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ALTERNATIVE CLAIM RESOLUTION MECHANISMS

1) Establishment of Alternative to Traditional Litigation

2) Letter: 01/02/1989 To: Governor Cowper From: Mary Pierce

3) Comparison of Medical Liability Reforms By: AWA, AMA, and FIAA

4) Physician Insurer

Model Alternative Medical Liability Determination Act

Reforming the Civil Litigation Process - 8/1984

1) Board of Overseers

2) Reforming the Civil Litigation Process

3) Characteristics of State-Court Annexed Arbitration Programs

4) Comprehensive State ADR Program Database

5) State Programs by Case Type

6) Memo: 03/15/1989 To: Sam Cotten From: Patricia Young

7) Court Annexed Arbitration in Hawaii

8) Hawaii Arbitration Rules

9) Executive Summary

10) Court-Annexed Arbitration Program - 01/1989

11) Court-Ordered Arbitration in North Carolina

12) Study Results

13) Summary

14) Memo: 11/07/1988 From: Patricia Young

15) Code of Virginia

16) Memo: 02/14/1989 From: Patricia Young

ALTERNATIVE CLAIM RESOLUTION MECHANISMS

ALABAMA	Ala. Code §6-5-485 (1975)
ALASKA *	Alaska Stat. §09.55.535 (Supp. 1983)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Proc. Code §1295 (West 1981)
COLORADO	--
CONNECTICUT	C.G.S.A. §§52-549 et seq. and 4-141 et seq.
DELAWARE	Chapter 682 (Arbitration Code)
FLORIDA *	-- Medical Mediation Panels ruled unconstitutional
GEORGIA	OCGA §§28-5-60 through 28-5-86
HAWAII *	Hawaii Revised Statutes, §§671-11 to 671-20
IDAHO	IC §6-1001 et seq. (medical malpractice claims)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, par. 2-611.1
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	K.R.S. Chapter 44
LOUISIANA	La. Rev. Stats. 13:5141-5157; 40:1299.41-1299.48
MAINE	14 MRSA §§1151-1155
MARYLAND *	Courts & Judicial Proceedings (CJ) Title 3, Subtitle 2 (1976)
MASSACHUSETTS *	-- See comments.
MICHIGAN	Mich. Comp. Laws Ann. §500.3051 to .3062
MINNESOTA *	Minnesota Statutes 1984, Ch. 494; see also 115B.25-115B.37 and 572.30
MISSISSIPPI	--
MISSOURI	Uniform Arbitration Act, §§435.350 to 435.470, RSMo. 1980, and H.B. 120
MONTANA *	Ch. 449, L. 1977 (Title 27, Ch. 6, MCA); Ch. 684
NEBRASKA	--
NEVADA *	NRS 41A
NEW HAMPSHIRE	NHRSA 541-B
NEW JERSEY *	Yes
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	Ohio Rev. Code Ann. §2711.21 to .24
OKLAHOMA	120.S.1984 §§1801 et seq.
OREGON *	See comments.
PENNSYLVANIA *	--
RHODE ISLAND	R.I. Gen. Laws §8-17-1
SOUTH CAROLINA *	§§56-11-510, et seq. of S.C. Code
SOUTH DAKOTA	--
TENNESSEE	T.C.A. §9-8-101 through 9-8-406, as to claims against state only
TEXAS *	Article 4590, §6.03, Revised Statutes
UTAH	--
VERMONT	Vt. Stat. Ann. Title 12, §7002(a) (Supp. 1982)
VIRGINIA	Va. Code §§8.01-581.1 to 581.12:2 (Supp. 1983)
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING *	Proposal to create a pretrial screening panel
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

ALASKA
1) AS 09.43.190-.220 (arbitration of small claims)
2) AS 09.43.010-.180 (Uniform Arbitration Act)
3) AS 09.55.535 (Voluntary Arbitration of Medical Malpractice Claims)

HAWAII
Hawaii Medical Malpractice; Haw. Rev. Stat. Ch. 672, Design Professionals

MARYLAND
Health Care Malpractice Claims

MASSACHUSETTS
Maximum amount increased in area of small claims; Superior court can now remand cases to District Court for trial when amount is under $15,000.

MINNESOTA
See also Minn. Stat. §§115B.25 to 115B.37 (only for hazardous substance injury); see also Minn. Stat. 572.30.

MONTANA
Montana L. 1985 (Title 27, Ch. 5, MCA). Medical Legal Panel Act; Uniform Arbitration Act.

NEVADA
Screening panel for medical malpractice actions.

NEW JERSEY
The State Supreme Court has instituted an arbitration program for automobile negligence claims where the amount in controversy does not exceed $15,000. Any party has a right to de novo trial in Superior Court.

NEW YORK
The state may only be sued in Court of Claims (Court of Claims Act, §9). Arbitration is available in any case if all parties agree (CPLR, §7501). Medical malpractice actions must go to a medical malpractice panel (Judiciary Law, §148-a), but this does not preclude a civil trial.

OHIO
See R.C. 2711.21-2711.24 relative to medical claims arbitration. See R.C. 9.83(E) relative to administrative "compromises" of motor vehicle, watercraft, and aircraft claims against the state. See entire R.C. Chapter 2711. relative to arbitration (often contract disputes). Also see Municipal Court Superintendence Rule 15 and Common Pleas Court Superintendance Rule 15.

OREGON
Trial Court Rules establish non-binding arbitration for cases where less than $15,000 in damages are sought.

PENNSYLVANIA
Cities of Philadelphia and Pittsburgh provide arbitration for claims of $20,000 or less; others for $10,000 or less.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

SOUTH CAROLINA

South Carolina Laws, 1976, as amended (Arbitration of Property Damage Liability Claims); South Carolina Supreme Court has issued rules for voluntary arbitration of appeals and disputes over attorney fees.

TEXAS

Creation of Texas Medical Disclosure Panel to determine proper disclosure for every medical and surgical procedure.

January 23, 1989

Steve Cowper, Governor
Third Floor, State Capitol
P.O. Box A
Juneau, AK 99811

Dear Governor Cowper:

We at the Medical Indemnity Corporation of Alaska have been concerned for some time about the existing inefficiencies and basic unfairness of the current tort system as regards medical malpractice. We are not alone in our concern with various national organizations appointing study groups to investigate the problem.

In fact "alternative" proposals to the current tort system have been developed by the American Hospital Association (AHA), the American Medical Association (AMA) and an organization to which we belong, Physician Insurers Association of America (PIAA).

Last May, I attended the annual meeting of the PIAA where their study group presented an overview of their alternative. Although they had not completed their proposal (they have just now done so), I was favorably impressed with their recommendations. I felt further investigation of an alternative system was warranted, especially since MICA had already been studying various types of arbitration legislation in other states.

In June of 1988 a unique opportunity was presented to us. Jerry Cogan, a medical student in Seattle, was looking for a project for a thesis and contacted us for suggestions. We concluded that Mr. Cogan could do a comparison study of the alternatives to the present system as proposed by the AHA, AMA and PIAA. The advantages of Mr. Cogan doing the research were: a) this was a project he could accomplish from Seattle, b) we would supply the needed information including Alaska's own statutes on arbitration as well as some direction, c) the resulting study would not be an expense to MICA.

We are forwarding that comparison to you. It is basically Mr. Cogan's analysis with some modifications by myself. We at MICA believe there is value to the citizens of this state to consider an alternative. I'm personally very encouraged by the PIAA study and will be traveling to Boston in late May for a presentation of the final results.

We would like an indication of interest from you. Do you believe that this is a viable option? Would you like us to forward further information as we receive it? Thank-you for your consideration.

Sincerely,

Mary A. Pierce

Mary A. Pierce
Executive Director

MAP/tmb/LETTER.SC

Enclosure

bcc: William Brock
Paul Roller

A COMPARISON OF MEDICAL LIABILITY REFORMS BY THE AHA, THE AMA, AND PIAA

by
Jerry Cogan
for the Medical Indemnity Corporation of Alaska

Medical liability reform can be broken down into five categories: "1.) the compensable event, 2.) the measure of compensation, 3.) the payment mechanism, 4.) the forum used to resolve disputes, and 5.) the method of implementing the new rights and responsibilities."

Three independent organizations have formed committees to come up with 'non-traditional' approaches to help resolve the medical malpractice crisis. They are the American Hospital Association, the American Medical Association, and Physician Insurers Association of America. In order to facilitate a comparison, their proposals will be broken down into the above categories.

Please note at this time that the PIAA proposal has not been finalized and the information contained herein is not complete.

THE COMPENSABLE EVENT

In the AHA Medical Malpractice Task Force Report on Non-traditional Approaches to the Medical Malpractice Crisis, the compensable event is specified in a private contract by defining the applicable standard of care. Thus, the matter of what is compensated becomes a event which is more fully understood by the patient and the physician. The matter of contracts will be considered later in the discussion of the method of implementing the new rights and responsibilities.

Besides defining the standard of care, the contract allows for the definition of kinds of evidence and witnesses which can be introduced, it could allow for the patient to elect not to sue in exchange for lower health care costs, and/or contract for no-fault compensation.

In the AMA/Specialty Society proposed alternative, the compensable event is broken down into several categories: 1.) the existence of duty, 2.) standard of care, 3.) proof of standard of care, 4.) causation, 5.) consent to medical care and informed consent, and 6.) damages.

The Existence of Duty

With this specific issue, the AMA/Specialty Society Committee felt that there were not enough problems with the current legal rules, and thus recommended only "codification and adoption of the standard rules governing the creation and extent of a duty on the part of the physician."

The Standard of Care

To ensure that a broad range of acceptable medical care is legally recognized as non-negligent, the AMA specifically proposed the following:

> "A physician is under a duty to use that degree of care and skill which is expected of a prudent competent practitioner in the same or similar circumstances, using available resources, contemporary principles, and which is commensurate with the care and skill of others of similar training, experience and/or certification. A physician is not a guarantor of good results from treatment reasonably given."

In addition to this, the AMA proposal seeks to protect the physician from the patient who refuses treatment even after being fully informed of the risks of treatment and of non-treatment.

This proposal provides health professionals, in a sense, with protection in the event of a poor outcome when that health professional acted in a responsible manner. To elaborate, if the health care provider used the expertise and means available, available medical facilities, and did so in a manner consistent with the state of medical knowledge at that time, that individual should not be held liable. Likewise, the general health of the patient would be taken into consideration, especially if the patient's general health limited appropriate medical options.

Proof of Standard of Care

The AMA/Specialty Society proposes three major rules under this heading. It would be required that an expert witness have the same education, training, and experience as the defendant and have practiced in the field within the past five years. Medical literature would be admitted as evidence, but could not be considered as conclusive evidence. Finally, the doctrine of *res ipsa loquitor*, which permits a plaintiff to prove negligence by circumstantial evidence, would be limited to evidence based on expert testimony. These proposals governing proof are not new, but include some adjustments to current rules.

Causation

Under the current tort system "the plaintiff must demonstrate both that the injury would not have occurred in the absence of the defendant's negligence (cause in fact) and that the injury was reasonably foreseeable and not too remote in time, space or logical connection from the negligent act (proximate cause)." Thus, under the current system, causation can be "difficult for the plaintiff to prove, even when negligence is clearly established." Thus, the AMA/Specialty Society proposes the following:

> "The plaintiff must prove that it is more likely than not that the physician's negligence was a contributing factor in causing the plaintiff's injury. If the physician's negligence was a contributing factor, his liability is limited solely to the extent of his responsibility for the injury. The physician will not be liable for the patient, or other factors such as the patient's preexisting medical condition."

Consent to Medical Care and Informed Consent

Consent applies to the physician informing the patient of the nature of a proposed treatment and receiving the patient's agreement prior to medical treatment. The legal standards concerning consent are considered adequate by the AMA/Specialty Committee with one exception. Here it is only proposed that the 'reasonable person' standard be adopted for determining when voluntary consent has been given.

Informed consent implies that the patient must be sufficiently informed to make a reasoned choice concerning a treatment and/or alternatives. The AMA/Specialty Committee proposes four changes. They recommend that adequacy of disclosure be made from the perspective of the reasonable patient and not from the perspective of the reasonable practitioner. The current rule on causation, which requires that the patient prove that a reasonable person would not have chosen the treatment option pursued, is recommended. However, the practitioner should be permitted to defend by showing that a patient's views or beliefs would have caused that individual to act differently than a "hypothetical reasonable person." The privilege to withhold information should only be used on therapeutic grounds and then only when harm of disclosure is highly probable. This recommendation is an adoption of the guideline proposed by the President's Commission for the Study of Ethical Problems in Medicine. Finally, the responsibility for the disclosure should be placed on the physician who is going to perform the procedure.

Damages

Under the current tort system the plaintiff must prove that a compensable injury has been suffered. However, the proposed changes in this category relate to inconsistencies, inaccuracies, and the unpredictability in the assessment of damages. This will be addressed in the next section under the measure of compensation.

Specifics about the compensable event as defined by the PIAA proposal are unknown at this time.

Summary: The AHA and the AMA differ greatly in their handling of the definition of the compensable event. The AHA proposal is very flexible in that the compensable event is defined in a contract and can thus be applied specifically. The AMA proposal, on the other hand, specifically proposes codification of some standard rules and the limitation of others.

THE MEASURE OF COMPENSATION

In the AHA report, limitations on a patient's right to recover could be stipulated in the contract. These limitations could be for pain and suffering, for awards that duplicate compensation from a collateral source, or for punitive damages. In addition, the contract could provide for periodic payments, prejudgment interest, and a first refusal right of provider to provide reparative care. The contract could also provide for a voucher system to ensure payment for future medical care, payment for lost earnings, and other related losses.

The AMA/Specialty Society proposes several changes in this category. First, they propose that damages for pain and suffering, loss of enjoyment of life, loss of consortium, and punitive damages all be lumped into one award. In addition, they propose a cap on this award limited to fifty percent of the plaintiff's average annual wage multiplied by that individual's life expectancy. These changes provide a flexible and measurable approach where none currently exists.

They also recommend the development of specific guidelines for the computation of economic damages. These guidelines could be defined by statute and/or could be established by the agency (board) responsible for the administration of these reforms using life expectancy tables, work-like expectancy tables, etc. to compute damages.

The AMA/Specialty Society recommends that the collateral source rule be adopted. It is their feeling that a patient should not be compensated twice for the same injury because this rule creates a problem of uncertainty and inefficiency. Indirect cost of the collateral source payments could be allowed at the discretion of the hearing officer.

Finally, it is recommended that the rule of joint and several liability be abolished, allowing claimants to seek and obtain compensation from each defendant only in proportion to his own liability.

The PIAA proposal apparently will contain a fixed schedule of benefits. Medical costs will be paid without limitation. Lost wages will be computed as a function of actual wage loss with a cap. These costs will be paid as they occur and would be subject to collateral source offset. Pain and suffering will be included, but with a cap.

Non-economic damages will be paid according to a fixed schedule of benefits. There will be a set amount for total permanent disability.

Summary: In the AHA proposal, again the measure of compensation would be defined in the contract. It appears at this point that the AMA and PIAA proposals are similar in their handling of compensation for economic damages, in that there would be guidelines and a cap. Both proposals also provide for a measurable approach for the payment of non-economic damages, with the AMA proposing payment based on annual wages and life expectancy and PIAA proposing a fixed schedule of benefits. Both proposals also subject payments to the collateral offset rule.

PAYMENT MECHANISM

In the contract approach suggested by the AHA Task Force, the method of payment can be specified, however, they specifically endorse the exploration of a Medical Indemnity Fund as the method of compensating medical malpractice victims for future medical expenses.

The medical indemnity fund is modeled after the New York Medical Indemnity Bill (S.B. 6770) and is designed to compensate plaintiffs and at the same time protect from awards that exceed actual provable damages. It is specifically designed for awards in excess of $100,000 and is financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

Another feature of this proposal is that the attorney's fee is taken from the first $100,000. With this feature, attorneys would have less incentive to inflate a case and its damages, thereby reducing the potential for an excessive award.

There are many advantages to this proposal, two of which are especially significant. 1.) Complainants are not limited or denied a right to trial because of a perceived award size. 2.) It provides an incentive to settle a case, because the attorney's fee is limited.

Of the disadvantages to this proposal, that there is no data to ascertain that there would be a savings, is paramount. It is difficult to project the number of cases which would warrant compensation and which might come to trial, that under the present system would not.

The AMA/Specialty Society propose one modification to the current lump sum payment mechanism and recommends consideration of a second. They propose that damage awards greater than $250,000 should be made on a yearly payment schedule. In addition, they feel that consideration should be given to a system for modification of awards for future damages if there is substantial change in economic requirements. Both the health care provider and the patient would be able to petition for these award modifications. To finance award modifications, a fund could be created to insulate insurers from uncertainty.

It is not known at this time what payment mechanism is proposed by PIAA, however, there would be restrictions on attorney contingency fees. In addition, there would be partial payment to attorneys losing cases, which would be based on actual time spent on the case.

Summary: The AHA proposed Indemnity Fund is specifically designed for awards in excess of $100,000 and which have not been settled out of court. It is similar to the AMA proposal in that it is felt that it will decrease liability costs relative to the traditional lump sum payment mechanism. The AMA proposes to make yearly payments on awards over $250,000, with consideration given to modification of awards. All three proposals provide for features to limit attorney fees. The PIAA proposal might provide an incentive to plaintiff attorneys to encourage their clients to utilize the system by providing them some compensation whether they win or lose.

FORUM FOR RESOLUTION OF DISPUTES

The method for resolution of medical malpractice claims proposed by the AHA is arbitration. The use of arbitration could be stipulated for in the private contract or an arbitration agreement can be made between a physician and his patient or a hospital and patient separately. If a separate arbitration agreement is used, this agreement is a contract, is controlled by the law of contracts, and must contain "ordinary elements of a valid contract."

There are four types of arbitration described in the AHA proposal: binding vs. non-binding, voluntary vs. mandatory, prospective vs. retrospective, and administered vs. non-administered. These types can be combined to provide variety in the specifics of arbitration, however, the AHA advocates arbitration which is 1.) *voluntary* (i.e., made freely and knowingly, with full explanation, and with a specified time for revocation for the patient) and 2.) *binding* (i.e., subject to judicial review only on narrow grounds).

To safeguard arbitration agreements from court challenge it is further suggested that the agreements have the arbitration provision in large bold print, be written in language easily understood by lay persons, and when the patient signs the agreement the arbitration provision should be specifically brought to the attention of the patient. Especially important is that the patient knows that the issue of alleged malpractice is to be decided by neutral arbitration and not by a judge and jury.

The arbitration panel is usually made up of three members and its composition is usually defined by statute or by the arbitration agreement. Selection of arbitrators is variable. In Alaska, each party selects one panel member and mutually agree on the third member. If agreement cannot be reached, the courts provide for selection of the third member.

The AMA/Specialty Society report gives states the choice to decide whether they wish to have a separate administrative agency to handle malpractice issues or use existing medical boards. The use of existing medical boards would mean that physician quality control (medical discipline) and resolution of malpractice issues would be combined. They feel that use of existing medical boards, 1.) could "provide significant leadership" and 2.) would be more amenable to adoption by legislators for this "experimental undertaking."

A restructuring of the existing medical board, however, would be necessary. Seven experienced and neutral members, with a minimum of two and a maximum of three physicians, would be appointed by the governor to full time positions for terms of five years. The jurisdiction of this board would have to be broadened to include nurses and other health care personnel, as well as hospitals, to resolve all medical liability claims. However, this board would not have jurisdiction over "claims not alleging medical negligence," such as product liability cases.

This proposal divides the "administrative adjudicatory process" into three parts. The initial hearing process would provide for claims review where there would be an evaluation of the basis for the charge, all potentially negligent health care providers could be joined in a single claim proceeding, the health care provider(s) or insurance company could offer a settlement, which would be evaluated for reasonableness by the board, or the board could dismiss the claim administratively if it was without merit.

If the claim was not dismissed, then there would be a peer review of the claimant's file, conducted by experts in the health provider's field of practice. To administratively dismiss a claim at this level would require the consensus of two such experts acting independently.

For a patient to renew a claim after dismissal it would be required that the plaintiff retain private counsel and supply the board with the statement of a qualified expert stating that the patient's injury was the fault of the "health care provider under the appropriate standards of care."

The next action by the board would be the arrangement of a hearing, which would be conducted by a hearing examiner. This hearing could be based entirely on the "basis of documentary proof" and would not require an oral hearing, but if an oral hearing was required, the examiner would conduct the proceedings. The medical board would then review the decision and decide if it represented the board's view. This would allow the hearing examiner's opinion to "become binding precedent in future cases."

Provision for appeal is two-fold after the decision of the hearing examiner. First the decision would be appealed to the Medical Board, with provisions to limit the number of appeals. Appeals of the board's decisions would go to the intermediate appellate court of the state, with further appeal to the state supreme court available as with any appeal.

The performance monitoring function of the board would allow the board to "detect physicians whose practices call for rehabilitative assistance from the board or, if necessary, discipline. Generation of information for this function would come not only from medical liability proceedings, but would also be required from insurance companies, hospitals and other institutional credentialing bodies, peer reviews, and reports by individual physicians.

PIAA proposed the use of a fault-based administrative system for the resolution of disputes. According to the Medical Liability Monitor, it would be modeled in some respects after the worker's compensation program. The commission would be made up of a judge, a physician, and a lay person, all of whom would be appointed by the governor. Rather than replace the civil justice system, this system would offer incentives to encourage resolution of claims through the administrative system rather than using the courts.

Summary: All three proposals suggest the removal of malpractice cases from the courts, at least initially. The AHA proposes the use of arbitration, the AMA proposes the use of an administrative agency or modifications of existing medical boards, and likewise, PIAA proposes the use of an administrative system. The AMA proposal differs from the AHA and PIAA proposals which are alternatives to the courts, in that it would be a mandatory system, but does allow for appeal through the courts.

METHOD OF IMPLEMENTING THE NEW RIGHTS AND RESPONSIBILITIES

As was earlier discussed, the AHA proposes that private contracts be used. It is their recommendation that private prospective "contractual arrangements can offer relief to medical malpractice litigation crisis by removing certain issues and situations from tort litigation." The AHA found that while tort reform offers promise in "making awards more predictable and consistent", it and other non-traditional changes are "compliments to, not substitutes for", existing tort reforms that are believed to be effective.

This recommendation contains the following qualifications: 1.) The contract should be a.) voluntary and b.) entered into with full understanding of the consequences. 2.) To avoid court challenge that a contract is one of adhesion, more than one choice of valid contract should be given. 3.) The contract should provide a *quid pro quo* to the health care provider, i.e., lower premiums or lower fees for those agreeing to the contract.

Private contractual agreements are favored because they will not provoke a constitutional challenge, and the above recommendations would help prevent challenges on "grounds of unconscionability". Private contracts also allow for individualized expectations and allocation of risks, but still, there might be real or imagined "inequality in the bargaining relationship."

In response to perceived unfairness to both plaintiff and defendant, inefficiency and cost of the civil jury system in resolving medical liability disputes, the AMA/Specialty Society proposes a new, experimental statute which would provide for a fault-based administrative system. In addition to the administrative change they also propose changes in legal standards which apply to medical malpractice actions that have developed under the tort system.

These changes are currently recommended only for a few states on an experimental basis, rather than as across the board changes. This will allow for testing of the alternative system, for a response from trial lawyers, and for evaluation of the risk management, peer review and management systems embodied in the proposals.

In defense of this proposal they cite three areas where they feel that the current system fails. First, it is felt that under the current system victims of medical negligence are not adequately compensated. According to a study by Dazon, only one in twenty-five incidents of malpractice received compensation.

The authors of this proposal also feel that juries are not "optimally" suited for dealing with the complicated issues that come up in medical liability cases. In addition, it has been noted that juries do not made their awards in a predictable manner. It was found by M. Peterson, that juries tend to award plaintiffs in medical malpractice cases awards that are two to four times awards for similar injuries and loss in other types of cases such as automobile accidents.

Finally, it is believed that this alternative system can resolve medical malpractice cases in a more timely manner and with less expense than the current civil justice system.

The proposal by PIAA also relies on change by statute. Their proposal, in some respects, is modeled after the worker's compensation program. The principal goal of their system is to establish uniformity in the process of resolving claims and establishing some predictability in the cost of claims.

Summary: Both the AMA and PIAA proposals require statutory change, however, the AHA proposal appears to rely on existing legal mechanisms, and except for the legislative establishment of the indemnity fund would require no change.

References:

1. Abraham, Kenneth S., Medical Liability Reform- A Conceptual Framework. *JAMA*, 1988; 260 (1): 86-72.
2. American Medical Association Specialty Society Medical Liability Project: *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based System.* Chicago, American Medical Association, 1988.
3. *Medical Malpractice Task Force Report on Non-Traditional Approaches to the Medical Malpractice Crisis*, American Hospital Association, Date?.
4. Golin, CB (Publisher): *Physician Insurers Float New Proposal for Fault-Based Alternative System*, Medical Liability Monitor, 1988; 13 (6): 1-2, 8.
5. Pierce, M.: Unpublished notes from PIAA Convention, 1988.

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Fourth Quarter, 1989

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MICA

The Physician Insurer

Inside: Earthquake! Kauai meeting beckons; PIAA companies' score high on disciplinary actions; tail coverage survey coming

A quarterly publication of the Physician Insurers Association of America

Brad Cohn, MD

The President speaks

The day the earth shook

We had wrapped up our work early. After all, the Bay Area World Series was about to resume for game three at Candlestick Park. The day was beautiful, the city resplendent for the gala, business booming, hotels bulging, people ebullient—and then suddenly with no warning, EARTHQUAKE!

It shook like hell! There was tragedy with loss of life and extensive property damage. There were business and transportation interruptions, communications failures, and much personal discomfort for the population. There were untold heroisms, ample

(Cont. on page 2)

Delegates endorse optional state model bill but reject federal alternative version

At a special meeting of delegates from PIAA member-companies in Chicago on October 7 the association adopted an official policy on model legislation proposed by the Committee to Study Alternatives to the Present System.

The delegates endorsed the state alternative version of the Model Alternative Medical Liability Determination Act proposed by the committee but rejected the federal alternative version.

Turn-out for the special meeting was substantial. Twenty-three member-companies were present and 14 others were represented by proxy. Only four were not present, and of these, at least one was delayed in transit.

The meeting was called to order by PIAA President Brad Cohn, MD, San Francisco, at exactly 9 a.m. on October 7 at the O'Hare Hilton and was concluded within an hour.

(Cont. on page 2)

Dr. Richard V. Bradley, president, Missouri Medical Insurance Company, rises to thank PIAA's Alternatives Committee for its excellent work during the recent delegates' meeting in Chicago.

Earthquake KOs loss prevention meeting

When a devastating earthquake rumbled across the San Francisco area on October 17, a PIAA meeting was one of the "casualties."

Special from San Francisco: In this issue are reports from west coast companies and from some PIAA people who came through the recent earthquake.

PIAA's Loss Prevention Interim Workshop, which was scheduled to begin at the Park Hyatt at the Embarcadero Center the following morning had to be postponed. Efforts are being made to reschedule the meeting in February of 1990.

Section chairman Adam Wilczek, Medical Inter-Insurance Exchange of New Jersey, who had arrived in San Francisco early to handle preliminary arrangements, was able to get word to the 85 anticipated registrants by telephone in the hours immediately following the earthquake. Some began calling him at 1 and 2 a.m. to check on the status of the meeting.

Wilczek learned that the hotel in which the meeting was to be held would not register any guests until power was restored and that the San Francisco airport had been closed to all flights.

(Cont. on page 6)

President

(Cont. from page 1)

evidence of people's concern for people, and there was no panic. Everyone seemed to be following the old axiom, "when the going gets tough, the tough get going." It was truly marvelous!

There is much to be learned from such experiences. Our cities, no newcomers to earthquakes, saw relatively little loss of life and property damage, due to preparedness. Our businesses were up and running promptly because of disaster planning. Our population was minimally distressed because of the community spirit and will to overcome adversity. And worldwide help was proffered in the fraternal spirit from others who felt a kinship to our adversity.

Within hours after the quake, I had made and received calls to and from other PIAA companies. The first call was from Bob Crawford, president of MICA in Arizona, wanting reassurance that our personnel were uninjured, and offering unlimited help if need be to restore our company (MIEC) to an operational status. Multiple offers of aid followed, even among competitors, and it was crystal clear to me that there was a caring among PIAA members that is an important ingredient of our organization that must not be overlooked. That caring along with the lessons of this disaster prompted me to reflect upon the strengths of PIAA and how we must marshall them to meet successfully the challenges in our future.

Any or many of our 41 companies may unexpectedly experience some sort of catastrophe. Each should now review its plan for such dreaded events, update it, and

(Cont. on page 10)

PIAA delegates vote on alternatives; accept state

(Cont. from page 1)

Delegates from PIAA companies listened intently as they gathered in Chicago on October 7 for a special meeting to consider alternative solutions to medical malpractice claims resolution.

(Cont. from page 1)

Delegates came to vote

"Delegates were well prepared when they arrived in Chicago for the special meeting. Although ample time was provided for debate, things moved along very swiftly to a conclusion. It was obvious that the delegates came to vote, not to talk," said Dr. Cohn. "We were impressed that the meeting was marked by statesmanship, rather than politics."

The Alternatives Committee, after several years of study, had proposed a fault-based administrative system keyed to a set schedule of benefits as an alternative to the present system for resolving medical liability claims. The concepts in the proposal initially were incorporated into a model federal bill. That bill included exemptions for states that already have substantial tort reform on the books or have less severe professional liability problems.

Fears about tort reform erosion

At the PIAA Annual Meeting in Boston last May, some delegates expressed concern that enactment of a federal bill might weaken or even wipe out existing tort reforms in their states. As a result, a resolution was adopted deferring preparation of a model federal bill. Instead, the committee was directed to prepare model state legislation which might be introduced on a voluntary basis in selected states on a trial basis.

The resolution also specified that no plan be adopted by the PIAA board until regional meetings could be held around the nation at which member-companies could further analyze and comment on the proposal. The resolution directed that another meeting of PIAA delegates be held after the regional meetings were concluded to take final definitive action on the proposed alternative plan legislation.

Immediately following the Boston meeting a series of regional meetings were scheduled and conducted in five cities. Sessions focused on the model state bill with some discussion of federal issues.

A number of constructive suggestions for refining the state model version were offered at the regional meetings and subsequently incorporated into the final draft, Peter Sweetland, President, Medical Inter-Insurance Exchange of New Jersey, who chairs the Alternatives Committee, told delegates to the special session.

Flawed system needs alteration

"The committee found near universal support for the principle that the tort system as it operates in most states is seriously flawed and that bold initiatives are warranted to address this issue. The committee also found strong support, except on the west coast, for the view that its model state proposal was a promising initiative which should be pursued at least on an experimental basis in some states," Sweetland said.

Sweetland introduced the first resolution which proposed that the delegates endorse the Model Alternative Medical Liability Determination Act in its state alternative version. The resolution also encouraged PIAA members and friends of legislative reform to seek adoption of the model state bill in one or more states and authorized the board of trustees and such PIAA

model, but reject federal legislation version

PIAA President Brad Cohn, MD, chairs the special delegates' meeting. Seated left to right are Joyce Harbourt, PIAA administrative manager, Alternatives Committee Chairman Peter Sweetland, NJ; W. Maurice Lawson, MD, secretary-treasurer, and J. Anthony Manger, PIAA counsel, and Alternatives Committee member.

committees as it may designate to take such actions as they deem appropriate in their discretion to carry out the purposes and intent of this resolution.

Delegates from three states rose to express favor for the state model resolution. Victor Adamo, President, Physicians Insurance Company of Michigan, said his company wants to take the PIAA model bill to a governor's fact-finding body interested in medical liability reform.

Dr. Charles Hollis, Jr., chairman and CEO of MAG Mutual of Georgia, said Georgia was interested in a model state bill and had proposed something similar to that legislature, but recommended incorporation of a sunset provision in any version of a state-level PIAA model bill.

However, Dr. Cohn cautioned that a sunset provision is "a two-way street" which could provide the leverage for those opposed to tort reform to strike past legislation from the books and block further reform.

Dr. Loren Winterscheid, chairman, Washington State Physicians Insurance Exchange and Association, said his state supports the model state bill and has already met with its lobbyists to incorporate the bill as part of its legislative program, using the ERISA statutes as the vehicle.

When a vote was called on endorsement of an optional state alternative model bill, 18 delegates voted yes and 14 no, with five abstentions.

Little support for federal bill

The second resolution proposed that the membership endorse the Model Alternative Liability Determination Act in the federal alternative version, subject to the proviso that any proposed act be modified by permitting the state legislature of any state to elect to exempt that state from the provisions of the act.

Delegates overwhelmingly rejected this resolution. The tally was nine for and 28 against with no abstentions.

One other motion was put before the special delegates' meeting. Dr. Ivan Neubauer, NORCAL, moved to appoint Dr. Brad Cohn, as the formally designated PIAA liaison to the federal government during his term as PIAA president. The motion further proposed that Dr. Cohn be given discretion to obtain input from the membership at large on any issues. The motion was seconded and unanimously approved.

Tax reform update

Donald J. Fager, Esq., Medical Liability Insurance Company of New York, chairman of the PIAA Oversight Committee, presented a report on efforts to achieve reform of the 1986 tax legislation which is impacting heavily, particularly upon claims-made companies and newer PIAA companies.

Fager said vigorous efforts were underway to achieve needed reforms and that PIAA is making every effort to coordinate its activities with those of other member-companies seeking change through other routes.

"There was general agreement after meetings in Washington that we should proceed shoulder to shoulder on these ventures," Fager said. He expressed optimism that something

(Cont. on page 10)

Special delegates' meeting

These companies attended the October 7 special meeting of PIAA delegates in Chicago:

Mutual Assurance, Inc., AL
Medical Insurance Exchange of California
NORCAL Mutual Insurance Company, CA
Southern California Physicians Insurance Exchange
The Doctors' Company, CA
COPIC Insurance Company, CO
National Capital Reciprocal Insurance Company, DC
Florida Physicians Insurance Company
MAG Mutual Insurance Company, GA
Iowa Physicians Mutual Insurance Trust
Louisiana Medical Mutual Insurance Company
Medical Mutual Insurance Company of Maine
Medical Mutual Liability Insurance Society of Maryland
Michigan Physicians Mutual Liability Company
Physicians Insurance Company of Michigan
Missouri Medical Insurance Company
Medical Inter-Insurance Exchange of New Jersey
Medical Liability Mutual Insurance Company of New York
Medical Mutual Insurance Company of North Carolina
Physicians Liability Insurance Company, OK
Pennsylvania Medical Society Liability Insurance Company
Washington State Physicians Insurance Exchange & Association
American Medical Assurance Company, IL

These companies were represented by proxy:

Mutual Insurance Company of Arizona
Connecticut Medical Insurance Company
Florida Physicans Insurance Trust
Illinois State Medical Inter-Insurance Exchange
Kentucky Medical Insurance Company
Midwest Medical Insurance Company, MN
Medical Defense Associates, MO
Risk Control Associates, Inc., MO
New Mexico Physicians Mutual Insurance Company
Northwest Physicians Mutual Insurance Company of Oregon
American Physicians Insurance Exchange, TX
Texas Medical Liability Trust
Utah Medical Insurance Association
Physicians Insurance Company of Wisconsin

These companies were not present in person or by proxy:*
Medical Assurance Company of Mississippi
Physicians Insurance Company of Ohio
State Volunteer Mutual Insurance Company, TN
Florida Physicians Protective Trust

* Some individuals' flights were delayed and at least one proxy was held up in the mails.

