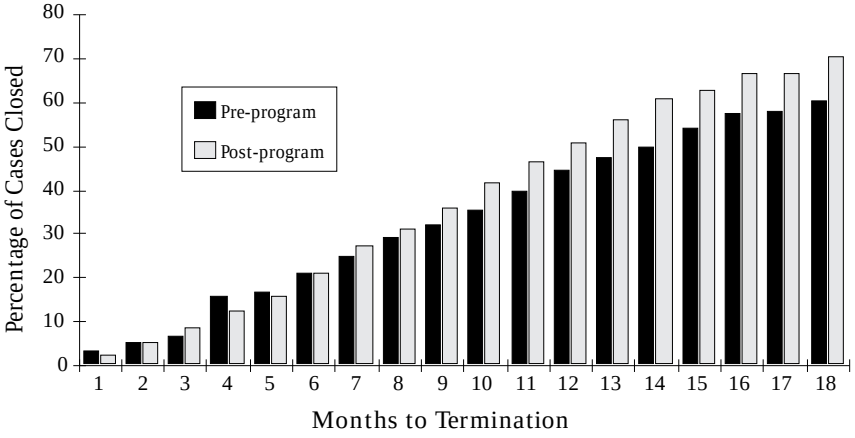



63. The differences in distribution for these three districts were statistically significant, using the Kolmogorov–Smirnov test, a standard tool of statistical analysis that compares the similarity of two cumulative distributions.

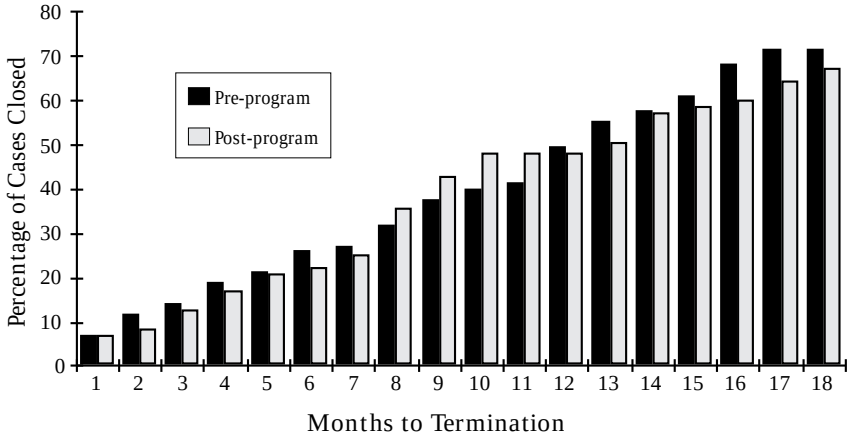
GRAPH 4
Cumulative Proportion of Cases Closed by Months to Termination in Middle Florida: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration



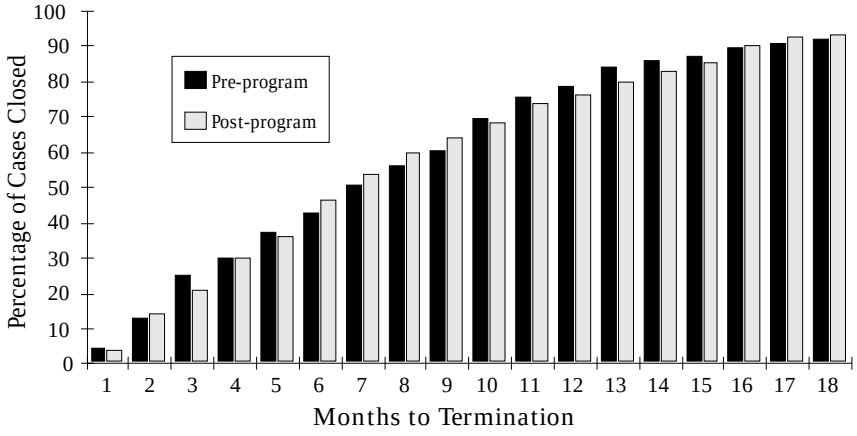

GRAPH 5
Cumulative Proportion of Cases Closed by Months to Termination in Western Missouri: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration



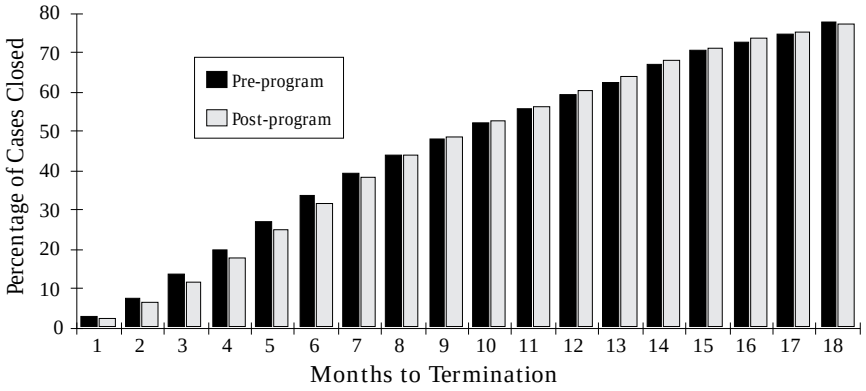
GRAPH 6
Cumulative Proportion of Cases Closed by Months to Termination in Western Texas: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration



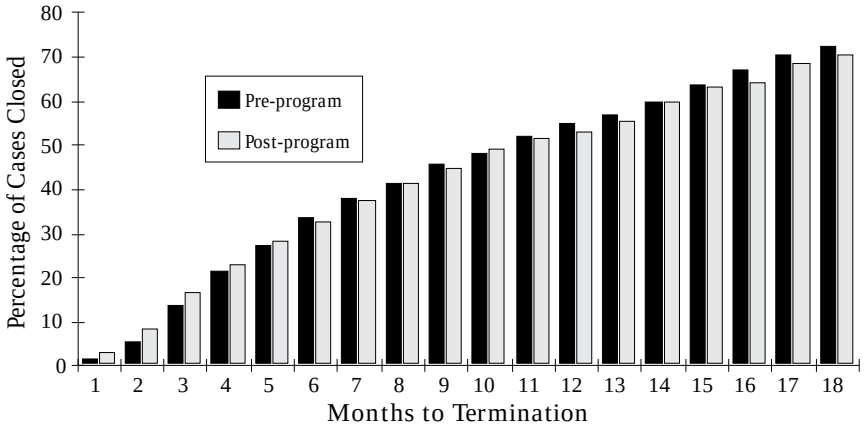

GRAPH 7
Cumulative Proportion of Cases Closed by Months to Termination in Western Oklahoma: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration



GRAPH 8
Cumulative Proportion of Cases Closed by Months to Termination in New Jersey: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration




GRAPH 9
Cumulative Proportion of Cases Closed by Months to Termination in Eastern New York: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration



Western Texas (see Graph 6) does not show a reduction in the overall time from filing to disposition, but displays a pattern that is very similar to that found in Middle North Carolina. The post-program cases close much more slowly at first, then catch up and surpass the pre-program cases in the eighth through the eleventh months, and then fall behind again. In Western Oklahoma, New Jersey, and Eastern New York (see Graphs 7-9), there is little difference between the two distributions.

These results support our expectation that arbitration programs can, but do not necessarily, reduce the time from filing to disposition. We look now at which features affected participants' views about whether arbitration accomplishes some of the more specific goals that underlie its potential to reduce disposition time.

TABLE 28
Pre-Program and Post-Program Sample Sizes and Proportion of Cases in the Post-Sample Likely to Have Been Eligible for Arbitration

| | M.D. Fla. | D. N.J. | W.D. Okla. | W.D. Tex. | W.D. Mich. | W.D. Mo. | E.D. N.Y. |
|---|---|---|---|---|---|---|---|
| Number of Contract and Tort Diversity Cases Under $150,000 Filed | | | | | | | |
| Pre-program | 293 | 761 | 457 | 85 | 264 | 164 | 356 |
| Post-program | 294 | 851 | 406 | 143 | 318 | 161 | 339 |
| Number of Contract and Tort Diversity Arbitration Cases Under $150,000 Filed During Post-Program Time Period | 165 | 447 | 178 | 30 | 84 | 44 | 76 |
| Estimated Proportion of Post-Program Sample Referred to Arbitration | 56% | 53% | 44% | 21% | 26% | 27% | 22% |

*Note:* Cases from Western Texas are from the San Antonio office only.

## Encouraging earlier settlement discussions before the hearing

Since most arbitration cases are disposed of before the hearing, the major program impact on speed would be to encourage earlier settlements through the early scheduling of an arbitration hearing. Setting a time for the arbitration, like setting a date for trial, is expected to focus attorneys' attention on meaningful discussions. Key factors in accomplishing the goal of earlier settlement, therefore, are the timing of the arbitration hearing, the firmness of the hearing date, and how these compare with the district's normal practices in civil cases.

Over half (54%) of the attorneys in cases that closed after referral but before a hearing agreed that referral of their case to arbitration resulted in settlement discussions at an earlier point than would otherwise have occurred (see Table 29). There were, however, large differences among the districts. Eastern Pennsylvania led with 61%, followed by Eastern New York at 57%. Western Texas had the smallest proportion and was the only district in which less than half (38%) of the attorneys agreed. Attorneys in Northern California and Western Missouri split fifty–fifty, and slightly over half of those from the other districts reported earlier settlement discussions. Note that these views of attorneys do not coincide closely with the findings from the pre-program to post-program comparison of disposition times. A district where the time did appear to be reduced—Western Missouri—had one of the lowest proportions of attorneys agreeing that earlier settlement discussions were promoted, whereas a district with no evidence of speedier dispositions—Eastern New York—had the highest agreement percentage among the new pilot courts.

