

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
1755 SCOMM 69: HOUSE LIABILITY INSURANCE TASK FORCE, 1989-1990 323

ADR TRENDS & ABSTRACTS

From the Hawaii State Judiciary / Program on Alternative Dispute Resolution

Vol 4, No 1

Honolulu, Hawaii

Jan/Feb/Mar 1988

C O U R T A N N E X E D A R B I T R A T I O N I N H A W A I I

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.

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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 ~~interposes~~ 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 ensuring prompt resolution of many law suits is impressive. Some experts suggest that the 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 W. 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 Hawaii 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 consulted 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. HRCF 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 \$24,516. 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 discovery 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, 22% of the lawyers surveyed believed that if their case had not been in the CAP 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 43% 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 has saved 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 conclude. 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 CAD. Information about this case was received from attorneys Wayne Sakai, Paul DiBianco, and Mark Desmarais. Only the names of the parties and the defendant have been fictionalized.)

The Facts:

On March 17, 1984, Sylvia Akama was driving on Wai'aleale 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 13, 1986, Akama v. Tsuda entered into the Court Arbitration Program (CAP). In effect, the two parties agreed to put their case on a 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 Ahama v. Tsuda case entered into arbitration, Ahama 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 to \$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. Kirititsu
Frank T. Lockwood
Christopher P. McKenzie
Kenneth T. Okamoto
Gerald Y. Sekiya
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
B. 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