Tail coverage

(Cont. from page 4)

surance and hopefully with the PIAA leadership, Ms. Miller said.

"AMA's concern is to identify any problems in this area and eventually to suggest ways of dealing with them," the AMA attorney said.

Ms. Miller said that very preliminary review of the survey data suggests that nine companies of the 36 responding offer some form of occurrence coverage as well as claims-made policies. An overwhelming majority said that they had special underwriting or pricing policies for applicants applying for protection with previous claims coverage.

About one-third of the respondents said they are considering or have already begun offering prepaid tail coverage to their insureds.

The questionnaires sought quite in-depth information on tail coverage arrangements. The data will be useful to PIAA companies and to policymakers. Results are being tabulated in aggregate form and no company-specific data will be revealed.

Tax burden heightens

As a result of the 1986 Tax Reform Act, the 1987-1990 federal income tax bill for the property/casualty insurance industry is expected to be $12.2 billion, or $7.8 billion more than under the prior law, according to a report from the Insurance Services Office. The study notes that faster use of prior net operating losses and slower creation of new ones during these years leave less NOLs available to reduce future taxes.

Institute of Medicine recommends actions to solve obstetrical crisis

Recommendations to resolve a crisis in obstetrical care precipitated by severe liability problems were issued by a special Institute of Medicine committee in October.

The committee, in introducing its proposals, said "problems created by the medical liability issue in obstetrics represent a serious threat to the delivery of obstetrical care in this nation."

Short and long-term solutions were suggested, including extension of the Federal Tort Claims Act coverage or its equivalent to obstetricians serving government-financed community and migrant worker health centers.

On a temporary basis, states should contribute to professional liability coverage for Medicaid providers, as is being done in such states as Missouri, Hawaii and Montgomery County, MD.

Additionally, the committee said the National Health Services Corps, whose ranks have been depleted because of congressional cutbacks, should be expanded.

States should investigate alternatives to the tort system. Particularly promising in the view of the committee are no-fault designated compensable events schemes, fault-based administrative systems like that proposed by the AMA and a number of medical special societies, and contractual arrangements for resolution of potential liability disputes between providers and patients.

Also proposed were support for demonstration projects through the Department of Health and Human Services "for various solutions and studies of proposed state legislation," development of a national data base on malpractice claims beyond the scope of the National Practitioner Data Bank now being geared up for operation, and systematic technology assessment to "establish appropriateness, reliability and effectiveness of new medical procedures before they are widely disseminated and become the accepted standard of care."

A preliminary review of the committee's report was "a statesmanlike approach to identifying the problems and from that point of view, to address some potential solutions," suggested PIAA President Brad Cohn, MD. "We will watch with interest and a fair degree of caution the progress of these proposals."

The two-volume report, Medical Professional Liability and the Delivery of Obstetrical Care, is available from the National Academy Press, 2101 constitution Avenue, N.W., Washington, DC 20417 for $54.95 for the set. Telephone 202-334-3313 or 800-624-6242.

Settle Texas antitrust suit

In a surprise move last month, St. Paul Fire and Marine Insurance Co. of St. Paul, MN, and the Travelers Insurance Co. of Hartford, CT, agreed to out-of-court settlements in the massive Texas antitrust suit Attorney General Jim Mattox filed last year against eight insurers, the Insurance Services Office and a group of insurance executives.

Mattox intends to continue legal action against the other defendants.

Board

(Cont. from page 4)

Committee.

- Agreed to seek PIAA representation on the National Practitioner Data Bank Advisory Committee and technical group.
- Planned to meet November 30 and December 1 in Hawaii during AMA's Interim Meeting. PIAA will again host a luncheon for AMA delegates on December 3.

Cohn gets out PIAA message

PIAA President Brad Cohn, MD, San Francisco, despite the earthquake that hit his hometown in October, has been speaking, talking with reporters and attending a number of meetings around the country on behalf of the association.

In late October, Dr. Cohn participated in a panel on medical liability at the meeting of the American Academy of Pediatrics meeting in Chicago. In an unusual kind of presentation, he explained from the physician's standpoint what happens when a claim is filed, discussing the contractual relationship with an insurer and each one's responsibility.

He spoke with editors of Barron's for a comprehensive article published October 2. (See page 12) and was pictured and contributed comments to an American Medical News story published October 20 on the use of videos in medical liability cases.("My guess is that it inflates the settlement along the way," he said. Calls for radio, TV and print interviews now regularly flow to PIAA as the spokesman for the physician-insurance industry.

MKM&W
Draft of 7/21/89

MODEL ALTERNATIVE MEDICAL LIABILITY DETERMINATION ACT

(State Alternative Version)

Submitted by:

Physician Insurers
Association of America
Committee on Alternatives

TABLE OF CONTENTS

		Page
SECTION 1.	SHORT TITLE; PURPOSE	1
SECTION 2.	DEFINITIONS	1
SECTION 3.	REMEDIES; JURISDICTION; REMOVAL	2
SECTION 4.	ESTABLISHMENT OF THE MEDICAL LIABILITY DETERMINATION BOARD	3
SECTION 5.	HEARING PROCEDURE	4
	(a): Creation of Panels	4
	(b): Pleadings; Assignment to a Panel	5
	(c): Discovery	6
	(d): Experts	7
	(e): Settlement Conference; Additional Discovery	8
	(f): Motion for Summary Decision	9
	(g): Hearings	9
	(h): Joint Respondents	9
	(i): Mixed Actions	10
	(j): Appeals	11
	(k): Modification of Decision	11
SECTION 6.	DAMAGES	12
	(a): Limitation of Recovery	12
	(b): Payment of Damages	18
SECTION 7.	LIMITATIONS OF ACTIONS	20
SECTION 8.	EFFECTIVE DATE	21

SECTION 1. SHORT TITLE; PURPOSE

(a) This Act may be cited as the "Model Alternative Medical Liability Determination Act."

(b) The interests of injured persons, health care providers and the public are being undermined by the cost, unpredictability and inequities resulting from the civil justice system's administration of medical malpractice disputes. It is the intent of this Act to provide an efficient and equitable alternative mechanism for the resolution of medical malpractice disputes.

SECTION 2. DEFINITIONS

When used in this Act:

(1) The term "Board" means the Medical Liability Determination Board.

(2) The term "Claimant" means any person who files a Verified Complaint with the Medical Liability Determination Board, including any person who files such a complaint as a successor in interest, guardian, or legal representative.

(3) The term "Collateral Benefits" means all benefits and advantages received or entitled to be received by an individual as a result of a Treatment Related Injury or by his dependents or estate pursuant to any State or Federal income disability, worker's compensation or health benefits act, any health, sickness, life, or income disability insurance, accident insurance, or any contract or agreement of any group, organization, partnership, or corporation to provide, pay for or reimburse retirement benefits or the cost of medical, hospital, dental or other health care services.

(4) The term "Health Care Provider" or "Provider" means any person, clinic, hospital, health dispensary, health maintenance organization, or health care facility, licensed, certified or authorized in this State to provide health care services. For purposes of this Paragraph, a "Health Care Provider" shall include, but not be limited to: any institution described in Subsection (e), (f), (g), (j), (o), (dd), and any health care professional described in Subsection (r) of Section 1861 of Title XVIII of the Federal Social Security Act.

(5) The term "Health Care Services" means the undertaking by a Health Care Provider of health maintenance, diagnosis, or treatment of human disease, pain, injury, disability, deformity or physical or mental condition, but excluding a service that is limited to the formulating and/or dispensing of drugs or medications.

(6) The term "Non-Provider" means a person, entity, or association that is not a Health Care Provider.

(7) The term "Respondent", unless specifically stated otherwise, means any Health Care Provider or Non-Provider named in a complaint or subsequently joined to the action.

(8) The term "Treatment Related Injury" means sickness, disease, injury or bodily harm caused by a Health Care Provider who fails to provide Health Care Services in accordance with the standards required under applicable law.

(9) The term "Panel" means a Medical Liability Determination Panel appointed by the Board.

SECTION 3. REMEDIES; JURISDICTION; REMOVAL

(a) Any person claiming to have a Treatment Related Injury may, by himself, or by his attorney-at-law, make, sign and file a Verified

Complaint with the Board, or may institute a civil action in the Superior Court. A Claimant shall be barred from instituting a civil action in any court of this State relating to the same incident or Treatment Related Injury or on facts related to those alleged before the Board. A Claimant shall similarly be barred from instituting an action before the Board relating to the same incident, Treatment Related Injury or facts alleged before any State court.

(b) The Respondent named in the Verified Complaint or a Respondent that is subsequently joined may remove a claim filed with the Board to the Superior Court, provided however, that if judgment is entered by the court against any Health Care Provider Respondent, a Health Care Provider Respondent removing the matter to the Superior Court shall be required to pay Claimant the greater of the total damages attributable to that Health Care Provider Respondent's action or inaction or fifty (50%) percent of the total damages.

SECTION 4. ESTABLISHMENT OF THE MEDICAL LIABILITY DETERMINATION BOARD

(a) There is hereby established a Medical Liability Determination Board which shall be composed of nine (9) members. In addition to the Chairman of the Board, membership on the Board shall include two (2) representatives from the following: health care facilities; physicians; insurers of Health Care Providers; and attorneys licensed to practice in this State. Members of the Board, including the Chairman of Board, shall be appointed by the Governor consistent with the procedure for appointments to executive agencies. Members of the Board shall serve at the pleasure of the Governor. Each member of the Board, other than the Chairman, shall receive a salary of $_____ per year. The Chairman shall receive a salary of $_____ per year.

(b) The Board shall promulgate such rules and regulations pursuant to the administrative procedure act as may be necessary to achieve the effective and efficient operation of the Board. The Board shall also review exceptions from the decision of a Panel and render a final determination pursuant to Section 5(j)(1) of this Act. The Board shall file a report with the Governor as required by the Governor from time to time.

SECTION 5. HEARING PROCEDURE

(a) Creation of Panels

(1) The Board shall establish an adequate number of Medical Liability Determination Panels to consider claims coming before the Board. The Panels shall conduct hearings and determine matters of fact and law pursuant to this Act and the rules and regulations promulgated by the Board.

(2) Each Panel shall be composed of three (3) members including a practicing physician, a judge of the Superior Court, and a public member. The public member shall be a person who is neither an attorney nor a physician, who has no financial interest in any Health Care Provider, and whose occupation, experience and prior activities indicate no evidence of bias or partiality toward or against Health Care Providers in professional liability matters. The Board shall appoint all members to the Panel other than the judge serving on the Panel who shall be appointed by the Chief Justice of the Supreme Court. The Board shall select the physician member from among those physicians recommended by the State Medical Society. The judge sitting on the Panel shall serve as chairman. The terms and conditions of membership on the Panel shall be determined by the Board, provided, however, that Panel members shall serve a minimum term of three (3) years.

(b): Pleadings; Assignment to a Panel

(1) Any person seeking to institute an action before the Board shall file a Verified Complaint which describes the nature of the claim. The Board shall prescribe a form for the filing of a claim, provided, however, that the form shall require information relating to the date and place of Treatment Related Injury, the names of all Health Care Providers against whom damages are sought, the nature of the alleged Treatment Related Injury, and a description of the damages. The institution of an action before the Board constitutes a waiver of any patient-physician privilege and authorization for the disclosure of all relevant information from any source as to those matters before the Board.

(2) All Respondents shall file an Answer within thirty (30) days of their receipt of the Verified Complaint in the manner and form prescribed by the Board. An Answer shall set forth a Respondent's defenses to each claim asserted and shall include every known counterclaim, cross-claim, claim for contribution or indemnity and claim against any person not a party to the action.

(3) The Board shall adopt rules providing for the mandatory joinder of parties and claims to ensure that all aspects of the claim are adjudicated concurrently. Failure to comply with the rules adopted under this Paragraph shall bar all future actions or claims against any party, whether or not such party has been joined in the action, before the Board or in the Superior Court.

(4) Upon receipt by the Board of Respondents' Answers, the Board shall assign the matter to a Panel. The Chairman of the Panel shall preside over and decide all disputes or issues arising prior to the hearing.

(5) The Board shall prescribe rules regarding the circumstances under which the amendment of Verified Complaints, Answers and other pleadings may be permitted.

(c): Discovery

Discovery in matters before the Board shall be limited as follows:

(1) Within ninety (90) days of the filing of Respondents' Answers, the parties shall file the following information with the Board and shall serve the same on all parties: (A) all relevant medical records; (B) any existing medical report from a Health Care Provider who has treated the Claimant for any condition related to the alleged Treatment Related Injury; (C) an affidavit describing the facts and circumstances of the claim and the nature of alleged damages; and (D) answers to a uniform set of interrogatories propounded by the Board. This ninety (90) day period shall be known as the Initial Discovery Period.

(2) Except in unusual circumstances approved by the Panel, depositions shall not be permitted during the Initial Discovery Period. Depositions may be otherwise scheduled at the settlement conference (as provided for in Subsection 5(e)).

(3) Each party may serve upon any other party interrogatories or requests for admissions within twenty (20) days of the beginning of the Initial Discovery Period, provided that such interrogatories or requests for admissions shall not exceed thirty (30) questions. Responses to interrogatories or requests for admissions under this Subparagraph shall be served upon the propounding party prior to the conclusion of the Initial Discovery Period.

(d): Experts

(1) During the Initial Discovery Period, the Panel shall consider the appointment of one or more impartial qualified experts whose opinions would materially aid the Panel in its determination of the claim. The Board shall maintain a list of qualified medical, vocational and actuarial experts. For purposes of this Paragraph, a "qualified expert" shall be actively engaged at least fifty (50%) percent of his time in clinical practice or teaching, or in a combination of clinical practice and teaching, in the area or specialty at issue in the matter before the Board.

(2) The parties shall be notified of the qualified expert or experts appointed by the Panel and shall have a reasonable opportunity to object to the appointment of such qualified expert or experts for good cause. For purposes of this paragraph "good cause" shall include, but not be limited to, qualification of the expert or conflict of interest.

(3) The qualified expert or experts appointed by the Panel shall be provided by the Panel with copies of all pleadings and discovery. A qualified expert may request additional information from a party or require the Claimant to submit to a physical examination.

(4) Each qualified expert shall submit a written report to the Panel setting forth his findings and opinions within thirty (30) days of his appointment. This report shall be admissible into evidence at the hearing. The findings and conclusions contained in the report shall not be binding upon the Panel, but shall be accorded such weight as the Panel, sitting as the trier of facts, chooses to ascribe to them in view

of all the relevant evidence introduced at the hearing. A copy of the qualified expert's report shall be forwarded to each party by the Panel. The Board shall reasonably compensate the qualified expert for his time in conducting an examination, if any, and preparing a report. A qualified expert appointed by the Panel may be deposed or required to testify by a party as to the findings and opinions stated in his report. The party taking the qualified expert's deposition or requiring his attendance at the hearing shall pay the qualified expert a reasonable fee, which fee shall be determined by the Panel if the qualified expert and party involved cannot agree on reasonable compensation.

(5) A party may submit a report or testimony of its own expert to the Panel in support of a claim. The qualifications of the expert do not have to meet the standards of a qualified expert (as defined in Paragraph (1)), provided however, that the Panel can, in its discretion, disregard or ascribe limited weight to the findings and conclusions of such an expert. A copy of such expert's report shall be submitted to the expert or experts appointed by the Panel, who may, within thirty (30) days thereafter, submit a supplemental report with respect to the qualifications of the party's expert and such expert's findings and conclusions.

(e): Settlement Conference; Additional Discovery

Within one hundred and eighty (180) days of the filing of Respondents' Answers, a member of the Panel appointed by the Chairman shall hold a settlement conference with the parties. If the parties are unable to completely resolve their dispute, a hearing date shall be scheduled for no later than two hundred and twenty five (225) days after

the filing of Respondents' Answers. At the settlement conference, the parties shall advise the member of the Panel of the need, if any, for further discovery prior to the hearing. The Panel member may grant reasonable discovery requests and shall fix the scope and time deadlines for any further discovery.

(f): Motion for Summary Decision

At any time subsequent to the conclusion of the Initial Discovery Period, a party may move before the Panel for a summary decision upon all or any part of a claim or as to any defense. A summary decision shall be granted if the pleadings and discovery, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.

(g): Hearings

Hearings shall be conducted so as to be consistent with the rules of procedure and evidence promulgated by the Board. The Panel may, in the interests of efficiency or encouraging settlement of a claim, conduct separate hearings on liability, damages and allocation of negligence among multiple Respondents.

(h): Joint Respondents

(1) In a matter involving multiple Respondents, the Panel shall determine the extent, if any, of each Respondent's liability for damages and shall fix a percentage of negligence attributable to each Respondent.

(2) No Health Care Provider Respondent shall be jointly and severally liable for the damages attributable to another Respondent. Non-Provider Respondents shall be jointly and severally liable for the damages attributable to all Non-Provider Respondents.

(i): Mixed Actions

(1) For purposes of this Subsection, a "mixed action" means an action in which claims against Health Care Providers for Treatment Related Injuries are asserted with claims against Non-Providers.

(2) Except as otherwise provided in this Subsection, the terms and provisions of this Act shall apply to mixed actions, provided however, that a Non-Provider removing a mixed action shall not be subject to the provisions of Section 3(b). A mixed action before the Board shall be transferred to the Superior Court if all claims against Health Care Providers are dismissed or settled, or the Panel, on its own motion or on motion of any party, determines that the claims against the Health Care Providers were asserted soley for the purpose of invoking the Board's jurisdiction. A party shall be barred from instituting claims before the Board that were either dismissed, settled or transferred to the Superior Court.

(3) In any mixed action before the Board or the Superior Court, the trier of fact shall divide the total damages into amounts compensable under this Act (as defined in Subsection 6(a)(1)) and amounts that are not recoverable under this Act, such as noneconomic loss in excess of the amounts defined in Paragraph 6(a)(2)(B) and exemplary or punitive damages. The trier of fact shall also determine the percentage of damages directly attributable to each party's negligence. Claimant's recovery in a mixed action shall be limited to: (A) from Health Care Providers, the percentage of damages attributable to the Health Care Providers and allowable under Subsection 6(a)(1); and (B) from Non-Providers, the percentage of damages recoverable under this Act and any other damages permitted applicable law. The limitation on

damages described in this Paragraph shall govern if a Non-Provider institutes an action against a Health Care Provider in the Superior Court to recover all or part of a judgment entered against the Non-Provider in a matter where the Health Care Provider provided Health Care Services.

(j): Appeals

(1) A party shall be afforded the opportunity to file exceptions to the decision of the Panel with the Board in a manner and subject to such rules as shall be prescribed by the Board. The record reviewed by the Board shall include the exceptions, replies, if any, transcript of the hearing, evidence introduced at the hearing, and may, in the Board's discretion, be enlarged to include additional documentary evidence or a supplemental hearing. Within the time prescribed by law, the Board shall enter an order adopting, rejecting or modifying the Panel's decision. The Board's order shall constitute a final decision.

(2) A party may appeal the final decision of the Board to the Superior Court, Appellate Division. The Appellate Division shall affirm the Board's decision unless the court determines that the Board's decision could not reasonably have been made or is not based upon sufficient credible evidence in the record as a whole and giving due regard to the Board's expertise.

(k): Modification of Decision

An application for modification of a decision granting future net economic and noneconomic loss (as defined in Paragraphs 6(a)(2)(A) and (B)) may be made to the Board, or to the Superior Court if it entered judgment in the matter, at any time by a Respondent. The application

shall be granted if the Respondent shows by clear and convincing evidence that there were facts in existence at the time of the original decision that were fraudulently concealed or that could not have been discovered by reasonable diligence, or that there have been changed circumstances such as the rehabilitation of the Claimant, or refusal of the Claimant to participate in rehabilitation, occupational training or education, that were not, and reasonably could not have been, anticipated at the time of the initial decision.

SECTION 6. DAMAGES

Except as hereinafter provided, the provisions of this Section shall be applicable to all actions in which a Health Care Provider is found liable for a Treatment Related Injury, whether such claim is adjudicated before the Board or in a the Superior Court.

(a): Limitation of Recovery

(1)(A) The amount of damages payable to a Claimant for a Treatment Related Injury shall be equal to the sum of net economic loss (as defined in Paragraph (2)(A) of this Subsection), and net noneconomic loss (as defined in Paragraph (2)(B) of this Subsection), reduced by all Collateral Benefits. Damages awarded by the Board may also include attorney's fees (as described under Paragraph (2)(C) of this Subsection).

(B) The amount of damages payable to a deceased Claimant's estate or Dependents (as defined in Paragraph (2)(D)(i) of this Subsection) shall be the amount of death benefits (as defined in Paragraphs 2(D)(ii)) and 2(D)(iii) of this Subsection), reduced by all Collateral Benefits. Damages awarded by the Board may also include attorney's fees (as described under Paragraph (2)(C) of this Subsection).

(2) For purposes of this Subsection:

(A) The term "net economic loss" means (I) lost income (as defined in Paragraphs (2)(A)(i)(a), (2)(A)(i)(b) and (2)(A)(iii) of this Subsection), plus (II) compensable dependent care (as defined in Paragraphs (2)(A)(ii) and (2)(A)(iii) of this Subsection), plus (III) reasonable and necessary medical expenses (as defined in Paragraph (2)(A)(iv) of this Subsection), plus (iv) rehabilitation and occupational training expenses (as described in Paragraph (2)(A)(v) of this Subsection), reduced by the amount of Collateral Benefits.

(i)(a) The term "lost income" for a Claimant that was employed prior to the Treatment Related Injury shall mean 70% of the loss of income from work Claimant would have performed if he had not been injured, reduced by 70% of any income for substitute work actually performed or which the Claimant unreasonably failed to perform, provided however, that damages for lost income, less Collateral Benefits shall not exceed twice the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) multiplied by the number of weeks of lost income.

(i)(b) The term "lost income" for a minor or an unemployed or nonworking Claimant shall mean the greater of 70% of the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection), or 70% of the average weekly wage as documented in Claimant's actual income history, less Collateral Benefits.

(ii) The term "compensable dependent care" shall mean reasonable expenses incurred to replace ordinary and necessary services Claimant would have performed for the benefit of himself or his family if he had not been injured, less Collateral Benefits.

(iii) Total damages for lost income and compensable dependent care (as provided for in Paragraphs (2)(A)(i)(a), (2)(A)(i)(b), and (2)(A)(ii) of this Subsection) shall not exceed three (3) times the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) multiplied by the number of weeks of lost income, or number of weeks for which Claimant will receive damages for compensable dependent care.

(iv) Reasonable and necessary medical expenses shall include the cost of present and future medical care required to treat or cure Claimant's Treatment Related Injury, provided however, that such future medical expenses can be determined with reasonable certainty. Respondent shall pay future medical expenses as incurred under a procedure to be established by the Board. Modification of damages for future medical expenses shall be permitted in accordance with Subsection 5(k).

(v) Rehabilitation and occupational training expenses shall include expenses for a procedure or treatment for rehabilitation or occupational training if the procedure, treatment or training is reasonable and appropriate for Claimant's Treatment Related Injury, the expenses are reasonable in relation to the probable rehabilitative effects, and such procedure, treatment or training is likely to contribute substantially to rehabilitation or reduce Claimant's net economic loss. In the event the Panel cannot conclusively determine if such procedure, treatment or training will contribute substantially to Claimant's rehabilitation or reduce net economic loss, it may award temporary rehabilitation and occupational training expenses and shall reevaluate the effect of the procedure, treatment or training within a reasonable period of time not to exceed five (5) years.

(vi) The State Average Weekly Wage shall be determined by reference to the report on Employment and Earnings, Average Weekly Earnings for Production Workers on Manufacturing Payrolls, as published by the United States Bureau of Labor Statistics, or by reference to such other comparable index or record maintained by the United States Bureau of Labor Statistics or the State Department of Labor.

(B) The term "net noneconomic loss" shall be limited to damages for permanent impairment (as defined in Paragraph (2)(B)(i) of this Subsection) and severe temporary impairment (as defined in Paragraph (2)(B)(ii) of this Subsection), reduced by the amount of Collateral Benefits. Net noneconomic loss shall not include damages for other pain, suffering, inconvenience, mental anguish, punitive or exemplary damages, or any other general damages arising from the loss to another individual, including but not limited to loss of consortium, companionship, marital care, guidance and education.

(i) The term "Permanent Impairment" means a medically determinable injury or impairment caused by a Treatment Related Injury which results in dismemberment, significant disfigurement or substantial limitation of a bodily function, which will last throughout the life of the Claimant.

(ii) The term "Severe Temporary Impairment" means a medically determinable injury or impairment caused by a Treatment Related Injury which prevents Claimant from actively engaging in his usual and customary employment, or impairs Claimant's ability to perform all or a substantial amount of ordinary and necessary functions for himself and his family, for at least one hundred and eighty (180) days.

(iii) The Board shall establish a schedule setting the maximum noneconomic damages to be awarded for different categories of Permanent Impairment and Severe Temporary Impairment. The schedule of damages shall account for variables such as Claimant's age and partial impairment, provided however, that the maximum amount of damages that may be awarded for a Permanent Impairment or Severe Temporary Impairment shall not exceed one-half (½) the State Average Weekly Wage multiplied by the number of weeks of Claimant's actual life expectancy, provided however, the Claimant's actual life expectancy shall be calculated based upon the existence of the Permanent Impairment or Severe Temporary Impairment, and further provided that no category of noneconomic loss shall be compensated by an amount in excess of the maximum amount payable for a Permanent Impairment.

(C) Attorney's fees awarded under Paragraphs (1)(A) and (1)(B) shall be determined as follows:

(i) An amount equal to the attorney's reasonable hourly rate shall be payable to Claimants prevailing, in whole or in part, in a matter before the Panel, Board or the Superior Court, Appellate Division, provided that (I) the total amount of attorney's fees claimed does not exceed twenty-five (25%) percent of all damages payable to Claimant; (II) the Claimant submits sufficient documentation supporting the request for an award of attorney's fees; and (III) attorney's fees in excess of the amount provided in (I) above may be granted if the Panel determines that the novel issues or complexities of the claim support an award of additional attorney's fees.

(ii) An amount equal to one-third of the attorney's reasonable hourly rate may be awarded to Claimants that do not prevail on a claim before the Board if the Panel, or the Board in the case of an appeal, in its discretion, determines that Claimant had good cause to institute and pursue a claim. In the event a Claimant subsequently prevails on appeal, either before the Board or the Superior Court, Appellate Division, the Claimant shall be entitled to a retroactive award of attorney's fees consistent with the terms set forth in Paragraph (2)(C)(i) above.

(D) (i) The term "Dependent" shall mean a person related to the deceased Claimant by blood, adoption, or marriage who is entitled to bring a civil action under State law for damages arising from the Claimant's death.

(ii) Death benefits payable to a Dependent shall be equal to the lesser of (I) lost income (as defined in Paragraphs (2)(A)(i)(a), (2)(A)(i)(b) and limited by Paragraph (2)(A)(iii) of this Subsection), plus compensable dependent care (as defined in Paragraph (2)(A)(ii) and limited by Paragraph (2)(A)(iii) of this Subsection), or (II) five hundred times the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) less Collateral Benefits, but only to the extent that such Collateral Benefits exceed $50,000. In the event there are multiple Dependents, the total damages awarded under this Paragraph shall be divided among Dependents in such proportions as will result in a fair and equitable apportionment of the damages.

(iii) In the event the deceased Claimant has no Dependents (as defined in Paragraph (2)(D)(i) of this Subsection), death benefits payable to a deceased Claimant's estate shall be equal to the lesser of

(I) two hundred and fifty times the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) less Collateral Benefits, but only to the extent that such Collateral Benefits exceed $50,000, or (II) damages that would be payable under Paragraph (2)(D)(ii) of this Subsection if the deceased Claimant had Dependents.

(b): Payment of Damages

(1) Except as otherwise provided in this Subsection, damages for net economic loss incurred prior to the decision of the Panel or judgment by the Superior Court and death benefits to a deceased Claimant's estate (as provided in Subsection (a)(2)(D)(iii) of this Section) shall be payable within ten (10) days of the decision or judgment, unless a stay pending appeal has been granted by the Panel or the Superior Court, or within ten (10) days of the resolution of an appeal of the decision or judgment.

(2) Damages for future lost income and compensable dependent care whose present value exceeds $50,000, net noneconomic loss (as defined in Subsection (a)(2)(B) of this Section) and death benefits to a Dependent (as provided in Subsection (a)(2)(D)(ii) of this Section) shall be paid in monthly installments over the expected duration of the loss, or Treatment Related Injury, or in the case of payment for death benefits, over the Claimant's life expectancy prior to the Treatment Related Injury. The payment of damages referred to in this Paragraph shall be adjusted to account for inflation based upon the annual percentage increase in the cost of living, as determined by reference to the Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. City Average), as published by the United Stated Bureau of Labor Statistics, or by reference to such other index of comparable

reliability as the Board may select. The Board may require the Respondent, at its sole cost and expense, to purchase an annuity to guarantee the periodic payment of future damages as described in this Paragraph.

(A) Subject to Paragraphs (A)(i) and (A)(ii) below, damages for future lost income (as defined in Paragraphs (a)(2)(A)(i)(a) and (a)(2)(A)(i)(b) of this Section) and compensable dependent care (as defined in Paragraph (a)(2)(A)(ii) of this Section) which would have been payable to the Claimant shall be payable to the Claimant's surviving spouse and qualified dependents. In the event a surviving spouse and multiple qualified dependents exist, the damages shall be divided among the surviving spouse and multiple qualified dependents in such proportions as will result in a fair and equitable apportionment of the damages.

(i) A surviving spouse shall be entitled to receive damages which would have been payable to the Claimant for future lost income and compensable dependent care until the earlier of the surviving spouse's remarriage, or seven (7) years from the Claimant's date of death.

(ii) The term "qualified dependent" shall mean a child of the deceased Claimant by blood or adoption that is no older than eighteen (18) years of age, provided however, that a child continuously enrolled as a full time student may be qualified dependent until the age of twenty-three (23).

(iii) Payments made to a surviving spouse and qualified dependents pursuant to this Paragraph shall be subject to the terms and conditions of the introductory section of this Paragraph (2).

(3) Payment of attorney's fees pursuant to Subsection (a)(2)(C) shall be payable within ten (10) days of the decision of the Panel or within ten (10) days of the resolution of an appeal of the decision.

SECTION 7. LIMITATIONS OF ACTIONS

(1) No action alleging a Treatment Related Injury shall be commenced more than two (2) years after the discovery of a Treatment Related Injury, provided however, that in no event shall an action be commenced more than four (4) years from the provision or omission of Health Care Service alleged to have caused the Treatment Related Injury.

(2) The disability, incapacitation or imprisonment of a Claimant shall toll the time period set forth in Paragraph (1) for one (1) year after the termination of the disability, incapacitation or imprisonment, provided however, that no action may be commenced more than four (4) years from the provision or omission of Health Care Services alleged to have caused the Treatment Related Injury. A disability shall be deemed terminated if a legal guardian is appointed with sufficient authority to institute a claim under the Act.

(3) A person shall not be considered to be under a legal disability because of his age if he has a competent guardian with legal authority to bring a claim or action for any Treatment Related Injury, provided that a claim which accrued prior to a minor's eighth birthday may be filed at any time through the minor's tenth birthday.

(4) Notwithstanding any of the provisions in this Subsection, the time periods described in Paragraphs (1) and (2) of this Section shall be tolled during the time in which the fact of injury was intentionally concealed by the Health Care Provider.

SECTION 8. EFFECTIVE DATE

The Effective Date of this Act shall be [date enacted].

REFORMING THE CIVIL LITIGATION PROCESS: HOW COURT ARBITRATION MAY HELP

Deborah R. Hensler

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(October 1984)

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The Institute for Civil Justice, established within The Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.

Rand is a private, nonprofit institution, incorporated in 1948, which engages in nonpartisan research and analysis on problems of national security and the public welfare.

The Institute examines the policies that shape the civil justice system, the behavior of the people who participate in it, the operation of its institutions, and its effects on the nation's social and economic systems. Its work describes and assesses the current civil justice system; analyzes how this system has changed over time and may change in the future; evaluates recent and pending reforms in it; and carries out experiments and demonstrations. The Institute builds on a long tradition of Rand research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

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The Rand Corporation
Santa Monica, California 90406-2138

Reforming the Civil Litigation Process: How Court Arbitration May Help *

by Deborah R. Hensler

The growing backlog of cases in our nation's civil court system too often translates into sharply-higher litigation costs and lengthy delays before a case is heard. In some jurisdictions, waiting periods are as long as five years and trial costs can typically equal or exceed the disputed amount.

To reduce the congestion, some states, including New Jersey, are instituting court-administered arbitration programs to resolve a broad range of civil cases.

Dr. Deborah R. Hensler, a senior social scientist for The Institute for Civil Justice, The Rand Corporation, has done extensive research into the problem of court congestion and alternative dispute resolution methods.

She holds a B.A. degree in political science from Hunter College and a Ph.D. in political science from Massachusetts Institute of Technology. Dr. Hensler is the author of numerous publications.

Across the nation, civil court systems have been inundated with an unprecedented amount of litigation. New Jersey's civil courts today are handling 75 percent more cases than they managed a decade ago. In the last four years alone in the federal district courts, the number of cases filed, most of which arise from civil disputes, increased by almost 50 percent. A recent survey by the Rand Corporation's Institute for Civil Justice found that three-quarters of the administrators of the states' highest courts believe that they are facing serious problems of congestion and delay on the civil side of their court systems.

Traditionally, when court workloads increased, legislatures appropriated funds for new judgeships. Over time, in most jurisdictions, the supply of judicial resources expanded to meet the demand. Recently, however, with court costs climbing and budgets constrained, legislatures have begun to resist requests for new judgeships. A recent Institute for Civil Justice report estimated that the public pays more than one quarter of a million dollars per year for each state trial court judgeship, and about three-quarters of a million dollars annually for each federal district court judgeship. (The cost of a judgeship includes the judge's salary, a support staff and a pro rata share of court operating expenses.) The combined bill for processing civil cases through the state and federal trial court systems was estimated at about $2.2 billion annually.

Faced with increasing fiscal limitations, courts are trying to manage existing resources more efficiently. Some use computer-based systems to schedule cases for conferences and trial. Others have established procedures to review judicial productivity.

In many jurisdictions, judges also have been rethinking their role in managing litigation. Historically, attorneys were responsible for determining

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the form, content and pace of litigation activities. Judges were responsible for hearing attorney's motions, making dispositive judgments, and eventually, presiding over trial. But now this traditional division of responsibilities has been challenged by court officials, and even by some attorneys, who believe that judges must assume greater control over the litigation process. According to these court reformers, if attorneys are left to their own devices, too many will explore every aspect of a case, whatever the time and expense involved. Critics charge that the institutionalization of "discovery," the process of exchanging information about a case, has intensified such time-consuming practices.