Attorneys' views of earlier settlement discussions were not significantly affected by any program characteristics, nor were they related to the three factors that were expected to influence their views: the schedule prescribed in the local rule, the actual median time from filing to disposition of cases closed between referral and hearing, and attorney perceptions of whether adjournments were difficult to obtain. Two factors positively related to reports of earlier discussions were representation of plaintiffs, and initially believing that the case was at least somewhat likely to reach trial. It is possible that cases viewed as unlikely candidates for trial are also those most likely to settle easily in the first place and that referral to a court-annexed arbitration program will do little to speed their disposition.

TABLE 29
Attorneys' Views of Whether Referral to Arbitration Led to Earlier Settlement Discussions

| | Yes | No |
|---|---|---|
| All Respondents in Cases Closed Prior to the Hearing ($n$ = 1,834) | 54.4 | 45.6 |
| **A. By District** | | |
| | Yes | No |
| E.D. Pa. ($n$ = 474) | 61.0 | 39.0 |
| N.D. Cal. ($n$ = 299) | 50.2 | 49.8 |
| M.D. Fla. ($n$ = 240) | 53.8 | 46.3 |
| D.N.J. ($n$ = 227) | 52.4 | 47.6 |
| W.D. Okla. ($n$ = 167) | 54.5 | 45.5 |
| W.D. Tex. ($n$ = 48) | 37.5 | 62.5 |
| W.D. Mich. ($n$ = 167) | 52.7 | 47.3 |
| W.D. Mo. ($n$ = 123) | 50.4 | 49.6 |
| E.D.N.Y. ($n$ = 89) | 57.3 | 42.7 |
| **B. By Attorney Characteristics** | | |
| | Yes | No |
| Side | | |
| Plaintiff ($n$ = 881) | 59.1 | 40.9 |
| Defendant ($n$ = 947) | 49.9 | 50.1 |
| **C. By Attorney Views of the Case** | | |
| | Yes | No |
| Expected Trial was Likely? | | |
| Yes ($n$ = 989) | 57.4 | 42.6 |
| No ($n$ = 828) | 51.9 | 48.1 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 15, p. 19, for regression results.

## Effecting quicker settlements

Attorneys in cases that closed before the hearing were also asked if the case settled more quickly than they had anticipated at the outset. A majority of the attorneys (51%) disagreed (see Table 30). The responses varied somewhat across districts. In Middle Florida, Western Texas, Western Michigan, and Eastern New York, a majority agreed that the case settled earlier, and in Eastern Pennsylvania, Northern California, Western Oklahoma, and Western Missouri a majority disagreed. In New Jersey, the attorneys split fifty–fifty.

TABLE 30
Attorney Views of Whether Referral to Arbitration Led to Quicker Settlements: Cases Closed Before the Hearing

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents in Cases Closed Prior to the Hearing (*n* = 1,787) | 10.0 | 39.1 | 43.6 | 7.3 |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| E.D. Pa. (*n* = 472) | 8.9 | 35.8 | 45.6 | 9.7 |
| N.D. Cal. (*n* = 287) | 9.1 | 32.1 | 50.5 | 8.4 |
| M.D. Fla. (*n* = 232) | 12.5 | 43.5 | 37.5 | 6.5 |
| D.N.J. (*n* = 223) | 6.7 | 43.0 | 45.3 | 4.9 |
| W.D. Okla. (*n* = 156) | 10.9 | 37.8 | 45.5 | 5.8 |
| W.D. Tex. (*n* = 49) | 20.4 | 40.8 | 30.6 | 8.2 |
| W.D. Mich. (*n* = 161) | 8.1 | 46.6 | 40.4 | 5.0 |
| W.D. Mo. (*n* = 118) | 11.0 | 37.3 | 44.1 | 7.6 |
| E.D.N.Y. (*n* = 89) | 15.7 | 47.2 | 31.5 | 5.6 |

B. By District Characteristics

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Median Days from Filing to Disposition in Cases Closed After Issue was Joined | | | | |
| Under 210 (*n* = 388) | 11.9 | 41.2 | 41.7 | 6.2 |
| 214 (*n* = 472) | 8.9 | 35.8 | 45.6 | 9.7 |
| 219 & 222 (*n* = 336) | 10.7 | 33.3 | 47.6 | 8.3 |
| 230 (*n* = 118) | 11.0 | 37.3 | 44.1 | 7.6 |
| 267 & 273 (*n* = 250) | 10.8 | 46.8 | 37.2 | 5.2 |
| 315 (*n* = 223) | 6.7 | 43.0 | 45.3 | 4.9 |

C. By Program Characteristics

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Days from Answer to Hearing | | | | |
| 80 (*n* = 281) | 13.9 | 43.1 | 36.3 | 6.8 |
| 120 (*n* = 156) | 10.9 | 37.8 | 45.5 | 5.8 |
| 150 (*n* = 966) | 9.8 | 35.9 | 45.5 | 8.7 |
| 165 (*n* = 161) | 8.1 | 46.6 | 40.4 | 5.0 |
| 180 (*n* = 223) | 6.7 | 43.0 | 45.3 | 4.9 |

*(continued)*

TABLE 30, continued

D. By Attorney Views of the Case

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Expected Trial was Likely? | | | | |
| Yes (*n*=801) | 12.7 | 42.7 | 39.1 | 5.5 |
| No (*n*=970) | 7.7 | 36.4 | 47.1 | 8.8 |
| Lack of Trust a Barrier to Settlement? | | | | |
| Yes (*n*=442) | 8.1 | 38.9 | 41.6 | 11.3 |
| No (*n*=1,300) | 10.5 | 39.3 | 44.5 | 5.7 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 16, p. 20, for regression results.

The original pilot courts, Eastern Pennsylvania and Northern California, had the highest proportions of attorneys disagreeing that the case settled earlier than expected. Since this question asked attorneys to compare what actually happened in the case with what they expected to happen, it may be that the operation of arbitration programs since 1978 has changed the initial expectations of attorneys.

Attorneys' views of quicker settlements were influenced both by time schedules in the local rule and by the actual time to disposition of referred cases that closed before the hearing. Attorneys from pilots with local rules that allow less time between answer and the hearing were more likely than others to agree that the case settled more quickly. This lends support to the notion that the ability of arbitration programs to promote earlier settlements before the hearing is tied to the timeliness of the hearing date. Surprisingly, however, attorneys from courts with longer median disposition times for arbitration sample cases that closed between referral and the hearing were more likely to say that the case settled earlier than expected. This probably relates to the loose relationship between the disposition time of referred arbitration cases and the general speed of case processing in the district (see Chapter 4). Attorneys from districts where the arbitration caseload took relatively longer to dispose of may also have expected a longer time to disposition at the outset of the case.

## Views of attorneys in de novo demand cases

Although reducing disposition time is a goal of court-annexed arbitration programs, there is also the danger that inserting the requirement for a

hearing prior to proceeding to trial could actually add to the delay in some cases. We asked attorneys in cases that returned to the trial calendar via a demand for trial de novo if they thought that arbitration delayed resolution of the case. Seventy percent said no (see Table 31). The differences across districts were not statistically significant, and the responses were unaffected by any characteristics of the district, the program, the attorneys, or attorneys' views of the case.

TABLE 31
Attorney Views of Whether Arbitration Delayed Case: De Novo Cases

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents (*n*=703) | 12.9 | 16.8 | 50.8 | 19.5 |
| E.D. Pa. (*n*=43) | 9.3 | 16.3 | 51.2 | 23.2 |
| N.D. Cal. (*n*=47) | 6.4 | 14.9 | 61.7 | 17.0 |
| M.D. Fla. (*n*=182) | 14.3 | 15.9 | 46.2 | 23.6 |
| D.N.J. (*n*=53) | 13.2 | 13.2 | 47.2 | 26.4 |
| W.D. Okla. (*n*=96) | 9.4 | 13.5 | 56.3 | 20.8 |
| W.D. Tex. (*n*=20) | 10.0 | 20.0 | 45.0 | 25.0 |
| W.D. Mich. (*n*=197) | 12.7 | 19.8 | 54.8 | 12.7 |
| W.D. Mo. (*n*=43) | 16.3 | 20.9 | 44.2 | 18.6 |
| E.D.N.Y. (*n*=22) | 36.4 | 13.6 | 31.8 | 18.2 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 17, p. 21 , for regression results.

## Views of parties as to the time required to settle the dispute

Parties were asked if the time required to resolve the dispute was reasonable. Two-thirds agreed that it was (see Table 32). A majority of parties from all districts said that the time was reasonable, with the proportion ranging from a low of 53% in Western Michigan to a high of 75% in Western Missouri.

There were, however, significant differences depending on the stage at which the case closed. The proportion of parties in de novo demand cases who agreed that the time was reasonable exceeded a majority (56%), but was significantly less than that for parties in successful arbitrations (70%) or those in cases that closed before the hearing (75%).