Abbott, Ethan D.B.
 Abe, Fred Y.
 Abe, Michael K.
 Agana, Melvin Y.
 Agmeta, Victor Jr.
 Ahu, Elvin P.
 Akama, Dudley G.
 Akiba, Lorraine d.
 Albu, Ronald
 Alcantara, Leonard F.
 Alexander-Taylor, Amy
 Alston, Paul
 Aluli, Yuklia
 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 R.
 Bernstein, Mark D.
 Bettencourt, David
 Sigelow, Bruce C.
 Blaustein, Mark P.
 Bocken, R. Charles
 Bogert, Philip D.
 Border, Patrick W.
 Bordner, William A.
 Brandt, George W.
 Broder, Sherry P.
 Burke, Edmund
 Carnay, Thomas I. 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.
 Chas, Kevin S.W.
 Ching, Randall Y.C.
 Ching, Wesley H.H.
 Choi, Cedric
 Chong, Robert A.
 Chew, Steven J.T.
 Chey, Malcom W.B.
 Chu, Harold
 Chuck, Gregory W.
 Chun, Jarrold Y.
 Chun, Richard C.F.
 Chun-Moon, Lowell K.Y.
 Chung, Randall Y.S.
 Chung, Steven K.S.
 Cook, Thomas E.
 Corpe, Randolph L.
 Coogrove, Gail Y.
 Cowan, Stuart M.
 Crumpton, Charles W.
 Cuskaden, Everett
 Davis, Mark S.
 Davis, Walter
 Desmarais, Mark S.
 Devens, Paul
 Dessant, David J.
 Dibianco, Paul E.
 Duffy, James E. Jr.
 Durbin, Paul J.
 Earle, Jacqueline L.S.
 Edmunds, John S.
 Eggers, William J. III
 Eichor, Rick J.
 Englishart, C. Andrew
 Estes, James T.
 Ezra, David A.
 Fairbanks, David L.
 Fell, Charles F.
 Fenton, Ashley K.
 Fern, Dennis K.
 Ferrara, Christopher D.
 Fong, Peter
 Fong, Valerie W.H.
 Fong, Wesley F.
 Fong, Janel D.
 Fray, Philip S.
 Fried, L. Richard Jr.
 Fritz, Collin M.
 Furusue, Craig K.
 Furutani, Miles S.
 Futa, Janice T.
 Garcia, Max M.
 Gibson, Michael W.
 Gilroy, William H. Jr.
 Gaudier, Larry
 Gaudin, Kai
 Gaudreau, Howard
 Gouber, H. William Jr.
 Greenay, H. Burnham
 Gronau, Kurt A.
 Guttman, Steven
 Hall, David W.
 Hare, C. Michael
 Hayashi, Leslie Ann
 Hae, Alfred H.H.
 Hae, 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 M.
 Hiramatsu, Beverly L.K.
 Hirono, Marie K.
 Hiseaka, Steven
 Hoe, Allen K.
 Hoka, Richard L.
 Hong, Michael D.
 Horie, Walter K.
 Howell, A. Peter
 Hughes, Roy F.
 Huthart, Neil F.
 Hunt, William S.
 Ichida, Wesley W.
 Ikada, Walter M.
 Ikada, Wesley H.
 Ikahara, Archie T.
 Ikai, 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.
 Jarvis, Garard Aulama
 Jim On, Shelton G.W.
 Johnson, Solomon E.
 Johnston, Mary Blaine
 Jones, Ward D.
 Kakazu, Cheryl K.
 Kaneko, Stuart A.
 Kanetake, Stanley T.
 Kaolulo, Archibald C.K.
 Kawachika, James A.
 Kawashima, James
 Kikina, Wayne
 Kassner, 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.
 Komaiji, John T.
 Kondo, Wray
 Koraka, Mervyn M.
 Koyanagi, Faye M.
 Kugisaki, Craig T.
 Kuniyuki, Ken T.
 Kupchak, Kenneth R.
 Kurren, Barry M.
 Kuwasaki, Leroy T. Jr.
 Lee, John R.
 LePountaine, Ralph R.
 Lau, Jeffrey D.
 Lau, Kenneth
 Lau, Laurence K.
 Lawhn, James H.
 Leavitt, James T. Jr.
 Lebb, Edward R.
 Lee, Dale W.
 Lee, Douglas T.Y.
 Lee, Stephen W.H.A.
 Leong, Robin J.
 Levinson, Steven H.
 Libkuman, Ronald D.
 Lilly, Michael A.
 Lin, Kuen Mi
 Lo, David
 Lockwood, Frank
 Lockwood, John A.
 Loo, George
 Louis, David M.
 Love, Chad P.
 Low, Donald H.C.
 Lum, Leslie W.S.
 MacPherson, Stephen R.
 Maciszewski, Felix A.
 McLaren, Alexander T.
 Mah, Stanley S.
 Marrash, Alexander C.
 Marsh, Michael R.
 Marutani, Allen I.
 Masui, Stanford H.
 Matsui, G. W.M.
 Matsumoto, Colbert
 Matsumoto, Robert K.
 McCarthy, Michael F.
 McKenzie, Christopher
 McPheters, Howard
 Morse, Robert E.
 Miho, Katsuge
 Miller, William S.
 Mirikitani, Winston
 Miwa, Colin O.
 Miyagi, Melvyn M.
 Moore, William C.
 Morikawa, Randall I.
 Morry, G. Richard
 Morse, Jack
 Mosley, Roger G.
 Mui, Thomas L.
 Mukaida, Wayne H.
 Myrdal, John R.
 Nagase, Nelson T.
 Nagle, James F.
 Nagle, William J. III
 Nakamoto, Francis M.
 Nakamura, Hideo
 Nakamura, Kenneth H.
 Nakamura, Lee T.
 Nakamura, Richard F.
 Nakamura, Yoshio
 Nakashima, David A.
 Nakashima, Steven M.
 Nakayama, Paula M.
 Neece, Wayne
 Ng, Peter P.J.
 Nip, Ranton
 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, Tamm W.
 Ono, Andrew S.
 Ono, Jeffrey T.
 Ortiz, Jonathan L.
 Oshima, Leighton K.