The concept of "discovery" was introduced in the federal court system in the 1930s to ensure that both sides in a case had equal access to relevant information and to encourage a resolution of the dispute based on the facts. At first, discovery was applauded for making litigation more rational. Today, however, it is widely viewed as a leading cause of court congestion and delay. Motions to compel or prevent discovery increase the demand for judicial decision-making and may be used to delay the progress of litigation. Preliminary results from a recent study of the causes of delay suggest that cases involving discovery take half again as long, on average, as cases without discovery. Discovery can be particularly arduous and time-consuming in complex cases but it also is used routinely in simple personal injury litigation. One New Jersey judge recently estimated that only 20 to 25 percent of the motions he hears truly require court action; the remainder, in his opinion, involve matters that could and should be settled between the attorneys without formal court intervention.

One New Jersey judge recently estimated that only 20 to 25 percent of the motions he hears truly require court action.

Judicial Case Management

Discovery abuse is the target of much of the current movement toward judicial management of cases. In federal district courts, newly-adopted rules require the judge to meet with the attorneys for each case, soon after a suit is filed, to set a schedule for pretrial activities and to establish case-specific limitations on discovery. State jurisdictions generally cannot afford this custom-tailored approach. Instead, they have adopted limits on the amount and timing of discovery that apply to the entire civil caseload. By 1984, at

least 25 states had authorized such limitations. A proposal to adopt across-the-board limitations in New Jersey is currently being considered by a statewide committee on civil case management and procedure appointed by Chief Justice Robert Wilentz.

Unrestrained discovery not only increases the demand for judicial decision-making; it imposes enormous administrative burdens on the courts. In New Jersey today, it is not unusual for a judge to hear 250 motions, the majority of which relate to discovery, on a single "motion day." Many courts regularly schedule such days twice a month.

For litigants, congestion on the court's calendar can mean long delays, increased litigation costs and, eventually, the realization that they cannot afford to wait for their "day in court." Attorneys and judges, knowing how much it costs to try a case, take it for granted that most suits will be settled out of court. But Americans, whose hazy notions about the civil justice system are derived from television and high school textbooks, often are surprised to discover that trial is the exception, rather than the norm. They also may be stunned by the fact that if they wish to have their cases tried, they must wait as long as five years or more in some large jurisdictions. It is not surprising that, nationwide, *less than 10 percent* of civil suits actually go to trial.

Trial costs in many jurisdictions now equal or exceed the amount in dispute in the typical civil case. At least half of all civil jury verdicts involve amounts less than $10,000, while the cost to the court of trying the average civil case is about $5,000 in state trial courts and about $10,000 in federal district courts. Less is known about the private costs of litigation but they are surely in the thousands of dollars. Keenly aware of the costs associated with trial, judges in many jurisdictions invest considerable time attempting to settle cases. Usually these settlements are arrived at in conversation with the attorneys, while the litigants are absent.

Trial costs in many jurisdictions now equal or exceed the amount in dispute in the typical civil case.

As a result, the civil justice system for most Americans offers a framework for negotiating a bargained outcome of their case, not an adjudication of their dispute. Unhappily, it seems we have reached this point not through a comprehensive review of the alternatives, but rather, through a patchwork of efforts to shore up the system.

Alternative Approaches

While judges and court administrators have moved to streamline and control the litigation process, some policy-makers have begun asking, "Isn't there a better way?" Across the country, there is a growing movement in favor of diverting certain kinds of cases from the trial process to alternative mechanisms for dispute resolution. Several years ago, attention focused on "neighborhood justice centers" that operate outside the court system. To demonstrate the concept, the federal government subsidized the establishment of three model centers, in Atlanta, Kansas City and Los Angeles. Although these centers achieved considerable success in dealing with individual disputes, they generally did not divert many civil cases from court. Instead, they provided an alternative forum for resolving neighborhood and domestic quarrels that otherwise might have ended up in the criminal courts.

As neighborhood justice centers multiplied, they also spurred the development of a host of other mediation and arbitration programs, variously supported by local public agencies, private corporations and civic organizations. These programs deal with issues as disparate as consumer complaints, disputes over child custody and environmental conflicts. A recent article estimated that there are over 500 arbitration and mediation programs in the United States, with the number of disputes handled by each program annually ranging from a few dozen to many thousands.

Across the country, there is a growing movement in favor of diverting certain kinds of cases from the trial process to alternative mechanisms for dispute resolution.

Despite the availability of such programs and their apparent popularity for resolving certain kinds of disputes, Americans, in ever-increasing numbers, continue to bring civil disputes to the court system for resolution. Because of this, many supporters of alternative dispute resolution have turned their attention to mechanisms operating within the court framework. Court-authorized and court-administered mediation and arbitration currently are the most popular approaches. Mediation is most commonly authorized for resolving family law disputes. Arbitration is viewed as a promising way to resolve a broader range of civil cases involving money damages: personal injury and property damage suits, breach of contract cases and collection disputes.

First established in 1952 in Pennsylvania, court-

administered arbitration programs now are authorized in 12 states. The Institute for Civil Justice estimates that arbitration programs are operating in more than 100 trial courts around the country. Although no one has compiled data on the number of cases arbitrated in these courts, the total probably exceeds 100,000 annually.

New Jersey is one of the most recent entrants into this area. In 1983, the New Jersey state legislature enacted a statute (A-3822) requiring court-administered arbitration of all disputes arising from automobile accidents in which damages for personal injury do not exceed $15,000. A pilot program testing alternative rules for implementing arbitration is operating in Burlington and Union Counties. Statewide implementation is scheduled to begin this fall.

How Court-Administered Arbitration Works

Court arbitration programs may be established by state statute, as in New Jersey, or by rule of a state supreme court or local court. All programs authorize the courts to compel arbitration of civil damage suits that fall within a specified jurisdictional limit. Nationwide, most programs apply to cases in which the disputed amount is less than $25,000.

Although the courts can compel arbitration, any of the parties to a suit may reject the arbitration award and request that the case be calendared for a trial "de novo," a trial that proceeds without regard to the arbitration verdict. The inclusion of an appeal option is generally regarded as necessary to ensure that the litigant's constitutional right to trial is not abrogated.

Court-annexed arbitration is, then, neither voluntary nor binding, thus distinguishing it from its private commercial counterpart.

A pilot program testing alternative rules for implementing arbitration is operating in Burlington and Union Counties.

In all court-annexed arbitration programs, cases are heard by private attorneys or retired judges who volunteer to serve as arbitrators. Arbitrators receive only a small honorarium for their time. Arbitration hearings are private, informal and typically quite brief. The proceedings usually are not recorded and relaxed rules of evidence prevail. Before beginning the hearing, some arbitrators may ask if the parties would prefer to settle the case. But once a hearing begins, arbitration proceeds as an adjudicative process. The facts of the dispute are heard, albeit in an abbreviated fashion, and the litigants usually partici-

pate as witnesses. These features distinguish arbitration from mediation, in which a third party tries to help the disputants reach a compromise, and from judicial settlement conferences, in which a judge meets with the attorneys (in the absence of litigants) to arrive at a rough assessment of the case value.

If accepted, the arbitrator's award is entered as a court judgment and is enforceable. In many programs, appellants who request trial de novo are required to reimburse the court for the arbitrators' fees; in some programs, court costs and the attorney fees may be levied on unsuccessful appellants. The New Jersey court arbitration statute authorizes all three types of fees if the party appealing the arbitration award does not improve his or her position at trial. (Court costs and attorneys' fees may be waived if the court believes they would create a "substantial economic hardship" for the appellant.) These fees are intended to discourage frivolous appeals.

Does Arbitration Reduce Congestion, Costs and Delay?

Much of our information about how well arbitration works comes from two Institute for Civil Justice studies: one an evaluation of the first operational year of the California arbitration program and the other a study of a much older program in Pittsburgh (Allegheny County), Pennsylvania. Researchers in both studies concluded that arbitration can contribute significantly to reducing congestion, costs and delay. Passage of an arbitration statute does not ensure program success. The researchers found that a critical element in the program's effectiveness is how it is designed and implemented. And, however designed, court-administered arbitration cannot be expected to solve all of a court's congestion and delay problems.

The Institute's researchers identified key decisions that program designers must make, including setting jurisdictional limits of the program, establishing procedures for determining case eligibility for arbitration, adopting guidelines and procedures for selecting arbitrators and deciding how many arbitrators will hear each case, where the hearings will take place and whether there will be financial disincentives for appealing.

Researchers in both studies concluded that arbitration can contribute significantly to reducing congestion, costs and delay.

But there is no "right" or "wrong" way to design an arbitration program. What works well in one ju-

risdiction may be ill-suited to another. Moreover, many of the design choices involve trade-offs. For example, a program might make court employees responsible for scheduling each hearing or it could allow the arbitrators to schedule and conduct the hearings outside the court system. The obvious benefit of the latter approach is that it reduces the court's clerical/administrative workload. On the other hand, the court under this system cannot ensure that hearings will be scheduled in timely fashion. Indeed, there is some evidence that arbitrator-administered cases are more subject to delay than are court-administered proceedings.

A program can be carefully designed to reflect the priorities, needs and objectives of a particular court system and its community.

The fact is that no arbitration program can be perfect from every standpoint. But a program *can* be carefully designed to reflect the priorities, needs and objectives of a particular court system and its community. It is critical, therefore, that program designers work with practitioners to develop a system that not only helps the court reduce congestion and delay but also satisfies practitioners and the community at large with its procedures and its capacity to deliver acceptable outcomes.

How Arbitration Affects Litigants

When considering whether or not to adopt court arbitration, some policymakers assume that litigants will benefit from a rapid, inexpensive form of dispute resolution. Others are concerned that arbitration, with its abbreviated procedures and rapidly-decided outcomes, will provide "second-class" justice.

The Institute's Pittsburgh research project was the first study of court arbitration to systematically examine what litigants obtain from such a program and how they feel about it. The researchers concluded that the Pittsburgh program offers an efficient and essentially fair procedure for resolving civil disputes to a broad cross-section of the local citizenry. They noted, however, that these findings apply specifically to the Pittsburgh program and that similar systematic analyses have not yet been conducted in other arbitration jurisdictions.

The study answered the following questions:

Who Uses Arbitration? The Institute found that the Pittsburgh program was used by a diverse set of litigants, with a broad range of disputes that involved money. Arbitrated cases included consumer disputes

(sometimes brought by the consumer, sometimes by a business person seeking payment), contract disputes, automobile and other property damage cases and personal injury cases.

Who Wins and Who Loses? More than three-quarters of the Pittsburgh plaintiffs obtained some compensation from the arbitrators. There is some variation in the relative success of plaintiffs but the researchers could find no evidence that any particular class of litigants or suits was disadvantaged by arbitration. The only exception to this finding involved litigants who did not engage attorneys to represent them. Surprisingly numerous in Pittsburgh, these litigants appeared to be systematically disadvantaged wher facing represented opponents.

How Much Does It Cost to Arbitrate? The average attorney charged about $200 to $300 to litigate a non-contingency fee case through arbitration in Pittsburgh. Of particular interest was the fact that a substantial number of plaintiff attorneys who had a high-volume arbitration practice took cases on a flat fee basis. But even when attorneys were paid on an hourly rate basis, the fee for litigating a case through arbitration was only about $400. These figures compared with estimates of about $2,000 to take a routine, arbitration-eligible case to trial.

What Happens on Appeal? About 25 percent of the arbitration cases heard in Pittsburgh were appealed but most of those were settled without further court intervention. After examining the outcomes of settlement and trial after appeal, the researchers concluded that the appeal mechanism served its intended purpose as a corrective device for individual arbitration errors or misjudgments, while preserving the pattern of outcomes delivered by arbitrators.

Are Litigants Satisfied? The majority of individual litigants interviewed were quite satisfied with the program. Although winners were more satisfied than losers, a majority of the latter were at least somewhat satisfied with the program.

The survey also found that most litigants had a simple definition of what constituted a fair dispute resolution procedure: They wanted an opportunity to have their case heard and decided by an impartial third party. Most did not care whether a judge in black robes or an attorney in business attire heard and decided their case. Some Pittsburgh litigants expressed a preference for the three-person panel,

About 25 percent of the arbitration cases heard in Pittsburgh were appealed but most of these were settled without further court intervention.

rather than a judge, because "three heads are better than one." Nor did most care whether their cases were heard in a formal courtroom, complete with bar and dais, or around a plain wood table in a small hearing room. As one Pittsburgh litigant said, "I wouldn't care if they held it in a closet!" For individual litigants what was important was that they had enough time to tell their story, that the arbitrators paid equal attention to the disputants–and that they could afford the process.

Are Attorneys Satisfied? Lawyers, of course, view the arbitration proceeding from a different perspective. Many Pittsburgh lawyers expressed concerns about the arbitration procedures. Some criticized the use of arbitrators whose legal experience was not germane to the case at hand. Others disliked the tendency of arbitrators to interpret evidentiary rules loosely and to decide cases on the basis of "equity concerns," rather than a strict interpretation of the law. Most, however, believed that arbitration's flaws are far outweighed by its strengths as an inexpensive and expeditious mechanism for hearing disputes.

Preliminary evaluation results indicate that there is a high degree of satisfaction with arbitration procedures among attorneys and litigants in both pilot efforts.

The New Jersey Experience with Arbitration

The New Jersey pilot arbitration programs have been in operation in Burlington and Union Counties since the spring of 1984. The rules of program operation were developed by local judges and attorneys, with the advice of a statewide committee on alternative dispute resolution, and were approved for pilot implementation by the Supreme Court. Within the broad guidelines set by the statute, the two courts are experimenting with slightly different approaches to arbitration. For example, Burlington County is using two-person arbitrator panels, while in Union a single arbitrator hears and decides each case. Procedures for assigning arbitrators to hear specific cases also differ.

The Administrative Office of the Courts is conducting an evaluation of the two pilot programs that will serve as a basis for developing the final rules for statewide implementation, slated for this fall. Preliminary evaluation results indicate that there is a high degree of satisfaction with arbitration procedures among attorneys and litigants in both pilot efforts.

New Jersey's systematic approach to testing and evaluating arbitration program rules is uncommon; most state court systems have not allocated re-

sources for this sort of effort before implementing their arbitration programs. By proceeding in this careful fashion, New Jersey may be able to avoid various "start-up" problems that have afflicted some arbitration programs.

No "Quick Fixes"

Court officials have long realized, and empirical research has begun to confirm, that there are no "quick fixes" for the problems of the civil justice system. Dispute resolution mechanisms that are appropriate for one type of case may be inefficient or inequitable for others. Approaches to reducing costs and delays that appear to be effective in the short run may, over time, lose their effectiveness or create unanticipated costs for the courts or the parties. Approaches that work in one jurisdiction may not be easily transferable to another, which has a different legal tradition. Over the long run, we will have to come to terms with the fact that the nature of civil litigation in a sophisticated, technological society such as ours is different from that of the past. We will have to examine carefully the organization of our court institutions, their procedures for doing business and our approaches to resolving disputes–all of which have deep roots in the past–with an eye to making them more consistent with contemporary realities. Based on its efforts to date, New Jersey is likely to be in the forefront of these efforts.

Over the long run, we will have to come to terms with the fact that the nature of civil litigation in a sophisticated, technological society such as ours is different from that of the past.

Other ICJ Publications

R-2716-ICJ
The Law and Economics of Workers' Compensation
Policy Issues and Research Needs
L. Darling-Hammond and T. J. Kniesner
1980

R-2717-ICJ
Models of Legal Decisionmaking
Research Design and Methods
D. A. Waterman and M. A. Peterson
1981

R-2732-ICJ
Court Efforts to Reduce Pretrial Delay
A National Inventory
P. Ebener, with the assistance of J. Adler, M. Selvin, and M. Yesley
1981

R-2733-ICJ
Judicial Arbitration in California
The First Year
D. Hensler, A. Lipson, and E. Rolph
1981

R-2792-ICJ
The Resolution of Medical Malpractice Claims
Modeling the Bargaining Process
P. M. Danzon and L. A. Lillard
1982

R-2793-ICJ
The Resolution of Medical Malpractice Claims
Research Results and Policy Implications
P. M. Danzon and L. A. Lillard
1982

R-2870-ICJ/HCFA
The Frequency and Severity of Medical Malpractice Claims
P. M. Danzon
1982

R-2881-ICJ
The Civil Jury
Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979
M. A. Peterson and G. L. Priest
1982

R-2882-ICJ
Cost-Benefit Analysis and Voluntary Safety Standards for Consumer Products
L. L. Johnson
1982

R-2888-ICJ
Costs of the Civil Justice System
Court Expenditures for Processing Tort Cases
J. Kakalik and A. Robyn
1982

R-2904-ICJ
Educational Policymaking Through the Civil Justice System
P. T. Hill and D. L. Madey
1982

R-2918-ICJ
Workers' Compensation and Workplace Safety
Some Lessons from Economic Theory
R. B. Victor, L. Cohen, C. Phelps
1982

R-2922-ICJ
The Pace of Litigation
Conference Proceedings
J. W. Adler, W. F. Felstiner, D. R. Hensler, and M. A. Peterson
1982

R-2979-ICJ
Workers' Compensation and Workplace Safety
The Nature of Employer Financial Incentives
R. B. Victor
1982

R-2985-ICJ
Costs of the Civil Justice System
Court Expenditures for Various Types of Civil Cases
J. S. Kakalik and R. L. Ross
1983

R-3002-ICJ
Managerial Judges
J. Resnik
1982

R-3006-ICJ
Comparative Justice
Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980
M. G. Shanley and M. A. Peterson
1983

R-3011-ICJ
Compensation of Injuries
Civil Jury Verdicts in Cook County
M. A. Peterson
1984

R-3013-ICJ
New Tools for Reducing Civil Litigation Expenses
M. A. Peterson
1983

R-3022-ICJ
Designing Safer Products: Corporate Responses To Product Liability Law and Regulation
G. Eads and P. Reuter
1983

R-3032-ICJ
The Selection of Disputes for Litigation
G. L. Priest and B. Klein
1984

R-3042-ICJ
Costs of Asbestos Litigation
J. S. Kakalik, P. A. Ebener, W. L. F. Felstiner, M. G. Shanley
1983

R-3071-ICJ
Simple Justice
How Litigants Fare in Arbitration—A Case Study of the Pittsburgh Court Arbitration Program
J. W. Adler, D. R. Hensler, C. E. Nelson, and G. Rest
1983

R-3084-ICJ
Regulating the Content and Volume of Litigation
An Economic Analysis
G. L. Priest
1983

R-3132-ICJ
Variation in Asbestos Litigation Compensation and Expenses
J. S. Kakalik, P. A. Ebener, W.L.F. Felstiner, G. W. Haggstrom, M. G. Shanley
1984

N-1965-ICJ
Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution
D. R. Hensler and J. Adler, with the assistance of G. Rest
1983

N-1994-ICJ
Jury Awards and Prejudgment Interest in Tort Cases
S. J. Carroll
1983

N-2096-ICJ
California Enacts Prejudgment Interest: A Case Study of Legislative Action
A. Lipson
1984

N-2186-ICJ
Court-Ordered Arbitration: The California Experience
E. S. Rolph, D. R. Hensler
1984

P-6963-ICJ
Court-Annexed Arbitration in the State Trial Court System
D. R. Hensler
1984

A special bibliography (SB 1064) provides a list of other Rand publications in the civil justice area. To request the bibliography or to obtain more information about The Institute for Civil Justice, please write the Institute at this address: The Institute for Civil Justice, The Rand Corporation, 1700 Main Street, P.O. Box 2138, Santa Monica, California 90406-2138, (213) 393-0411.

Page No. 1
12-01-89

Appeal fee — % appellate multiplier — explanation of penalty

ID	STATE	PHONE		CASES_REF	CA_PAY_AMT	CA_PEN_AMT	CA_PENALTY
000403	AZ	(602) 262-3204		2222	75.00	0.00	reimburse county fee & tax cos
000195	CA	(415) 499-6190		237	75.00	0.00	
000353	CO	(303) 278-6197		583	0.00	10.00	
000257	CO	(303) 221-7917		476	0.00	10.00	cost Arbit up to 1000.00
000277	DE	(302) 571-2343		454	0.00	1.00	Fees & Costs of Arb. & Compen
000121	GA	(404) 730-4549		920	0.00	15.00	Arb Panel costs, fees pd arb.
001312	HI	(808) 548-4380		639	0.00	15.00	
000136	IL	(815) 987-2568		1518	200.00	0.00	
000530	MI	(517) 482-0650		311	0.00	10.00	Court Rule MCR 2.403 (O)
000565	NJ	(609) 853-3294		686	150.00	20.00	no cost unless 20% increase
000576	NJ	(609) 989-6174		0	150.00	0.00	
000598	NJ	(201) 285-6406		0	150.00	20.00	750.00Attys Fee &500.00artness
000700	NJ	(201) 929-4701		1200	150.00	0.00	
000717	NJ	(201) 527-4329		1789	150.00	20.00	
001195	NJ	(609) 345-6700	ext: 3329	0	150.00	20.00	
001213	NJ	(201) 646-2064		2900	150.00	20.00	
001214	NJ	(201) 431-6530		436	150.00	20.00	
001215	NJ	(201) 431-6530		149	150.00	20.00	
001216	NJ	(201) 431-6530		4130	150.00	20.00	
001220	NJ	(609) 345-6700	Ext: 3596	1056	150.00	20.00	
001233	NJ	(201) 621-5686		3300	0.00	20.00	
001260	NJ	(598) 753-3285		183	150.00	20.00	no cost if verdict is <20%
000822	OH	(513) 732-7108		172	200.00	0.00	arbitrator's fee
000839	OH	(614) 462-5326		564	160.00	0.00	
000900	OH	(513) 632-8751		800	245.00	0.00	
001186	PA	(717) 325-8556		33	275.00	0.00	
001182	PA	(215) 348-6040		907	300.00	10.00	award improved by 10% 2/3 ref
000926	RI	(401) 277-6147		0	100.00	0.00	
000282	DC	(202) 879-1478		193	0.00	10.00	arb. fee, + costs, att. fees
				~~25858~~	~~3430.00~~	301.00	

Information from the database about fees to appeal and penalties for not bettering ones position at trial

Information for ADR Services provided by the National Center for State Courts

Susan Keilitz, Staff Attorney, Research Division
804/253-2

CHARACTERISTICS OF STATE COURT-ANNEXED ARBITRATION PROGRAMS

STATE	DOLLAR LIMITS	NUMBER OF ARBITRATORS	STATEWIDE	MANDATORY
Arizona	Varies	1	X	X
California	$50,000	1	X	X
Colorado	$50,000	1 or 3		X
Connecticut	$50,000	1		
District of Columbia	$50,000	1		X
Delaware	$50,000	1		X
Florida	No Limit	1		
Georgia	$25,000	3		X
Hawaii	$150,000	1	X	X
Illinois	$15,000	3		X
Louisiana	$2,000	1	X	
Michigan	No Limit	1		
Minnesota	$50,000	1		X
Minnesota	No Limit	1		
Missouri	$50,000	1		
Nevada	$3,000	1		X
New Hampshire	No Limit	1		X
New Jersey	$20,000	1 or 2	X	X
New Mexico	$15,000	1		X
New York	$6,000	1 or 3	X	X
North Carolina	$15,000	1		X
Ohio	Varies	1		Varies
Oregon	$15,000	1		X
Pennsylvania	$20,000	3	X	X
Rhode Island	$50,000	1		X
Washington	$25,000	1		X

COMPREHENSIVE STATE ADR PROGRAM DATABASE

CASE TYPE	NUMBER REPORTED
CUSTODY/VISITATION	261
CHILD SUPPORT	181
SPOUSAL MAINTENANCE	145
PROPERTY DIVISION	158
VISITATION ENFORCEMENT	71
CHILD ABUSE AND NEGLECT	26
DOMESTIC VIOLENCE	78
MINOR CRIMINAL	165
CONTRACT	315
TORT	283
SMALL CLAIMS	188
LANDLORD/TENANT	181
OTHER	254

STATE PROGRAMS BY CASE TYPE

Arizona (4)
California (20)
Colorado (20)
Connecticut (5
Delaware (1)
District of Columbia (5)
Florida (16)
Georgia (2)
Hawaii (5)
Idaho (1)
Maine (2)
Maryland (2)
Massachusetts (8)
Michigan (56)
Missouri (8)
Michigan (56)
Missouri (8)
New Jersey (13)
New Mexico (1)
New York (74)
North Carolina (15)
Ohio (10)
Oklahoma (12)
Oregon (13)
Pennsylvania (10)
Puerto Rico (1)
Rhode Island (1)
South Carolina (1)
Texas (10)
Vermont (1)
Washington (12)
Wisconsin (5)

CONTRACT

Arizona (3)
California (20)
Colorado (20)
Connecticut (2)
Delaware (2)
District of Columbia (5)
Florida (15)
Georgia (1)
Hawaii (3)
Idaho (1)
Maine (3)
Maryland (2)
Massachusetts (5)
Michigan (59)
Missouri (7)
New Jersey (17)
New York (69)
North Carolina (4)
Ohio (10)
Oklahoma (12)
Oregon (1)
Pennsylvania (1)
Rhode Island (1)
South Carolina (1)
Texas (9)
Washington (12)
Wisconsin (3)

TORT

Arkansas (1)
Arizona (5)
California (9)
Colorado (12)
Connecticut (6)
Delaware (1)
District of Columbia (3)
Florida (11)
Georgia (2)
Hawaii (5)
Idaho (1)
Kansas (2)
Louisiana (2)
Maine (1)
Massachusetts (5)
Michigan (20)
Missouri (7)
New Jersey (16)
New York (15)
North Carolina (13)
Ohio (7)
Oklahoma (12)
Pennsylvania (9)
Puerto Rico (1)
South Carolina (1)
Texas (10)
Vermont (4)
Washington (2)
Wisconsin (4)

SMALL CLAIMS

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

March 15, 1989

MEMORANDUM

TO: Representative Sam Cotten

ATTN: David Rogers

FROM: Patricia Young PY
Legislative Analyst

RE: Hawaii Court Annexed Arbitration Program
Research Request 89.306

You asked this agency to provide a copy of the Hawaii statute which allows for arbitration of personal injury claims. You requested a brief description of the process, as well as contacts in Hawaii for more detailed information.

The Hawaii Court Annexed Arbitration Program (CAP) is an alternative dispute resolution program designed to encourage settlements, to reduce litigants' costs, to expedite processing and resolution, and to reduce civil caseloads in the courts. Originally intended to handle comparatively small and simple personal injury cases, the CAP has expanded to include all tort cases with a probable jury award value of $150,000 or less. The CAP is a mandatory, non-binding program.[1] Litigants may select a private arbitrator, or the arbitration commission administrator will assign one to hear the case and deliver a judgment. A litigant who wishes to appeal a judgment must do so within 20 days of the arbitrator's award. If the court does not alter the award by at least 15 percent in favor of the appealing party, the appealing party is required to pay reasonable costs and fees, costs of jurors, and attorney's fees up to $5,000.

I have attached a copy of the enabling statute and rules, background information on the program, and caseload and result data. Contacts in Hawaii for more information are Ed Aoki, CAP arbitration administrator, at (808) 548-4380; Peter Adler, director of the Program on Alternative Dispute Resolution (ADR), at (808) 548-3080; and Dee Dee Letts, assistant director, at the same number.

I hope this is information useful. Please call if you have any questions or need further information.

Attachment

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[1]Exemptions from arbitration are considered by the arbitration judge upon request.

ADR TRENDS & ABSTRACTS
From the Hawaii State Judiciary / Program on Alternative Dispute Resolution

Vol 4, No 1 Honolulu, Hawaii Jan/Feb/Mar 1988

COURT ANNEXED ARBITRATION IN HAWAII

A Special Report

As the Program on ADR begins its fourth year of operation, it is fitting that we provide a special report on Hawaii's Court Annexed Arbitration Program (CAP). This program was - and still is - one of the most important alternative dispute resolution experiments underway in the state. Because of its unique goal of reducing litigant costs and its high gatekeeping amount of $150,000, the program is also of great interest nationally. We continue to receive many inquiries from other state and federal court jurisdictions asking how the program is progressing. We know this is also of great interest locally because of continuing debates over tort and insurance reform. In addition to our regular mailing list, therefore, we are sending copies of this issue to the 500+ attorneys in Hawaii who serve as CAP Arbitrators and to an expanded list of judges, court administrators, and elected officials. We look forward to any comments readers might have to offer and bringing you additional updates in the future. Peter S. Adler, Director, Program on ADR

Peter S. Adler
Director
Program on A.D.R.

CONTENTS

I. Why Courts Adopt Arbitration.....1

II. Court Arbitration in Hawaii.....2

III. Hawaii's Court Arbitration Rules: A Synopsis.....5

IV. Caseload Report: February, 1986 to December, 1987.....8

V. Research and Evaluation: Preliminary Findings.....10

VI. Akama v. Tanda: A Case Study.....13

VII. Leadership and Management.....15

VIII. First Circuit Arbitrators.....16

IX. Second, Third, and Fifth Circuit Arbitrators.....18

X. Authors.....19

I. WHY COURTS ADOPT ARBITRATION

(The following article has been excerpted from COURT ORDERED ARBITRATION: A BRIEFING FILE published by the National Institute for Dispute Resolution in June, 1985)

Backlogs undermine faith in the efficiency of the courts. Plaintiffs in law suits are uncertain when their cases will be resolved. Defendants face prolonged uncertainty before knowing what, if anything, they will have to pay in damages. Both sides face mounting legal costs if their cases drag on. Some observers believe that delays harden the positions of litigants, encourage plaintiffs to hope for large settlements, and force cases into trials that are expensive for both the parties and the public. In sum, prolonged court delays unnecessarily tax both public and private resources and deprive litigants of the timely resolution of disputes which is among the most fundamental obligations of a just society.

Thus, there is a challenge to solve the problem of justice delayed - to adopt a method that has the criteria for offering prompt, relatively inexpensive, less formal and fair resolution of a great many civil court actions, while firmly preserving the procedural and substantive rights of all citizens involved in law suits.

Court-ordered arbitration is one method which, in recent years, has found great favor in meeting these criteria. It introduces mandatory, but nonbinding rulings by arbitrators before civil cases may be pressed to trial. The key words are mandatory and nonbinding. In jurisdictions where court-ordered arbitration applies, an arbitrator or arbitrators hear the evidence of selected civil suits in a relatively informal setting with simplified hearing procedures and sometimes, a set time limit. Then they render a decision. That's the mandatory part. If one or more parties to the action refuses to accept the arbitrator's decision, the action then can be pursued through formal litigation. That's the nonbinding part. Citizens do not lose their rights to the full course of litigation if that is what they demand. The opportunity of having one's day in court is preserved, although there are disincentives for rejecting a judgment reached in arbitration and pursuing litigation. For example, a losing party may have to pay the attorney's fees of a courtroom opponent.

The promise of prompt resolution of disputes should not obscure the other benefits of court ordered arbitration. The overhead costs of resolving disputes are usually lower with arbitration than with litigation. The rules and procedures of arbitration are less rigid and formal than those in the courtroom. Arbitration often leaves fewer traces of acrimony among disputants once they have resolved their differences. Court-ordered arbitration, thus, is a beneficial tool for resolving disputes, whether court dockets are crowded or not.

Another important attribute of court-ordered arbitration is flexibility. Beyond these core propositions, programs differ from state to state, for example, in the causes of suits to which court-ordered arbitration may be applied; the ceiling of dollar amounts that can be involved in suits; the selection and payment of arbitrators; the disincentives to pursuing litigation; the level of involvement of the judiciary; or the point in the judicial process at which a case is referred to mandatory arbitration.

Court arbitration is now in operation in more than 20 state and federal jurisdictions. Its potential for reducing caseloads of courts and assuring prompt resolution of many law suits is impressive. Some experts suggest that its widespread adoption could affect more than one half of the nation's total civil caseload.

II. COURT ARBITRATION IN HAWAII

by Peter Adler

In March, 1985 Chief Justice Herman Lum asked Judges Philip Chun and Ronald Moon along with various members of the First Circuit's Civil Rules Committee and the Judiciary's Program on ADR to explore the feasibility of establishing a mandatory, non-binding program of arbitration in Hawaii's State Courts. The initial goals, as charted by the Chief Justice, were to reduce the high cost of going to court for litigants, to speed up case processing for routine personal injury cases, and to help prevent the buildup of civil delays.

This planning group began its investigation and, after 10 months of research and development, inaugurated the start of Hawaii's CAP. As originally conceived, the program was to be created as an experiment and pilot program launched under the Supreme Court's rule-making powers. It would focus only on personal injury cases with a probable jury verdict value of $50,000 or less.

To implement the program, a governing body - the Judicial Arbitration Commission - was established by the Supreme Court and the following members appointed by Chief Justice Lum: Judge Ronald Moon (Chairperson and Arbitration Judge); James E. Duffy, Jr., Esq.; Robert Grantham; Sharon R. Himeno, Esq.; James E. Kawashima, Esq.; Walter S. Kirimitsu, Esq.; Frank Lockwood, Esq.; Christopher P. McKenzie, Esq.; Kenneth Okamoto, Esq.; Gerald Y. Sekiya, Esq.; and Robert S. Toyofuku, Esq. Appointed as Advisors to the Commission were Warren Price III, Esq.; Raymond T. Tam, Esq.; and Dr. Peter S. Adler.

In its earliest form, the CAP was designed to handle comparatively smaller and simpler cases brought into arbitration by either a plaintiff's or defendant's demand. To implement the program, a small staff headed by Arbitration Administrator Edwin Aoki was hired. Office procedures were established and rules and forms were published with the assistance of the National Law Institute. A panel of approximately 100 pro-bono Arbitrators was selected and trained by the Commission and seminars acquainting Hawaii's practicing lawyers were held. After CAP operations actually commenced in February, 1986, the CAP began processing 15 to 20 cases per month.

In July, 1986 - and as part of its special summer session - the State of Hawaii Legislature passed Act 2 pertaining to tort and insurance reform. This statute gave the CAP a basis in law and mandatorily expanded the program's focus to include all tort cases and not just personal injuries. It also raised the arbitration threshold limit to $150,000 which would theoretically make 80% of all First Circuit tort filings arbitration-eligible.

Following the initial passage of Act 2, the Judicial Arbitration Commission studied a variety of ways of implementing the new legislatively imposed limits. Data on the existing arbitration program and on past and prospective civil caseloads were analyzed and court arbitration programs in other jurisdictions were contacted for advice. What emerged from this second round of planning was the CAP's present features which are unique in the United States. These features include:

- "Gatekeeping" procedures that presume all cases to be arbitration eligible and that put the onus of seeking exemptions from arbitration on litigants.

- A joint (arbitrator and court) case management model that empowers arbitrators to control discovery.

- A required pre-hearing conference 30 days after an arbitrator has been selected or assigned.

- An option for litigants to select and pay for their own arbitrators rather than using the court's panel.

- Continued emphasis on systematic experimentation and evaluation.

On May 1, 1987, the above features, as embodied in amended Rule 34 of the Hawaii Rules of Court, took effect in the First Circuit. In August, 1987 the use of a formal "comparison" group for research purposes was inaugurated. This research is long-term and will continue under a three-year contract with the University of Hawaii. In October and November, 1987 the arbitration program was expanded to include the Second, Third, and Fifth Circuits making Hawaii the first state in the nation to implement court-ordered arbitration on a state-wide basis.

III. HAWAII'S COURT ARBITRATION RULES: A SYNOPSIS

by Pamela Gring

Rule 1. The Court Annexed Arbitration Program

A mandatory, non-binding program for certain civil cases.