Parties' responses were not influenced by any of the program characteristics, but they were affected by views of case outcome. Parties who reported being satisfied with the outcome were also more likely to say that

the time to disposition was reasonable. Type of party and type of representation also related to the ratings. Businesses were more likely than other types of parties to report that the time was reasonable, as were any parties who were represented by insurance companies. Pro se parties were much less likely to agree that the case took a reasonable length of time.

Higher ratings were also associated with views that the process was understandable and gave parties some control over the decision to end the case. All groupings of parties, however, had majorities who agreed that the time required to resolve the dispute was reasonable, except for the thirty-one parties who reported little or no understanding of what was going on, and the twelve pro se parties.

TABLE 32
Party Views of Whether the Time Required to Resolve the Case Was Reasonable

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| All Respondents ($n$=536) | 12.5 | 54.9 | 20.0 | 12.7 |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| N.D. Cal. ($n$=71) | 21.1 | 52.1 | 14.1 | 12.7 |
| M.D. Fla. ($n$=68) | 11.8 | 58.8 | 17.6 | 11.8 |
| D.N.J. ($n$=45) | 6.7 | 60.0 | 26.7 | 6.7 |
| W.D. Okla. ($n$=132) | 13.6 | 59.1 | 15.9 | 11.4 |
| W.D. Tex. ($n$=14) | 14.3 | 42.9 | 42.9 | 0.0 |
| W.D. Mich. ($n$=95) | 6.3 | 46.3 | 26.3 | 21.1 |
| W.D. Mo. ($n$=68) | 13.2 | 61.8 | 16.2 | 8.8 |
| E.D.N.Y. ($n$=43) | 14.0 | 46.5 | 23.3 | 16.3 |

B. By When the Case Closed

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Before Hearing ($n$=217) | 15.2 | 59.4 | 14.7 | 10.6 |
| As a Result of Hearing ($n$=140) | 14.3 | 55.7 | 19.3 | 10.7 |
| After De Novo Demand ($n$=179) | 7.8 | 48.6 | 26.8 | 16.8 |

*(continued)*

TABLE 32, continued

C. By Party Views of Outcome

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Outcome Satisfaction | | | | |
| Satisfied (*n* = 338) | 16.9 | 58.3 | 16.3 | 8.6 |
| Not Satisfied (*n* = 187) | 4.8 | 49.7 | 26.2 | 19.3 |

D. By Party Characteristics

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Type of Party | | | | |
| Private Individual (*n* = 165) | 10.3 | 41.8 | 28.5 | 19.4 |
| Business (*n* = 236) | 14.4 | 61.4 | 16.1 | 8.1 |
| Other (*n* = 127) | 10.2 | 60.6 | 16.5 | 12.6 |
| Type of Representation | | | | |
| Own Attorney (*n* = 438) | 12.1 | 56.2 | 18.7 | 13.0 |
| Insurance Company (*n* = 76) | 13.2 | 55.3 | 22.4 | 9.2 |
| Pro Se (*n* = 11) | 18.2 | 27.3 | 27.3 | 27.3 |

E. By Party Views of Process

| | Strongly Agree | Agree | Disagree | Strongly Disagree |
|---|---|---|---|---|
| Understanding | | | | |
| At least some (*n* = 500) | 13.2 | 55.4 | 20.6 | 10.8 |
| Little or none (*n* = 31) | 0.0 | 45.2 | 12.9 | 41.9 |
| Control Over Decision to End Case | | | | |
| At least some (*n* = 312) | 17.3 | 57.7 | 16.0 | 9.0 |
| Little or none (*n* = 164) | 3.0 | 51.2 | 25.6 | 20.1 |

*Note:* See the Technical Appendix, on file at the Federal Judicial Center, at Analysis 18, p. 22, for regression results.

## Conclusion

Arbitration programs can, but do not always, reduce disposition time and lead to earlier settlements. Furthermore, the programs do not appear to delay resolution of de novo demand cases, and parties report reasonable case-processing times.

The evidence suggests that arbitration programs in Middle Florida, Western Michigan, and Western Missouri have reduced disposition time, but such evidence was not present in the other new pilot courts.

A majority of attorneys in arbitrated cases that closed before the hearing agreed that referring the case to the program resulted in earlier settlement, but a majority also reported that the case had not settled quicker than expected at the outset. Part of the latter finding might be attributed to the longstanding arbitration programs in Eastern Pennsylvania and Northern California, which may have altered attorneys' initial expectations of the time required to resolve a case. Overall, however, there is only lukewarm attorney support for the suggestion that arbitration expedites settlement discussions and settlements before the hearing.

Seventy percent of the parties in arbitration cases reported that the time required to resolve the dispute was reasonable. Parties in cases closed either before or as a result of the arbitration hearing were the most likely to agree that the time to disposition was reasonable, but even in de novo demand cases a majority responded favorably. Furthermore, 70% of the attorneys in de novo demand cases did not think that the arbitration hearing delayed resolution.

# Chapter 9
# Reducing Court Burden

Court-annexed arbitration programs seek to reduce judges' caseload burden so that judicial resources can be directed toward other cases on the court's calendar. This chapter presents the results of the judge survey and discusses which factors influence the probability that an arbitration case will return to the trial calendar.

## Court assessment of arbitration programs

When an arbitration program had been in place for at least eighteen months, we asked judges to indicate their level of support for the program. Seventy-nine percent of the fifty-seven responding judges reported very positive support; an additional 17% reported somewhat positive support. Only 3.5% indicated that they were somewhat negative, and no judge reported a very negative attitude (see Table 33). The differences across districts were significant, based primarily on the strength of judges' positive support.

Judges were also asked their opinion of a limited number of program options. In general, they tended to support the specific procedures adopted in their districts (see Table 34). For example, Northern California, the only district in which arbitration hearings are routinely held in arbitrators' offices, is also the only district with a majority of judges who disagree that hearings should always be held in the courthouse. Furthermore, the judges in those courts where the clerk's office selects the arbitrators are more likely to agree that arbitrators should be selected in this way than are judges from courts that use a mixed method (e.g., party selection from a list chosen by the clerk's office) who, in turn, are more likely to agree than judges from Middle Florida and Middle North Carolina, where the litigants have the most control over arbitrator selection.

Judges were also asked if they would support the expansion of court-annexed arbitration to other courts. Ninety-seven percent responded that they would (see Table 35). The strength of judges' support for their program and its expansion is directly related to perceived workload reduction benefits for the court (see Tables 33 and 35).

TABLE 33
Judges' Ratings of Their Support for Their Court-Annexed Arbitration Programs

| | Very Positive | Somewhat Positive | Somewhat Negative | Very Negative |
|---|---|---|---|---|
| All Respondents (*n*=57) | 78.9% | 17.5% | 3.5% | 0.0% |

A. By District

| | Very Positive | Somewhat Positive | Somewhat Negative | Very Negative |
|---|---|---|---|---|
| E.D. Pa. (*n*=14) | 14 | 0 | 0 | 0 |
| N.D. Cal. (*n*=7) | 6 | 1 | 0 | 0 |
| M.D. Fla. (*n*=6) | 5 | 0 | 1 | 0 |
| M.D.N.C. (*n*=3) | 3 | 0 | 0 | 0 |
| D.N.J. (*n*=10) | 9 | 1 | 0 | 0 |
| W.D. Okla. (*n*=3) | 2 | 1 | 0 | 0 |
| W.D. Tex. (*n*=1) | 1 | 0 | 0 | 0 |
| W.D. Mich. (*n*=3) | 3 | 0 | 0 | 0 |
| W.D. Mo. (*n*=4) | 1 | 2 | 1 | 0 |
| E.D.N.Y. (*n*=6) | 1 | 5 | 0 | 0 |

B. By Judges' Perceptions

| | Very Positive | Somewhat Positive | Somewhat Negative | Very Negative |
|---|---|---|---|---|
| Arbitration Reduces Caseload Burden of Judges* | | | | |
| Strongly Agree (*n*=35) | 97.1% | 2.9% | 0.0% | 0.0% |
| Agree (*n*=22) | 59.1% | 40.9% | 0.0% | 0.0% |
| Disagree (*n*=2) | 0.0% | 0.0% | 100.0% | 0.0% |

*=chi square significant at or beyond the .05 level.

*Note:* Table entries for each district are numbers rather than percentages.

TABLE 34
Judges' Support for Various Program Procedures

A. How Should Arbitrators Be Selected?

| Method of Arbitrator Selection | Proportion of Judges Approving Method |
|---|---|
| By Clerk | 85% |
| By Parties from List Drawn by Clerk | 33% |
| By Parties | 11% |

B. Where Should Hearing Be Held?

| Place of Hearing | Proportion of Judges Approving Place |
|---|---|
| Always in Courthouse | 85% |
| Not Always in Courthouse (N.D. Cal.) | 43% |

TABLE 35
Judges' Agreement That Other Courts Would Do Well to Introduce Arbitration

| | Strongly Agree | Agree | Disagree | Strongly Doisagree |
|---|---|---|---|---|
| All Respondents (*n*=59) | 61.0% | 35.6% | 3.4% | 0.0% |

A. By District

| | Strongly Agree | Agree | Disagree | Strongly Doisagree |
|---|---|---|---|---|
| E.D. Pa. (*n*=15) | 13 | 2 | 0 | 0 |
| N.D. Cal. (*n*=6) | 6 | 0 | 0 | 0 |
| M.D. Fla. (*n*=6) | 3 | 2 | 1 | 0 |
| M.D.N.C. (*n* =3) | 2 | 1 | 0 | 0 |
| D.N.J. (*n* =10) | 5 | 5 | 0 | 0 |
| W.D. Okla. (*n* =3) | 0 | 3 | 0 | 0 |
| W.D. Tex. (*n*=1) | 1 | 0 | 0 | 0 |
| W.D. Mich. (*n*=4) | 3 | 1 | 0 | 0 |
| W.D. Mo. (*n* =4) | 1 | 2 | 1 | 0 |
| E.D.N.Y. (*n* =7) | 2 | 5 | 0 | 0 |

B. By Judges' Perceptions*

| | Strongly Agree | Agree | Disagree | Strongly Doisagree |
|---|---|---|---|---|
| Arbitration Reduces Caseload Burden of Judges | | | | |
| Strongly Agree (*n* =36) | 80.6% | 19.4% | 0.0% | 0.0% |
| Agree (*n* =23) | 34.8% | 65.2% | 0.0% | 0.0% |
| Disagree (*n* =2) | 0.0% | 0.0% | 100.0% | 0.0% |

*Chi square significant at or beyond the .05 level.