Pablo, Christopher	Walker, Susan P.
Pacorro, Clarence A.	Watson, Kelli K.
Painter, Eaver W. Jr.	Watts, Thomas
Park, Arthur Y.	Weinberg, Jan
Park, Corey	White, Emmet
Park, Patricia K.	Williams, John R.
Parsons, Wayne D.	Wilson, Michael D.
Paul, James T.	Winegar, Cynthia
Pavey, Judith Ann	Witherman, Charles H.
Perkins, John F.	Wolff, Peter C. Jr.
Perry, Madelyn L.	Wong, Henry W.C.
Playdon, George W.	Wong, John C.
Pong, Winfred K.T.	Wong, Michael J.Y.
Portnoy, Jeffrey	Wong, Sidney J.Y.
Potts, Dennis W.	Worth, Edgar A.
Price, Warren III	Yamamoto, Myles T.
Rau, Robert E.	Yamamoto, Paul T.
Richards, Robert P.	Yamano, Ernest Y.
Ripley, Arthur Jr.	Yano, Francis H.
Robbins, Kenneth S.	Yano, Vincent H.
Robinson, David M.	Yap, Frank K.L. Jr.
Rosca, Arthur F.	Yampuku, Roy Y.
Roney, John A.	Yomono, Brian K.
Ryan, Joseph A.	Yoshida, Gerald C.
Sakai, Wayne M.	Young, Gregg H.
Sakuda, Bert S.	Yusi, Jennifer M.
Sakurai, Colleen H.	
Schneider, Joseph	
Schulmeister, David	
Schutter, David C.	
Sekiya, Gerald Y.	
Shaughnessy, Patricia L.	
Shigemura, Gary Y.	
Shintani, Randal I.	
Sia, Jeffrey H.K.	
Sieton, Randolph R.	
Snyder, Burt L.	
Stone, James J.	
Stone, Peter T.	
Street, J. Stephen	
Stutenberg, James A.	
Sugimoto, Brian D.	
Sumida, Kevin P.H.	
Sutton, Richard C. Jr.	
Suzuki, Norman	
Tan, Raymond J.	
Taylor, Jeffrey M.	
Terance, Janice h.	
Tharp, James W.	
Thomas, Juan D. Jr.	
Thomas, Mark A.	
Togioka, Leslie C.	
Tom, Herbert K.	
Tom, Michael D.	
Tom, Stephen D.	
Tomas, Paul A.	
Toyokuni, Robert S.	
Trecker, Steven J.	
Tsukiyama, Ted T.	
Tumacher, John	
Turbin, Richard	
Turk, David L.	
Ukishima, Daniel S.	
Van Etten, Alan	
Wei, Louis K.	

IX. SECOND, THIRD, AND FIFTH CIRCUIT ARBITRATORS

Second Circuit

Albrechtson, Al
 Bana, Armando C.
 Brumbaugh, James P.
 Callahan, Michael J.
 Cardozo, Joseph E.
 Chasburn, Lowell
 Clair, John G. Jr.
 Cole, Thomas R.
 D'Ambeau, Madelyn S.
 Dombroski, James M.
 Fleming, William L.
 Foster-Au, Renata
 Fukusaka, Ken R.
 Fukushima, Howard M.
 Garcia, Stephen G.
 Goldsmith, Stephen E.
 Hall, Vick J.
 Haywood, Guy A.
 Higa, Kase
 Ho, Diane
 Kohne, William L.
 Koller, Lillian S.
 Langa, Sanford J.
 Leuteneker, Tom C.
 Luna, S. Martin
 MacDonald, Barclay E.
 Macrae, Edward P.
 McNulty, Deborah
 McNulty, Tim
 Nakamura, Craig G.
 Nakamura, David H.
 Niles, Dennis J.
 Ogile, William F.
 Priest, Richard A. Jr.
 Ramil, Antonio V.
 Ranken, Anthony L.
 Robert, Gary
 Rowland, Robert E.
 Shimoda, Walter
 Takaouki, Anne M.
 Takayasu, James B.
 Tam, John F.
 Tateishi, Michael K.
 Tengan, Davelynn M.
 Thomas, Jack T.
 Ueoka, Meyer M.
 Ueoka, Paul M.
 Walton, Everett