Rule 2. Intent of Program and Application of Rules

Purpose is to obtain prompt, equitable resolution of civil matters designated by the Judicial Arbitration Commission. Not applicable to other forms of arbitration (e.g. private arbitration agreements, arbitration under existing statutes). The arbitration rules are intended to be discretionary and informal.

Rule 3. The Arbitration Judge

A Circuit Court judge appointed by the Chief Justice shall determine all disputed issues under the Rules.

Rule 4. The Judicial Arbitration Commission

Established by the Chief Justice to oversee the Arbitration program. It selects and trains arbitrators; hires, supervises and evaluates the staff; and promulgates rules necessary to carry out its responsibilities.

Rule 5. The Arbitration Administrator

Appointed by the Commission and is responsible for the operation and management of the Program.

Rule 6. Matters Subject to Arbitration

Tort cases with a probable jury award value of $150,000 or less may be accepted at the discretion of the Commission. Other civil case may be submitted if parties agree and the Arbitration Judge approves. Parties can agree to be bound by any arbitration ruling. The Judge may accept or remove an action for good cause.

Rule 7. Relationship to Circuit Court Jurisdiction and Rules; Form of Documents

Cases within the jurisdiction of the Circuit Court remain so for all phases of the proceedings. Except for authority expressly delegated to others, issues will be determined by the responsible Circuit Court. Where applicable, rules of the Circuit Court and civil procedure apply. All parties in an action submitted to arbitration are parties to the arbitration unless dismissed by the Judge.

Rule 8. Determination of Arbitrability

All qualifying tort cases are automatically in the Program. Exemptions from arbitration will be considered if the request is supported by adequate evidence. A case may be removed or readmitted to the Program with proper factual support. The Arbitration Judge has final say on

arbitrability. The Judge has discretion to impose reasonable costs and attorney's fees against parties who unreasonably try to remove a case from the Program.

Rule 9. Assignment to Arbitrator

After each party strikes 2 out of 5 possible arbitrators, the Administrator appoints an arbitrator from the remaining list. When parties are added after arbitrators are chosen, objections may be made by those parties. Parties may select private arbitrators.

Rule 10. Qualifications of Arbitrators

The Commission maintains a panel of arbitrators who have completed an orientation and training program. Issues concerning disqualification are referred to the Commission for final, non-reviewable determination.

Rule 11. Authority of Arbitrators

Arbitrators have general powers of a court. A challenge to an arbitrator's authority will be made to the Administrator, who makes a ruling in due course.

Rule 12. Stipulations

Stipulations must be in writing, signed by the counsel or parties, and filed with the arbitrator.

Rule 13. Restrictions on Communications

Individual parties may not discuss the case with the arbitrator unless other parties are notified.

Rule 14. Discovery

The extent of discovery is governed by the arbitrator. HRCP regulates the type of discovery, which may be modified by the arbitrator.

Rule 15. Scheduling of Hearings; Pre-hearing Conferences

Arbitration must be completed within 9 months from the date of service to the last defendant. The arbitrator must hold a pre-hearing conference within 30 days of case assignment.

Rule 16. Pre-hearing Statement

Thirty days before the arbitration hearing the parties must submit a statement disclosing probable evidence and witnesses to be used.

Rule 17. Conduct of Hearing

The arbitrator has discretion over conduct of the hearing. No transcript or recording is permitted.

Rule 18. Arbitration in the Absence of a Party

Arbitration may proceed when a duly notified party is not present or fails to obtain a continuance.

Rule 19. Form and Content of Award

Arbitrator's awards must be in writing, signed and on proper forms. Findings of Fact and Conclusions of Law are not required.

Rule 20. Filing of Award

Awards must be filed with the Administrator within 7 days of the conclusion of arbitration or 30 days after receiving final memoranda of counsel.

Rule 21. Judgment on Award

If no party files a written Notice of Appeal and Request for Trial *De Novo* within 20 days, the award is considered as a final judgment and is not appealable.

Rule 22. Request for Trial *De Novo*

A party may file a request for trial *de novo* within 20 days, after which the case will be set for trial.

Rule 23. Procedures at Trial *De Novo*

An arbitration award will be sealed if a trial *de novo* is requested. Juries will not be informed of arbitration proceedings.

Rule 24. Scheduling of the Trial *De Novo*

Cases transferred to the Program maintain approximately the same place as they would on the civil trial docket.

Rule 25. The Prevailing Party in the Trial *De Novo*; Costs

To prevail the party appealing must improve their award by 15% or more.

Rule 26. Sanctions for Failing to Prevail in the Trial *De Novo*

Sanctions include: reasonable costs and fees, costs of jurors, and attorney's fees ($5,000 or less).

Rule 27. Effective Date

Rules apply to all 1st Circuit cases filed after February 15, 1986. The Program became effective in the 2nd Circuit as of October 1, 1987, in the 3rd Circuit as of October 15, 1987, and in the 5th Circuit as of November 1, 1987.

IV. CASELOAD REPORT: FEBRUARY, 1986 TO DECEMBER, 1987

by Edwin S. Aoki

This progress report covers First Circuit CAP activity from the program's start-up on February 15, 1986 through December 31, 1987. It reports the status of nearly 1,000 cases. In the beginning - what we call Phase I - only personal injury cases with a probable jury verdict value of $50,000 or less were eligible for the program. The arbitration program was, de facto, "voluntary" because cases could only enter if one of the parties demanded it.

On May 1, 1987 major changes were made to the CAP as a result of a law passed by the Special Legislative Session on Tort Reform in June, 1987. These changes (1) expanded the jurisdictional amount from $50,000 to $150,000 and made the arbitration more "mandatory". All tort cases were now viewed as arbitration eligible and automatically "in" the program unless a plaintiff or defendant could demonstrate that the case had a value in excess of the jurisdiction and should be out.

Phase I (Cases filed February 15, 1986 to April 30, 1987)

In Phase I, the CAP admitted a total of 278 cases. 241 were successfully terminated. By terminated, we mean they were either settled, dismissed, or an award was rendered after an arbitration hearing and the case did not go to trial. A few cases were either removed from the Program because the value of the case had increased from the date of entry or were removed to a Federal Court.

Of the 241 cases that were terminated, 166 (69%) were concluded by the way of settlement by the parties, usually with the assistance of an arbitrator but prior to a formal arbitration hearing. Cases terminated by way of settlement took an average of 207 days. 53% of all cases took longer and 47% took less time. The average amount of settlement of these cases was $20,863. The total of all settlements was $3,400,792.

60 cases were arbitrated to the point of award. Cases which went to an arbitration award took an average of 258 days. 42% of all these cases took longer and 58% took less time. The average arbitration award was $24,016. The total amount of awards filed was $1,056,704. The highest individual award to a plaintiff was $93,103. The lowest was $2,926. 9 awards of zero ($0) were made.

There are currently 37 cases from Phase I pending.

Phase II (Cases filed May 1, 1987 to December 31, 1987)

Since Phase II began, the CAP has experienced a dramatic increase in the number of cases entering the program. Part of this is due to the raise in jurisdictional limit and part of it to the CAP's "gatekeeping" mechanisms of presuming cases eligible. During this time, the CAP received 668 cases or an average of 84 cases per month.

Of these 668 cases, 151 (23%) were terminated either by way of a settlement, award or dismissal. The low termination rate reflects the fact that many of these cases are "fresh", that is, they have only recently entered the arbitration system. Many of these cases are awaiting assignment of an arbitrator which normally takes 60 days from the date a complaint is filed, served, and answered.

Of the 151 cases that were terminated, 63 (42%) were terminated by way of a settlement. The average time to a settlement was 102 days with 45% of these cases taking longer and 55% taking less time. The average settlement amount of these cases was $29,842. The total amount of all settlements was $1,880,108.

Of these Phase II cases that have terminated, seven were by awards. The average time involved was 142 days with 45% taking longer and 55% taking less time. The average amount of these awards was $53,962. The highest award was $131,286. and the lowest was $9,186. Thus far in Phase II, there have been no zero ($0) awards. There are currently 517 pending cases under the CAP's Phase II procedures.

Summary: All Cases

Total Cases Received in the CAP	946
Total Cases Terminated	392
Total Pending Cases	554
Total Amount of All Settlements	$5,280,900
Average Amount of All Settlements	$23,366
Average Lapsed Time for All Settlements	178 days
Total Amount of All Awards	$1,434,442
Average Amount of All Awards	$28,126
Average Lapsed Time for All Awards	245 days
Number of Awards	67
Number of Trial de Novo Requests	23
Number of Appeals that have Gone to Trial	0

V. RESEARCH AND EVALUATION: PRELIMINARY FINDINGS

by John Barkai and Gene Kassebaum

A team of researchers from the University of Hawaii that includes ourselves and others is currently studying and evaluating Hawaii's Court Arbitration Program (CAP). Hawaii's CAP has a number of unique features including the highest dollar ceiling in the country ($150,000), early intervention in cases, and strong limitations on dis_overy as a way of reducing litigant costs. Because of these features, the program and its evaluation is of great interest nationally.

The research project is located at Department of Sociology, Porteus Hall 237, University of Hawaii at Manoa, Honolulu, Hawaii 96822. It is being funded by a three-year contract from the Judiciary and in-kind contributions from the Program for Conflict Resolution, the Sociology Department, and the William S. Richardson School of Law, all of the University of Hawaii at Manoa. The principal researchers are Sociology Professors Gene Kassebaum, David Chandler, and Law Professor John Barkai.

Our study of the CAP is really a study of two groups of cases: those assigned to the arbitration program and a "comparison group" of cases assigned to regular litigation. All tort cases are assigned to CAP when they are filed. Eligible cases are then assigned to either arbitration or litigation. CAP currently assigns, by random numbers, one-half of the cases to arbitration and one-half to litigation.

A comparison group of cases is necessary to measure the effects of arbitration against cases in regular litigation. It is also needed in order to develop an adequate database on cases in ordinary litigation. Current court records are only partially useful in this regard because they are geared to tracking cases but not to evaluating alternatives.

Data collected for the evaluation are being kept in the strictest confidence. Only aggregated information will be released, and no information about any specific case will be made public. Evaluation data will be collected from 1) court and arbitration records, 2) surveys sent to lawyers and arbitrators for cases both in arbitration and regular litigation, and 3) inquiries to insurance companies, discussions with judiciary employees, and interviews with lawyers.

The Survey of Closed Cases from Phase I:

It must be strongly emphasized that this brief article only reports the findings of the first surveys of arbitration cases in Phase I ($50,000) program. Phase II ($150,000) began in May, 1987. Although some Phase II cases have terminated, no Phase II case has reached the nine month deadline. Consequently, not enough cases have terminated to provide any meaningful data on Phase II. Data which will be collected later in Phase II may be similar to or different from the data reported here.

In our current work, surveys were sent to all award cases (over-sampled because they have more information) and one out of four settlements in Phase I. Approximately 300 surveys were sent to 56 awards and 170 settlements. These cases represent all the cases that had terminated at the time the surveys were distributed. 60% or 200 surveys were returned (66 plaintiff, 66 defense, and

and 68 arbitrators). The information presented here is thus drawn from 186 usable survey forms (61 plaintiff, 64 defense, and 61 arbitrators). Approximately one-half of the sample comes from award cases and one-half comes from other cases. To give a more accurate view of the program, therefore, the tabulations are weighted according to standard statistical methods to produce data in proportion to the actual number of cases terminating in settlements and in awards.

Findings on Phase I ($50,000) Cases:

Mode of Termination and Arbitrator Involvement. Approximately 20% of the cases that enter the program go all the way to an arbitration award and 80% settle before award. Arbitrators are actively involved in half the cases. 28% settle with the arbitrator's assistance and 22% receive an arbitrators award. In the other half of the cases there is either no arbitrator appointed or no work for the arbitrator. 20% of all cases settled before an arbitrator was involved, and 30% settled after the arbitrator was involved, but without the arbitrators assistance. The award cases can be appealed to a trial de novo, but so far appeals have either settled or are still pending.

Lawyer and Client Satisfaction. Overall, 76% of lawyers were satisfied with the way their case was handled in the program, but there was more criticism and dissatisfaction from defense lawyers than from plaintiff lawyers. Nearly all (84%) plaintiff lawyers were satisfied with CAP in the particular case surveyed; 71% of defense lawyers reported being satisfied. Not surprisingly, satisfaction also differed depending on whether the case settled or went to award. 100% of plaintiff lawyers and 90% of defense lawyers whose cases settled were satisfied; 72% of plaintiff lawyers and 38% of defense lawyers whose cases went to an award were satisfied.

Lawyer satisfaction is highly correlated to the lawyer's perception of whether the award was similar to what the lawyer thought might be the trial verdict. When cases proceeded to awards, more plaintiff lawyers (64%) than defense lawyers (44%) thought the awards were similar to what the verdict would have been at trial. The assumption that the case would have gone to trial is quite hypothetical. In Hawaii only three percent of personal injury cases are tried. 87% of plaintiff lawyers who saw the awards as similar to verdicts were satisfied with the arbitration program, only 40% who saw the awards as different from trial were satisfied. Defense lawyers had very similar impressions. 82% of defense lawyers who saw the awards as similar to verdicts were satisfied with the arbitration program; only 36% who saw the awards as different from trial were satisfied.

Interestingly, both plaintiff and defense counsel estimated 74% of their clients were satisfied and both estimated that their clients were 88% satisfied with settlements and 8% dissatisfied. Differences were more dramatic for awards. Plaintiff lawyers estimated that 72% of their clients were satisfied and 28% dissatisfied with the award. However, defense lawyers estimated that 52% of their clients were satisfied and 48% dissatisfied with the award. We would like to know how satisfied the insurance companies are. They are the true clients for most defense lawyers.

Speed of Disposition. Overall, 72% of the lawyers surveyed believed that if their case had not been in the program it would have taken longer to terminate. The views of plaintiff and defense lawyers differed again. 87% of plaintiff lawyers thought the case would have taken longer if it was not in the program; 56% of defense attorneys thought it would have taken longer.

Discovery. A major program goal is to reduce expense for litigants by reducing discovery. Discovery did appear to be reduced. 83% of plaintiff lawyers, 67% of defense lawyers, and 80% of arbitrators reported discovery reductions. Discovery can be reduced either because the lawyers agree to limit discovery or because the arbitrator denies requests for discovery. Arbitrators reported that they only denied discovery requests in 9% of cases, which suggests that discovery is being reduced mainly through voluntary compliance by the lawyers. It is important to note that only 1% of plaintiff lawyers and 11% of defense lawyers reported that discovery reduction affected the outcome of the case.

Discovery costs also were examined. For plaintiff lawyers, discovery was less than $100 in 31% of the cases and less than $400 in 68% of the cases. Only 7% of plaintiff lawyers reported discovery expenses over $1000. For defense lawyers, discovery was less than $100 in 42% of the cases and less than $400 in 57% of the cases. Only 8% of defense lawyers reported discovery expenses over $1000. At this time we cannot yet estimate how much the program will save in discovery costs although insurance companies already may know the answer. We will not know the discovery costs for ordinary litigation until the comparison cases are surveyed. However, 81% of plaintiff lawyers and 54% of defense lawyers reported that the case would have cost more if it had not been in CAP.

Summary of Findings on Phase I ($50,000) Cases:

Satisfaction. Generally, lawyers were satisfied with the program, although more plaintiff lawyers were satisfied than were defense lawyers. As might be expected, more lawyers were satisfied with their voluntary settlements than with the awards by the arbitrators.

Speed of Disposition. Most plaintiff lawyers believed that if their case had not been in the arbitration program it would have taken longer to terminate. Only about half of the defense lawyers believed that the arbitration program was faster than ordinary litigation.

Discovery and Cost Reduction. Plaintiff lawyers, defense lawyers, and arbitrators, all reported that the program reduced discovery and that discovery reduction did not affect case outcome. Most plaintiff lawyers believed that if their case had not been in CAP it would have cost more to terminate. Only about half of the defense lawyers believed that the arbitration program was less costly than ordinary litigation.

In keeping with the scope and work of our study, we will continue to evaluate the development and impact of Hawaii's CAP. Future reports will include cases that entered the program after May 1, 1987.

VI. AKAMA v. TSUDA: A CASE STUDY

by Cynthia Lee

(The following story chronicles an actual case handled in the CAP. Information about this case was received from attorneys Wayne Sakai, Paul DiBianco, and Mark Desmarais. Only the names of the plaintiff and defendant have been fictionalized.)

The Facts:

On March 17, 1984, Sylvia Akama was driving on Waialae Avenue near Kahala Mall Shopping Center. Suddenly the car in front turned up a ramp into the shopping center. Sylvia braked and then stopped to prevent hitting the car in front. Samuel Tsuda, who was directly behind Sylvia, was not as lucky. He ended up running into her and causing one of the most common kinds of auto accidents: a rear end collision.

Two years later on April 12, 1986, after consulting various doctors and chiropractors, Sylvia Akama had her attorney, Paul DiBianco, file a Complaint against Samuel Tsuda. The allegations included among other things "severe and lasting physical injuries", "great pain of body and mind", and "loss of income". Samuel Tsuda's attorney, Mark Desmarais, answered this complaint on May 14, 1986.

The Case In Arbitration:

On July 18, 1986, Akama v. Tsuda entered into the Court Arbitration Program (CAP). In effect, the two parties agreed to put their case on a fast-track system that continued their circuit court case but also sought to resolve matters without the time, expense and complications of a full circuit court trial. Since court arbitration is non-binding, the parties did not exclude the possibility of a trial. That right was retained if either side were dissatisfied with the results of arbitration.

On August 12, 1986, attorney Wayne Sakai was selected and confirmed as Arbitrator of the case. His deadline for filing an award was April 18, 1987, nine months after the agreement to enter into arbitration was filed. As required, Sakai sent a letter to both parties to schedule a pre-hearing conference within thirty days after his appointment. In his letter, he asked both attorneys to submit, two days before the conference, written statements of facts and issues, and a summary of discovery items.

According to Arbitrator Sakai, the liability of Samuel Tsuda was not a major issue. The major point of the case was the extent of Sylvia Akama's injuries and how much she should be awarded in compensation. Thus, much of the discovery allowed by Sakai involved medical examinations by both parties' doctors and submittal of these doctor's reports to Sakai. These examinations and reports were considered important enough that the case was extended by 60 days to June 18, 1987 to allow for a test that defendant Tsuda's doctor thought was necessary.

As the case proceeded, Arbitrator Sakai encouraged the two parties and their attorneys to reach a settlement. Whenever possible, he suggested ways to economize and speed up the process of resolution. He did not, however, get directly involved in negotiations because he felt that the two parties were too far apart in their figures. Since he might eventually end up hearing the case, he did not

actually conduct mediated settlement discussions.

After several pre-hearing conferences, the case did go to a formal arbitration hearing. The hearing was like a trial, with direct and cross-examination of witnesses and parties, and the introduction of evidence. On June 18, 1987, exactly 11 months after the Akama v. Tsuda case entered into arbitration, Akama was awarded special damages of $5,902.83 and general damages of $28,000. Defendant Tsuda had 20 days to appeal this decision and to ask for a jury trial but, declined to do so. According to his attorney, Mark Desmarais, Tsuda did not want to risk the sanctions of having to pay costs and fees, attorney's fees of up $5,000, and the cost of jurors if he could not better the jury trial outcome by 15%.

Reflections by the Attorneys:

The three attorneys in this case, Arbitrator Wayne Sakai, Plaintiff's attorney, Paul DiBianco, and Defendant's Attorney, Mark Desmarais, have all performed the roles of Arbitrator, defense attorney, and plaintiff's attorney. They felt that the Arbitration Program was, in general, accomplishing its goals of speeding up the process of civil litigation and doing it more economically and with results fairly close to circuit court awards.

Paul DiBianco summarized the assessments of all three attorneys involved in this case:

1) The process was faster so that the parties had a resolution of the dispute sooner. They didn't have to remain in litigation and prolong their anxiety over what the outcome might be.

2) The simpler procedures allowed for more informal discovery procedures and cut down the costs and fees, particularly those related to experts.

3) The informal proceedings allowed both the parties, and their witnesses, to feel more comfortable, especially since Arbitrator Wayne Sakai did not wear a black robe.

From Defendant's point of view, Samuel Tsuda and the insurance company expressed satisfaction with the handling of this case by the CAP. Samuel Tsuda was happy that the process was faster and simpler and the insurance company was pleased that costs were lower.

VII. LEADERSHIP AND MANAGEMENT

Judicial Arbitration Commission

Judge Ronald T.Y. Moon, First Circuit, Chairperson
Judge Boyd P. Mossman, Second Circuit
Judge Shunichi Kimura, Third Circuit
Judge Kei Hirano, Fifth Circuit
James E. Duffy, Jr.
Robert Grantham
Sharon R. Himeno
James Kawashima
Walter S. Kirimitsu
Frank T. Lockwood
Christopher P. McKenzie
Kenneth T. Okamoto
Gerald Y. Sakiya
Robert S. Toyofuku

Advisors to the Commission:

Peter S. Adler
Warren Price, III
Raymond J. Tam

Neighbor Island Arbitration Committees

Hawaii

Lawrence W. Cohn
Kenneth A. Ross
Diana L. Van De Car
Andrew P. Wilson

Kauai

Kurt R. Bosshard
Daryl Y. Dobashi
Raymond G. Duvauchelle
Calvin K. Murashige

Maui

James Krueger
E. Martin Luna
Robert M. Monden
Shackley Raffetto

Arbitration Administrators

Hawaii - Eleanor Mirikitani
Kauai - Steven S. Okihara
Maui - Robert M. Monden
Oahu - Edwin S. Aoki

VIII. FIRST CIRCUIT ARBITRATORS

Abbett, Ethan D.B.
Abe, Fred Y.
Abe, Michael K.
Agena, Melvin V.
Agmata, Victor Jr.
Ahu, Elvin P.
Akana, Dudley G.
Akiba, Lorraine A.
Albu, Ronald
Alcantara, Leonard F.
Alexander-Taylor, Amy
Alston, Paul
Alulli, Yuklin
Aoki, Paul S.
Ashford, George W. Jr.
Au, Ronald G.S.
Ayabe, Sidney K.
Bain, Elton J.
Bays, A. Bernard
Bell, Roy J.
Bendet, Edward B.
Bernstein, Mark D.
Bettencourt, David
Bigelow, Bruce C.
Blauenstein, Mark P.
Bocken, R. Charles
Bogetto, Philip D.
Border, Patrick W.
Bordner, William A.
Brandt, George W.
Broder, Sherry P.
Burns, Edmund
Carney, Thomas J. Jr.
Carroll, Benjamin L. III
Chang, Gary W.B.
Chang, Howard T.
Chang, Kevin S.C.
Chang, Louis L.C.
Chang, Nelson S.W.
Chang, Robert H.K.
Chang, Roy K.S.
Char, Peter C.P.
Chee, Kevin S.W.
Ching, Randall Y.C.
Ching, Wesley H.M.
Choi, Cedric
Chong, Robert A.
Chow, Steven J.T.
Choy, Milton W.H.
Chu, Harold
Chuck, Gregory W.
Chun, Jerrold T.
Chun, Richard C.F.
Chun-Hoon, Lowell K.T.
Chung, Randall Y.S.
Chung, Steven K.S.
Cook, Thomas E.
Corpe, Randolph L.
Cosgrove, Gail Y.
Cowan, Stuart M.
Crumpton, Charles W.
Cuskaden, Everett
Davis, Mark S.
Davis, Walter
Desmarais, Mark S.
Devens, Paul
Dezzani, David J.
Dibianco, Paul S.
Duffy, James E. Jr.
Durbin, Paul J.
Earle, Jacqueline L.S.
Edmunds, John S.
Eggers, William J. III
Eichor, Rick J.
Englehart, C. Andrew
Estes, James T.
Ezra, David A.
Fairbanks, David L.
Fell, Charles P.
Fenton, Ashley K.
Fera, Dennis K.
Ferrara, Christopher D.
Fong, Peter
Fong, Valerie W.H.
Fong, Wesley F.
Fonseca, Jurel D.
Fray, Philip S.
Fried, L. Richard Jr.
Fritz, Collin M.
Furuseno, Craig K.
Furutani, Miles S.
Futa, Janice T.
Garcia, Noa N.
Gibson, Michael V
Gilardy, William J. Jr.
Gouveia, Larry
Gouin, Hal
Greenberg, Howard
Goudeau, J. William Jr.
Greenly, H. Burnham
Grenau, Kurt A.
Guttman, Steven
Hall, David W.
Hara, C. Michael
Hayashi, Leslie Ann
Hee, Alfred H.H.
Hee, Sherman S.
Henderson, Harvey E. Jr.
Hiatt, Jerry
Hiatt, Lynn
Higa, Warren H.
Higashi, Jeffrey Y.
Himeno, Sharon R.
Himmelman, John D.
Hirai, Colleen K.
Hirai, Richard H.
Hiramatsu, Beverly L.K.
Hirono, Mazie K.
Hiseka, Steven
Hee, Allen K.
Hoke, Richard L.
Hong, Michael D.
Horie, Walter K.
Howell, A. Peter
Hughes, Roy F.
Hulbert, Neil F
Hunt, William S.
Ichida, Wesley W.
Ikeda, Walter N.
Ikeda, Wesley H.
Ikehara, Archie T.
Ikei, Clayton C.
Indie, Michael T.
Ing, Dennis A.
Ishida, Lincoln J.
Ito, Alvin T.
Ito, Ernest A.
Iwanaga, Michiro
Izumi, Francis M.
Jaffe, Edward A.
Jervis, Gerard Aulama
Jim On, Shelton G.W.
Johnson, Solomon S.
Johnston, Mary Blaine
Jones, Ward D.
Kakazu, Cheryl K.
Kaneko, Stuart A.
Kanetake, Stanley T.
Kaolulo, Archibald C.K.
Kawachika, James A.
Kawashima, James
Kakina, Wayne
Kessner, Robert C.
Kidani, Grant K.
Kim, Alexander Y.H.
Kim, Bruce S.
Kim, Dewey H. Jr.
Kim, Michael T.I.
Kimura, George Y.
Kimura, Glenn I.
King, Adrienne S.
King, James A.
King, Samuel P. Jr.
Kirimitsu, Walter
Kitamura, Henry T.
Kleintop, Charles
Kobayashi, Bert T.
Kodani, Roy M.
Komatsubara, Kerry M.
Komiji, John T.
Kondo, Wray
Kotake, Mervyn M.
Koyanagi, Faye M.
Kugisaki, Craig T.
Kuniyuki, Ken T.
Kupchak, Kenneth R.
Kurren, Barry M.
Kuwaeaki, Larry T. Jr.
Lacy, John R.
LaFountaine, Ralph R.
Lau, Jeffrey D.
Lau, Kenneth
Lau, Lawrence K.
Lawhn, James M.
Leavitt, James T. Jr.
Lebb, Edward R.
Lee, Dale W.
Lee, Douglas T.Y.
Lee, Stephen W.H.A.
Leong, Robin J.
Lewin, Gordon F
Levinson, Steven H.
Libkuman, Ronald D.
Lilly, Michael A.
Lim, Kwon Mi
Lo, David
Lockwood, Frank
Lockwood, John A.
Loo, George
Louie, David M.
Love, Chad P.
Low, Donald H.C.
Lum, Leslie W.S.
MacDonald, Stephen R
Maciszewski, Felix A.
Maclaren, Alexander T.
Mah, Stanley S.
Marrack, Alexander C.
Marsh, Michael R.
Matsutani, Allen I.
Matsui, Stanford M.
Matsui, Clyde W.M.
Matsumoto, Colbert
Matsumoto, Robert K.
McCarthy, Michael F.
McKenzie, Christopher
McTheeters, Howard
Meres, Robert K.
Miho, Katsuge
Miller, William S.
Mizukami, Winston
Mive, Colin O.
Miyagi, Melvyn M.
Moore, Willson C.
Morikawa, Randall I.
Morry, C. Richard
Morse, Jack
Moseley, Roger G.
Mui, Thomas L.
Mukaida, Wayne M.
Myrdal, John R.
Nagaue, Nelson T.
Nagle, James F.
Nagle, William J. III
Nakamoto, Francis M.
Nakamura, Hideki
Nakamura, Kenneth M.
Nakamura, Lee T.
Nakamura, Richard F.
Nakamura, Yoshiro
Nakashima, David A.
Nakashima, Steven M.
Nakayama, Paula M.
Neeser, Wayne
Ng, Peter P.J.
Nip, Ranson
Nip, Robert L.S.
Nishida, Rodney S.
Nishimoto, John S.
Nishimura, Donald S.
Noguchi, George K.
O'Brien, Francis T.
O'Connor, Michael F.
Okamoto, Kenneth
Okimoto, Blake T.
Oliver, Jason F
Ono, Andrew S.
Ono, Jeffrey T.
Ortiz, Jonathan L.
Oshima, Leighton K.

Pablo, Christopher
Pacarro, Clarence A.
Painter, Xavier W. Jr.
Park, Arthur Y.
Park, Corey
Park, Patricia K.
Parsons, Wayne D.
Paul, James T.
Pavey, Judith Ann
Perkin, John F.
Perry, Madelyn L.
Playdon, George W.
Pong, Winfred K.T.
Portnoy, Jeffrey
Potts, Dennis W.
Price, Warren III
Rau, Robert E.
Richards, Robert P.
Ripley, Arthur Jr.
Robbins, Kenneth S.
Robinson, David M.
Rocca, Arthur P.
Roney, John A.
Ryan, Joseph A.
Sakai, Wayne M.
Sakuda, Bert S.
Sakurai, Colleen M.
Schneider, Josepa
Schulmeister, David
Schutter, David C.
Sekiya, Gerald Y.
Shaughnessy, Patricia L.
Shigemura, Gary Y.
Shintani, Randal I.
Sia, Jeffrey M.K.
Slaton, Randolph R.
Snyder, Burt L.
Stone, James J.
Stone, Peter T.
Street, J. Stephen
Stubenburg, James A.
Sugimoto, Brian D.
Sumida, Kevin P.H.
Sutton, Richard C. Jr.
Suzuki, Norman
Tam, Raymond J.
Taylor, Jeffrey M.
Teramae, Janice L.
Thorp, James W.
Thomas, John D. Jr.
Thomas, Mark A.
Togioka, Leslie C.
Tom, Herbert K.
Tom, Michael D.
Tom, Stephen D.
Tomar, Paul A.
Toyofuku, Robert S.
Trecker, Steven J.
Tsukiyama, Tod T.
Tumacder, John
Turbin, Richard
Turk, David L.
Ushijima, Daniel S.
Van Etten, Alan
Wai, Louis K.
Walker, Susan P.
Watson, Kali K.
Watts, Thomas
Weinberg, Jan
White, Emmet
Williams, John R.
Wilson, Michael D.
Winegar, Cynthia
Witherspoon, Charles M.
Wolff, Peter C. Jr.
Wong, Henry W.C.
Wong, John C.
Wong, Michael J.Y.
Wong, Sidney J.Y.
Worsh, Edgar A.
Yamamoto, Myles T.
Yamamura, Paul T.
Yamane, Ernest Y.
Yano, Francis H.
Yano, Vincent H.
Yap, Frank K.L. Jr.
Yempuku, Roy Y.
Yomono, Brian K.
Yoshida, Gerald C.
Young, Gregg H.
Yusi, Jennifer M.

IX. SECOND, THIRD, AND FIFTH CIRCUIT ARBITRATORS

Second Circuit

Albrechtsen, Al
Bama, Artemio C.
Brumbaugh, James P.
Callahan, Michael J.
Cardoza, Joseph E.
Chasburn, Lowell
Clair, John G. Jr.
Cole, Thomas R.
D'enbeau, Madelyn S.
Dombroski, James M.
Fleming, William L.
Foster-Au, Renata
Fukuoka, Ken R.
Fukushima, Howard M.
Garcia, Stephen G.
Goldsmith, Stephen E.
Hall, Dick J.
Haywood, Guy A.
Higa, Kase
Ho, Diane
Kohne, William L.
Keller, Lillian S.
Langa, Sanford J.
Leutenecker, Tom C.
Luna, S. Martin
MacDonald, Barclay E.
Mason, Edward F.
McNulty, Deborah
McNulty, Tim
Nakamura, Craig G.
Nakamura, David H.
Niles, Dennis J.
Ogle, William F.
Priest, Richard A. Jr.
Ramil, Antonio V.
Ranken, Anthony L.
Robert, Gary
Rowland, Robert E.
Shimoda, Walter
Takaouki, Anne M.
Takayesu, James S.
Tam, John S.
Tarcisoni, Michael K.
Tengan, Davelynn M.
Thomas, Jack T.
Ueoka, Meyer M.
Ueoka, Paul M.
Walton, Rwarre

Third Circuit

Altman, Gary
Amano, Donald M.
Amano, Riki May
Bertsch, Robert P.
Bethea, Robert S.
Brown, Maren Nayes
Burgess, John M.A.
Carlsmith, Donn W.
Chock, Nolan K.C.
Choi, Jeffrey
Chong, Clayton E.
Chong, Curtis E.
Choy, Duane D.
Christensen, Steven K.
Clay, James C.
Cohn, Lawrence W.
Cook, Valea A.
Cornell, Craig S.
Cox, Victor M.
Crudele, Robert J.
Dabney, Michael
deSilva, Tim E.
Dixon, Steven S.
Dod, Nelson K
Fagundes, Joseph M. III
Fukuhara, Calvin J.
Gaudin, Sam M.
Gallup, Wallace M. Jr.
Giannini, Frederick D.O.
Halsted, Douglas L.
Manohano, Peter
Mara, Gilbert K.
Mase, Glenn S.
Hara, Michael S.
Hasegawe, Geraldine N.
Hasegawa, Raymond K.
Hastings, Robert W. II
Henricks, Arne T.
Ibarra, Ronald
Ing, Wendell Y.Y.
Izeijo, James S.
Ishado, Lester J.
Ishida, Richard T.
Iwashita, Andrew S.
Jolly, William E.
Kimura, Glenn N.
Kimura, Jay T.
Kinoshi, Kaipo
Kitaoka, Carol S.W.
Kunimura, Ruth A.
Kushi, Herbert I.
Lau, Robert I.W.
Lee, Ansen K.
Leitel, Ira
Leithead, Arthur S.
Lenell, Maredith
Lim, Steven
Love, Colin L.
Lui-Kwan, Timothy
Martin, Donald K.
Marx, Robert P.
Matsukawa, Michael J.
McCarthy, William J. Jr.
McIntosh, James L.
Medeiros, Michael J.
Meneses, Stephen J.
Metcalf, Wayne C. III
Meyer, Lionel D.
Miller, Frank L. IV
Moore, Michael W.
Nakamoto, Roy A.
Nakamura, Greg K.
Narimatsu, Curtis T.
Nishimura, Dennis D.
Oda, Stuart M.
Okamoto, Alan M.
Okura, Sanford K.
Olson, John L.
O'Toole, Patricia K.
Peterson, Richard
Pinao, Meralynne K.
Quitiquit, Sylvester V.
Renders, Ariana G.
Roehrig, Christopher J.
Roehrig, Stanley H.
Rowell, William J.
Ross, Kenneth A.
Schulze, Richard P.
Schutte, Sandra E. Pechter
Sellers, Kevin R.
Shumaker, Terrence
Segi, J. James
Tabamura, Dwight
Takase, Gerald A.
Trethewey, Richard
Trientos, Robert D.
Tully, Robert B.
Van De Car, Diana L.
Van De Car, Lloyd
Van Fernis, Mark
Viteusek, Roy A. III
Wagner, John A.
Welles, Radcliffe
Wessel, Norman A.
Wilson, Andrew P.
Yamada, Katsuya
Yamada-Ross, Dale
Yamamoto, Jerel I.
Yamashiro, Stephen K.
Yoshioka, Terence T.
Yah, Thomas T.W.
Yuda, George S.
Yuen, Christopher J.
Zola, Michael S.