## Judge perceptions of reduction of burden

Fifty-eight percent of the judges strongly agreed that their arbitration program reduced the caseload burden (see Table 36). An additional 38% agreed, and 3% disagreed; none strongly disagreed.

TABLE 36
Judges' Perceptions of Reduction of Caseload Burden

| | Strongly Agree | Agree | Disagree | Strongly Doisagree |
|---|---|---|---|---|
| All Respondents (*n*=60) | 58.3% | 38.4% | 3.3% | 0.0% |
| **A. By District** | | | | |
| E.D. Pa. (*n*=15) | 13 | 2 | 0 | 0 |
| N.D. Cal. (*n*=7) | 4 | 3 | 0 | 0 |
| M.D. Fla. (*n*=6) | 3 | 2 | 1 | 0 |
| M.D.N.C. (*n* =3) | 1 | 2 | 0 | 0 |
| D.N.J. (*n* =10) | 7 | 3 | 0 | 0 |
| W.D. Okla. (*n* =3) | 1 | 2 | 0 | 0 |
| W.D. Tex. (*n*=1) | 1 | 0 | 0 | 0 |
| W.D. Mich. (*n*=4) | 2 | 2 | 0 | 0 |
| W.D. Mo. (*n* =4) | 1 | 2 | 1 | 0 |
| E.D.N.Y. (*n* =7) | 2 | 5 | 0 | 0 |
| **B. By District Characteristics** | | | | |
| Diverts at least 15% of caseload to arbitration? | | | | |
| Yes (*n*=32) | 71.9% | 28.1% | 0.0% | 0.0% |
| No (*n*=27) | 44.4% | 48.1% | 7.4% | 0.0% |
| **C. By Judges' Perceptions** | | | | |
| Arbitration cases require attention prior to hearing? | | | | |
| Always or frequently (*n* =11) | 54.5% | 27.3% | 18.2% | 0.0% |
| Occasionally or never (*n* =52) | 60.8% | 39.2% | 0.0% | 0.0% |

The extent to which burden is reduced should depend on how many cases are diverted to the arbitration process, how judges' involvement in the prehearing phase of arbitration cases relates to what their involvement would be absent the program, and how many arbitration cases return to the regular trial calendar with demands for trial de novo. In fact, judges who reported less frequent involvement in arbitration cases before the hearing, and those in programs that divert at least 15% of the caseload to the arbitration program, were significantly more likely to agree, and agree strongly, that the program reduces the caseload burden of judges. Note

that it is actual judicial practice rather than the presence of a local rule designed to reduce judicial involvement (presumably a precondition of the practice) that is related to judges' perception of burden reduction.[64]

There was not, however, a significant relationship between judges' assessments of burden reduction and either the actual or perceived level of demands for trial de novo. This probably results from the fact that the large majority of arbitration cases—at least two-thirds—do not return to judges' trial calendars in any of the districts, and fewer still reach trial. Even so, we would expect the level of burden reduction to be related to the de novo demand rate, since this defines the proportion of cases that could require judicial attention after the hearing.

## De novo demands

Overall, 14% of the cases identified for, and not later exempted from, the arbitration program returned to the regular trial calendar. The range across districts was from 7% in Eastern New York to 32% in Western Michigan, and the differences across the pilot courts were significant.

The probability of returning to the trial calender is a combination of the probability that a case will be arbitrated and the probability that, once heard, a de novo demand will ensue. The least burdensome cases are therefore those that are less likely both to be heard and to produce de novo demands when they do reach hearing. Five program features were associated with this result: (1) providing for a hearing before a panel of arbitrators, (2) lower hearing costs, (3) longer periods between answer and the hear–ing,, (4) U.S. plaintiff cases, and (5) contract cases.[65]

Although these program features are associated with the least burden on the court, the fact that they lead to fewer arbitrations (as well as fewer de novo demands) suggests they are not the best for increasing litigants' options for case resolution. No program features were associated with both a higher likelihood of hearing and a lower probability of a de novo demand. Four, however, led to more hearings and had no effect on demands for trial de novo: (1) providing for litigant input into the arbitrator selection pro-

64. In some districts, magistrates rather than judges normally handle the pretrial scheduling of civil cases, so it would be the magistrates (unfortunately not included in our survey) who would benefit from rules that place responsibility for scheduling arbitration cases in the clerk's office.

65. See the Technical Appendix (on file at the Federal Judicial Center) at pp. 23, 24.

cess, (2) requiring the posting of arbitrators' fees with any demand for trial de novo, (3) tort cases, and (4) civil rights cases.[66]

Despite these associations, it should be noted that program features explain only a small proportion of the variation in whether a case is arbitrated (6%) or trial de novo is demanded (4%). This means that factors other than objective rule provisions or case characteristics are more determinative of whether any particular case is likely to return to the regular trial calendar.

## Trial rates

### Reducing trial rates

Arbitration programs could, of course, have their largest impact on court burden through a reduction in the trial rate. This, however, was not a primary goal of the arbitration programs in any of the pilot courts, because they recognized that the types of cases eligible for the arbitration program are unlikely to reach trial in the first place.

The first evaluation of the pilot arbitration programs in Eastern Pennsylvania and Northern California concluded only that it was difficult to doubt that the programs caused some decrease in the trial rate.[67] The current research does not fill the void of definitive knowledge about trial rates, nor will this knowledge be easy to come by. The problem is methodological. Even the random assignment design in Middle North Carolina, which found no significant difference between the trial rates of the arbitration and control groups,[68] was not adequate to address the trial rate issue: The arbitration and control groups were too small to reliably detect a reduction in the already low trial rate (4%) if one occurred.[69] The question of whether court-annexed arbitration reduces trial rates can be answered only by long-term commitment to random assignment from jurisdictions with very large programs.

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66. *Id*.

67. E. Lind & J. Shapard, *supra* note 5, at 140.

68. E. Lind, *supra* note 25, at 39–40.

69. This will be a persistent problem in attempts to evaluate the issue of trial rate. The ability of statistics to detect differences in proportions depends on sample size, the amount of the difference to be detected, and the actual size of the proportions themselves. Larger sample sizes are needed to detect small differences and/or to detect the differences between proportions that fall at extremes of the scale. To have an 80% probability of detecting a two-percentage-point reduction from a trial rate of 4%, both the arbitration and control samples must exceed 1,000 cases.

## Conclusion

The large majority of judges in the pilot courts support their own program and agree with its particular features; there is no widely held view about what characteristics constitute a good program. But judges do agree that other courts would do well to adopt arbitration programs.

The strength of judges' positive attitudes toward their programs varies significantly with the strength of their agreement that arbitration reduces their caseload burden. Ninety-seven percent of the judges agreed that burden was reduced, with 58% agreeing strongly. The factors that were significantly associated with judges' burden assessments were the proportion of the civil caseload that their district diverts to the arbitration program and the frequency with which arbitration cases require their attention prior to the hearing. Neither the actual nor perceived rate of de novo demands in arbitration cases affected these assessments, a finding attributed to the fact that less than a third of the arbitration caseload returns to the regular trial calendar in every pilot court.

The case least likely to return to the regular trial calendar is a U.S. plaintiff contract case in a program that provides for a longer answer-to-hearing period and a panel of arbitrators paid relatively lower fees. The case most likely to reach arbitration, and thereafter neither more nor less likely to return to the regular trial calendar, is a tort or civil rights case in a program that allows party input to the arbitrator selection process and requires the posting of fees along with any demand for trial de novo. We do not know whether the pilot arbitration programs reduce the number of trials.

The influence of program characteristics is very small, accounting for less than 10% of the variation in arbitration or de novo rates. This means that factors that we did not account for in our analyses are more important in determining whether a case will return to the regular trial calender. For this reason, we are not in a position to prescribe broad program parameters to ensure that an arbitration program will reduce burden on the court.

# Chapter 10
# Mandatory vs. Voluntary Referral

All of the pilot court-annexed arbitration programs mandate the referral of selected cases to arbitration, so this research does not directly address the relative merits and drawbacks of voluntary and mandatory referral. We do, however, have information that is relevant to the debate. The data from this research touch on the major criticism of mandatory programs—that they pose an unacceptable barrier to trial—as well as the major problem with voluntary programs—that they don't attract cases.

## Mandatory programs and the right to trial

The most frequently expressed concern about the mandatory referral of cases to alternative dispute resolution programs is the belief that this interferes with the right to trial.