Third Circuit

Altman, Gary
 Amato, Donald M.
 Amato, Riki May
 Bartsch, Richard P.
 Bethen, Robert E.
 Brown, Karen Mayan
 Burgess, John M.A.
 Carlsmith, Donn W.
 Chock, Nolan K.C.
 Choi, Jeffrey
 Chung, Clayton E.
 Chong, Curtis E.
 Choy, Duane D.
 Christensen, Steven K.
 Clay, James C.
 Cohn, Lawrence W.
 Cook, Valen A.
 Cornell, Craig S.
 Cox, Victor M.
 Crudele, Robert J.
 Dabney, Michael
 daSilva, Tim E.
 Dixon, Steven B.
 Dnt, Nelson R.
 Fagundes, Joseph M. III
 Fukuhara, Calvin J.
 Gaudin, Ben H.
 Gallup, Wallace M. Jr.
 Giennini, Frederick D.O.
 Halsted, Douglas L.
 Manohano, Peter
 Hara, Gilbert K.
 Hara, Glenn G.
 Hara, Michael E.
 Hasegawa, Geraldine N.
 Hasegawa, Raymond K.
 Hastings, Robert W. II
 Henricks, Arne T.
 Ibarra, Ronald
 Ing, Wendell Y.Y.
 Ireijo, James S.
 Ishado, Lester J.
 Ishida, Richard T.
 Iwashita, Andrew S.
 Jolly, William E.
 Kimura, Glenn N.
 Kimura, Jay T.
 Kimura, Keigo
 Kitaka, Carol S.W.
 Kunimura, Ruth A.
 Kushi, Herbert I.
 Lau, Robert I.W.
 Lee, Anson K.
 Leitel, Ira
 Leithaad, Arthur S.
 Lenell, Meredith
 Lim, Steven
 Love, Colin L.
 Lui-Kuan, 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
 Mischak, E. 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
 Grinpas, Robert M.
 Hong, Walton D.Y.
 Jung, James G. Jr.
 Kahr, E. Courtenay
 Komori, Arthur S.
 Licks, James W.
 Masuoka, George M.
 McCreery, Lawrence D.
 Murashige, Calvin E.
 Nii, Michael M.
 Perry, Warren C.R.
 Shimizu, Wayne S.
 Shiraishi, Clinton I.
 Shiraishi, Sherman T.
 Trask, Arthur K. Jr.
 Watanabe, Kathleen M.A.
 Wilson, Donald H.
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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, consultative and financial help to the Judiciary during the CAP's start-up.

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COURT ANNEXED ARBITRATION PROGRAM

FIRST CIRCUIT COURT

FEBRUARY 15, 1986 through DECEMBER 31, 1988

REPORT DATE - JANUARY 25, 1989

	<u>* OLD RULES</u>	<u>** NEW RULES</u>	<u>TOTAL</u>
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	336	336
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**

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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-

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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.)

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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

Rule 8

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.

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(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.

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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

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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.

Rule 15

(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.

Arbitration Rules

Rule 21

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

Rule 21

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.

Arbitration Rules

Rule 27

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.

We would like to thank the following people for their assistance on this project: the project staff of the Study of Arbitration and Litigation, Claudia Kamiyama, Thomas Webb, Ratana Ariyavisitakul, Fran Adams, and May Lam; Peter Adler, Director of the Hawaii Judiciary's Program on Alternative Dispute Resolution; Arbitration Administrator Ed Aoki and his staff Susan Izumi and Lynn Nozaki; and Arbitration Judge Ronald T.Y. Moon.

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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 limitations 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 in 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

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

	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	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

	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	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

	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
VOLUNTARILY	86	83	67	71
REDUCED (say lawyers)				
	<u>PHASE I</u>		<u>PHASE II</u>	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
VOLUNTARILY	--	--	85	83
REDUCED (say arbitrators)				

Table 3: Denial of Discovery

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

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

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

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

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

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

AVERAGE DISCOVERY COST	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
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

DISCOVERY COST	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
\$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,

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 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.

4. In the fiscal years 1985-86 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

	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	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

	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	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

AVE. HOURS OF WORK BY ARBITRATOR	<u>PHASE I</u>		<u>PHASE II</u>	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
	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

	<u>PHASE I</u>	<u>PHASE II</u>
	SETTLEMENTS	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 jurisdictional 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

COMPLEXITY	<u>PLAINTIFF</u>		<u>DEFENSE</u>	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
	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.

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 biased 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 slightly 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 in 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.

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***Report Of The
Governor's
Medical
Malpractice
Insurance
Commission***

October 1, 1975

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

JAY S. HAMMOND
GOVERNOR

POUCH D — JUNEAU 99811

October 1, 1975

The Honorable Jay Hammond
Governor, State of Alaska
State Capital
Pouch A
Juneau, Alaska 99801

Dear Governor Hammond:

After long and careful deliberations the Commission of Alaska citizens which you appointed to study and make recommendations concerning the problem of adequate professional liability insurance availability for the medical profession is pleased now to submit its report including findings, recommendations and proposed specific legislation.