Fifth Circuit

Blake, Hartwell H.K.
Boschard, Kurt R.
Budd, Nancy J.
Chihara, Ted A.
Dobashi, Daryl Y.
Duvauchelle, Raymond C.
Esaki, Amy I.
Feldhacker, William
Grimpas, Robert M.
Hong, Walton Y.Y.
Juna, James G. Jr.
Kahr, E. Courtney
Komori, Arthur S.
Licka, James W.
Masuoka, George M.
McCreery, Lawrence D.
Murashige, Calvin K.
Nii, Michael N.
Perry, Warren C.R.
Shimizu, Wayne S.
Shiraishi, Clinton I.
Shiraishi, Sherman T.
Trask, Arthur K. Jr.
Watanabe, Kathleen N.A.
Wilson, Donald E.
Yamada, Dennis R.

X. AUTHORS

The National Institute for Dispute Resolution (NIDR) is a private, non-profit foundation that provides support and technical assistance in the field of ADR. NIDR provided early consultation and financial help to the Judiciary during the CAP's start-up.

Peter S. Adler, Ph.d., is Director of the Judiciary's Program on Alternative Dispute Resolution (ADR). He is a trained mediator and arbitrator and has worked in the ADR field since 1979.

Pamela R. Gring is a second-year law student at the Northwestern School of Law of Lewis and Clark College in Oregon. She is currently working at the Judiciary's Program on ADR on an externship arrangement with Lewis and Clark.

Edwin S. Aoki is the CAP's Arbitration Administrator. He is a trained arbitrator and has worked in the field of claims management for more than 15 years.

John L. Barkai, Esq. and Gene Kassebaum, Ph.d., are Co-Principal Investigators of the team that is conducting research and evaluation of the CAP. Barkai is Professor of Law at the Richardson School of Law, University of Hawaii. Kassebaum is Professor of Sociology at the University of Hawaii. Both Barkai and Kassebaum have extensive academic backgrounds in the field of law and justice.

Cynthia H. Lee, Esq., is with the Judiciary's Program on ADR. She is a former Public Defender and is currently working on the development of mediation and arbitration applications in Hawaii's Family Court.

COURT ANNEXED ARBITRATION PROGRAM

FIRST CIRCUIT COURT

FEBRUARY 15, 1986 through DECEMBER 31, 1988

REPORT DATE - JANUARY 25, 1989

	* OLD RULES	** NEW RULES	TOTAL
TOTAL CASES RECEIVED IN THE PROGRAM	278	1,297	1,575
CASES TERMINATED			
SETTLEMENTS	186	378	564
AWARDS	65	139	204
DISMISSED	20	134	154
OTHERS	6	60	66
REQUEST TO EXEMPT GRANTED	N/A	62	62
TOTAL CASES TERMINATED	277	773	1,050
TOTAL PENDING CASES	1	524	525
AWARDS			
ISSUED	66	151	217
APPEALED	27	83	110
APPEALS SETTLED	21	29	50
REQUEST TO EXEMPT CASES			
TOTAL FILED	N/A	455	455
GRANTED	N/A	000	000
DENIED	N/A	46	46
DENIED, ASSIGNED TO COMPARISON GROUP	N/A	73	73

* - OLD RULES (2/15/86 through 4/30/87)

** - NEW RULES (5/1/87 - effective date)

EXHIBIT A

HAWAII ARBITRATION RULES

(Rules Governing the Court Annexed Arbitration Program)

Appended to the Rules of the Circuit Courts of the State of Hawaii as Exhibit A pursuant to Circuit Court Rule 34, added January 22, 1986

TABLE OF CONTENTS

Rule 1.	The Court Annexed Arbitration Program	A.1
Rule 2.	Intent of Program and Application of Rules	A.1
Rule 3.	The Arbitration Judge	A.1
Rule 4.	The Judicial Arbitration Commission	A.1
Rule 5.	The Arbitration Administrator	A.2
Rule 6.	Matters Subject to Arbitration	A.2
Rule 7.	Relationship to Circuit Court Jurisdiction and Rules; Form of Documents	A.3
Rule 8.	Determination of Arbitrability	A.3
Rule 9.	Assignment to Arbitrator	A.4
Rule 10.	Qualifications of Arbitrators	A.5
Rule 11.	Authority of Arbitrators	A.6
Rule 12.	Stipulations	A.6
Rule 13.	Restrictions on Communications	A.7
Rule 14.	Discovery	A.7
Rule 15.	Scheduling of Hearings; Pre-Hearing Conferences	A.7
Rule 16.	Prehearing Statement	A.8
Rule 17.	Conduct of the Hearing	A.8
Rule 18.	Arbitration in the Absence of a Party	A.8
Rule 19.	Form and Content of Award	A.9
Rule 20.	Filing of Award	A.9
Rule 21.	Judgment on Award	A.9
Rule 22.	Request for Trial *De Novo*	A.10
Rule 23.	Procedures at Trial *De Novo*	A.10
Rule 24.	Scheduling of the Trial *De Novo*	A.10

Rule 25. The Prevailing Party in the Trial *De Novo*: Costs A.11

Rule 26. Sanctions for Failing to Prevail in the Trial *De Novo* A.11

Rule 27. Effective Date A.11

HAWAII ARBITRATION RULES

Rule 1. THE COURT ANNEXED ARBITRATION PROGRAM

The Court Annexed Arbitration Program (the Program) is a mandatory, non-binding arbitration program, as hereinafter described, for certain civil cases in the State of Hawaii.

Rule 2. INTENT OF PROGRAM AND APPLICATION OF RULES

(A) The purpose of the Program is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters to be designated by the Judicial Arbitration Commission.

(B) These rules shall not be applicable to arbitration by private agreement or to other forms of arbitration under existing statutes, policies and procedures.

(C) These arbitration rules are not intended, nor should they be construed, to address every issue which may arise during the arbitration process. The intent of these rules is to give considerable discretion to the arbitrator, the Arbitration Administrator and the Judicial Arbitration Commission. Arbitration hearings are intended to be informal, expeditious and consistent with the purposes and intent of these rules.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 3. THE ARBITRATION JUDGE

(A) The Arbitration Judge for the Program shall be a Circuit Court Judge who shall be appointed by the Chief Justice.

(B) The Arbitration Judge shall determine all disputed issues under these rules as hereinafter set forth, including, but not limited to, all disputed issues concerning the arbitrability of cases and the qualifications and acts of arbitrators.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 4. THE JUDICIAL ARBITRATION COMMISSION

(A) The Chief Justice shall establish a Judicial Arbitration Commission which will have the responsibility to develop, monitor, maintain, supervise and evaluate the Program for the State of Hawaii.

(B) The Judicial Arbitration Commission shall include a chair-

person who shall be the Arbitration Judge, and a representative to be designated by the President of the Hawaii State Bar Association. Additional members shall be appointed at the discretion of the Chief Justice.

(C) The Judicial Arbitration Commission shall be responsible for the selection and training of arbitrators.

(D) The Judicial Arbitration Commission shall be responsible for the hiring, supervision and evaluation of the Arbitration Administrator and all additional necessary staff.

(E) The Judicial Arbitration Commission shall interpret these rules prior to the appointment of an arbitrator in any case under the Program.

(F) The Judicial Arbitration Commission may promulgate rules and regulations necessary to fulfill its responsibilities under these rules.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 5. THE ARBITRATION ADMINISTRATOR

The Arbitration Administrator shall be appointed by the Judicial Arbitration Commission and shall be responsible for the operation and management of the Program, as hereinafter set forth.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 6. MATTERS SUBJECT TO ARBITRATION

(A) All tort cases, including appeals or transfers from district courts, having a probable jury award value, not reduced by the issue of liability and not in excess of One Hundred Fifty Thousand Dollars ($150,000.00), exclusive of interest and costs, may be accepted into the Program at the discretion of the Judicial Arbitration Commission.

(B) Any other civil case, regardless of the monetary value or the amount in controversy, may be submitted to the Program upon the agreement of all parties and the approval of the Arbitration Judge.

(C) Parties to cases submitted or ordered to the Program may agree at any time to be bound by any arbitration ruling or award.

(D) The Arbitration Judge may accept into, or remove from, the Program any action where good cause for acceptance or removal is found. The Court's decision in this regard is non-reviewable.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 7. RELATIONSHIP TO CIRCUIT COURT JURISDICTION AND RULES; FORM OF DOCUMENTS

(A) Cases filed in, or removed to, the Circuit Court shall remain under the jurisdiction of that court for all phases of the proceedings, including arbitration.

(B) Except for the authority to act or interpret these rules expressly given to the arbitrator, the Arbitration Administrator, the Judicial Arbitration Commission, or the Arbitration Judge, all issues shall be determined by the Circuit Court with jurisdiction.

(C) Before a case is submitted or ordered to the Program, and after a Notice of Appeal and Request for Trial *De Novo* is filed, all applicable rules of the Circuit Court and of civil procedure apply. After a case is submitted or ordered to the Program, and before a Notice of Appeal and Request for Trial *De Novo* is filed, or until the case is removed from the Program, these rules apply.

(D) The calculation of time and the requirements of service of pleadings and documents under these rules shall be the same as under the Hawaii Rules of Civil Procedure.

(E) Circuit Court Rule 12(a)(17), and all rules of court or of civil procedure requiring the filing of pleadings, remain in effect notwithstanding the fact that a case is under the Program.

(F) All dispositive motions shall be made to the Circuit Court as required by law or rule notwithstanding the fact that a case is under the Program.

(G) All documents required to be utilized or filed under these rules shall be in a form designated by the Arbitration Judge.

(H) Once a case is submitted or ordered to the Program all parties subsequently joined in the action shall be parties to the arbitration unless dismissed by the Arbitration Judge.

Rule 8. DETERMINATION OF ARBITRABILITY

(A) The court shall view all tort cases as arbitration eligible and automatically "in" the Program unless plaintiff certifies that his or her case has a value in excess of the jurisdictional amount of the Program which is $150,000. Plaintiff shall file a request for exemption at the time of filing and such a request shall include a summary of facts which support plaintiff's contentions.

(B) Where exemptions from arbitration have been requested, the Arbitration Administrator shall review the contentions, facts and

evidence available and determine eligibility. The Arbitration Administrator may upon request require that a party submit additional facts which support the party's contentions. Any objection(s) to his decision must be filed with the Arbitration Judge within ten (10) days from the date the decision is served, with service to opposing counsel.

(C) Subsequent to the filing of the complaint, any party who believes a case should be removed from or readmitted to the Program, shall file a request to remove or readmit, with the Arbitration Judge. Such a request shall include a summary of the facts which support their contentions, with service to opposing party.

(D) The Arbitration Judge shall make all final determinations regarding the arbitrability of a case when that issue is disputed by any party, and may hold a conference on the issue of arbitrability at his discretion.

(E) The Arbitration Judge may, at his discretion, impose sanctions of reasonable costs and attorney's fees against any party who without good cause or justification attempts to remove a case from the Program.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 9. ASSIGNMENT TO ARBITRATOR

(A) Parties may select and stipulate to a private arbitrator(s), who is an arbitrator not on the panel of the Program, or one who is on the panel but who has agreed to serve on a private basis. Such stipulation must be made within twenty (20) days after the appearance of defense counsel and must include a statement signed by the arbitrator(s) expressing his or her express willingness to arbitrate under the rules and procedures of the Court Annexed Arbitration Program and a duly signed arbitrator's oath.

(B) Any and all fees or expenses related to the use of a private arbitrator(s) shall be borne by the parties.

(C) Unless the Arbitration Administrator is notified of a stipulation for a private arbitrator(s) within the above twenty (20) day period, the Arbitration Administrator will then serve the parties with identical lists of five (5) arbitrators.

(1) Thereafter, each party shall, within ten (10) days, return the list with no more than two (2) names stricken.

(2) If both parties respond, the Arbitration Administrator shall appoint an arbitrator from among those names not stricken.

(3) If only one party responds within the ten (10) day period, the Arbitration Administrator shall appoint an arbitrator from among those names not stricken.

(4) If neither party responds within the ten (10) day period, the Arbitration Administrator will appoint one of the five (5) arbitrators.

(D) If there are more than two (2) adverse parties, at least two (2) additional arbitrators per each additional party shall be added to the list with the above method of selection to apply.

(E) Where an arbitrator is assigned to a case and subsequent thereto, additional party(s) are added, said party(s) may object to the arbitrator assigned to the case within ten (10) days from the party(s)' appearance. Objection(s) must be in writing stating specific grounds and filed with the Arbitration Administrator, who will review the objection(s) and render a decision. This decision may be appealed to the Arbitration Judge.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 10. QUALIFICATIONS OF ARBITRATORS

(A) The Judicial Arbitration Commission shall create and maintain a panel of arbitrators consisting of attorneys licensed to practice in the State of Hawaii and, in its discretion, qualified non-attorneys.

(B) Attorneys serving as arbitrators shall have substantial experience in civil litigation, and shall have been licensed to practice law in the State of Hawaii for a period of five (5) years, or can provide the Judicial Arbitration Commission with proof of equivalent qualifying experience.

(C) Arbitrators shall be required to complete an orientation and training program following their selection to the panel and other additional training sessions or classes scheduled by the Judicial Arbitration Commission or Arbitration Administrator.

(D) Arbitrators shall be sworn or affirmed by the Chief Justice or his designee to uphold these rules of the Program, the laws of the State of Hawaii, and the Code of Ethics of the American Arbitration Association.

(E) An arbitrator who would be disqualified for any reason that would disqualify a judge under the Code of Judicial Conduct shall immediately resign or be withdrawn as an arbitrator.

(F) Any issue concerning the disqualification of an arbitrator shall be referred to the Judicial Arbitration Commission for a final,

non-reviewable determination.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 11. AUTHORITY OF ARBITRATORS

(A) Arbitrators shall have the general powers of a court and may hear cases in accordance with established rules of evidence and procedure, liberally construed to promote justice and the expeditious resolution of disputes. These include, but are not limited to, the power:

(1) To administer oaths or affirmations to witnesses;

(2) To relax all applicable rules of evidence and procedure to effectuate a speedy and economical resolution of the case without sacrificing a party's right to a full and fair hearing on the merits;

(3) To decide procedural issues arising before or during the arbitration hearing, except issues relating to his or her qualifications as an arbitrator;

(4) To invite or order, with reasonable notice, the parties to submit pre-hearing or post-hearing briefs;

(5) To examine, after notice to the parties, any site or object relevant to the case;

(6) To issue subpoenas for the attendance of witnesses or production of documentary evidence;

(7) To determine the place, time and procedure to hear all matters;

(8) To interpret these rules in all proceedings before him or her;

(9) To find witnesses or parties in contempt and to impose sanctions as provided by the laws of the State of Hawaii; and

(10) To attempt, with the consent of all parties in writing, to aid in the settlement of the case.

(B) Any challenge to the authority or the act of an arbitrator shall be made to the Arbitration Administrator who will make a ruling on the issue in due course. An appeal from the ruling of the Arbitration Administrator may be made within ten (10) days from the date of said ruling to the Arbitration Judge, who shall have the non-reviewable power to uphold, overturn or modify the ruling of the Arbitration Administrator, including the power to stay any proceeding.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 12. STIPULATIONS

Any stipulation between the parties relating to the conduct of the

MAR 13 '89 16:14 JUDICIARY ADMIN. 808 548-6002 P.12/17

arbitration proceeding, or any factual matter therein, shall be in writing and signed by the counsel or parties, and filed with the arbitrator.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 13. RESTRICTIONS ON COMMUNICATIONS

(A) Neither counsel nor parties may communicate directly with the arbitrator regarding the merits of the case, except in the presence of, or with reasonable notice to, all of the other parties.

(B) No disclosure of any offer or demand of settlement made by any party shall be made to the arbitrator prior to the filing of an award without the agreement of all other parties.

Rule 14. DISCOVERY

(A) Once a case is submitted or ordered to the Program, the extent to which discovery is allowed, if at all, is at the sole discretion of the arbitrator. Types of discovery shall be those permitted by the Hawaii Rules of Civil Procedure, but these may be modified in the discretion of the arbitrator to save time and expense.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 15. SCHEDULING OF HEARINGS; PRE-HEARING CONFERENCES

(A) All arbitrations shall take place and all awards filed no later than nine (9) months from the date of service of the complaint to all defendants, or the Order of Arbitration by the Arbitration Judge, unless said time is modified by the Arbitration Judge pursuant to this rule. Arbitrators shall set the time and date of the hearing within this period.

(B) The arbitration date may be advanced or continued upon petition for good cause to the arbitrator. Petition to the Arbitration Judge must be made for a continuance beyond the above nine (9) month period.

(C) Consolidated actions shall be heard on the date assigned to the latest case involved.

(D) Arbitrators and or the Arbitration Administrator may, at their discretion, conduct pre-arbitration hearings or conferences. However, arbitrators must schedule a pre-hearing conference within thirty (30) days from the date a case is assigned.

(E) Counsel shall give immediate written notification to the Arbitration Administrator of any change of the arbitration date, any settlement or changes of counsel.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 16. PREHEARING STATEMENT

(A) At least thirty (30) days prior to the date of the arbitration hearing, each party shall file with the arbitrator and serve upon all other parties a statement containing a list of probable witnesses whom the party intends to call at the arbitration hearing and a list of exhibits and documentary evidence anticipated to be introduced. The statement shall contain a brief description of the matters about which each witness will be called to testify. Each party, upon request, shall make all exhibits and documentary evidence available for inspection and copying by other parties at least twenty (20) days prior to the hearing date.

(B) A party failing to comply with this rule, or failing to comply with any discovery order, may not present at the hearing a witness or exhibit required to be disclosed or made available, except with the permission of the arbitrator.

(C) Each party shall furnish the arbitrator at least twenty (20) days prior to the arbitration hearing copies of any pleadings and other documents contained in the court file which that party deems relevant.

Rule 17. CONDUCT OF THE HEARING

(A) The arbitrator shall have complete discretion over the mode and order of presenting evidence and the conduct of the hearing.

(B) No transcription or recording shall be permitted of the arbitration proceedings.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 18. ARBITRATION IN THE ABSENCE OF A PARTY

An arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain a continuance. The arbitrator shall require the party present to submit such evidence as he or she may require for the making of an award, and may offer the absent party an opportunity to appear at a subsequent hearing.

Rule 19. FORM AND CONTENT OF AWARD

(A) Awards by the arbitrator shall be in writing, signed and on forms prescribed by the Arbitration Judge.

(B) The arbitrator shall determine all issues raised by the pleadings that are subject to arbitration under the Program, including a determination of comparative negligence, if any, damages, if any, and costs. The amount of damages that can be awarded is not limited to the jurisdictional amount for arbitration.

(C) Findings of Fact and Conclusions of Law are not required.

(D) After an award is made, the arbitrator shall return all exhibits to the parties who offered them during the hearing.

Rule 20. FILING OF AWARD

(A) Within seven (7) days after the conclusion of the arbitration hearing, or thirty (30) days after the receipt of the final authorized memoranda of counsel, the arbitrator shall file the award with the Arbitration Administrator, who shall then serve copies of said award to the attorneys of record. Application by the arbitrator to the Arbitration Administrator must be made for an extension of these time periods.

(B) The arbitrator may file with the Arbitration Administrator an amended award to correct an obvious error in the award if done within the seven day period for filing an award. Subsequent to this time, application must be made to the Arbitration Administrator. Any amended award shall be served upon the attorneys of record by the Arbitration Administrator.

(C) This rule does not authorize the use of an amended award to change the arbitrator's decision on the merits. An amended award may only modify an award in order to correct an inadvertent miscalculation or description, or to adjust the award in a matter of form rather than substance. Any modification of substance can only be made upon application to the Arbitration Judge.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 21. JUDGMENT ON AWARD

If, after twenty (20) days after the award is served upon the parties, no party has filed a written Notice of Appeal and Request for Trial *De Novo*, the clerk of the court shall, upon notification by the Arbitration Administrator, enter the arbitration award as a final judgment of the

court. Said award shall have the same force and effect as a final judgment of the court in the civil action, but may not be appealed.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 22. REQUEST FOR TRIAL DE NOVO

(A) Within twenty (20) days after the award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the Arbitration Administrator a written Notice of Appeal and Request for Trial *De Novo* of the action.

(B) After the filing and service of the written Notice of Appeal and Request for Trial *De Novo*, the case shall be set for trial pursuant to applicable court rules.

(C) If the action is triable by right to a jury, and a jury was not originally demanded but is demanded within ten (10) days of service of the Notice of Appeal and Request for Trial *De Novo* by a party having the right of trial by jury, the trial *de novo* shall include a jury, and a jury trial fee shall be paid as provided by law.

Rule 23. PROCEDURES AT TRIAL DE NOVO

(A) The clerk shall seal any arbitration award if a trial *de novo* is requested. The jury will not be informed of the arbitration proceeding, the award, or about any other aspect of the arbitration proceeding. The sealed arbitration award shall not be opened until after the verdict is received and filed in a jury trial, or until after the judge has rendered a decision in a court trial.

(B) All discovery permitted during the course of the arbitration proceedings shall be admissible in the trial *de novo* subject to all applicable rules of civil procedure and evidence. The court in the trial *de novo* shall insure that any reference to the arbitration proceeding is omitted from any discovery taken therein and sought to be introduced at the trial *de novo*.

(C) No statements or testimony made in the course of the arbitration hearing shall be admissible in evidence for any purpose in the trial *de novo*.

Rule 24. SCHEDULING OF THE TRIAL DE NOVO

Every case transferred to the Program shall maintain the approximate position on the civil trial docket as if the case had not been so transferred, unless at the discretion of the court, the docket position is modified.

Rule 25. THE PREVAILING PARTY IN THE TRIAL DE NOVO; COSTS

(A) The "Prevailing Party" in a trial *de novo* is the party who has (1) appealed and improved upon the arbitration award by 15% or more, or (2) has not appealed and the opposing party has appealed and failed to improve upon the arbitration award by 15% or more. For the purpose of this rule, "improve" or "improved" means to increase the award for a plaintiff or to decrease the award for the defendant.

(B) The "Prevailing Party" under these rules, as defined above, is deemed the prevailing party under any statute or rule of court, and as such is entitled to costs of trial and all other remedies as provided by law.

Rule 26. SANCTIONS FOR FAILING TO PREVAIL IN THE TRIAL DE NOVO

(A) After the verdict is received and filed, or the court's decision rendered in a trial *de novo*, the trial court may, in its discretion, impose sanctions, as set forth below, against the non-prevailing party whose appeal resulted in the trial *de novo*.

(B) The sanctions available to the court are as follows:

(1) Reasonable costs and fees (other than attorneys' fees) actually incurred by the party but not otherwise taxable under the law;

(2) Costs of Jurors;

(3) Attorneys' fees not to exceed $5,000;

(C) Sanctions imposed against a plaintiff will be deducted from any award rendered. Sanctions imposed against a defendant will be added to any award rendered.

(D) In determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawaii.

Rule 27. EFFECTIVE DATE

These rules become effective as of February 15, 1986 and shall apply to all cases filed thereafter; provided that the rules governing the creation and organization of the Program and Commission shall be effective immediately

THE COURT ANNEXED ARBITRATION PROGRAM:

JANUARY 1989 EVALUATION REPORT

Professor Gene Kassebaum*

Professor John Barkai**

Professor David Chandler***

Research for this report was funded by the Judiciary of the State of Hawaii and the Program on Conflict Resolution, The University of Hawaii at Manoa.

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* Professor of Sociology, Department of Sociology, University of Hawaii.

** Professor of Law, William S. Richardson School of Law, University of Hawaii.

*** Associate Professor of Sociology, Department of Sociology, University of Hawaii.

EXECUTIVE SUMMARY

THE COURT ANNEXED ARBITRATION PROGRAM: JANUARY 1989 EVALUATION REPORT

Professors Gene Kassebaum, John Barkai, and David Chandler

During the past few years, virtually all state and federal jurisdictions have considered various alternative dispute resolution (ADR) methods to treat the major problems with their court systems: high costs and excessive delay. Court-annexed arbitration is one of the most popular innovations. Programs are currently operating in at least twenty states and ten United States Federal District Courts.

In 1986, Hawaii's Court Annexed Arbitration Program (CAAP) was introduced to "provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." Hawaii Arbitration Rule 2(A). Since May 1987 this experimental program has been a mandatory, non-binding arbitration procedure for tort cases with a probable jury award of $150,000 or less. At this jurisdictional level, approximately 1500 tort cases per year are eligible for the program across the state.

The major goals of the program are: 1) to reduce litigant costs; 2) to increase the pace of disposing of cases; and 3) to maintain, if not improve, litigant satisfaction with Hawaii's civil justice system. Over 400 experienced lawyers are the volunteer arbitrators in this program. They are the key to implementing the program goals. An arbitrator is chosen by the lawyers in the case from a panel of five proposed arbitrators. The arbitrator then works with the attorneys to: 1) eliminate unnecessary pretrial discovery; 2) encourage and facilitate early settlement; and 3) manage the pace of case activity. In the minority of cases where settlement does not occur the arbitrator then; 4) holds a hearing in which litigants have a low cost opportunity for their "day-in-court"; and 5) renders an award. If the award is not accepted, the case returns to the ordinary litigation track for a trial de novo.

There is considerable national interest in Hawaii's Court Annexed Arbitration Program because it has several unique features. Hawaii is the only state which attempts to limit pretrial discovery in order to reduce litigant costs; Hawaii has the highest dollar ceiling ($150,000) among states that offer full arbitration hearings; Hawaii has the only state-wide arbitration program.

Researchers from the University of Hawaii are evaluating this experimental program in the First Circuit where approximately 1000 tort cases per year are eligible for the

program. The primary sources of empirical information in the research are over 1000 questionnaires of lawyers and arbitrators, and data bases from the arbitration program and the court. The evaluation design randomly assigns one half of the eligible cases to arbitration and the other half to a comparison group that goes through regular litigation. Only a small proportion of cases in the comparison group have terminated so they can not yet be used in the evaluation analysis.

Since the program began in 1986, more than 1500 cases have entered CAAP. The majority of cases settle in CAAP and do not result in an arbitration hearing. The ratio of settlements to awards is about 3 to 1. Just over 50 percent of the awards are appealed, but so far virtually all of the appeals have resulted in settlements on appeal. Only one of the over 750 cases that have terminated after entering CAAP has ended in a trial.

INCREASING THE PACE OF LITIGATION

Approximately three quarters of the CAAP cases close within the program requirement of nine months from the defendant's answer, but delays in assigning an arbitrator have resulted in a significant proportion of cases exceeding the nine month limit. The time to assign an arbitrator currently averages 67 days. The Judicial Arbitration Commission and the Arbitration Administrator are taking steps to rectify this delay. Nonetheless, most of the cases in CAAP close within one year from the answer by the defendant. Once arbitrators are assigned to a case, the cases progress at a timely pace. 60 percent of settlements and 38 percent of awards occur within six months, and only about 10 percent of the cases remain open nine months after the arbitrator is assigned.

In November 1988, a "general survey" was sent to the 91 lawyers (an almost equal number of plaintiff and defense lawyers) who handled the greatest number of arbitration cases among the cases we surveyed. These 91 lawyers were involved in 84 percent of the cases we surveyed, and many of them also were arbitrators. Although this general survey did not ask about specific cases, it does represent the general opinions of the lawyers who are the most active in the program. 92 percent of these "frequent flyers" thought that most CAAP cases were faster than cases in regular litigation.

Compared to other states, delay due to slow pretrial case processing is not a major problem in Hawaii's courts. Since CAAP appears to be increasing the pace of litigation, a backlog of cases should not develop, and there should be prompt access to the courts for litigants whose cases require a trial.

SATISFACTION

The great majority of both plaintiffs' and defense lawyers reported that they were satisfied with how their specific case was handled in CAAP. Defense lawyers were somewhat less satisfied than were plaintiffs' lawyers. As might be expected, there is more dissatisfaction about awards than about settlements.

In the general survey, 67 percent of the lawyers reported that they were satisfied with the program and 28 percent were dissatisfied. A major difference in satisfaction is found between plaintiffs' and defense lawyers. 91 percent of plaintiffs' lawyers reported being satisfied, but only 46 percent of the defense lawyers reported being satisfied. The reason for the dissatisfaction by the defense lawyers is not clear. Certainly one hypothesis for defense dissatisfaction would be that defense lawyers may be making less money on CAAP cases because limiitations on pretrial discovery result in fewer billable hours for the lawyers. We do know from the general survey that defense dissatisfaction is correlated to the opinion that the value of cases has increased.

REDUCING LITIGANT COSTS

The reduction of pretrial discovery is a chief feature of CAAP, and it is the feature which is expected to produce lower litigant costs. The majority of lawyers and arbitrators report that discovery was reduced in arbitrated cases. However, a significant minority of lawyers think that discovery limitation may have affected or did affect the outcome of their case.

Until more comparison cases close and we have cost data from them, we cannot say how much the program is actually reducing costs, and we cannot even confirm that it is reducing costs. However, in the general survey, 83 percent of the lawyers thought that most cases in CAAP were completed at lower cost. A few lawyers thought CAAP cost about the same amount, but not a single lawyer thought CAAP was more expensive in most cases.

We do have data on the cost of discovery for CAAP cases. The average discovery costs for each side in the litigation are about $400 for cases that settle and about $900 for cases that go to an arbitration award. These costs do not include the defense lawyers' fees for the time spent conducting the discovery.

Of course discovery costs are just part of total litigant costs. The largest part of litigant costs are lawyers' fees, not the discovery costs. Because plaintiffs' lawyers work on a contingent fee arrangement and defense lawyers work on an hourly fee arrangement, a reduction in discovery will not reduce the plaintiffs' lawyers fees but should reduce the defense lawyers

fees. A reduction of discovery costs therefore will reduce total litigation costs more for defendants than it will for plaintiffs.

Assuming that 1500 cases are eligible for CAAP state-wide each year, then for every $100 that the program can reduce litigation costs per case, total litigation costs would be reduced $150,000 annually in Hawaii. In addition to the direct cost savings for litigants, there also may savings for the state if judges and court clerks spend less time processing tort cases.

ARBITRATORS, CASES & HEARINGS

Almost all lawyers report that the arbitrators were experienced enough to handle the cases and were impartial. Arbitrators averaged less than 5 hours of work on settlements and about 15 hours on cases in which awards were rendered.

The average case is settled or results in an award of about $30,000; awards are averaging about 10 percent higher than settlements. Even with a $150,000 limit, almost 90 percent of the cases have settlements or awards of $50,000 or less. Very few cases are considered to be complex by the lawyers.

Accelerated pace and cost containment in CAAP does not prevent litigants from having their "day in court." Plaintiffs testified at virtually all arbitration hearings; defendants testified at the majority of hearings. However, expert testimony was presented in only one-third of the cases. Low levels of expert testimony may represent an important cost saving in CAAP as well as resulting in less inconvenience for doctors and other professionals.

IMPORTANT PROGRAM ISSUES

The issues of arbitrator quality, compensation, and supply, merit special discussion. First, despite informal comments that some of the arbitrators may not be qualified, the overwhelming weight of survey evidence indicates that arbitrators in CAAP were both impartial and experienced enough to handle the cases. Second, thoughts of providing any compensation to the arbitrators must be carefully analyzed. Payment might be justified based upon either an analysis of the economic benefits of the program or a theory of arbitrator motivation. However, any honorarium or stipend is an added cost of the program, and such a payment might offset any cost savings that CAAP achieved. Finally, the capacity of the program is a significant concern. With the current supply of arbitrators and operating assumptions, the program appears to be operating at maximum capacity even though it is only handling one-half of the tort cases in the state. The Judicial Arbitration Commission is working on this problem.

Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of the participants. Although it does not appear that CAAP could handle all the tort cases filed in Hawaii courts under its current operating procedures, the Judicial Arbitration Commission is working on this problem.

CAAP is delivering arbitration largely within the time frame prescribed by its rules, and is doing so to the satisfaction of the majority of lawyers. It clearly has succeeded in reducing pretrial discovery, and no other program can make that claim. After more comparison cases have closed, a later report will be able to provide data comparing pace, cost, and satisfaction in CAAP with regular litigation. To our knowledge, no other arbitration program in country claims to be reducing litigation costs; Hawaii leads the nation is this area.

THE COURT ANNEXED ARBITRATION PROGRAM: JANUARY 1989 EVALUATION REPORT

PROGRAM HISTORY

During the past few years, virtually all state and federal jurisdictions have considered various alternative dispute resolution (ADR) methods to treat the major problems with their court systems: high costs and excessive delay. Court-annexed arbitration is one of the most popular innovations. Programs are currently operating in at least twenty states and ten United States Federal District Courts.

In 1986, Hawaii's Court Annexed Arbitration Program (CAAP) was introduced to "provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." Hawaii Arbitration Rule 2(A). Since May 1987 this experimental program has been a mandatory, non-binding arbitration procedure for tort cases with a probable jury award of $150,000 or less. At this jurisdictional level, approximately 1500 tort cases per year are eligible for the program across the state.

The major goals of the program are: 1) to reduce litigant costs; 2) to increase the pace of disposing of cases; and 3) to maintain, if not improve, litigant satisfaction with Hawaii's civil justice system. CAAP seeks to achieve these goals by eliminating unnecessary pretrial discovery and controlling the pace of cases. In addition, the program attempts to stimulate early settlement, and yet offers litigants a low cost "day-in-court" in the form of an arbitration hearing. Litigants who are not satisfied with the arbitration award may "appeal" their case and put it into regular litigation.

A considerable amount of national attention has been directed to Hawaii's Court-Annexed Arbitration Program because our program is unique in several respects. The program has the highest dollar ceiling ($150,000) of any mandatory state arbitration program in the country and it is the only state-wide program. Most importantly, it appears to be the only program making a major effort to limit pretrial discovery, and as such it offers the greatest potential for reducing litigant costs.

The CAAP has operated in two different forms. Phase I began in February 1986, and was a voluntary program for cases valued at $50,000 or less. Phase II began in May 1987, and is a mandatory program for cases valued up to $150,000. The current $150,000 program is referred to as Phase II. All data presented in this report will refer only to Phase II unless otherwise noted.

PROGRAM DESCRIPTION

Since May 1, 1987, when Phase II began, all tort cases are initially assigned to the arbitration program, and then attorneys must request that their case be exempted from the program if they believe the value of their case exceeds $150,000. After the defendant's answer is filed (or the last defendant's answer if there are multiple defendants), a volunteer arbitrator is assigned to the case. The arbitrator must schedule a pre-hearing conference within 30 days from the date a case is assigned and determine what pretrial discovery will be allowed. Discovery is only permitted with the consent of the arbitrator. The arbitrator can attempt to aid in the settlement of the case if all parties consent in writing. If the case precedes to an arbitration hearing, attorneys must file a pre-hearing statement 30 days prior to the hearing.