No arbitration programs are completely mandatory. The pilot federal programs all contain exemption procedures for cases inappropriately identified for the program. Neither do they constitute insurmountable barriers to trial. In each program, any party not satisfied with the outcome of the arbitration may demand trial de novo. The programs do have disincentives to demands for trial de novo. At a minimum, all require payment of the arbitrators' fees if the party who demands a trial de novo does not receive a judgment more favorable than the arbitration award, and eight of the ten pilot courts require that these fees be posted along with any demand. The fees range from a low of $75 (in Western Oklahoma) to $500 in Middle North Carolina. However, since these fees are much lower than the expected cost of trial, litigants who find them unsurmountable are not likely to have pursued their cases through trial without the program.

Our data do not show that these disincentives are seen as significant barriers. Indeed, the findings from this research indicate the contrary. Districts with higher fees had proportionally more cases arbitrated and more de novo demands than those with lower fees. We also found no evidence that a required posting of fees affected demands for trial.

Neither is there any evidence that litigants in cases mandatorily referred to arbitration see themselves as receiving second-class justice. Eighty percent of all parties in cases mandatorily referred to arbitration agreed that the procedures used to handle their cases were fair. Among parties

who had prior trial experience, 84% agreed that the procedures were fair. In Middle North Carolina, which employed a random design for the evaluation, parties in arbitration cases were significantly more likely to say that their experience with the litigation was fair than were those in a control group of cases that went through regular procedures. Furthermore, half of all parties who participated in an arbitration hearing selected arbitration as their preferred method of decision making when asked to choose among judges, juries, arbitration, or "makes no difference."

## Voluntary programs and program size

If voluntary programs can accomplish everything that mandatory programs do, then almost everyone would opt for the non-coercive programs. However, voluntary alternative programs in other jurisdictions have been notably unsuccessful in attracting cases.[70] Programs that do not attract cases are unlikely to have any overall effect on the cost of litigation or court burden. Recall that the proportion of the civil caseload diverted to mandatory arbitration programs was significantly related to the strength of judges' agreement that the program reduced their caseload burden. The only other factor similarly related was the frequency with which judges reported involvement in arbitration cases prior to the hearing. Voluntary programs that anticipate judicial participation in selecting cases for arbitration also ensure that this potential avenue for burden reduction will not come into play. Without a reduction in the caseload burden of judges, the cost and time required to administer a voluntary program could result in a net increase in the burden on the court system.

It is not clear why there is a low rate of participation in voluntary programs. Litigants may not be as dissatisfied with traditional processes as commonly thought. Parties may not be aware of alternatives. Attorneys may be unwilling to advise trying "something new" for fear their advice will be faulted if the something new does not work out. And they may be wary of electing a procedure that might be construed as a sign of weakness. They may also fear disclosing their case in advance of trial or believe that, in some cases, delay serves the best interests of their clients and may therefore avoid programs that purport to speed cases to disposition.

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70. J. Pearson, *An Evaluation of Alternatives to Court Adjudication,* 7 Justice Sys. J. 420 (1982).

Where non-participation is attributable more to habit than aversion, the problem might be solved by voluntary programs that incorporate features designed to ensure increased awareness of the alternatives.

## Experimentation with degrees of voluntariness

The available structures for alternative dispute resolution programs are more extensive than the simple voluntary–mandatory dichotomy might suggest. For example, voluntary arbitration procedures may consist of a simple notification, via local rule, that the program is available should litigants wish to avail themselves of it. Thus, litigants are offered a program that they may, at the expenditure of some effort, opt into. Judicial officers need not play a role. Programs of this sort will likely be used sparingly. Another option, designed to increase awareness and program size, but which also increases judicial involvement, could be to require that arbitration be discussed at the Rule 16 conference. Program size might be increased without increasing judicial involvement by automatically referring cases to the program but allowing any litigant to opt out.

The difference between a voluntary program of the "opt-out" variety and mandatory programs from which cases may be exempted is the authority the court has to deny a request for exemption. We noted above that no court-annexed arbitration program is completely mandatory. A "mandatory" program that operates in such a way that any request for exemption is granted is, in practice, a voluntary opt-out program.

We recommend that districts entering the voluntary pilot programs adopt somewhat different patterns of "voluntariness" so that the programs can serve as laboratory models to assess program participation and litigant satisfaction.

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# Chapter 11
# Conclusions and Recommendations

## Assessment of program features

This research found no program characteristic that either guaranteed satisfaction, or resulted in overall dissatisfaction, with arbitration, so there is no empirical basis for requiring any particular way of structuring arbitration programs. There were, however, a number of program design or implementation features that had a relatively small, but significant, influence on particular program goals. Table 37 presents a summary of these program, case, and litigant characteristics. In all instances, although the characteristics described were found to cause real differences in litigant perceptions or case processing, these differences are small.

### Setting program eligibility criteria

The pilot courts vary in the case-type and dollar-demand criteria that define cases eligible for their arbitration programs. Their choices were based on ideas about which types of cases are most likely to benefit from the program and assessments of how many cases the programs could handle given available resources.

This research did not find that any particular nature of suit, jurisdictional basis, or dollar amount identified generally better candidate cases for arbitration. None of the case features was consistently related one way or the other to litigant perceptions of whether any goals were achieved. However, there was some evidence that tort and civil rights cases might benefit from arbitration in terms of increasing litigants' options (see p. 117). Since the current legislation exempts all civil rights cases from mandatory referral to arbitration, courts are advised to explore the option of arbitration with litigants in civil rights cases involving only money damages to see if they are interested in consenting to arbitration.

We did find that arbitration programs that diverted less than 15% of the civil caseload to the program were less likely to result in a perceived reduction of court burden. Data presented in Chapter 4 (see pp. 41–42) suggest that the proportion of the civil caseload diverted to the pilot programs depended both on eligibility criteria and on the unique features of each district's caseload. Courts considering adoption of a court-annexed arbitration program should first do a thorough caseload analysis to determine which

eligibility requirements will divert enough cases (at least 10%) to make the effort worthwhile, and at the same time limit the size of the program to available resources. Programs do not necessarily have to begin with their optimal eligibility criteria, but might choose to start more restrictively and, if justified, expand with experience. This course was followed successfully by Eastern Pennsylvania.

### Time Limits

Answer to hearing. The pilot courts adopted time periods between answer and hearing that range from 80 to 180 days. The selection of a particular time period depended both on the normal case processing time for civil cases in the district and on whether the program was explicitly designed to reduce the time to disposition in cases that settled before the hearing.

TABLE 37
Summary of Program, Case, and Respondent Characteristics Related to Litigant and Judge Views of Arbitration

A. Party Views

| | Correlated Characteristics | | | |
|---|---|---|---|---|
| Party Views of: | Rule Features | Case Feaures | Party Characteristics | |
| Procedural Fairness | None | None | None | |
| Hearing Fairness[a] | None | None | None | |
| Preferred Decision-Maker[a] | None | None | None | |
| Reasonable Cost | None | None | None | |
| Reasonable Personal Time Requirements | None | None | None | |
| Reasonable Time to Disposition | None | None | + Represented by insurance company<br>+ Business party<br>– Pro se party | |

*(continued)*

TABLE 37, continued

B. Attorney Views

| Attorney Views of: | Correlated Characteristics: Rule Features | Case Feaures | Attorney Characteristics |
|---|---|---|---|
| Hearing Fairness[a] | None | None | + Experience as an arbitrator |
| Preferred Decision-Maker[a] | + Lower hearing costs<br>– Litigant input to arbitrator selection process<br>– Up-front payment of fees as de novo disincentive | – Diversity jurisdiction | None |
| Preferred Decision-Maker | + Longer time from answer to hearing<br>– Allowing only one arbitrator<br>– Litigant input to arbitrator selection process | None | + Prior experience in a state arbitration program |
| Approve Concept of Arbitration | + Lower hearing costs<br>– Allowing only one arbitrator<br>– Litigant input to arbitrator selection process | + Diversity jurisdiction<br>– U.S. defendant jurisdiction | + Plaintiff<br>+ Experience as an arbitrator<br>– Experience with binding arbitration |
| Approve Program | + Lower hearing costs<br>– Allowing only one arbitrator<br>– Litigant input to arbitrator selection process | None | + Plaintiff<br>+ Experience as an arbitrator<br>– Experience with binding arbitration |
| Attorney Time Savings | – Allowing only one arbitrator<br>– Litigant input to arbitrator selection process | None | None |
| Client Cost Savings | – Litigant input to arbitrator selection process | None | None |
| Client Time Savings | – Litigant input to arbitrator selection process | None | None |
| Earlier Settlement Discussions[b] | None | None | + Plaintiff |
| Quicker Settlements[b] | – Longer time from answer to hearing | None | None |
| Delay because of Hearing[c] | None | None | None |

*(continued)*

TABLE 37, continued

C. Judge Views

| Judge Views of: | Correlated Characteristics: Rule Features | Case Feaures | Judge Characteristics |
|---|---|---|---|
| Reduction of Court Burden | + Diverts at least 15% to program<br>+ Infrequent judge involvement in prehearing phase of arbitration cases | Not Applicable | Not Applicable |

a = Arbitrated cases only

b = Cases closed before the hearing

c = Cases closed after a de novo demand

TABLE 38

Summary of Program and Case Characteristics Associated with Case Processing Variables

| Likelihood that | Rule Features | Case Features |
|---|---|---|
| Hearing Was Held | + Litigant input to arbitrator selection process<br>+ Up-front payment of fees as de novo disincentive<br>+ Allowing only one arbitrator<br>– Lower hearing cost<br>– Longer time from referral to hearing | + Tort<br>+ Civil Rights<br>– Contract<br>– U.S. plaintiff jurisdiction |
| De Novo Was Demanded | + Hearing by one arbitrator<br>– Lower hearing cost<br>– Longer time from referral to hearing | + Diversity jurisdiction |

We found that shorter answer-to-hearing time periods were significantly associated with lawyers' reports of quicker settlements before the hearing. However, shorter answer-to-hearing periods were also associated with fewer attorneys selecting arbitration as their preferred procedure, and with higher probabilities that the case would both reach hearing and result in a de novo demand. Therefore, although shorter periods may speed the settlement of those cases that close before the hearing, they may also cause the hearing to be held a little too early in the process, thereby making settlement before the hearing, and case resolution at the hearing, somewhat less likely.