Our thorough investigation of this matter has convinced all the members of the Commission that the proposed solutions in our report are the most likely of any proposals reviewed by the Commission or enacted by legislatures of other states to encourage a significant improvement in the availability of adequate insurance.

The Commission believes that the draft of specific proposed legislation and a more comprehensive comment on the legislative segment of this report will require additional time to prepare and thus seeks the indulgence of the Governor in permitting the Commission to make a supplement to this report within an additional thirty days.

Yours sincerely,

Langhorne A. Motley
Chairman, Governor's Medical
Malpractice Insurance Commission

REPORT
OF THE
GOVERNOR'S MEDICAL MALPRACTICE
INSURANCE COMMISSION

TO

GOVERNOR JAY S. HAMMOND
STATE OF ALASKA

OCTOBER 1, 1975

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RECOMMENDATIONS

RECOMMENDATION NO. 1: (Page 18)

The liability of the health care provider should terminate three years after occurrence (two years statute of limitations and one year limit on discovery). Any reported cases after the third year ought to become the responsibility of a special fund and not the liability of the health care provider.

RECOMMENDATION NO. 2: (Page 20)

Any award to which the injured patient is entitled should be reduced by all available collateral sources such as private, group or governmental medical or disability benefits whether contributory or noncontributory, except life insurance, by precluding the introduction into evidence of the items of damage compensated by collateral sources, except federal programs which, by law, must seek subrogation.

RECOMMENDATION NO. 3: (Page 21)

Medical professionals should be immune from liability to a person who is not his patient for administering emergency medical care where the giving of immediate aid appears to be the only alternative to death or serious bodily injury or harm.

RECOMMENDATION NO. 4: (Page 22)

The law should provide that no promise to achieve a certain medical result is valid unless that promise is in writing signed by the health care provider.

RECOMMENDATION NO. 5: (Page 23)

The definition of medical negligence be improved by adopting a national standard of acceptable medical care in lieu of a local community standard, limiting the standard to that at the time of the act, and imposing the standard appropriate under all circumstances under which the health care provider was acting.

RECOMMENDATION NO. 6: (Page 25)

Cases brought more than three years after the date of the incident alleged to cause the loss complained of must be proven by evidence that is clear and convincing.

RECOMMENDATION NO. 7: (Page 27)

There be enacted provision for appointment of ad hoc medical expert panels composed of at least one physician and two health care providers of the same discipline as the health care provider charged, impanelled for filing of an action and prior to any pretrial proceedings, to initiate an investigation of available evidence and report to the parties its findings as to medical facts.

RECOMMENDATION NO. 8: (Page 27)

The findings of the expert medical panel be admissible as evidence and the panelists subject to cross examination in any subsequent trial.

RECOMMENDATION NO. 9: (Page 29)

There be established a medical adjudication board consisting of nine citizens of the State who are neither health care providers nor legal

professionals, nor insurers, and three physicians appointed by the Governor, and one Superior Court judge assigned by the court. This board would be the exclusive tribunal for medical negligence cases.

RECOMMENDATION NO. 10: (Page 30)

Upon the filing of a claim with the Medical Adjudication Board, the case be assigned to a Hearing Committee consisting of three of the citizens, one of the physicians and the judge who shall hear and finally determine the case.

RECOMMENDATION NO. 11: (Page 31)

The legislature enact a joint resolution for the amendment of Article I, Section 16, of the Alaska State Constitution, permitting the legislature to consider an alternative system of adjudicating medical negligence claims which may be a substitution for trial by jury.

RECOMMENDATION NO. 12: (Page 33)

Provisions be made to authorize and administer the awards of future income and continuing medical care to be paid periodically rather than in a lump sum.

RECOMMENDATION NO. 13: (Page 33)

Jury and board awards shall be rendered by category of loss.

RECOMMENDATION NO. 14: (Page 39)

Create a Health Care Providers Indemnity Corporation, a public corporation, which would be regulated by the Director of Insurance as a domestic

property and casualty insurer and which would be a mandatory and exclusive source of minimum limits of medical malpractice insurance for all health care providers for the losses reported within the first three years after occurrence.

RECOMMENDATION NO. 15: (Page 39)

The corporation may contract with servicing carriers for administrative and claims services and seek contracts of indemnity from admitted carriers retaining for itself no insurable risk.