Over 400 lawyers now serve the program as volunteer arbitrators. They are selected from lawyers who have at least 5 years of experience and most of them practice personal injury litigation. After a short, group orientation, the new volunteers are added to the pool of arbitrators. Their names are placed randomly in 5 person panels for each case. Each lawyer may strike two names ensuring that at least one arbitrator is chosen for each case.

At the arbitration hearing, the rules of evidence can be relaxed and no transcription or recording is permitted. Arbitration awards must be in writing although findings of fact and conclusions of law are not required. Awards are not limited to the jurisdictional amount of $150,000. Awards must be filed within seven days of the conclusion of the arbitration hearing or within thirty days after the receipt of the final authorized memoranda of counsel. The award becomes the final judgment if no party files a written Notice of Appeal and Request for Trial De Novo within 20 days after the award is served upon the parties.

If such Notice of Appeal and Request for Trial De Novo is timely filed, the case is scheduled for trial de novo.[1] The case is then treated as if it never had been in arbitration and full discovery is permitted under the rules of civil procedure. However, no testimony made during the course of the arbitration hearing is admissible in the trial de novo. There are disincentives attached to the appeal process in the form of sanctions for failure to prevail in the trial de novo. When parties appeal, they must do at least 15 percent better at the

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1. In the almost three years that CAAP has been in operation, only one case has actually resulted in a trial de novo. All other appeals have either settled before trial or remain pending.

trial de novo than they did at the arbitration award or be subject to sanctions of attorney fees up to $5000, costs of jurors, and other reasonable costs actually incurred.

THE EVALUATION PROCEDURE

Researchers from the University of Hawaii are evaluating the program in the First Circuit, where approximately 1000 tort cases per year are eligible for the program. Information for the evaluation comes primarily from surveys of lawyers and the case record database of the Arbitration Administrator. The evaluation design randomly assigns one-half of the eligible cases to arbitration and the other half are assigned to a comparison group that goes through the regular litigation process. Since the program began in 1986, more than 1500 cases have entered CAAP. The majority of cases settle in CAAP and do not result in an arbitration hearing. The ratio of settlements to awards is about 3 to 1. Just over 50 percent of the awards are appealed, but so far virtually all of the appeals have resulted in settlements on appeal. Only one of the over 750 cases that have terminated after entering CAAP has ended in a trial.

In the evaluation effort, more than 600 CAAP and comparison cases have been surveyed, and more than 1000 surveys have been completed and returned by lawyers. Although the comparison group will figure heavily in the final evaluation, they are not included in this interim report because very few have closed so far. Furthermore, the comparison cases that have closed appear to be early closings (85% settled before an answer was filed by the defendant), and therefore they are probably not representative of the typical cases in regular litigation.

Data in this report are drawn from five sources: (1) a case record database maintained by the Arbitration Administrator; (2) surveys of lawyers and arbitrators, conducted after a case closes by settlement, award or dismissal, sampling cases in arbitration or in the comparison group; (3) surveys of lawyers conducted after an arbitration appeal is concluded; (4) interviews and focus group sessions with lawyers, arbitrators, insurance industry representatives and others involved in tort litigation; and (5) a general survey of the lawyers most active in CAAP.

The evaluation focuses on the following questions:

1) Is CAAP reducing litigant costs?
2) Do arbitrators and lawyers comply with the basic concept of limiting discovery?
3) Is CAAP increasing the pace of litigation?
4) Are cases closed within prescribed time limits?
5) Are participants satisfied with arbitration?
6) Is there an adequate supply of arbitrators?
7) Are arbitrators experienced enough and impartial?

PACE OF TERMINATIONS

The majority of lawyers report that CAAP is reducing the time it takes to terminate their case. The one exception is that a majority of defense lawyers report that their CAAP settlement would have taken about the same time to close in regular litigation.

Table 8: Estimates of Time Savings

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
TIME WOULD BE LONGER IF NOT IN CAAP	60 %	76 %	28 %	77 %

CAAP rules require that cases be completed within nine months (270 days) of the service of the complaint. Our analysis of the average time for closing cases, which we refer to as "pace," is based upon the first 567 cases that have closed in CAAP. The average pace is within the nine months for settlements and just over nine months for awards. We do not have a statistic from the judiciary on the average pace for cases in regular litigation, but numerous sources have indicated that cases in regular litigation go to settlement conferences 18-20 months after filing. Only 7 percent of settlements and 19 percent of awards in CAAP exceed one year. This data on pace excludes cases that terminated before the defendant answered, and such cases are approximately 1/3 of all cases closed in CAAP.

Table 9: Pace of Case Closings

	SETTLEMENT	AWARD
AVERAGE PACE LAST ANSWER UNTIL CLOSING	223 days	283 days
TIME FROM LAST ANSWER UNTIL CLOSING		
≤ 270 days	71%	52%
271- 365	22	29
> 365	7	19
AVERAGE PACE FROM ARBITRATOR ASSIGNMENT UNTIL CLOSING	167 days	197 days
TIME FROM ARBITRATOR ASSIGNMENT UNTIL CLOSING		
< 90 DAYS	10%	3%
91-180	51	35
181-270	32	52
271-365	6	8
> 365	1	3

While the overall program has a substantial number of cases that extend beyond the 9 month deadline, the arbitrators are able to terminate cases within nine months of assignment. In fact a significant proportion of cases are closed much earlier. 60% of the settlements and 38% of the awards occur within 6 months or less. It is the delay in assigning arbitrators to cases which accounts for almost 90 percent of the delays past nine months. The average time to assign an arbitrator from the case entering CAAP was 117 days, and from the defendant's answer was 67 days. The program administration reports that the delay occurs when all arbitrators are assigned to pending cases. Under the single case policy the program must wait for cases to close until 5 arbitrators are available to form a panel for each new case.

REDUCING DISCOVERY TO REDUCE LITIGATION EXPENSES

The reduction of pretrial discovery is a chief feature of CAAP, and it is the feature which is expected to produce lower litigant costs in Hawaii's program. Of more than 30 court-annexed arbitration programs across the country, Hawaii's appears to be the only program that is attempting to reduce discovery. Most other arbitration programs start to operate after discovery is completed. At most, they limit the time for discovery, but not the amount.

The majority of lawyers and arbitrators report that discovery was reduced in CAAP. Discovery can be reduced either because the arbitrator denies requests for discovery or because lawyers voluntarily agree to limit discovery. The discovery reduction appears to come mainly from lawyers voluntarily reducing discovery. Denials of discovery by the arbitrator take place in less than 1/3 of the cases.

Table 1: Estimates of Discovery Reduction

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
DISCOVERY REDUCED (say lawyers)	73 %	83 %	65 %	70 %
DISCOVERY REDUCED (say arbitrators)	80	92	84	93

Table 2: Views of How Discovery Was Reduced

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
VOLUNTARILY REDUCED (say lawyers)	86	83	67	71

	PHASE I		PHASE II	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
VOLUNTARILY REDUCED (say arbitrators)	--	--	85	83

Table 3: Denial of Discovery

	PHASE I		PHASE II	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
DENIED DISCOVERY (say arbitrators)	12 %	26 %	21 %	32 %

One concern about discovery reduction is whether it affects the outcome of the case. A significant percentage of lawyers think that discovery reduction did affect or may have affected the outcome of their case (this finding is less characteristic of settlements than of award cases).

Table 4: Effect of Discovery Denial

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
AFFECTED OUTCOME YES OR MAYBE (say lawyers)	15 %	40 %	37 %	53 %

Discovery reduction is important because a reduction in discovery will lower discovery costs, which are a part of litigant costs. The majority of lawyers report that discovery costs are lower in CAAP. The one exception is that majority of defense lawyers report that discovery costs for settlements are about the same in CAAP and regular litigation. Plaintiff's lawyers more often see CAAP as saving costs than do defense lawyers.

Table 5: Discovery Costs of CAAP

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
COSTS GREATER IF NOT IN ARB (say lawyers)	67 %	56 %	28 %	52 %

At this time we cannot say how much the program is actually reducing costs, and we cannot even confirm that it is reducing costs. Answers to these questions will not be available until more comparison cases close. However, we do have data on what the discovery costs have been for cases in CAAP. These discovery costs are reported in the table below. Keep in mind that the reported discovery costs for award cases underestimates the final discovery cost of these cases because more discovery is likely to be conducted if the case is appealed. The data show that discovery is more expensive in cases that go to awards than in cases that settle, and discovery for the defense is generally more expensive than for plaintiffs (the exception here is for Phase II awards). Interestingly, reported costs have declined somewhat from Phase I to Phase II even though Phase II includes higher valued cases.

Table 6: Discovery Costs Reported

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
AVERAGE DISCOVERY COST				
Phase II	$322	$980	$479	$865
Phase I	$429	$825	$731	$926

Discovery costs for the majority of defense surveyed were below $400, and almost 2/3 of the plaintiffs had discovery costs of less than $1,000. Only about 1/3 of the cases had discovery costs in excess of $1,000.

Table 7: Ranges of Discovery Costs

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
DISCOVERY COST				
$0-399	24%	37%	60%	50%
400-999	40	24	27	7
1000 +	36	39	13	43

Of course discovery costs are just part of total litigant costs. For the majority of cases we surveyed, for both the plaintiff and the defense discovery costs were 10 percent or less of the total costs. The largest part of litigant costs are lawyers' fees, not the discovery costs. We estimated the fees for plaintiffs' lawyers by computing 1/3 of the settlement or award value, which is the standard contingent fee percentage. In the cases for which we had the settlement or award amount, the lawyers' fees for plaintiffs' lawyers averaged $10,946 for settlements (n=82) and $9,186 for awards (n=51). The average fee

computed for awards includes defense awards for zero damages.[2] The plaintiffs' lawyer would not earn a fee in such cases.

For defense lawyers, the average fee was $2,928 for settlements (n=45) and $5,955 for awards (n=42). The fees for defense lawyers were taken from the figures reported by the defense lawyers on the surveys. Bear in mind that if the award is appealed, both plaintiffs' lawyers and defense lawyers will continue to work on the case. The fee for the plaintiffs' lawyers will not change even though these lawyers work more hours on the case because plaintiffs' lawyers are working on a contingent fee. In fact, the fee of the plaintiffs' lawyers is more likely to decrease because cases that settle on appeal often settle for somewhat less than the award.[3] On the other hand, defense lawyers will continue to earn more fees when the case is appealed because these lawyers are working on an hourly fee. We cannot estimate the defense lawyers fees on appeal until more appealed cases close and can be surveyed.

For defendants, a reduction of discovery costs is likely to also reduce lawyers' fees because defense lawyers generally charge an hourly rate. If less discovery is allowed, presumably the defense lawyers will bill fewer hours on each case. If discovery is being reduced by CAAP, defense lawyers are probably making less money on each case they handle in CAAP. However, one effect of CAAP is that some insurance companies now pay defense lawyers a flat fee for handling cases through the arbitration hearing. We cannot estimate how prevalent the new flat fee system has become or even what the amount of the flat fee is. Neither insurance companies nor defense lawyers have discussed the specifics of the flat fee arrangements with us.

For plaintiffs, a reduction of discovery costs will not effect the lawyers' fee. Plaintiffs lawyers work on contingent fee, typically receiving 1/3 of the total settlement as the fee. After the plaintiff's lawyer's fee is deducted, the discovery costs and any other litigation expenses are subtracted and the plaintiff receives the remaining amount. Put simply, the fee of the plaintiffs' lawyer is not affected by the amount of work done by the lawyer; the fee is purely a function of the size of the settlement. If CAAP reduces not only the number of calendar days that a case remains open, but also reduces the amount of time a lawyer needs to spend preparing the case, plaintiff's lawyers could be making more money per hour with CAAP. Additionally,

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2. Twenty-two percent of the awards were defense awards, and we did not calculate a contingent fee for these cases.

3. Of the first 29 cases that settled on appeal after an award, 18 cases, or 62 percent settled at a value of less than the award.

because plaintiffs' lawyers often advance the discovery costs, CAAP also will be benefit plaintiffs' lawyers because they will now advance costs for a shorter period of time. Furthermore, earlier payment by the defendants to the plaintiffs will mean that plaintiffs will have the use of their money sooner, which is an economic benefit.

POTENTIAL SAVINGS IN LITIGATION COSTS

Although information from lawyer surveys indicates that the majority of lawyers think that CAAP is cheaper than regular litigation, until we have information from the comparison cases we cannot confirm that it is cheaper nor can we estimate how much cheaper it might be. However, we can provide a range of potential savings under certain conditions.

The first step is to estimate the number of cases that could be in CAAP. If a comparison group continues, approximately 1000 cases would enter the program each year; without a comparison group, approximately 1500 cases would enter the program each year.[4] Please bear in mind that the following analysis is purely hypothetical; no data that has been collected that support these estimates of cost savings. However, it is easy to project the potential costs savings produced by CAAP at various levels of reduction of litigation costs. For every $100 that CAAP could reduce litigation costs, total litigation expenses annually in the state could be reduced by $100,000 if the comparison group remains in place.[5] If the comparison group were eliminated, the potential savings would be approximately $150,000 for each $100 average savings.

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4. In the fiscal years 1985-85 and 1986-87, each year there were approximately 1250 tort cases filed in the First Circuit. One-half of the cases are being placed in the comparison group and are not in CAAP. Approximately 500 tort cases are filed annually in all of the other circuits combined. Assuming that 10 percent of the cases in CAAP are exempted because they are estimated as being over the $150,000 limit, state-wide, approximately 1012 would be eligible for CAAP each year (625 cases from the First Circuit plus 500 from the other circuits, minus 10 percent for exempted cases). If there was no comparison group, approximately 1575 cases would be eligible for the program each year (1750 cases from the First Circuit plus 500 from the other circuits, minus 10 percent for exempted cases).

5. This analysis assumes that 1012 cases average a $100 reduction. The $101,200 potential savings is rounded to $100,000.

SATISFACTION WITH CAAP

We have not attempted to contact the individual litigants who have had cases in CAAP to ask about their satisfaction with the program. In most cases, individual litigants, especially injured plaintiffs, would not have had experience with other tort litigation, and therefore they could not compare CAAP to regular litigation. Instead we have asked the lawyers, virtually all of whom have had cases in both CAAP and in regular litigation, to indicate their level of satisfaction with the program and also to indicate what they think the level of satisfaction was for their clients.

The majority of lawyers reported being satisfied with CAAP when they were surveyed about a specific case. They are generally more satisfied with settlements than awards. Defense lawyers are less satisfied with both settlements and awards than are plaintiffs' lawyers.

Table 10: Lawyer Satisfaction

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
SATISFIED	96 %	75 %	75 %	63 %

ARBITRATORS, CASES & HEARINGS

Almost all lawyers report that the arbitrators were experienced enough to handle the cases and were impartial.

Table 11: Lawyers' Views of Arbitrators

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
EXPERIENCED ENOUGH	97 %	83 %	88 %	89 %
IMPARTIAL	98	89	97	90

Arbitrators averaged less than 5 hours of work on settlements and about 15 hours on awards. In Phase II the average hours of arbitrator work per case has decreased slightly from Phase I. The amount of time that arbitrators spend on a case varies widely. Half of the settlements are achieved in 3 hours or less, but 10 percent take from 9 to 30 hours. Similarly 20 percent of the awards take 8 hours or less, and 17 percent of the awards take from 21 to 50 hours. This data suggests either that cases vary considerably in the problems they present or that arbitrators vary considerably in their style and skill at managing the case, or perhaps both.

Table 12: Arbitrators' Work Hours

	PHASE I		PHASE II	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
AVE. HOURS OF WORK BY ARBITRATOR	6.1	15.8	4.5	14.9
HOURS PER CASE				
0-3	39%	0%	52%	1%
4-8	41	26	38	20
9-15	12	40	6	41
16-20	4	12	2	20
21-30	2	8	2	14
31-50	2	14	0	3

The lawyers reported that the majority of the arbitration hearings took less than 4 hours to complete. However, 30 percent of the hearings took 5 to 8 hours and 7 percent took longer than 9 hours.

Table 13: HOURS OF ARBITRATION HEARING

HOURS OF ARB. HEARING		
1 - 4 HOURS	72 %	62 %
5 - 8 HOURS	20	31
9 + HOURS	8	7

The arbitrator is allowed to engage in the settlement process with the signed consent of all parties. However, less than half of the arbitrators report being formally involved in settlement efforts in Phase II, which is a proportion that has declined since Phase I. We have heard in interviews and focus groups that lawyers are not willing to allow settlement discussions with the arbitrator because if a mediated settlement fails, then the arbitrator would be improperly influenced by information acquired during settlement discussions.

Table 14: Settlement Activities

	PHASE I SETTLEMENTS	PHASE II SETTLEMENTS
ENGAGED IN SETTLEMENT (say arbitrators)	71 %	41 %
ASSISTED IN SETTLEMENT (say arbitrators)	55	25

Data from CAAP records indicates that the average case is valued at about $30,000. The average is higher in Phase II. Almost 90 percent of the cases have settlements or awards of $50,000 or less.

Table 15: AVERAGE SETTLEMENT OR AWARD

	SETTLEMENT	AWARD
Phase II	$28,191	$31,426[6]
Phase I	$20,880	$21,244

Table 16: Amount of Settlement or Award

AMOUNT OF SETTLEMENT OR AWARD	Percentage Within Range
$0 - $ 50,000	89 %
$50,001 - $ 75,000	6
$75,001 - $ 100,000	3
$100,001 +	2

When the jurisdicaitonal limit was raised to $150,000, many people speculated that higher valued cases would be more complex, and therefore inappropriate for an arbitration program. Very few cases in the $150,000 program, however, are considered to be complex by the lawyers.

Table 17: Case Complexity

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
COMPLEXITY	7 %	16 %	8 %	5 %

HEARINGS

Accelerated pace and cost containment in CAAP do not prevent litigants from having their "day in court." Plaintiffs were able to tell their stories to a neutral fact-finder by testifying in virtually all (96%) of the arbitration hearings. Defendants also had an opportunity to personally respond and their testimony was heard in 68% of those cases. Even though the plaintiff testified at almost every hearing, expert testimony was heard in only one third (36%) of the cases. Low levels of expert testimony at the hearings may represent an important cost saving for CAAP as well as resulting in less inconvenience for doctors and other professionals.

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6. This average calculated from 130 cases includes the defense or zero awards.

IMPORTANT PROGRAM ISSUES

The issues of arbitrator quality, compensation, and supply, have received much attention from the Judicial Arbitration Commission. First, despite informal comments from the legal community that some of the arbitrators might not be qualified to handle cases or might be bias toward one side, the survey evidence is overwhelmingly the opposite. Lawyers reported that the arbitrator in their case was experienced enough and impartial. This disparity between the general lore and specific assessments may result from the CAAP procedure which allows each side to exclude the two most unacceptable arbitrators on the panel. While there may be some arbitrators that certain lawyers think are unqualified, the lawyers are usually able to exclude such arbitrators from their case with their preemptory challenges.

In discussions of CAAP, sometimes an arbitrator whose own law practice concentrates on representing plaintiffs in tort cases is called a "plaintiff's" arbitrator, and, of course, defense lawyers are called "defense" arbitrators. The implication is that "plaintiff" arbitrators will give a better, and presumably a higher, award to the plaintiffs and that "defense" arbitrators will be better for the defense. This assumption of arbitrator bias can be seen in the arbitrator selection process. When an arbitrator panel of five names is presented to the lawyers in each case, perhaps not surprisingly, plaintiffs' lawyers mainly strike defense lawyers and defense lawyers mainly strike plaintiff lawyers. The assumption is that plaintiffs' lawyers would favor plaintiffs and defense lawyers would favor defendants. However, the survey data indicates that 90 percent of the lawyers thought the arbitrator in their case was impartial.

An examination of the zero dollar or defense awards also suggests that bias does not exist. As of June 1988 the defense awards, are almost identical for "plaintiff arbitrators" and "defense arbitrators." In fact, on the basis of defense awards, a defense lawyer has a sightly better chance of getting a defense award from a plaintiff arbitrator. Plaintiff arbitrators made 13 defense awards out of 50 awards rendered; defense arbitrators made 11 defense awards out of 54 awards. Furthermore, the average dollar amount of awards also suggests either no bias or at most a slight reverse bias. As of June 1988, average awards were lower for plaintiff arbitrators ($31,769) than for defense arbitrators ($32,735). Our conclusion is that there is no indication that bias results from the type of the arbitrator's law practice.

Second, is the issue of arbitrator compensation. CAAP currently operates through the volunteer efforts of several hundred lawyers who serve as arbitrators. This "pro bono" aspect

of court-annexed arbitration is rare. Although no arbitration program in the country pays the arbitrators at a rate matching the income of a lawyer in private practice, most programs do at least offer an honorarium or stipend. Some people have suggested that CAAP should compensate arbitrators in some way to attract and retain arbitrators or because of the economic benefits of the program. In fact, the November general survey indicated that a third of lawyers responding thought paying arbitrators would improve the program, and this was the most common suggestion.

This evaluation does not take a position on this policy issue of arbitrator compensation, but offers several considerations. First, if CAAP actually reduces the costs and increases the pace of litigation, then clear economic benefits accrue to the defendant, the plaintiff, and the plaintiffs' lawyers, and there is an argument for compensating the lawyers whose time is used to produce these savings. None of the people or groups who appear to benefit economically from CAAP are typically considered to be indigent, and therefore none of them would be candidates for pro bono legal services.

Economic benefits may accrue to the person or corporation (typically an insurance company) who pays the defense costs, and who might save costs under CAAP; to the plaintiff who might receive both a larger share of the settlement if litigation costs are reduced and who might receive the settlement earlier; and to the plaintiffs' lawyer who might save the time value of money by advancing the costs of litigation for a shorter period of time. And with reduced discovery, defense lawyers and private court reporters who record depositions might be making less money on tort cases with CAAP. If these people are not making less money, then CAAP is probably not saving any costs.

Second, is an argument that some honorarium or other reward is necessary to attract, motivate, and retain arbitrators. Although lawyers might be willing to volunteer for a while, some lawyers might stop arbitrating unless they derive some personal or professional benefit.

If, under any theory, the argument for compensation is persuasive, a strong note of caution is advised. Until data from the comparison cases can be collected and analyzed, it cannot be determined how much money, if any, is being saved by using CAAP. Even if the CAAP savings is large enough to be significant, the savings could be offset by the payment of a stipend to the arbitrators.

Besides the economic argument against paying arbitrators, there are other arguments as well. CAAP might be a means of encouraging "pro bono" activity by lawyers whose practice expertise would not otherwise lend itself to traditional forms of "pro bono" activity. Furthermore, the amount of time that a

lawyer is likely to spend as an arbitrator each year is small. Many arbitrators might even be willing to contribute more time to the program voluntarily.

Finally, the long run capacity of the program is a significant concern. Under the present program policies and conditions, CAAP is strained to handle half of the First Circuit's tort cases within the 9 month deadline. The current supply of arbitrators is inadequate to handle all the tort cases eligible for arbitration if the comparison group were eliminated.

CONCLUSIONS

Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants. Although under the current operating procedures, it does not appear that CAAP could handle all the tort cases filed in Hawaii courts, the Judicial Arbitration Commission is working on this problem.

CAAP is delivering arbitration largely within the time frame prescribed by its rules, and is doing so to the satisfaction of the majority of lawyers. It clearly has succeeded in reducing pretrial discovery, and no other program can make that claim. After more comparison cases have closed, a later report will be able to provide data comparing pace, cost, and satisfaction in CAAP with regular litigation. To our knowledge, no other arbitration program in country claims to be reducing litigation costs; Hawaii leads the nation is this area.

GENERAL SURVEY RESULTS
SUMMARY

In November, 1988, we sent a special "general survey" to the 91 lawyers (an almost equal number of plaintiff and defense lawyers) who handled the greatest number of arbitration cases among the cases we surveyed. These 91 lawyers were involved in 84 percent of the cases we surveyed. 62 lawyers completed and returned the survey (a 68 percent response rate). Although this general survey does not ask about specific cases, it does represent very recent general opinions from the lawyers who are the most active in CAAP.

PACE & COST

The lawyers indicated that most cases in CAAP were completed faster and cost less than cases in regular litigation. Ninety-two percent of all lawyers thought CAAP was faster than regular litigation and 83 percent thought it was cheaper. Eight percent thought cases took about the same amount of time, and 17 percent thought cases cost about the same amount. Not a single plaintiffs' or defense lawyer thought CAAP was slower or more expensive than regular litigation.

SATISFACTION

Seventy-eight percent of all lawyers reported that they were satisfied with the program, and 29 percent were dissatisfied. A major difference in satisfaction was found between plaintiffs' lawyers and defense lawyers. Ninety-one percent of the plaintiffs' lawyers were satisfied with the program, but only 46 percent of the defense lawyers were satisfied.

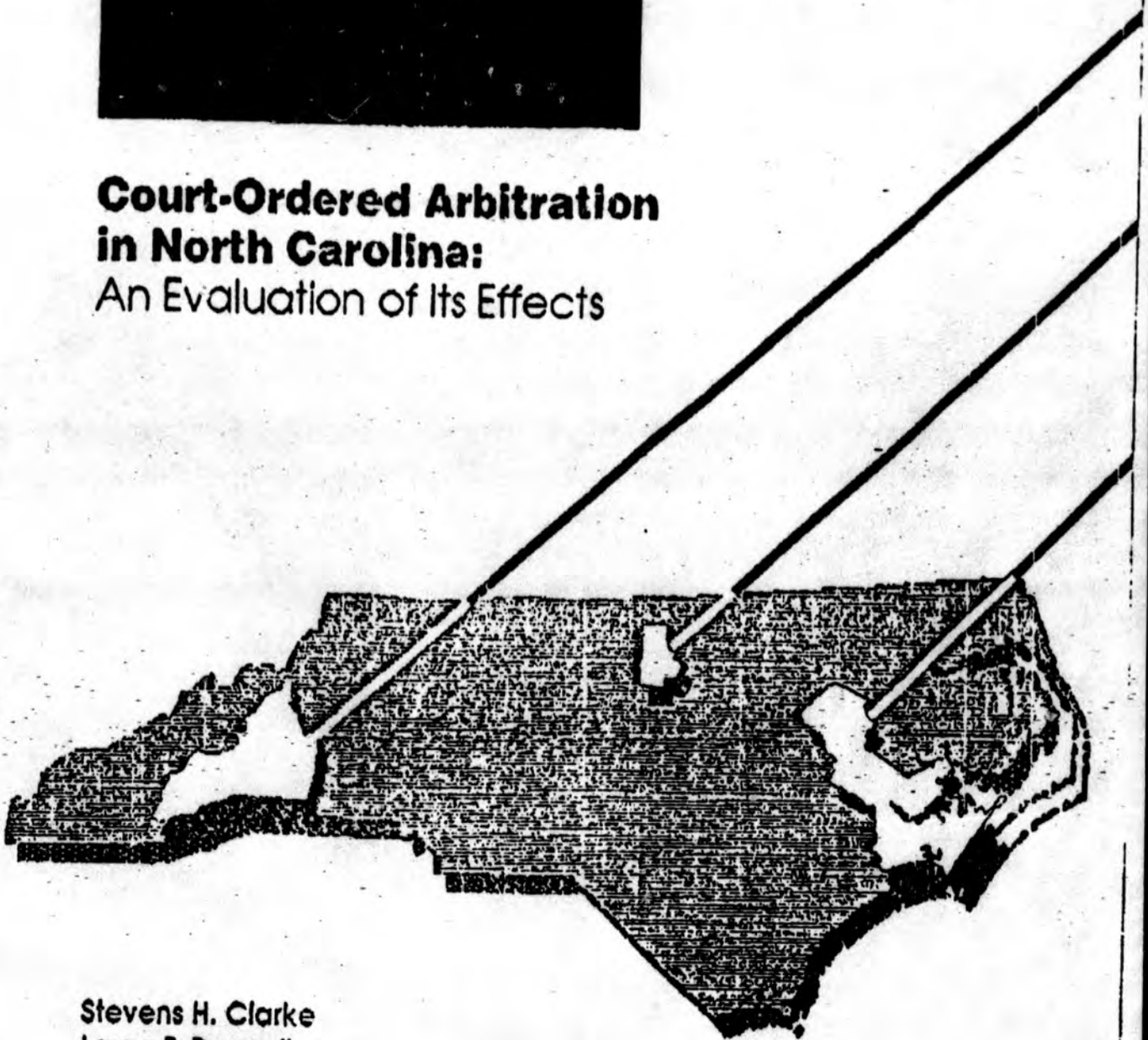
CHANGES IN VALUE OF THE CASES

Lawyers were asked what effect arbitration has had on the settlement value of tort cases eligible for the program. Thirty-three percent of lawyers believed that the settlement value has remained the same, 35 % thought the impact was unclear, 7 percent thought value decreased, and 25 % thought the value increased. Again, the major differences are between plaintiffs' and defense lawyers. Only 14 percent (3 of 22) of plaintiffs' lawyers but 42 percent (8 of 19) defense lawyers thought values have increased. Dissatisfaction by the defense lawyers is correlated to the opinion that the value of cases has increased.

ARBITRATOR SERVICE

Forty-seven percent (28 of 60) of all lawyers and 55 percent (21 of 38) lawyers who have served as arbitrators said that arbitrators should be willing to be assigned two or more arbitration cases at one time.

Court-Ordered Arbitration in North Carolina: An Evaluation of Its Effects



Stevens H. Clarke
Laura F. Donnelly
Sara A. Grove
1989

Institute of Government
The University of North Carolina at Chapel Hill

Study Results in Brief

Overall Assessment

- The arbitration program disposed of eligible civil cases faster than standard procedure. It reduced trials and out-of-court settlements, replacing them with promptly scheduled adversarial hearings in a courtroom before specially trained arbitrators.
- The program improved litigants' satisfaction with the outcome and procedure used in their cases.
- Attorneys were satisfied with the program and, in a survey, voted strongly in favor of continuing it.

Implementation of the Program

- Fifty-two percent of contested cases went to hearings.
- Seventy-two percent of cases that went to hearings ended in judgment on arbitrator's award. In 19 percent, demand for trial de novo was made, but trial de novo actually occurred in only 9 percent. Nine percent ended in dismissal or other nontrial disposition.

Effect on Dispositions and Disposition Times

- The program had no effect on the percentage of cases contested (it remained 25 percent).
- The program did not change the fraction of plaintiffs' claims recovered in contested cases, which remained about two thirds.
- Median disposition time in contested cases was reduced by 33 to 45 percent.
- Trial rates in contested cases were reduced by more than two thirds (20 percent to 7 percent).

- Dismissals in contested cases were reduced by 31 percent.
- Arbitration hearings and awards were substituted for settlement more often than for trial.
- The program had the same type of effects in urban, rural, and semi-urban judicial districts, but the strength of effects varied.

Effect on Litigant Satisfaction

- Litigants in contested cases generally were more satisfied with the arbitration program than with standard procedure.
- The program increased satisfaction of litigants who lost or settled but had no effect on winners.
- Litigants who won generally were satisfied with both arbitration and the standard procedure.

Survey of Attorneys in Pilot Districts

- Attorneys were asked whether the program should be continued. Their responses were:
  - 70 percent—continue in present districts and expand to other districts
  - 8 percent—continue in present districts
  - 6 percent—move to other districts
  - 11 percent—discontinue program
  - 5 percent—undecided
- Attorneys reported working less time and billing less on cases in the arbitration program than in comparable cases in standard litigation.

Summary

North Carolina's pilot program of court-ordered arbitration, which began in January, 1987, substitutes an informal hearing before an arbitrator (a specially trained attorney) for standard procedure in certain civil cases. The standard procedure leads to a judge or jury trial in a few cases but usually ends in out-of-court negotiation and settlement or in dismissal of the claim. Following a recommendation by the North Carolina Bar Association, the General Assembly authorized the privately funded pilot program, subject to rules issued by the North Carolina Supreme Court. The Administrative Office of the Courts (AOC) planned and carried out the administration of the program, and the UNC-CH Institute of Government evaluated it at the bar association's request. The pilot program operated in three diverse judicial districts: the Fourteenth (Durham County, an urban area in central North Carolina); the Third (a semi-urban district comprising four counties in the eastern part of the state); and the Twenty-ninth (a five-county western district made up of small towns and rural areas).

Procedures and Participants

Eligible cases. The supreme court's rules provide that, to be eligible for the program, a case must involve a damage claim not exceeding $15,000. Cases are excluded if they involve injunctions, family matters, real estate, wills and decedents' estates, or ejectment of tenants. About 30 percent of eligible cases during the evaluation period involved actions on credit cards or bank loans, and 30 percent involved collection of money owed on wholesale goods and services and contracts not involving professional services. About 22 percent concerned health care or professional services, and 8 percent concerned retail sales. Only about 5 percent were negligence claims. Most (89 percent) of the eligible cases were regular district court cases; about 8 percent involved magistrate appeals (demands for a new trial [trial de novo] in district court following a small claims judgment in magistrate's court); and about 3 percent were in the superior court's jurisdiction.

Hearings and trials. Eligible cases must be scheduled for arbitration hearings within sixty days of (1) the last "responsive pleading" filed, which usually is the

defendant's "answer" (response contesting the plaintiff's claim) or (2) the filing of an appeal from magistrate's court. In standard civil procedure, there is no such deadline or hearing. The arbitration hearing, which is mandatory, is less formal than a trial and usually lasts no more than an hour. Normally held in a courtroom, the hearing ends in an arbitrator's "award" (decision), which is usually issued at the close of the hearing and explained by the arbitrator to the parties. If the award is not challenged within thirty days, it becomes a judgment of the court. But either party may demand a trial de novo (complete new trial) by a judge or jury upon paying a $75.00 fee that is returned if the trial judgment is more favorable to the demanding party than the arbitrator's award.

Program staff. A full-time arbitration coordinator in each district, under the supervision of the local trial court administrator and the AOC, monitors cases assigned to the program and facilitates disposition—for example, by notifying attorneys and parties of the dates of hearings and other required actions in their cases and by placing uncontested cases, cases in which no service has been made, and inactive contested cases on a "cleanup" calendar for early court attention. Although in standard litigation the trial court administrator performs some similar functions, the coordinators are able to give more individual attention to cases in the arbitration program and to reinforce the program's deadlines.

Design of Evaluation

The Institute's evaluation dealt primarily with the program's effects on eligible cases filed from January through June, 1987. During that time, half of the eligible cases were assigned at random to the program (these were called the arbitration group). The rest were assigned to a control group, in which standard procedures were followed. Effects on case disposition were estimated by comparing court records of the arbitration group with records of the control group and records of a "preprogram group"—a sample of cases filed in 1985 that would have been eligible for the program if it had existed at that time.

The satisfaction of litigants and attorneys with the program was measured by comparing interview results. For interviews, evaluators selected one sample of contested cases from the arbitration group and one from comparable contested cases filed before the program began that reached disposition in January or February, 1987 (the latter was called the comparison group). Cases dismissed or discontinued by the court were excluded. In each court case in both samples, evaluators sought to interview litigants and attorneys by telephone concerning their experience with that particular case. Evaluators succeeded in interviewing about half of the litigants and 95 percent of the attorneys; few refused to respond.