The choice of an answer-to-hearing time should depend on the primary purpose the program is to serve. If the idea is to speed settlements in the bulk of the cases that close before the hearing, short periods may assist in this goal. Longer periods are more consistent with the goal of reducing court burden.

Award to de novo demand. The first arbitration rule in Eastern Pennsylvania provided that demands for trial de novo were to be received within twenty days from issuance of the arbitrators' award. Eastern Pennsylvania later increased their award-to-demand period to thirty days. They had received complaints that the twenty-day time period was too short, leading to unnecessary de novo demands filed by lawyers who simply wanted to keep their options open until they could consult with their clients.

Two of the new pilot courts, however, adopted a twenty-day period as more consistent with other pretrial scheduling deadlines in their district. One questions the need for the extra ten days required by the current legislation for a speedy court that emphasizes party attendance at the hearing.

### Number of arbitrators

Decisions as to how many arbitrators should hear a case are based on perceptions of fairness, cost, and administrative burden. Districts that routinely conduct three-attorney hearings believe that the panel approach enhances fairness, in both appearance and fact, which should lead in turn to a higher likelihood that participants will accept the arbitration award. Courts that use only one arbitrator believe that careful selection of the arbitrator pool obviates the need for a panel in order to achieve fairness, and point to the administrative advantages of one-arbitrator hearings: each arbitrator can be paid more at the same, or lower, cost per case; scheduling of

hearings is simplified; and the same number of hearings can be conducted with a smaller arbitrator pool.

Attorneys in cases referred to one-arbitrator programs were less likely to select arbitration as their preferred method of decision making, or to approve of either the concept of arbitration or their program. The number of arbitrators, however, did not affect the views of parties, or those of attorneys who actually participated in an arbitration hearing, as to the fairness of the hearing or the selection of arbitration as their preferred method of decision making. Programs that supply only one arbitrator may appear somewhat less satisfactory, but they do not result in less satisfaction among those who avail themselves of the opportunity for a hearing.

The effect of the number of arbitrators on the reduction of court burden is mixed. Cases in one-arbitrator districts were both more likely to be arbitrated and to result in de novo demands. There is, however, a greater administrative burden associated with assembling panels and scheduling hearings before three attorneys.

Courts designing arbitration programs are advised to balance the negative appearance factor associated with using only one arbitrator with the administrative and dollar costs associated with panels. They should also consider the mixed method used in five of the pilot courts, which allows for hearings by either one or three arbitrators depending on what the parties request. Mixed-model rules that specify one-arbitrator hearings unless parties request otherwise result in the large majority of hearings being conducted by one arbitrator. The reverse is true where the mixed-model rule specifies a panel unless parties request otherwise.

### Arbitrator fees

In determining what to pay their arbitrators, districts evaluated the resources available for the program, and what they believed was needed both to attract top-flight members of the bar to serve as arbitrators and to keep them involved in the programs after the initial novelty wore off. Parity with what any other alternative federal or state programs paid their neutrals was also a consideration where pertinent.

There is no evidence that higher arbitrator fees enhance the quality of arbitration programs. In fact, higher fees were negatively associated with attorneys' approval of both the concept of arbitration and the particular program, and led fewer attorneys in arbitrated cases to select arbitration as their preferred procedure. Since in all of the pilot courts except New Jersey the financial disincentive for demanding trial de novo is the arbitrators'

fees, it is not possible to disentangle the fees, per se, from their post-hearing consequences. It is logical to assume that it is the higher cost of proceeding beyond the hearing that led to the attorneys' more negative attitudes.

However, higher fees do not discourage litigants from either proceeding to arbitration or demanding trials de novo. Rather, cases from districts that paid their arbitrators relatively more per case were both more likely to be arbitrated and more likely to result in demands for trials de novo than were other cases. Higher fees, therefore, should not be expected to translate into either litigant satisfaction or lesser burden on the court.

Courts designing arbitration programs are advised to engage in realistic discussions with their local bars to determine what fees are necessary to attract attorneys to their program, and to explore alternative non-monetary incentives to serving as an arbitrator. As examples, two of the current pilot programs, Western Oklahoma and Western Texas, exempt arbitrators from certain Criminal Justice Act appointments.

### Posting of arbitrator fees with de novo demands

The requirement that any demand for trial de novo be accompanied by the posting of the arbitrators' fees was first introduced in Eastern Pennsylvania, and is currently a feature in eight of the ten pilot courts. The purpose of the provision is to discourage frivolous de novo demands; the objection is that it might also stifle demands with merit. Instead, what the provision seems to do is increase the likelihood that cases will reach hearing without, on average, either encouraging or discouraging de novo demands.[71] This may indicate that parties view arbitration as a more appealing option if there is a program feature that encourages all litigants to take the award seriously.

### Litigant participation in arbitrator selection

Districts that allow litigants to select an arbitrator from the full list of those who have been certified believe that this enhances the fairness of the program and encourages parties to accept the arbitrator decision. Other courts, particularly those with large programs, believe that the administra-

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71. The two districts that operated under both procedures—Eastern Pennsylvania and Middle Florida—believe strongly that the up-front feature did reduce frivolous demands for trial de novo. Our design does not allow us to address the impact of such a provision in each court. We can say only that the provision in and of itself does not guarantee a lower de novo rate relative to that found in other pilot programs.

tive burden litigant-input procedures place on the clerk's office is unnecessary if the arbitrator pool is carefully selected in the first place. Four of the pilot courts opted for a mixed method under which the clerk's office selects a limited number of names from which litigants can choose.

Providing for input to the arbitrator selection decision does not affect parties' ratings of the fairness of either the program or the hearing, and the feature neither encourages nor discourages de novo demands. However, cases in programs that allow for at least some litigant input to the arbitrator selection process are more likely to be arbitrated. Having some say in the decision of who will hear the case, therefore, seems to make the arbitration hearing more appealing, but does not affect the likelihood that the award will be accepted.

Litigant input was consistently related to more negative attorney attitudes toward arbitration in general, and its ability to produce time and money savings. Parties' ratings of the reasonableness of their cost and time expenditures were not affected by this program feature, however.

While litigant input to the arbitrator selection process enhances the appeal of arbitration hearings, and the parties do not seem to think that the extra time it requires of them is unreasonable, the process appears cumbersome to some attorneys, creates an administrative burden on the clerk's office, and neither increases nor decreases the probability of de novo demands. Therefore, while litigant input may be beneficial in terms of increasing options, it is not likely to reduce cost or court burden.

### Summary

Despite the accomplishments of the pilot court-annexed arbitration programs, it is important to recognize the limitations of what they can be expected to do. Program features that can enhance the attainment of certain program goals may often do so at the expense of others, and the overall effect of the programs on any particular goal is likely to be relatively small. However, the selection of particular features in a purposeful way is an important first step in program implementation.

## Implementing arbitration programs

It is incumbent on those who are in favor of implementing a court-annexed arbitration program to enlist the support of members of the bench and bar. As a starting point, the programs should not be oversold in terms of what they can be expected to do, or how enthusiastically they are likely to be embraced by litigants and the courts. Although large majorities of lit-

igants were supportive of the court-annexed arbitration programs, most were moderately so. When given the chance to "agree" or "strongly agree," or to "approve" or "strongly approve," the more modest forms of support were more common than the more enthusiastic. Furthermore, of the ninety-three federal district courts, only thirty have ever expressed interest in becoming pilot arbitration courts. Of these, three withdrew their initial proposals from consideration (Northern Illinois, Southern Texas, and Eastern Washington) and one adopted and then disbanded its program (Connecticut).

What all this means is that court-annexed arbitration programs are not a panacea for overburdened courts and disgruntled litigants. However, they have shown themselves to be a useful tool if carefully designed and implemented in cooperation with other actors in the justice system.

A key to successful program planning is a full working knowledge of existing court practices and the local legal culture into which the program will be introduced. What attorneys are used to appears to influence their perceptions of the pilot court-annexed arbitration programs. Those who had previously participated in state alternative programs, and those with prior experience as an arbitrator, were generally more favorably disposed to the arbitration programs than others, while experience with binding arbitration led to less favorable perceptions. Program implementation may be eased by incorporating some features of successful state programs, while a history of unsuccessful state programs must be recognized as an obstacle to be overcome.