The evaluation also used data from surveys mailed to attorneys and arbitrators in the three judicial districts, data on arbitration hearings during the first thirteen months of the program, and case-flow data provided by arbitration coordinators and the AOC.

Results

Hearings. Three fourths of the 798 cases in the arbitration group required no hearing because they were "uncontested"—that is, the defendant did not file a formal answer to the complaint. The uncontested percentages were the same in the control and preprogram groups. Evidently the program had no effect on defendants' willingness to contest plaintiffs' claims. Half (51.8 percent) of the 199 contested arbitration group cases actually received arbitration hearings. The rest of the contested arbitration group cases ended in nontrial dispositions such as voluntary dismissal by the plaintiff, except for five cases that went to trial for complex procedural reasons.

Sixty percent of arbitration hearings were within the limit of one hour (which the arbitrator may increase), but some were as long as 190 minutes. Both parties attended most hearings, and the majority of parties were represented by counsel at the hearings.

Of the 103 arbitration group cases that had hearings, 72 percent ended in judgment on the arbitrator's award; demands for trial de novo were made in 19 percent; and the rest ended in dismissal (often with settlement). Of the twenty cases in which trial de novo was demanded, only nine actually went to trial (or were likely to go to trial after data collection ended), and the remainder reached nontrial dispositions. Thus, only 9 percent of all the hearings held in the arbitration group were followed by trial de novo. In twenty-two months of program operation (January, 1987, through October, 1988), only twenty-one trials de novo were held. There are several possible reasons why trial de novo did not become an attractive option. Trials involve considerable delay, personal time, and attorney fees. The arbitration process is faster and costs less than standard procedure, including trials. And arbitration hearings may have used up litigants' resources for further litigation.

Disposition time. The program resolved eligible cases faster than did standard procedure. In contested cases the program reduced the median disposition time (time from filing to disposition) of cases assigned to it by 33 to 45 percent. The median disposition time in contested cases was 4.6 months in the arbitration group, compared with 6.9 months in the control group and 8.4 in the preprogram group. Within about seventy-five days after filing, the percentage disposed of in the arbitration group began to exceed the percentages for the other groups. By twelve months after filing, 89 percent of the contested arbitration group cases had reached disposition, compared with 70 percent of the control group and 66 percent of the preprogram group. The program also apparently reduced disposition time slightly in uncontested cases.

Type of disposition in contested cases. The program reduced the trial rate in contested cases by about two thirds. Including the few cases likely to go to trial after data collection ended, only 7 percent of contested arbitration group cases went to trial, compared with 21 percent of the control group and 18 percent of the preprogram group. This meant a considerable saving of judges' and court clerks' time for cases assigned to the program. About half of contested arbitration group cases went to arbitration hearings, and 37 percent ended with judgment on the arbitrator's award. Some of these cases would have gone to trial in the absence of the program. But about twice as many would have received a nontrial disposition, usually dismissal, and most of these probably would have involved out-of-court settlement.

Thus arbitration hearings probably replaced out-of-court negotiation more often than they replaced trials.

Comparison of the three judicial districts. The program was effective in hastening disposition and reducing trials in all three judicial districts, but its effects differed in strength. In the Twenty-ninth Judicial District, whose preprogram disposition time had been the longest, the program achieved its greatest acceleration: the median times were 3.5 months for the arbitration group, 13.1 for the control group, and 13.1 for the preprogram group, indicating a reduction of 73 percent. Reductions were also substantial in the other districts: between 22 and 36 percent in the Third District, and between 37 and 53 percent in the Fourteenth District. There are several possible explanations for the program's different effects in the three districts. One is that the program tended to bring the pace of disposition up to a common standard. Thus the district with the longest disposition times (the Twenty-ninth) saw the most improvement. Another explanation is the number and dispersion of cases relative to staff. The Twenty-ninth District had the same staff (one arbitration coordinator) as the other two districts but 60 percent fewer cases. The Third and the Fourteenth Districts had approximately equal case loads, but in the Third District, cases were dispersed over four counties, while in the Fourteenth, they were concentrated in one county.

Trial rates in contested cases also were affected differently in the three districts. The greatest reduction was in the Fourteenth District (16 to 19 percentage points), but the rate also was reduced in the Twenty-ninth District (12 to 17 percentage points) and in the Third (8 percentage points). In the Fourteenth District none of the arbitration group cases went to trial.

Magistrate appeals. The program achieved about the same percentage reduction in disposition time in magistrate appeals as in regular district court cases, but it reduced the trial rate more: about 20 percent of magistrate appeals were diverted from trial, compared with 9 percent of regular district court cases. The trial rate before the program began had been twice as high in magistrate appeals as in contested regular district court cases. One reason for the program's greater effect on magistrate appeals is that arbitration hearings may have satisfied the appellants' desire for a formal readjudication after a decision in small claims court.

Representation by counsel. The program reduced disposition times and trial rates regardless of whether the parties had lawyers, but the amount of reduction varied with their representation. In cases where both sides had attorneys, the median time was 5.5 months in the arbitration group, compared with 10 to 11 months in the control and preprogram groups. Where only the plaintiff was represented by counsel, the median time was 4.4 months in the arbitration group, compared with 6 to 7 months in the control and preprogram groups. In cases with both parties represented by counsel, the program reduced the trial rate from the 14- to 16-percent range to 7.8 percent, and in cases with only the plaintiff represented, from the 10- to 19-percent range to zero.

Percentage recovered by the plaintiff. The program evidently had no effect on the percentage of their claims that plaintiffs recovered in judgments recorded in court. In contested cases the mean percentage recovered was 68.8 in the arbitration group, 66.9 in the control group, and 65.4 in the preprogram group. There also were virtually no differences when magistrate appeals and regular district court cases

were considered separately. The study did not investigate possible changes in recovery in out-of-court settlements.

Interviews of Litigants

Satisfaction with procedure and outcome. Interviewed litigants were more satisfied with arbitration than with standard litigation in comparable cases. For example, 77 percent of arbitration group litigants were satisfied with the procedures used in their cases, compared with 48 percent of comparison group litigants. The percentages of those "very dissatisfied" were 12 percent for the arbitration group and 33 percent for the comparison group. In the arbitration group 71 percent considered the outcome of their case "fair to everyone involved," compared with 55 percent of the comparison group. Similar differences between the two groups were found in responses to questions concerning opportunity to be heard, ease of understanding procedure, getting the dispute out in the open, getting at the facts in the case, resolving the dispute quickly, keeping down costs of litigation, and avoiding disruption of one's daily affairs.

Litigants' experience with arbitration hearings. Fifty-four of the interviewed litigants went to arbitration hearings, and most rated them favorably in terms of information provided to them, fairness of procedure, opportunity to be heard and to hear their opponent's side, and time allowed for the hearing. Most also spoke favorably of arbitrators' preparation and impartiality.

Winners, losers, and others. In cases ending in court judgments, "winners" were defined to include (1) plaintiffs who recovered at least half of their claims and (2) defendants who lost less than half of the plaintiff's claim; others were considered "losers." Litigants whose cases did not end in a court judgment constituted a third category; most such cases ended in voluntary dismissal and probably in out-of-court settlement.

Winning litigants were quite satisfied with the arbitration program, but they were equally satisfied with standard litigation. The program evidently improved the satisfaction of losing litigants and those in the "no-judgment" category (most of whom obtained settlements). The "overall satisfaction score" (which ranged from 4 to 16 points) averaged 12.9 for winners in the arbitration group and 12.3 for winners in the comparison group. Among losers, the mean score was 8.6 in the arbitration group—34 percent higher than the mean for the comparison group (6.4). In the no-judgment category, the mean score was 19 percent higher for the arbitration group than for the comparison group. Similar results were obtained comparing responses to eight specific evaluative questions.

***Pro se* litigants.** Litigants who were *pro se* (unrepresented by counsel) in the arbitration group reported having less difficulty and needing less help in preparing and presenting their cases than did those in the comparison group.

Interviews of Attorneys

Attorneys, speaking about their experiences in specific cases, were equally satisfied with the arbitration program and standard litigation. For example, 95 percent of the arbitration group attorneys rated the procedures used in their cases as fair, compared with 92 percent of the comparison group attorneys.

Survey of Attorneys

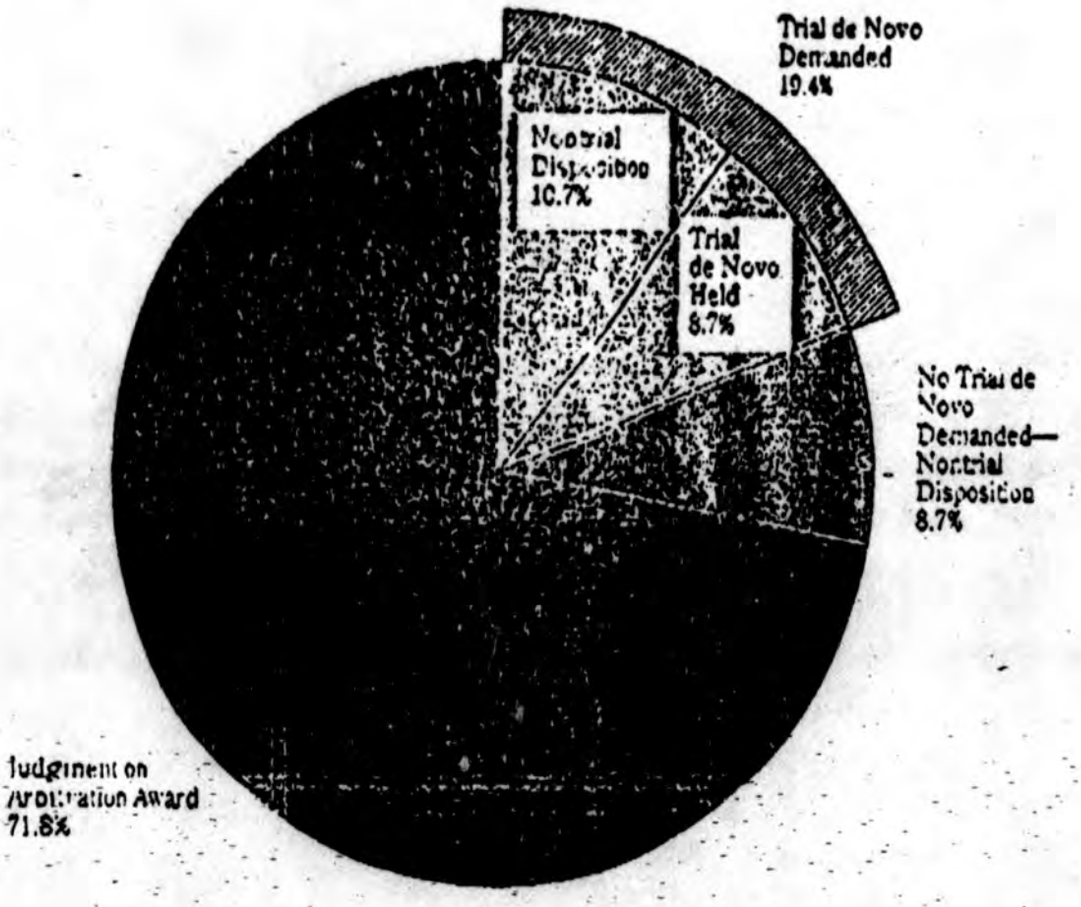
Attorneys (a total of 618) currently practicing civil law in the three pilot judicial districts were mailed a survey concerning the arbitration program. Half (310) responded. Of those, 97 percent were familiar with the program, and 61 percent had been involved as counsel in at least one arbitration hearing. The responding attorneys were favorable toward the program: 70 percent thought the program should be extended to other districts as well as continued in the present districts; 14 percent favored either keeping it in the present districts or moving it to other districts. Only 11 percent wanted the program to be discontinued (5 percent were undecided).

The survey asked attorneys about specific features of the program. Most (77 percent) favored including magistrate appeals in the program. Seventy-three percent approved of the one-hour limit on arbitration hearings. Regarding the damage limit, 65 percent felt it should remain at $15,000, 21 percent wanted to increase it, and 14 percent wanted to decrease it. While 53 percent favored keeping the restriction limiting the program to simple damage claims, 43 percent wanted to add new types of claims to the program (the type most often suggested for program expansion was domestic relations matters). Sixty percent thought that the $75.00 arbitrator's fee was too low. A majority (62 percent) said that the amount of time they worked on a case was less in the arbitration program than for comparable cases in standard practice, and 59 percent said that they billed less for such cases.

Conclusion

The court-ordered arbitration program sharply reduced court disposition time and reduced trials in cases eligible for the program. In many cases it substituted hearings before an arbitrator for long periods of inactivity or protracted out-of-court negotiation. These effects occurred in all three pilot districts, which were chosen for their diversity, but the effects varied in degree. Litigants who lost or settled were considerably more satisfied with the arbitration program than with standard procedure. Litigants who won—unsurprisingly—were satisfied with both the program and standard procedure. Attorneys were quite satisfied with the program in specific cases but were also satisfied with standard procedure. Surveys of attorneys and arbitrators in the three districts indicated a large majority favoring continuation and expansion of the program.

Figure 4. Disposition of Arbitration Group Cases That Went to Hearings



Arbitrators' Awards and Trials de Novo

Arbitrators' awards usually were accepted by the parties and became final judgments. Trials de novo were seldom demanded and more seldom held. Of the 199 contested cases assigned to the arbitration program during its first six months, 103 (51.8 percent) resulted in arbitration hearings; their ultimate dispositions are shown in Figure 4. Of the 103, seventy-four (71.8 percent) ended with the arbitrator's award becoming a judgment.[44] Demands for trial de novo were made in twenty (19.4 percent) of the 103 hearing cases. Of the nine remaining hearing cases, six ended in voluntary dismissal, and one was dismissed by the court (probably most of these involved settlements to avoid de novo trials); two were open when data collection ended but could not go to trial because the time to request trial under Arbitration Rule 5(a) had expired.

Of the twenty cases in which one of the parties demanded a trial de novo, trials

44. One of these seventy-four was an unusual case involving three defendants and a total claim of $3,876. The plaintiff received an arbitration award of $2,876 against one defendant, and this became a judgment. Using the decision rule explained in note 17, we treated that defendant as the "principal defendant" because he had the highest adverse judgment on suit. Therefore the disposition recorded was the disposition as to that defendant—"judgment on arbitration award." The plaintiff dismissed the action against another defendant. Receiving no award against the third defendant, he demanded a trial de novo with regard to that defendant alone. That portion of the case was open when data collection ended and was considered likely to go to trial. We did not treat the entire case as one likely to go to trial, because the bulk of the claim was decided by the arbitration award, which became final.

Figure 5. Cumulative Percentage of Contested Cases Disposed of, by Month, Compared for Arbitration, Control, and Preprogram Groups

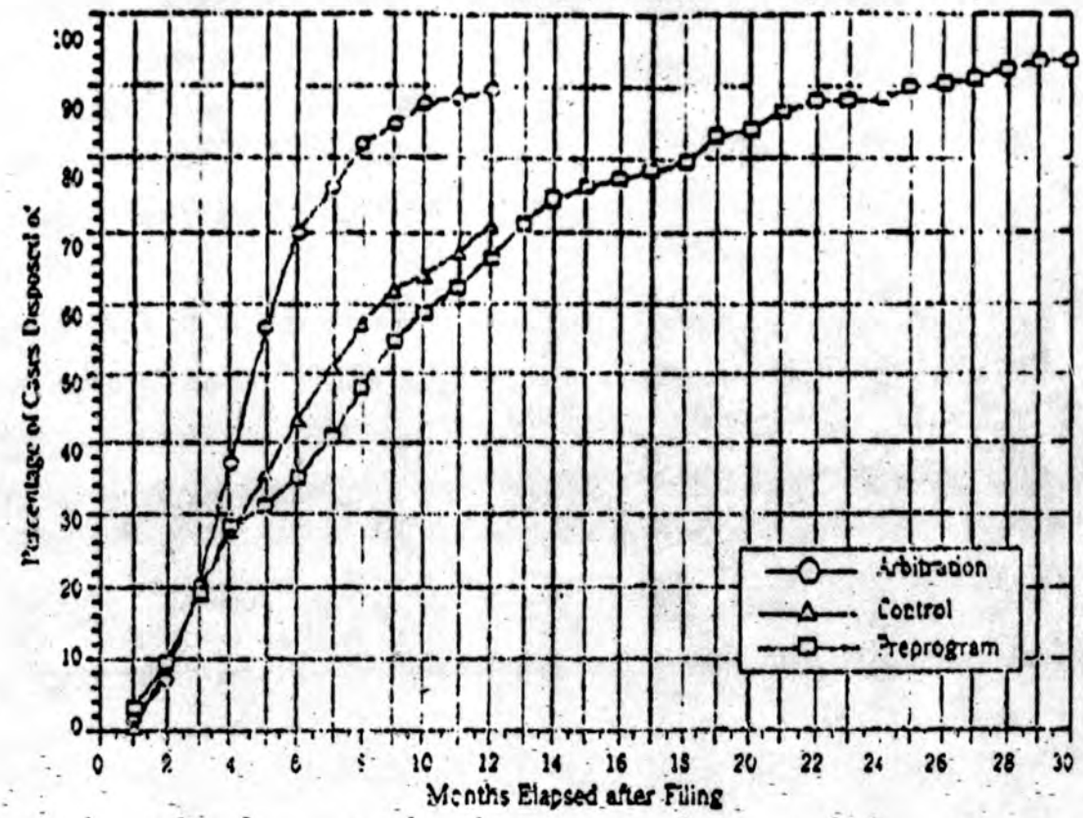


Figure 6. Cumulative Percentage of Uncontested Cases Disposed of, by Month, Compared for Arbitration, Control, and Preprogram Groups

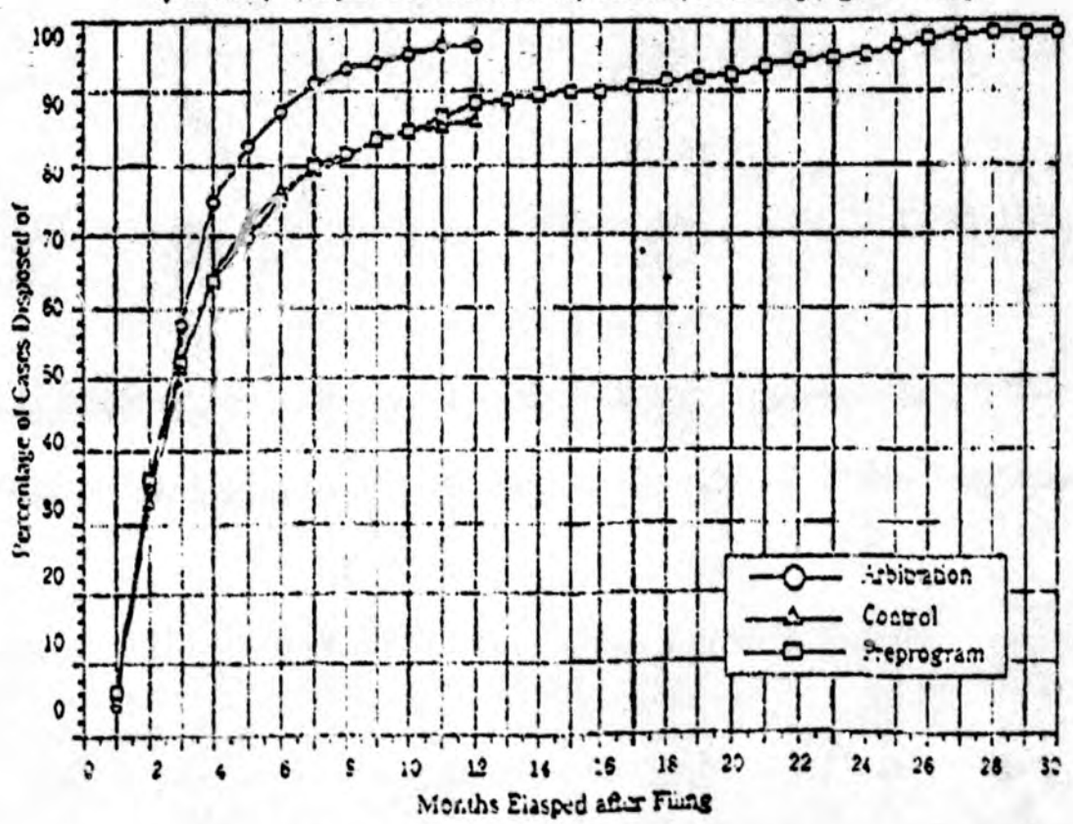


Figure 8. Proportions of Contested Cases Reaching Various Types of Dispositions

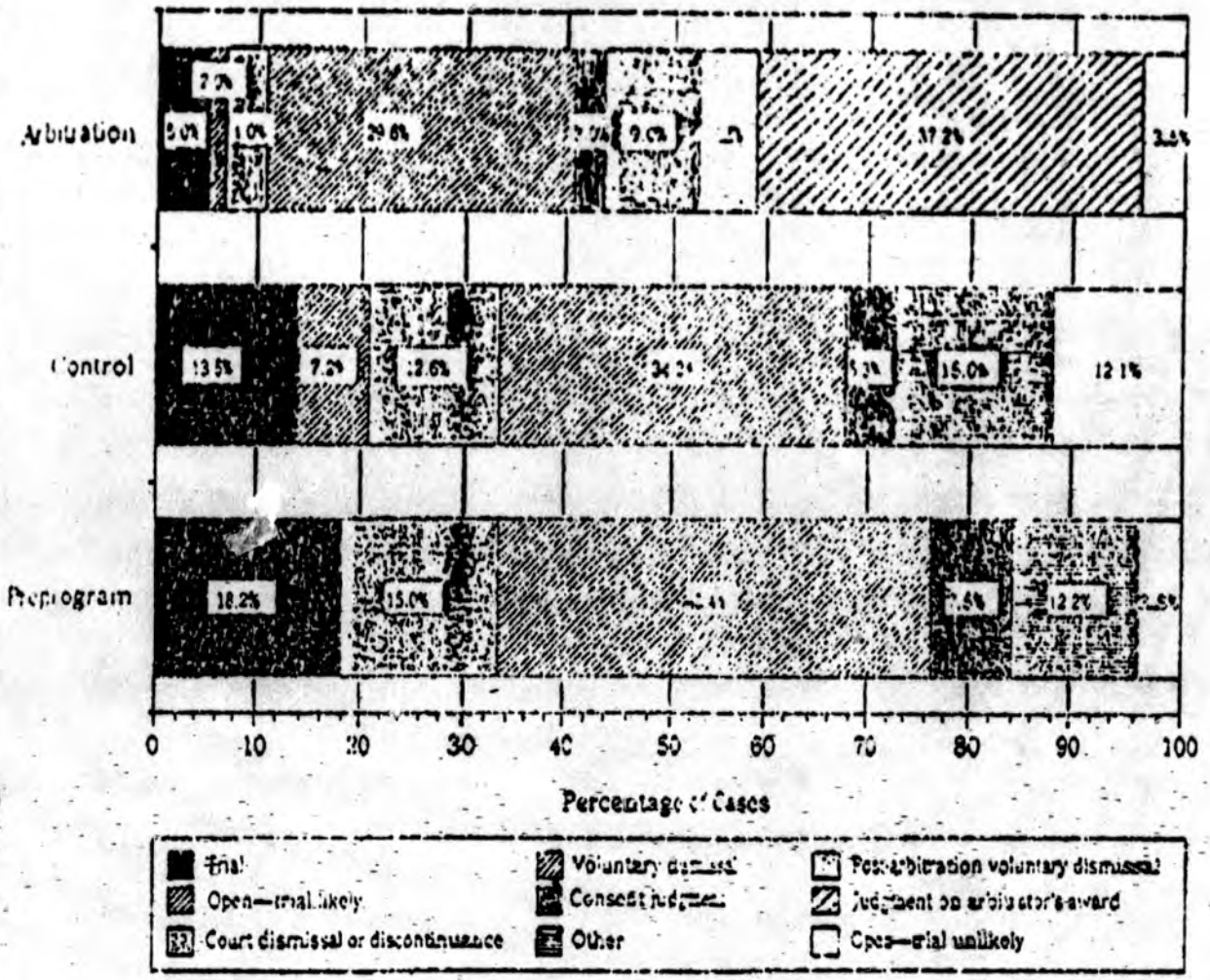


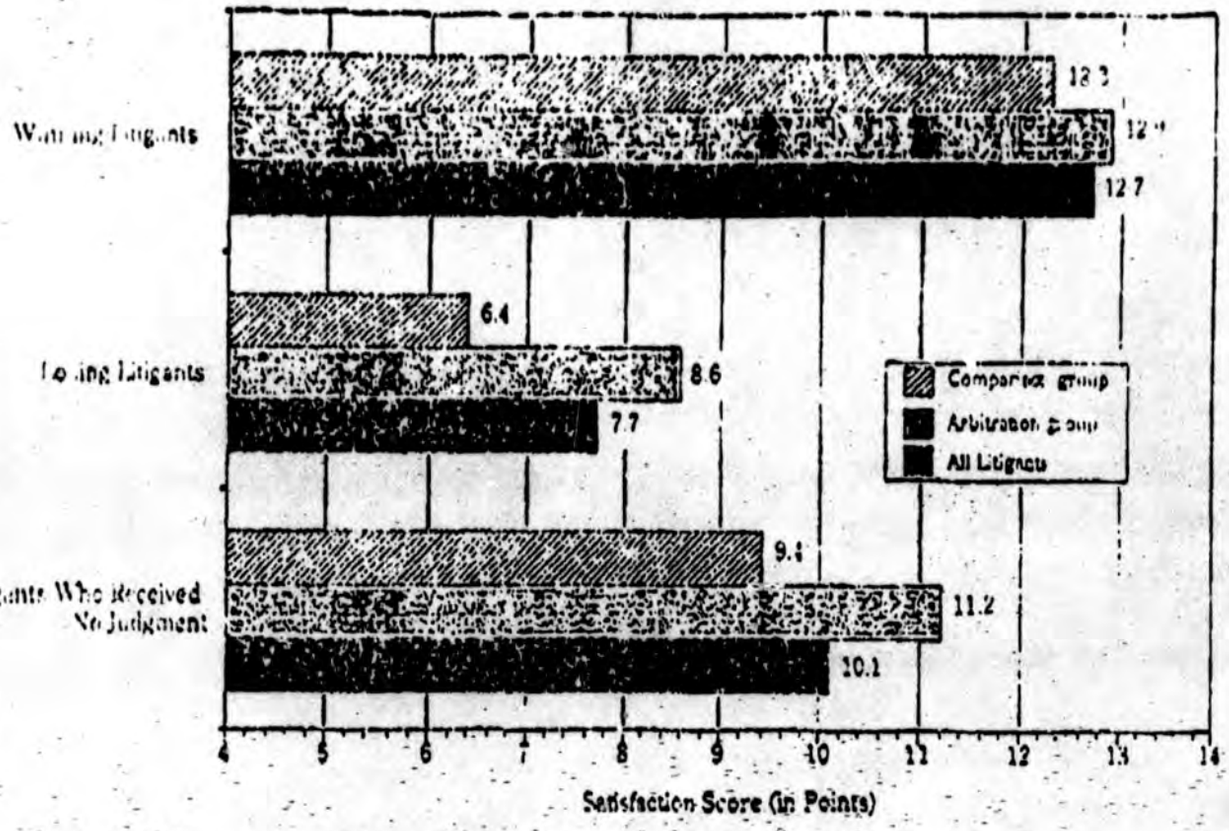
Figure 7 compares over time the cumulative percentage of cases disposed of for the arbitration, control, and preprogram groups in (1) contested regular district court cases and (2) magistrate appeals. The curves are similar to the ones in Figure 5 for all court divisions combined. Approximately four months after filing in contested regular district district court cases, and 2.5 months after filing in magistrate appeals, the percentage disposed of in the arbitration group began to exceed the comparable percentages in the other two groups.[51]

Type of Disposition
Contested Cases

The percentages of all contested cases receiving various types of dispositions in the arbitration, control, and preprogram groups are shown in Figure 8. Some cases remained open (not disposed of) when our data collection ended: 5.5 percent of the arbitration group, 19.3 percent of the control group, and 3.6 percent of the preprogram group. In the arbitration and control groups, we categorized open cases as

51. We can also see that in magistrate appeals (but not in regular district court cases) control group cases reached disposition sooner than preprogram group cases. Possible explanations for this difference are discussed on page 37.

Figure 22. Mean Satisfaction Score for Winning and Losing Litigants



resulted in out-of-court settlements.[68] It seems reasonable to expect that, in terms of satisfaction, in most cases a settlement would be somewhere between winning and losing.

To assess the importance of winning and losing and other factors that could contribute to overall satisfaction, we performed a regression analysis.[69] It indicated that by far the most important determinant of overall satisfaction was winning or losing; the other factors considered had little or no effect on overall satisfaction once the procedure followed (arbitration or standard procedure) was taken into account.

As shown in Figure 22, the mean overall satisfaction score was 7.7 for the forty-three losing litigants in the arbitration and comparison groups, 12.7 for the fifty-seven winning litigants, and 10.1 for the sixty-three litigants who received no judgment (most of the last group probably settled out of court). Thus, in terms of this score, winners were about 64 percent more satisfied than were losers, while those who (presumably) settled were about halfway between losers and winners.

The program evidently had different effects on the satisfaction of winners, losers, and those who settled. With respect to winners, the mean satisfaction score was 12.9 for the arbitration group and almost the same—12.3—for the comparison

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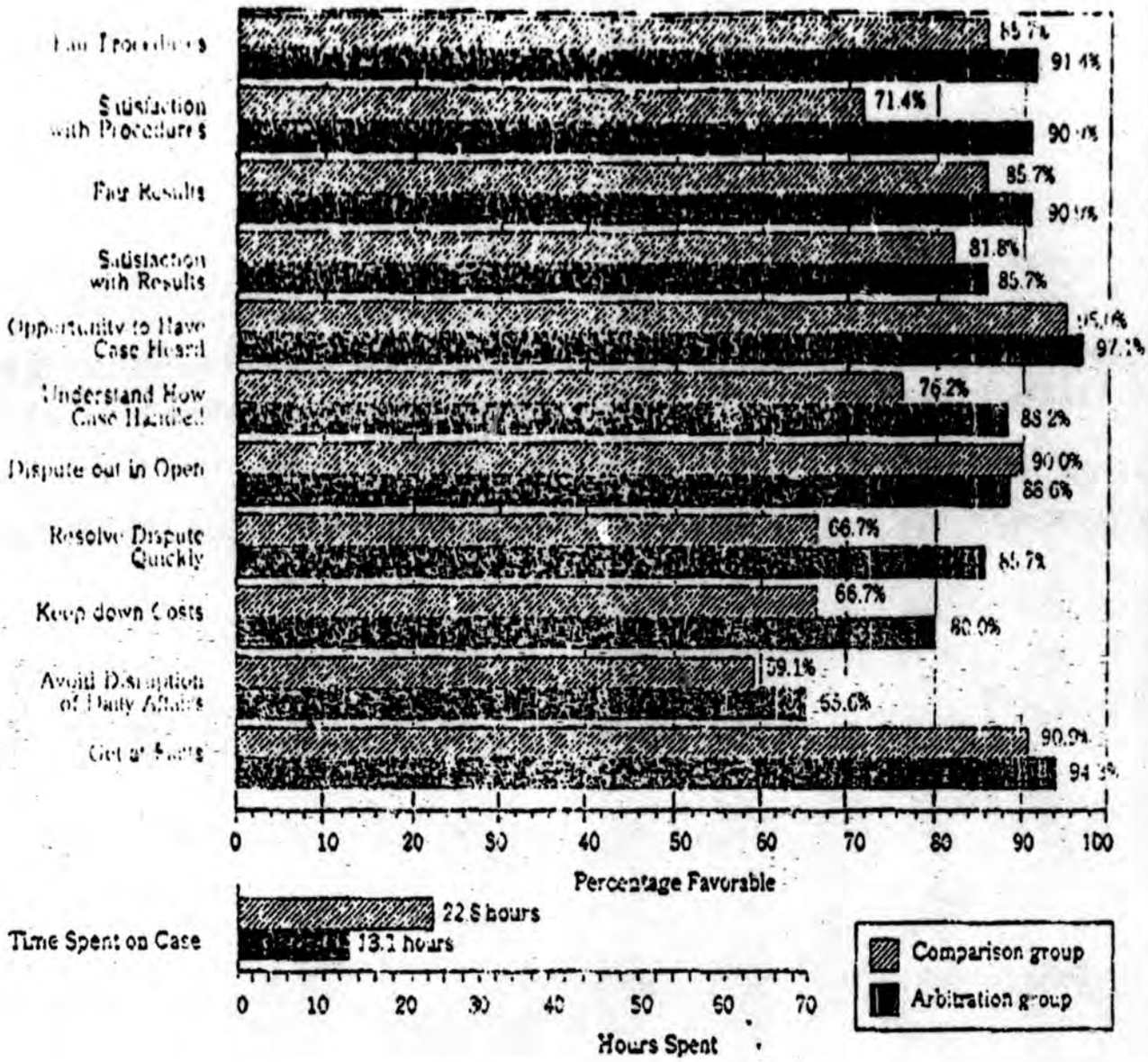
68. See chapter two.