It is also necessary to plan how court-annexed arbitration programs will relate to other existing alternatives and to the broader case-management practices of the court. Failure to do so may cause dissatisfaction. Although the reason for disbanding the Connecticut program is obscure at this point, it appears that the court and litigants preferred a preexisting mediation program that handled similar types of cases. Furthermore, the arbitration program in Western Michigan, which had the least favorable—although still high—approval ratings among attorneys, seems to have suffered from unfavorable comparison with a preexisting mediation program which provides for attorneys' fees sanctions if a rejected award is not bettered at trial. Here, far from finding the program a barrier to trial, the comments offered by attorneys showed dissatisfaction with the lack of meaningful sanctions for rejecting the arbitration award. There were also complaints from attorneys and parties whose cases went through both arbitration and mediation procedures.

These experiences should not be taken to mean that multiple alternatives cannot work. For example, Western Oklahoma, the new pilot with the highest proportion of "strongly approve" program ratings from attorneys, also uses court-sponsored settlement conferences and summary jury trials. The key is selecting the right cases for the right forum and avoiding too many different attempts to resolve any particular case short of trial. The end result should be a matching of various procedures with particular types of cases rather than making any one individual case subject to various alternatives. There comes a point at which litigants' rejection of pressures to settle or refusal to accept non-binding determinations should be taken to mean that they want what only a court can offer: a final adjudicative decision.

It is also likely that there is a break-even point for the court, at least for some types of cases, beyond which the time spent trying to resolve a case short of trial may be just as much of a burden on judicial resources as trying the case would be. The task for court administrators and researchers is to continue to try to identify optimal procedures most likely to provide the highest quality of justice at maximum efficiency for various types of cases.

# Appendix A
# Table of Local Rules

| District (Local Rule) | Case Type | Ceiling | Selection of Arbitrators | Number of Arbitrators | Arbitrator Compensation | Time of Hearing | Place of Hearing | Authority to Grant Continuances | Disincentives to Demanding Trial De Novo | Days to Demand Trial De Novo | Procedures to Reduce Judge Involvement |
|---|---|---|---|---|---|---|---|---|---|---|---|
| N.D. Cal.<br>(Local Rule 500) | Contract or negotiable instrument (diversity, federal question, maritime)<br>Personal injury or property damage (diversity, federal question, maritime),<br>Federal Tort Claims Act<br>Longshoremen & Harbor Worker's Act<br>Admiralty Act<br>Miller Act | $100,000<br>Current: $150,000 excluding punitive damages. | Random selection of 10 arbitrators by clerk; each party entitled to strike two names, starting with plaintiff; rank remaining six names in order of preference with defendant given first choice. | One, or three if parties agree in writing. | $150 per day for one arbitrator; $75 per day per panel member. Current: $250 and $150. | Scheduled by clerk 20 to 120 days after selection of arbitrators. | Any location selected by arbitrator(s). | None, except in extreme and unanticipated emergencies as established in writing and approved by the judge. | If party who demands trial de novo fails to obtain more favorable judgment at trial costs may be assessed.<br>Current: None. | 30 | None |
| M.D. Fla.<br>(Local Rule 8) | Contract or negotiable instrument (diversity, federal question)<br>Personal injury or property damage (diversity, maritime)<br>Federal Tort Claims Act<br>Miller Act<br>As approved by the Attorney General<br>Jones Act<br>FELA | $100,000<br>Current: $150,000 excluding punitive damages | Selection by parties from list of all eligible arbitrators; if not completed in 10 days, (current: 20 days) random selection by clerk. | Three, parties may agree to fewer. | To be determined by Chief Judge (now at $75 per day). | Scheduled by clerk within 60 days (current: 90 days) of selection and designation of arbitrators on at least 20 days' notice to parties. | U.S. Courthouse. | None, except that judge may grant for good cause shown | Arbitration fees if award at trial not greater than award at arbitration.<br>Current: Fees must be posted with court when demand for de novo trial filed. | 20 (current: 30) | None |
| W.D. Mich.<br>(Local Rule 43) | All civil cases except Social Security and pro se civil rights cases | $100,000, excluding punitive damages. | Random selection of three names by clerk. Each side may strike one; if two names remain, clerk will randomly select one. | One. | $250 plus reimbursement for expenses reasonably incurred. | Clerk sets hearing from 20 to 45 days after close of discovery and arbitrator selection. | Any location designated by the arbitrator. | None, except in extreme and unanticipated emergencies as established in writing and approved by the judge. | Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when demand for de novo trial filed.<br>Current: In addition, attorneys fees may be assessed if trial judgment not 10% more favorable than award. | 30 | 1. Clerk schedules discovery.<br>2. Judges are to defer ruling on motions for summary judgment. |

| District (Local Rule) | Case Type | Ceiling | Selection of Arbitrators | Number of Arbitrators | Arbitrator Compensation | Time of Hearing | Place of Hearing | Authority to Grant Continuances | Disincentives to Demanding Trial De Novo | Days to Demand Trial De Novo | Procedures to Reduce Judge Involvement |
|---|---|---|---|---|---|---|---|---|---|---|---|
| W.D. Mo.<br>(Local Rule 302) | All civil cases except administrative appeals and prisoner cases. | $100,000,excluding punitive damages. | Random selection by clerk. | Three, parties may agree to one. | $75 per day; reasonable expenses reimbursed. | Scheduled by clerk about five months from date last answer filed | Any room designated in order assigning the case. | Arbitrator may grant for up to 30 days; thereafter requires approval of judge. | Court may sanction failure to participate in a meaningful way, including but not limited to striking of any demand for a trial de novo. 2. Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when demand for de novo trial filed. | 30 | 1. Clerk schedules discovery<br>2. Judges may defer ruling on motions filed within 30 days of hearing. |
| N.J.<br>(Local Rule 47) | Contract or negotiable instrument<br>Personal injury or property damage<br>Federal Tort Claims Act<br>Longshoremen & Harbor Workers' Act<br>Miller Act<br>Jones Act<br>FELA | $50,000, excluding punitive damages. Current $100,000 | Selected by clerk. | One. | $150 per case; will entertain petition for expenses. | Set by clerk approximately six months from date last answer filed. | No mention | Arbitrator may grant for up to 30 days thereafter requires approval of judge. | 1.Court may sanction failure to participate in a meaningful way, including but not limited to striking of any demand for a trial de novo.<br>2. $250 deposit at time of demand for trial de novo; returned if requesting party does better at trial Current: deposit is now $150.. | 30 | Judges may defer ruling on motions filed within 30 days of hearing. |
| E.D.N.Y. | All civil cases except Social Security and prisoner cases. Current: Also excludes civil rights cases & tax matters. | $50,000. Current: $75,000 | Random selection by clerk. | Three, or one if parties agree in writing. | $75 per case for each panel member; $225 per case for single arbitrator. | Scheduled by clerk about five months from date last answer filed. Current: Clerk sets an outside limit of 180 days. | U.S. Courthouse Current: courtroom in the courthouse. | Arbitrator may grant for up to 30 days; thereafter requires approval of judge. | 1. Court may sanction for failure to participate, including striking of any demand for a trial de novo.<br>2. Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when demand for de novo trial filed. | 30 | Judges may defer ruling on motions filed within 30 days of hearing. |

| District (Local Rule) | Case Type | Ceiling | Selection of Arbitrators | Number of Arbitrators | Arbitrator Compensation | Time of Hearing | Place of Hearing | Authority to Grant Continuances | Disincentives to Demanding Trial De Novo | Days to Demand Trial De Novo | Procedures to Reduce Judge Involvement |
|---|---|---|---|---|---|---|---|---|---|---|---|
| M.D.N.C.<br>Local Rule 601-611-<br>Current: Local Rule 601-608 | Contract or negotiable instrument (diversity, federal question, maritime, interpleader)<br>Personal injury or property damage (diversity, federal question, maritime, interpleader)<br>Federal Tort Claims Act<br>Longshoremen & Harbor Workers' Act<br>Miller Act<br>Jones Act<br>FELA<br>Current: Excludes civil rights and adds cases in which purpose of arbitration is likely to be achieved. | $150,000, excluding punitive damages. | Selected by parties with choice either from list maintained by Private Adjudication Center or of any other person, whether or not an attorney. If not selected in fifteen days, Adjudication Center submits list of five names to each party; each party may strike two names. Current: The tasks previously done by the Adjudication Center are now done by the clerk's office. | One. | $40 per hour, up to maximums of $80 for preparation; $380 for hearing; $40 for post-hearing conference. Maximum per case of $500. Current: $120 for preparation; hearing time paid at $60 per hour to a maximum of $600; $80 for post-hearing conference. Maximum of $800 per case. | After issue clerk establishes 90 day-discovery period and "end date for arbitration" sixty days after close of discovery. Hearing scheduled by arbitrator, in consultation with clerk and parties, prior to the "end date." Current: "end date" set at end of discovery; hearing to be set Thirty days from reference order . | Lawyers' conference room or courtroom, arbitrator may move to another location in consultation with the clerk and parties. | No mention. | 1. If party who demands trial de novo fails to obtain more favorable judgment at trial arbitrator fees and expenses are assessed.<br>2. Court may impose sanctions for failure to proceed in good faith.<br>Current: Fees to be posted at time of de novo demand, to be returned if demanding party obtains a more favorable judgment, if clerk is notified of settlement at least 10 days before trial, or if court determines that demand was made for good cause. Failure to proceed sanctions still in effect. | 30 | 1. Clerk schedules discovery.<br>2. Judges are to defer ruling on dispositive motions (except jurisdiction).<br>Current: Judges are to resolve dispositive motions. |
| W.D. Okla.<br>(Local Rule 43) | Contract or negotiable instrument (diversity, federal question, maritime)<br>Personal injury or property damage (diversity,federal question, maritime)<br>Federal Tort Claims Act<br>Longshoremen & Harbor Workers' Act<br>Admiralty Act<br>Miller Act | $100,000. | Random selection of 10 arbitrators by clerk; each party may strike two names, starting with plaintiff; rank remaining six names, defendant given first choice. If parties fail to select arbitrators within 10 days, clerk randomly selects from original list of 10 names. Or, in cases with multiple parties where all parties cannot agree among themselves, each may select one name and clerk makes final determination. | One, or three if parties agree in writing. | $75 per day for one arbitrator or for each panel member. | Scheduled by clerk 20 to 90 days after arbitrator selection. | Any place designated by arbitrators, including courtroom or office building made available by the clerk. | None, except for extreme and unanticipated emergencies as established in writing and approved by the assigned judge. | Arbitration fees if award at trial not greater than award in arbitration. Must be posted with court when request for de novo trial is filed. In addition, if position of party who requests trial de novo not improved in excess of 10% of arbitration award, opposing counsel's fees and costs may be imposed. | 20 | None |

| District (Local Rule) | Case Type | Ceiling | Selection of Arbitrators | Number of Arbitrators | Arbitrator Compensation | Time of Hearing | Place of Hearing | Authority to Grant Continuances | Disincentives to Demanding Trial De Novo | Days to Demand Trial De Novo | Procedures to Reduce Judge Involvement |
|---|---|---|---|---|---|---|---|---|---|---|---|
| E.D. Pa.<br>(Local Rule 8) | All civil cases except Social Security and prisoner cases. Current: Excludes civil rights cases. | $75,000<br>Current: $100,000. | Random selection by clerk. | Three.<br>Current: May agree to one. | $75 per case; will consider additional compensation in protracted cases. | Scheduled by clerk about five months from date last answer filed.<br>Current: Time for hearing reduced to 120 days. | U.S. Courthouse; room selected by arbitration clerk. | Arbitrator may grant for up to 30 days; thereafter requires approval of judge. | 1. Court may sanction for failure to participate, including but not limited to striking of any demand for a trial de novo.<br>2. Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when request for de novo trial filed. | 30 | 1. Clerk schedules discovery.<br>2. Judges may defer ruling on motions filed within 30 days of the hearing. |
| W.D. Tex.<br>(Local Rule 300–309) | Contract or negotiable instrument (diversity, federal question)<br>Personal injury or property damage (diversity, maritime)<br>Miller Act<br>As approved by the Attorney General<br>Jones Act | $100,000.<br>Current $150,000. | Selection by clerk of five arbitrators; each party may strike one name. | Three. | $75 per day. | Scheduled by clerk 20 to 40 days after panel selection | Courthouse, federal building or other office building made available by clerk's office. | Arbitrator may grant for up to 30 days; thereafter requires approval of judge. | Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when request for de novo trial filed | 30 | None |

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# Appendix B
# Case Types Selected as Initially Eligible for Arbitration

## Case Types Selected As Initially Eligible for Arbitration

(Entries are percentage of identified cases in the district)

(* = less than 1% of the cases)

| | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of Eligible Cases | 2,415 | 669 | 630 | 1951,376 | | 596 | 144 | 579 | 261 | 423 |
| **Most Frequent Types of Cases (At Least 10% in At Least One District)** | | | | | | | | | | |
| Other Contract | 22 | 34 | 33 | 50 | 31 | 47 | 25 | 20 | 43 | 41 |
| Motor Vehicle | 13 | 3 | 6 | 12 | 18 | 3 | 3 | 6 | 2 | 4 |
| Other Personal Injury | 11 | 6 | 5 | 7 | 16 | 2 | 11 | 6 | 3 | 5 |
| Contract—Marine | 1 | 13 | 18 | 1 | 3 | 0 | 0 | 0 | 0 | 4 |
| Contract—Miller Act | * | 12 | 7 | 2 | 2 | 1 | 20 | * | 6 | 3 |
| Contract—Negotiable Instruments | * | 5 | * | 0 | 2 | 17 | 1 | 1 | 5 | 2 |
| Civil Rights—Other | 7 | * | * | 0 | * | 1 | 1 | 14 | 3 | 1 |
| ERISA | 3 | * | * | 0 | * | * | 1 | 5 | 3 | 12 |
| **More Frequent Types of Cases (Between 4% and 9%)** | | | | | | | | | | |
| Contract—Insurance | 6 | 9 | 7 | 7 | 5 | 4 | 8 | 5 | 5 | 4 |
| Civil Rights—Jobs | 2 | * | * | 0 | * | 2 | 1 | 9 | 2 | * |
| Personal Injury, Product Liability | 5 | 1 | 5 | 5 | 6 | 1 | 8 | 8 | 0 | 2 |
| Foreclosure | 1 | 0 | 0 | 0 | 0 | 8 | 0 | * | 0 | 0 |
| Marine Personal Injury | 2 | 4 | 5 | 1 | 2 | * | 0 | * | 0 | 1 |
| Other Personal Property Damage | 1 | 5 | 2 | 2 | 1 | 2 | 4 | 1 | 1 | 4 |
| Other Fraud; Truth in Lending | 1 | 1 | 1 | 2 | 1 | 2 | 1 | 1 | 6 | 0 |
| Commerce: ICC Rates | 2 | * | * | 1 | 5 | * | 0 | 1 | 1 | * |
| Federal Employers Liability | 5 | 1 | 1 | 1 | 2 | * | 0 | 2 | * | 2 |
| Other Statutory Actions | 1 | 0 | 2 | 1 | * | 2 | 4 | 2 | 6 | 3 |
| Labor Management Relations | 2 | 0 | 0 | 1 | * | 0 | 1 | 5 | 1 | 4 |
| Motor Vehicle Product Liability | 1 | * | 2 | 1 | * | 0 | 4 | * | 0 | 0 |

| Less Frequent Types of Cases (Between 1% and 3%) | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Medical Malpractice | 1 | 1 | 2 | 2 | 3 | * | 2 | 2 | 2 | * |
| Taxes | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 2 | 3 | 3 |
| Torts to Land | * | * | 0 | 0 | 0 | 2 | 1 | 0 | * | * |
| Assault, Libel, Slander | 1 | 1 | * | 1 | 1 | 0 | 1 | 1 | 0 | * |
| Asbestos Product Liability | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| Property Damage Product Liability | 1 | * | 1 | 2 | * | 1 | 0 | 1 | * | * |
| Airplane Personal Injury | * | 1 | * | 0 | 1 | 0 | 0 | 1 | 0 | 1 |
| Other Real Property | * | * | * | 0 | * | 2 | 1 | * | * | 0 |
| Fair Labor Standards | 1 | * | * | 0 | 0 | 1 | 0 | 1 | 1 | 0 |
| Other Labor | 1 | * | * | 0 | 0 | 0 | 0 | 2 | 1 | 1 |
| Securities, etc. | 1 | * | * | 0 | * | 1 | 1 | 2 | 1 | * |
| Rent, Lease, Ejectments | * | * | 0 | 1 | 0 | 0 | 0 | 0 | * | * |
| Antitrust | * | 0 | 0 | 0 | 0 | * | 0 | 1 | * | 0 |
| Bankruptcy Appeals | 1 | 0 | * | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Forfeiture and Penalties | * | * | 0 | 0 | 0 | 0 | 0 | 0 | 2 | * |
| Social Security | 2 | 0 | 0 | 0 | * | 0 | 0 | 0 | 0 | 0 |

| Infrequent Types of Cases (Between 4% and 9%) | 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. |
|---|---|---|---|---|---|---|---|---|---|---|
| Real Property Product Liability | * | 0 | 0 | 0 | 0 | * | 0 | * | 0 | 0 |
| Airplane Product Liability | * | * | * | 0 | 0 | 0 | 0 | * | * | 0 |
| Marine Product Liability | 0 | * | 0 | * | 0 | 0 | 0 | 0 | 0 | 0 |
| Banks and Banking | * | * | 0 | 0 | 0 | * | 0 | * | 0 | 0 |
| Tax Challenge | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | * | 0 |
| IRS—Third Party | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | * |
| Airline Regulations | * | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Trademark | * | 0 | * | 0 | 0 | 0 | 0 | * | 0 | 0 |
| Patent | * | 0 | 0 | 0 | * | * | 0 | * | 0 | 0 |
| Copyright | * | 0 | * | 0 | 0 | * | 0 | * | * | 0 |
| Agricultural Acts | 0 | 0 | * | 0 | 0 | 0 | 0 | * | * | 0 |
| Appeal of Fee Determination | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Substitute Trustee | 0 | * | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| State Statutes | * | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Railway Labor Act | * | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Environment Matters | * | 0 | 0 | 0 | 0 | 0 | 0 | * | 0 | * |
| Selective Service | 0 | 0 | 0 | 0 | 0 | 0 | 0 | * | 0 | 0 |
| Land Condemndation | * | 0 | 0 | 0 | 0 | * | 0 | 0 | 0 | 0 |
| Occupational Safety | 0 | 0 | 0 | 0 | 0 | 0 | 0 | * | 0 | 0 |

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