69. It was possible that other factors could interact with the arbitration program in influencing litigant satisfaction—that is, that the presence or absence of other factors could account for the program's apparent effect on litigant satisfaction. To test for this possibility, we formed four stepwise logit regression models of litigant satisfaction—one for each of the following questions concerning satisfaction: fairness of procedure, satisfaction with procedure, fairness of outcome, and satisfaction with outcome. In each model the dependent variable was the logit—the logarithm of the odds of responding favorably

Figure 23. Responses of Winning and Losing Litigants to Twelve Evaluative Questions
a. Winning Litigants

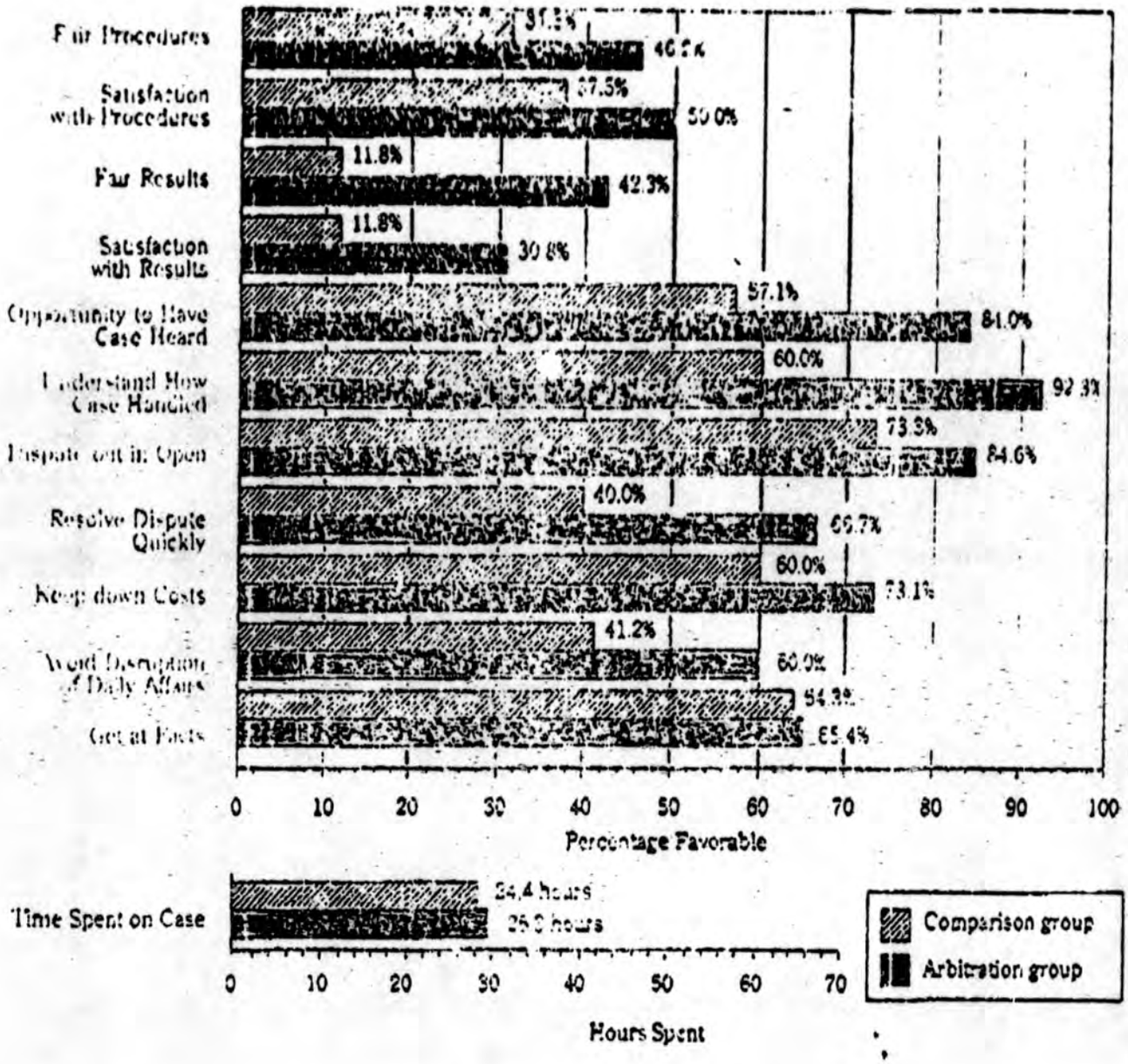


question arises from the following speculation. If the arbitration program had tended to lead to compromises of issues to a greater extent than standard procedure did, then losing defendants would have lost less, and winning plaintiffs would have won less. If this had occurred, it could explain why losing litigants (who were predominantly defendants) were more satisfied with the program than with standard litigation.[71] In other words, losers' satisfaction could have increased not because of the program's procedural design but because the design promoted compromise.

In the analysis of court record data (see chapter five), we found no difference between the three groups—arbitration, control, and preprogram—in the percentage recovered by the plaintiff. This analysis was limited to contested cases ending in judgment (we had no data on out-of-court settlement amounts). But the cases whose

71. However, in this case it would be difficult to explain how winners who won less were nevertheless as satisfied with the arbitration program as with standard procedure.

Figure 23. Responses of Winning and Losing Litigants to Twelve Evaluative Questions
b. Losing Litigants



litigants we succeeded in interviewing were not necessarily the same cases as those for which we collected record court data.

For the cases in our interview samples, we computed the percentage of plaintiffs' claims recovered by judgment[72] in each case that ended in a judgment. For losing defendants interviewed, the percentage of plaintiffs' claims that defendants lost averaged 86.2 percent in the arbitration group and 92.1 percent in the comparison group—a small, and not significant, difference. For winning plaintiffs interviewed, the percentage of their claims won averaged 69.6 percent in the arbitration group and 91.0 percent in the comparison group—again a negligible difference.[73]

72. Note that our analysis of the amount recovered by the plaintiff is incomplete in that it does not include out-of-court settlements.

73. We also examined the percentage recovered by (1) plaintiffs in cases where we interviewed (2) plaintiffs who lost and (3) defendants who won. The numbers in these two categories were very small because most interviewed plaintiffs won and most interviewed defendants lost. In both of these catego-

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

November 7, 1988

MEMORANDUM

TO:

ATTN:

FROM: Patricia Young
Legislative Analyst

RE: **Virginia Birth-Related Neurological Injury Compensation Act**
Research Request 89.077

You asked for information about the Virginia Birth-Related Neurological Injury Compensation Act. According to Representative Clifton Woodrum, bill sponsor, this legislation was proposed in response to the refusal of one of three major insurance carriers to provide liability insurance for physicians of obstetrics and gynecology (OB/GYN) practicing in Virginia in groups of fewer than ten.

Currently, there is a lively debate in many states, including Alaska, over whether the "insurance crisis" is genuine or a fabrication on the part of the insurance industry. Virginia's "Bad Baby Act," effective January, 1988, is one state's response to one aspect of the liability insurance crisis (see attached). This approach modifies many years of judicial experience and case law. Proponents and opponents alike will be watching this situation due to its potential impact. However, several years may pass before a sufficient number of cases have been processed to determine whether or not such legislation is justified.

Virginia's act limits the liability of physicians and hospitals for birth-related neurological injuries caused or aggravated by substandard care unless there is clear and convincing evidence that injuries were intentional or willfully caused.[1] This statute effects several changes in well-established, judicially created rules for determining civil liability and damages:

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[1]It is important to note that this statute covers only the most disabling and costly injuries. "Neurological injuries" are defined as injuries to the brain or spinal cord which render infants "permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living" (Code of Virginia, 38.2-5001).

- The law places a statutory upper limit on the amount of damages an injured party can recover for acts of negligence, gross negligence, and recklessness.

- An injured party is allowed only a nonjudicial remedy for acts of negligence, gross negligence, and recklessness. The injured party is prohibited from seeking redress in the courts unless there is willful or intentional wrongdoing on the part of the physician and/or the hospital.

- "Preponderance of evidence" is the standard of proof generally required in civil liability cases; this law increases the standard of proof to "clear and convincing evidence," a standard generally reserved for cases with overriding public policy implications.

In the event of a birth-related neurological injury, the act provides that the Industrial Commission of Virginia will award compensation to the legal representative of the infant for the following items:

- actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel for which the infant has not received nor is entitled to receive reimbursement from some other source [38.2-5009 (1)];

- loss of earnings from the age of eighteen through the age of sixty-five, in the amount of fifty percent of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector [38.2-5009 (3)]; and

- reasonable expenses incurred in connection with the filing of the claim, including reasonable attorneys' fees [38.2-5009 (4)].

The act stipulates that compensation is to be awarded from a fund governed by a governor-appointed board of directors and maintained by annual assessments of $5,000 from each participating OB/GYN physician; up to $150,000 from each participating hospital (based on $50 per delivery for the year prior to participation, but not to exceed $150,000 per hospital in any one twelve-month period); and $250 from each nonparticipating physician licensed by, and practicing in, the Commonwealth. According to the statute, "if required to maintain the fund on an actuarially sound basis," liability insurance carriers will also contribute annual assessments not to exceed "one quarter of one percent of . . . net direct [liability] premiums written" [38.2-5020 (B)]. Carriers are entitled to recover their assessed costs through surcharges on future policies and/or rate increases. Physicians and hospitals will presumably pass on their assessed costs to patients.

How compensation will be awarded is unclear and open to debate, and regulations implementing the statute have not been drafted. Some covered medical, rehabilitative, custodial, and equipment expenses would continue for the life of the injured, and actual costs for these expenses will vary over time. According to Representative Woodrum, the legal representative of the injured child would be required to petition the commission each year for out of pocket expenses; however, language in the statute suggests a lump sum award. Loss of earnings would occur 18 through 65 years in the future, and there appears to be disagreement regarding this award also. Representative Woodrum indicated that compensation for loss of earnings would not begin until the injured child had reached the age of eighteen and would continue only during the life of the injured. However, according to Larry Tarr, chief deputy commissioner, Virginia Industrial Commission, the award for loss of earnings would be a lump sum amount based on current wage averages.[2]

Since its proposal, the statute has been controversial: many physicians object to subsidization of OB/GYN practitioners; many consumers argue that this statute allows doctors and hospitals, under certain circumstances, to act in a negligent or reckless manner without fully compensating victims. The likely net effect of the law will be that no suits are brought against physicians or hospitals for birth-related neurological injuries. Controversy will continue, however, and law suits may arise over the current lack of administrative clarity. Steve Kaufmann, Virginia Division of Insurance, anticipates a move to repeal this statute. He also expects that the law may be challenged and, if necessary, appealed to the State Supreme Court.

I hope this information is useful to you. If you have questions, please call.

Attachment

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[2]Bob Griffin, chief economist, Virginia Employment Commission, Bureau of Labor Statistics, indicated that $371 was the 1987 average weekly wage of workers in the private, nonfarm sector. Based on the current average wage, a lump sum compensation for loss of earnings between the ages of 18 and 65 would be $463,008. If wage inflation were calculated, this amount would be substantially higher.

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1950

1988 Cumulative Supplement

ANNOTATED

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The Editorial Staff of the Publishers

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A. D. KOWALSKY, S. C. WILLARD, W. L. JACKSON,
P. R. ROANE, K. S. MAWYER, AND T. R. TROXELL

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1986 REPLACEMENT

Annotated through South Eastern Reporter, 2d Series, through Volume 364, page 832. For complete scope of annotations, see preface in supplement to Volume 1.

**Place in Pocket of Corresponding Volume of Main Set.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

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CHAPTER 50.

VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT.

Sec.
38.2-5000. Short title.
38.2-5001. Definitions.
38.2-5002. Virginia Birth-Related Neurological Injury Compensation Program; exclusive remedy; exception.
38.2-5003. Industrial Commission authorized to hear and determine claims.
38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing of responses.
38.2-5005. Tolling of statute of limitations.
38.2-5006. Hearing; parties.
38.2-5007. Interrogatories and depositions.
38.2-5008. Determination of claims; presumption; finding of Industrial Commission binding on participants; medical advisory panel.
38.2-5009. Commission awards for birth-related neurological injuries; notice of award.
38.2-5010. Rehearing on Commission determination or award.
38.2-5011. Conclusiveness of determination or award; appeal.
38.2-5012. Enforcement, etc., of orders and awards.
38.2-5013. Limitation on claims.
38.2-5014. Scope.
38.2-5015. Birth-Related Neurological Injury Compensation Fund.
38.2-5016. Board of directors; appointment; vacancies; term.
38.2-5017. Plan of operation.
38.2-5018. Assessments to be held in restricted cash account.
38.2-5019. Initial assessments.
38.2-5020. Annual assessments.
38.2-5021. Actuarial investigation, valuations, gain/loss analysis; notice if assessments prove insufficient.

§ 38.2-5000. Short title. — The provisions of this chapter shall be known and may be cited as the Virginia Birth-Related Neurological Injury Compensation Act. (1987, c. 540.)

§ 38.2-5001. Definitions. — As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living. This definition shall apply to live births only.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Industrial Commission of Virginia.

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the assessment required pursuant to this chapter for the year in which the injury occurred.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of

Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the assessment required pursuant to this chapter for the year in which the injury occurred.

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter. (1987, c. 540.)

§ 38.2-5002. Virginia Birth-Related Neurological Injury Compensation Program; exclusive remedy; exception. — A. There is hereby established the Virginia Birth-Related Neurological Injury Compensation Program.

B. The rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury.

C. Notwithstanding anything to the contrary in this section, a civil action shall not be foreclosed against a physician or a hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury, provided that such suit is filed prior to and in lieu of payment of an award under this chapter. Such suit shall be filed before the award of the Commission becomes conclusive and binding as provided for in § 38.2-5011. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5003. Industrial Commission authorized to hear and determine claims. — The Industrial Commission is authorized to hear and pass upon all claims filed pursuant to this chapter. The Commission may exercise the power and authority granted to it in Chapter 2 (§ 65.1-10 et seq.) of Title 65.1 as necessary to carry out the purposes of this chapter. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing of reponses. — A. 1. In all claims filed under this chapter, the claimant shall file with the Commission a petition, setting forth the following information:

a. The name and address of the legal representative and the basis for his representation of the injured infant;

b. The name and address of the injured infant;

c. The name and address of any physician providing obstetrical services who was present at the birth and the name and address of the hospital at which the birth occurred;

d. A description of the disability for which claim is made;

e. The time and place where the injury occurred;

f. A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim;

g. All available relevant medical records relating to the person who allegedly suffered a birth-related neurological injury and an identification of any unavailable records known to the claimant and the reasons for their unavailability;

h. Appropriate assessments, evaluations, and prognoses and such other records and documents as are reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the injured infant on account of a birth-related neurological injury;

i. Documentation of expenses and services incurred to date, which indicates whether such expenses and services have been paid for, and if so, by whom; and

j. Documentation of any applicable private or governmental source of services or reimbursement relative to the alleged impairments.

2. The claimant shall furnish the Commission with as many copies of the petition as required for service upon the Program, any physician and hospital named in the petition, the Board of Medicine and the Department of Health, along with a fifteen dollar filing fee. Upon receipt of the petition the Commission shall immediately serve the Program by service upon the agent designated to accept service on behalf of the Program in the plan of operation by registered or certified mail, and shall mail copies of the petition to any physician and hospital named in the petition, the Board of Medicine and the Department of Health.

B. Upon receipt of the petition, the Board of Medicine shall evaluate the claim, and if it determines that there is reason to believe that the alleged injury resulted from, or was aggravated by, substandard care on the part of the physician, it shall take any appropriate action consistent with the authority granted to the Board in §§ 54-316 through 54-325.

C. Upon receipt of the petition, the Department of Health shall evaluate the claim, and if it determines that there is reason to believe that the alleged injury resulted from, or was aggravated by, substandard care on the part of the hospital at which the birth occurred, it shall take any appropriate action consistent with the authority granted to the Department of Health in Title 32.1.

D. The Program shall have thirty days from the date of service in which to file a response to the petition, and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury, within the meaning of this chapter. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5005. Tolling of statute of limitations. — The statute of limitations with respect to any civil action that may be brought by or on behalf of an injured infant allegedly arising out of or related to a birth-related injury shall be tolled by the filing of a claim in accordance with this section, and the time such claim is pending shall not be computed as part of the period within which such civil action may be brought. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5006. Hearing; parties. — A. Immediately after such petition has been received, the Commission shall set the date for a hearing, which shall be held no sooner than 45 days and no later than 120 days after the filing of a petition, and shall notify the parties thereto of the time and place of such hearing. The hearing shall be held in the city or county where the injury

occurred, or in a contiguous city or county, unless otherwise agreed to by the parties and authorized by the Commission.

B. The parties to the hearing required under this section shall include the claimant and the Program. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5007. Interrogatories and depositions. — Any party to a proceeding under this chapter may, upon application to the Commission setting forth the materiality of the evidence to be given, serve interrogatories or cause the depositions of witnesses residing within or without the Commonwealth to be taken, the costs to be taxed as expenses incurred in connection with the filing of a claim, in accordance with subdivision 2 of § 38.2-5009. Such depositions shall be taken after giving notice and in the manner prescribed by law, for depositions in actions at law, except that they shall be directed to the Commission, the Commissioner or the Deputy Commissioner before whom the proceedings may be pending. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5008. Determination of claims; presumption; finding of Industrial Commission binding on participants; medical advisory panel. — A. The Commission shall determine, on the basis of the evidence presented to it, the following issues:

1. Whether the injuries claimed are birth-related neurological injuries as defined in § 38.2-5001. A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it has been demonstrated, to the satisfaction of the Industrial Commission, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that the infant was thereby rendered permanently nonambulatory, aphasic and incontinent.

If either party disagrees with such presumption, that party shall have the burden of proving that the injuries alleged are not birth-related neurological injuries within the meaning of the chapter.

2. Whether obstetrical services were delivered by a participating physician at the birth.

3. Whether the birth occurred in a participating hospital.

4. How much compensation, if any, is awardable pursuant to § 38.2-5009.

5. If the Commission determines (i) that the injury alleged is not a birth-related neurological injury within the meaning of this chapter, (ii) that obstetrical services were not delivered by a participating physician at the birth, or (iii) that the birth did not occur in a participating hospital, it shall cause a copy of such determination to be sent immediately to the parties by registered or certified mail.

6. By becoming a participating physician or hospital each participant is bound for all purposes including any suit at law against a participating physician or participating hospital, by the finding of the Industrial Commission (or any appeal therefrom) with respect to whether such injury is birth-related.

B. The deans of the medical schools of the Commonwealth shall develop a plan whereby each claim filed with the Commission is reviewed by a panel of three qualified and impartial physicians. This panel shall file its report and recommendations as to whether the injury alleged is a birth-related neurological injury within the meaning of this chapter with the Commission at least

ten days prior to the date set for hearing pursuant to § 38.2-5006. At the request of the Commission, at least one member of the panel shall be available to testify at the hearing. The Commission must consider, but shall not be bound by, the recommendation of the panel. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5009. Commission awards for birth-related neurological injuries; notice of award. — Upon determining (i) that an infant has sustained a birth-related neurological injury, (ii) that obstetrical services were delivered by a participating physician at the birth, and (iii) that the birth occurred in a participating hospital, the Commission shall make an award providing compensation for the following items relative to such injury:

1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel. However, such expenses shall not include:

a. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the federal government except to the extent prohibited by federal law;

b. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity;

c. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or federal government except to the extent prohibited by federal law; and

d. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

2. Expenses of medical and hospital services under subdivision 1 of this section shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person.

3. Loss of earnings from the age of eighteen. — An infant found to have sustained a birth-related neurological injury shall be conclusively presumed to have been able to earn income from work from the age of eighteen through the age of sixty-five, if he had not been injured, in the amount of fifty percent of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector.

4. Reasonable expenses incurred in connection with the filing of a claim under this chapter, including reasonable attorneys' fees, which shall be subject to the approval and award of the Commission.

5. A copy of the award shall be sent immediately by registered or certified mail to the parties. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5010. Rehearing on Commission determination or award. — If an application for review is made to the Commission within twenty days from the date of a determination pursuant to subdivisions A 1 through A 3 of § 38.2-5008, or within twenty days from the date of an award by the Commission pursuant to § 38.2-5009, the full Commission, excluding any member of the Commission who made the determination or award, if the first

hearing was not held before the full Commission, shall review the evidence. If deemed advisable and as soon as practicable, the Commission instead may hear the parties, their representatives and witnesses and shall make a determination or award, as appropriate. Such review or determination, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, shall be filed with the record of the proceedings and shall be sent immediately to the parties. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5011. Conclusiveness of determination or award; appeal. — A. The determination of the Commission pursuant to subdivisions A 1 through A 3 of § 38.2-5008, or the award of the Commission, as provided in § 38.2-5009, if not reviewed in due time, or a determination or award of the Commission upon such review, as provided in § 38.2-5010, shall be conclusive and binding as to all questions of fact. No appeal shall be taken from the decision of one commissioner until a review of the case has been had before the full Commission, as provided in § 38.2-5010. Appeals shall lie from the full Commission to the Court of Appeals in the manner provided in the Rules of the Supreme Court.

B. The notice of appeal shall be filed with the clerk of the Commission within thirty days from the date of such determination or award or within thirty days after receipt by registered or certified mail of such determination or award. A copy of the notice of appeal shall be filed in the office of the clerk of the Court of Appeals as provided in the Rules of the Supreme Court.

C. Cases so appealed shall be placed upon the privileged docket of the Court and be heard at the next ensuing term thereof. In case of an appeal from an award of the Commission to the Court of Appeals, the appeal shall operate as a suspension of the award, and the Program shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined in accordance with the provisions of this chapter. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5012. Enforcement, etc., of orders and awards. — The Commission has full authority to enforce its orders and protect itself from deception. While the language of this section is permissive and provides that a party may enforce an award in court, it must be read and considered in pari materia with the Commission's power pursuant to § 65.1-20 to punish for disobedience of its orders. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5013. Limitation on claims. — Any claim under this chapter that is filed more than ten years after the birth of an infant alleged to have a birth-related neurological injury is barred. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5014. Scope. — This chapter applies to all claims for birth-related neurological injuries occurring in this Commonwealth on and after January 1, 1988. The chapter shall not apply to disability or death caused by genetic or congenital abnormalities. (1987, c. 540.)

Effective date. — This section became effective Jan. 1, 1988.

§ 38.2-5015. Birth-Related Neurological Injury Compensation Fund. — There is established the Birth-Related Neurological Injury Compensation Fund to finance the Virginia Birth-Related Neurological Injury Compensation Program created by this chapter. (1987, c. 540.)

§ 38.2-5016. Board of directors; appointment; vacancies; term. — A. The Birth-Related Neurological Injury Compensation Program shall be governed by a board of five directors.

B. Directors shall be appointed for a term of three years or until their successors are appointed and have qualified.

C. 1. The directors shall be appointed by the Governor as follows:

a. One citizen representative;

b. One representative of participating physicians;

c. One representative of participating hospitals;

d. One representative of liability insurers; and

e. One representative of physicians other than participating physicians.

2. The Governor may select the representative of the participating physicians from a list of at least three names to be recommended by the Virginia Society of Obstetrics and Gynecology; the representative of participating hospitals from a list of at least three names to be recommended by the Virginia Hospital Association; the representative of liability insurers from a list of at least three names, one of which is recommended by the American Insurance Association, one by the Alliance of American Insurers, and one by the National Association of Independent Insurers; and the representative of physicians other than participating physicians from a list of at least three names to be recommended by the Medical Society of Virginia. In no case shall the Governor be bound to make any appointment from among the nominees of the respective associations.

D. The Governor shall promptly notify the association, which may make nominations, of any vacancy other than by expiration among the members of the board representing a particular interest and like nominations may be made for the filling of the vacancy.

E. The directors shall act by majority vote with five directors constituting a quorum for the transaction of any business or the exercise of any power of the Program. The directors shall serve without salary, but each director shall be reimbursed for actual and necessary expenses incurred in the performance of his official duties as a director of the Program. The directors shall not be subject to any personal liability with respect to the administration of the Program.

F. The board established by this section shall have the power to (i) administer the Program, (ii) administer the Birth-Related Neurological Injury Compensation Fund, (iii) appoint a service company or companies to administer the payment of claims on behalf of the Program, (iv) direct the investment and reinvestment of any surplus in the Fund over losses and expenses, provided any investment income generated thereby remains in the Fund, and (v) reinsure the risks of the Fund in whole or in part. (1987, c. 540.)

§ 38.2-5017. Plan of operation. — A. On or before September 30, 1987, the directors of the Program shall submit to the State Corporation Commission for review a proposed plan of operation consistent with this chapter.

B. The plan of operation shall provide for the efficient administration of the Program and for the prompt processing of claims made against the Fund pursuant to an award under this chapter. The plan shall contain other provisions including:

1. Establishment of necessary facilities;

2. Management of the Fund;

3. Appointment of servicing carriers or other servicing arrangements to administer the processing of claims against the Fund;

4. Initial and annual assessment of the persons and entities listed in § 38.2-5019 to pay awards and expenses, which assessments shall be on an actuarially sound basis subject to the limits set forth in § 38.2-5019; and

5. Any other matters necessary for the efficient operation of the Program.

C. The plan of operation shall be subject to approval by the State Corporation Commission after consultation with representatives of interested individuals and organizations. If the State Corporation Commission disapproves all or any part of the proposed plan of operation, the directors shall within thirty days submit for review an appropriate revised plan of operation. If the directors fail to do so, the State Corporation Commission shall promulgate a plan of operation. The plan of operation approved or promulgated by the State Corporation Commission shall become effective and operational upon order of the State Corporation Commission.

D. Amendments to the plan of operation may be made by the directors of the Program, subject to the approval of the State Corporation Commission. (1987, c. 540.)

§ 38.2-5018. Assessments to be held in restricted cash account. — All assessments paid pursuant to the plan of operation, shall be held in a separate restricted cash account under the sole control of an independent fund manager to be selected by the directors. The Fund, and any income from it, shall be disbursed for the payment of awards as provided in this chapter and for the payment of the expenses of administration of the Fund. (1987, c. 540.)

§ 38.2-5019. Initial assessments. — A. On or before January 1, 1988, the following persons and entities shall pay into the Fund an initial assessment in accordance with the plan of operation:

1. Physicians who wish to participate in the Virginia Birth-Related Neurological Injury Compensation Program and who otherwise qualify as participating physicians under this chapter shall pay an initial assessment of $5,000.

Any physician who is otherwise eligible to become a participating physician, but who did not meet the requirements of § 38.2-5001 on or before January 1, 1988, may become a participating physician by filing the agreements required by § 38.2-5001 and by paying an assessment to the Program on or before May 15, 1988. The amount of this assessment shall be determined by the Board of Directors of the Program on a prorated basis for the months remaining in 1988 at the time the assessment is paid. A physician who satisfies the conditions imposed by this paragraph shall be considered a participating physician in the Program for the remainder of 1988, beginning on the first day of the first month following the receipt by the Program of the required agreements and prorated assessment.

Physicians who are employed by the Commonwealth who wish to participate in the Program and who otherwise qualify as participating physicians may pay the assessment required by this subsection on or before July 31,

1988, provided they have notified the Program on or before January 1, 1988, of their desire to participate in the Program. Such participation shall become effective retroactive to January 1, 1988, at the time the assessment is received by the Program.

2. Hospitals which wish to participate in the Virginia Birth-Related Neurological Injury Program and that otherwise qualify as participating hospitals under this chapter shall pay an initial assessment of $50 per delivery for the prior year, as reported to the Department of Health in the most recent annual licensure survey of hospitals, not to exceed $150,000 per hospital in any one twelve-month period.

Any hospital which is otherwise eligible to become a participating hospital, but which did not meet the requirements of § 38.2-5001 on or before January 1, 1988, may become a participating hospital by filing the agreements required by § 38.2-5001 and by paying an assessment to the Program on or before May 15, 1988. The amount of the assessment shall be determined by the Board of Directors of the Program on a prorated basis for the months remaining in 1988 at the time the assessment is paid. A hospital satisfying the conditions imposed by this paragraph shall be considered a participating hospital in the Program for the remainder of 1988, beginning on the first day of the first month following the receipt by the Program of the required agreements and prorated assessment.

State hospitals which wish to participate in the Program and which otherwise qualify as participating hospitals may pay the assessment required by this subsection on or before July 31, 1988, provided they have notified the Program on or before January 1, 1988, of their desire to participate. Such participation shall become effective retroactive to January 1, 1988, at the time the assessment is received by the Program.

3. All physicians licensed by and practicing in the Commonwealth as of September 30, 1987, other than participating physicians, shall pay into the Fund an initial assessment of $250, in the manner required by the plan of operation.

B. Upon so certifying to the Program, any physician who comes within one of the following categories shall be exempt from paying the initial and annual assessments imposed upon physicians other than participating physicians pursuant to this chapter:

1. A physician who is employed by the Commonwealth and whose income from professional fees is less than an amount equal to ten percent of his annual salary.

2. A physician who is enrolled in a full-time graduate medical education program accredited by the American Council for Graduate Medical Education.

3. A physician who has retired from active clinical practice. (1987, c. 540; 1988, c. 164.)

The 1988 amendment, effective March 20, 1988, added the second paragraph of subdivision A 1 and added the second paragraph of subdivision A 2.

§ 38.2-5020. Annual assessments. — A. Beginning January 1, 1989, the persons and entities listed in subdivisions 1 through 3 of subsection A of § 38.2-5019, as of the date determined in accordance with the plan of operation, shall pay an annual assessment in the amount equal to their initial asssessments, in the manner required by the plan of operation.

B. Taking into account the assessments collected pursuant to subsection A of this section, if required to maintain the Fund on an actuarially sound basis, all insurance carriers licensed to write and engaged in writing liability insurance in the Commonwealth as of September 30, 1988, shall pay into the Fund an annual assessment, in an amount determined by the State

Corporation Commission pursuant to subsection A of § 38.2-5021, in the manner required by the plan of operation. Liability insurance for the purposes of this provision shall include the classes of insurance defined in §§ 38.2-117 through 38.2-119 and the liability portions of the insurance defined in §§ 38.2-124, 38.2-125 and 38.2-130 through 38.2-132.

1. All annual assessments against liability insurance carriers shall be made on the basis of net direct premiums written for the business activity which forms the basis for each such entity's inclusion as a funding source for the Program in the Commonwealth during the prior year ending December 31, as reported to the State Corporation Commission, and shall be in the proportion that the net direct premiums written by each on account of the business activity forming the basis for their inclusion in the Program bears to the aggregate net direct premiums for all such business activity written in this Commonwealth by all such entities. For purposes of this chapter "net direct premiums written" means gross direct premiums written in this Commonwealth on all policies of liability insurance less (i) all return premiums on the policy, (ii) dividends paid or credited to policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability insurance.

2. The entities listed in this subsection shall not be individually liable for an annual assessment in excess of one quarter of one percent of that entity's net direct premiums written.

3. Liability insurance carriers shall be entitled to recover their initial and annual assessments through (i) a surcharge on future policies, (ii) a rate increase applicable prospectively, or (iii) a combination of the two, at the discretion of the State Corporation Commission. (1987, c. 540.)

§ 38.2-5021. Actuarial investigation, valuations, gain/loss analysis; notice if assessments prove insufficient. — A. The Bureau of Insurance of the State Corporation Commission shall undertake an actuarial investigation of the requirements of the Fund based on the Fund's experience in the first year of operation, including without limitation the assets and liabilities of the Fund. Pursuant to such investigation, the State Corporation Commission shall establish the rate of contribution of the entities listed in subsection B of § 38.2-5020 for the tax year beginning January 1, 1989.

Following the initial valuation, the State Corporation Commission shall cause an actuarial valuation to be made of the assets and liabilities of the Fund no less frequently than biennially. Pursuant to the results of such valuations, the State Corporation Commission shall prepare a statement as to the contribution rate applicable to contributors listed in subsection B of § 38.2-5020. However, at no time shall the rate be greater than one quarter of one percent of net direct premiums written.

B. In the event that the State Corporation Commission finds that the Fund cannot be maintained on an actuarially sound basis subject to the maximum assessments listed in §§ 38.2-5019 and 38.2-5020, the Commission shall promptly notify the Speaker of the House of Delegates, the President of the Senate, and the Industrial Commission. (1987, c. 540.)

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

February 14, 1989

MEMORANDUM

TO:

ATTN:

FROM: Patricia Young PY
Legislative Analyst

RE: **Virginia Birth-Related Neurological Injury Compensation Act**
Research Request 89.077 (Supplemental Information)

After receiving the memorandum describing the Virginia Birth-Related Neurological Injury Compensation Act, you asked for information on changes in insurance premium rates for physicians and consumers resulting from passage of the act. You also requested information on solutions proposed by other states for dealing with this aspect of liability insurance. In addition, you asked for comments on whether or not a similar act would improve the liability insurance situation in Alaska.

Virginia's Birth-Related Neurological Injury Compensation Act--Results

Since the Virginia statute's effective date of January 1, 1988, no claims for compensation have been made. According to Bob Miller, deputy commissioner of regulation, Virginia Division of Insurance, passage of the act has resulted in a premium discount of approximately ten percent for participating obstetricians. If removing catastrophically damaged children from the tort system reduces costs, then premiums will probably decrease more significantly. Such decreases would not occur immediately, however, because insurers are still responsible for babies injured prior to the effective date. Furthermore, whether or not costs will be reduced is uncertain. The Virginia Legislature estimated that 40 children per year would meet the criteria for compensation. An actuarial firm estimated the cost per child at $500,000. Based on the estimate of 40 children, projected revenues of $14 million would fall short of the $20 million in costs. The shortfall could be far greater, however, because the actuarial analysis did not take into account the loss of earnings provision.

According to Ken Heland, associate director of the American College of Obstetricians and Gynecologists and head of the Department of Professional Liability, the statute is too strict in its definitions. He indicated, for example, that the significance of birth-related asphyxia is a topic of controversy currently raging among pediatric experts. Medical evidence increasingly suggests that asphyxia is only a very minor contributor to major birth-related problems. In addition, conditions of permanency can take several years to determine. Eligibility so narrowly defined, according to Mr. Heland, will significantly postpone or deter claims under the compensation act.

Although the law has not been challenged, it raises some constitutional questions. Under Virginia statute, an obstetrician's participation in the plan is optional. If an obstetrician chooses to participate, the injured party's exclusive remedy for damages--unless there is clear and convincing evidence that injuries were intentional or willfully caused--is limited to the benefits provided under the plan. An argument could be made that subjecting a patient to such a variable violates legal rights to equal protection, access to courts, and trial by jury.

Legislation in Other States

Florida is the only other state with legislation addressing birth-related neurological injuries. The statute, which is based on Virginia's and is very similar to it, was enacted in a special session in February 1988, and went into effect January 1, 1989. Pamela Burch Fort, staff director of the Florida Senate Committee on Insurance, noted that although the Florida Medical Association was the only supporters of the bill, dissenting members have now filed suit against it, claiming unconstitutionality.

Although malpractice liability insurance for obstetricians was more readily available in Florida than in Virginia, Florida obstetricians supported the law as a means to reduce premiums. Ms. Burch Fort indicated that the number of infants who qualify under the plan has not been determined. Estimates range from 60--based on a closed-claim study--to 376 per year. The variation is due to difficulties arising from eligibility definitions. The committee has concluded, however, that a permanent and total disability claim on a present value basis would total approximately $1 million. Less severe claims or less

than total disability would represent a cost of approximately $400,000. The cost of 60 claims might conservatively total $45 million per year. On a fully funded basis, program assessments would total only $22 million per year--far short of the most conservative estimated need. The committee further noted that closed-claim studies do not reflect birth-related neurological injuries which have not been litigated. The committee assumes, therefore, that the frequency of claims will probably increase under the compensation plan. Thus, whether or not costs, and therefore premiums, will be reduced is uncertain.

Other states have proposed or established no-fault systems of compensation for medical injuries, but according to Mr. Heland, only those in Virginia and Florida deal specifically with birth-related neurological injuries.[1]

Efficacy of a Birth-Related Neurological Injury Compensation Act in Alaska

Questions of constitutionality and other problems associated with both Virginia's and Florida's compensation programs--and uncertainty about whether or not costs will be reduced--diminish the possibility that a similar statute in Alaska would benefit physicians or consumers. Removal of catastrophically injured babies from the tort system of remedies might reduce premiums if the difficulties--including the problem of determining permanent birth-related neurological injuries--could be overcome. As Mr. Heland put it, "the idea might be a good one if it were debugged and improved upon." Jan Johnson, claims manager of the Medical Indemnity Corporation of Alaska, concurred and noted that a no-fault compensation program which provides a lump sum award is both more costly and less effective than a structured settlement or annuity which provides periodic payments for true medical and care needs and for lost income. Neither recommended implementation of a statute similar to Virginia's or Florida's.

I hope that this information is of use to you. Please call me if you have questions or need further information.

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[1]In Montgomery County, Maryland, obstetricians are considered part-time county employees and are covered by the county's liability insurance when treating patients referred by the county. Physicians are covered by their own insurance when treating private patients. This program helps assure access to care for the medically indigent--patients who are frequently more high risk due to lack of prenatal care. The program works, according to Ken Heland, because babies delivered for county patients are not counted in per delivery premium calculations. Mr. Heland commented that unless a state implements a similar system, premiums would probably not decline.