RECOMMENDATION NO. 16: (Page 40)

The rates for the coverages provided by the corporation should be developed based on Alaska's experience and retrospectively adjusted over a four-year period such that each category of health care providers would fully pay for all losses and expenses incurred in the programs yielding an appropriate profit to the indemnity carrier.

RECOMMENDATION NO. 17: (Page 42)

The corporation provide coverage retroactively to January 1, 1975 with appropriate additional premiums for those health care providers which had no insurance during that period.

RECOMMENDATION NO. 18: (Page 42)

A joint underwriting association should be authorized to be implemented upon a finding by the Director of Insurance that indemnity at a reasonable rate is not available from a private carrier.

RECOMMENDATION NO. 19: (Page 43)

The joint underwriting association should be composed of all property, casualty and disability insurers and all health care service contractors.

RECOMMENDATION NO. 20 (Page 44)

Create a late claims fund which shall be funded by assessments against all health care providers in amounts determined by the Director of Insurance after public hearing as necessary to actuarially carry all fund liabilities and guaranteed by the State to the extent necessary to cover actuarial deficiencies. There should also be provision for the legislature to reduce the assessment of health care providers upon a finding that the assessment is unaffordable.

RECOMMENDATION NO. 21: (Page 45)

Legislation should be enacted which will require the maintenance of separate, specific and detailed statistical information on malpractice claims. Authority should be exercised by the Director of Insurance to more deliberately regulate policy forms and rates for this line.

RECOMMENDATION NO. 22: (Page 47)

The proposals of this Commission should inure to the benefit of, and be binding upon all licensed in the State as hospitals, as defined in AS 18.20.130 and including hospitals operated by State and political subdivisions, chiropractors, dental hygienists, physicians, osteopaths, chiropedists, nurses, opticians, pharmacists, and physical therapists, dentists, optometrists, psychologists and pediatricists.

RECOMMENDATION NO. 23: (Page 48)

There should be a legislatively prescribed procedure for informing the patient of the consequences of a procedure and obtaining the consent to perform it and also setting forth the conditions pursuant to which consent is implied or not required.

RECOMMENDATION NO. 24: (Page 49)

The appropriate licensing boards should be authorized to render disciplinary sanctions against health care providers other than license suspension. The boards should be able to reprimand, censure, place on probation, restrict practice by time, specialty, procedure or facility or to require continuing education or retraining.

RECOMMENDATION NO. 25: (Page 50)

The appropriate licensing board should have authority to require more relevant and more frequent reports on health care practices by and from its licensees. Persons reporting should have immunity from defamation actions based on reports made to licensing boards to officially constituted service committees of hospitals and professional health care organizations.

RECOMMENDATION NO. 26: (Page 50)

The legislature appropriate such additional funds as are needed to properly staff the health care licensing boards with investigative and administrative personnel.

RECOMMENDATION NO. 27: (Page 51)

Provision should be made for more effective loss control by all health care providers but with specific attention to identified problem areas.

I. THE CHALLENGE TO THE COMMISSION

BACKGROUND

For the past two years the physicians, surgeons and hospitals of the State of Alaska have been experiencing growing difficulties in procuring adequate insurance coverage for their malpractice exposures. The medical professionals, through their associations, societies and individually, tried to solve the problem by negotiating group marketing plans through Alaska insurance brokers with most of the traditional malpractice insurance carriers. Most doctors found insurance available at affordable rates provided they were rated in the lower risk categories and had continuing coverage with the same carrier for several years. New practitioners and those in higher risk categories or those who did not stay with a single carrier for a continuous period of at least two years, searched with more difficulty for coverage. Some found coverage through Lloyds of London, however, the Lloyds' coverage was on a claims-made form and, by July of 1975, Lloyds had determined to accept no new business or renew existing coverages. Brokers placed many physicians with a nonadmitted malpractice writer which issued a claims-made form and shortly after accepting placement of a substantial number of doctors, became financially unable to continue the business. Those physicians were placed with yet another carrier which, also for financial reasons, could not continue the coverage. For much of this period of time the Alaska State Medical Association was in discussions with an Anchorage Insurance Broker which was able, after much negotiation, to provide a market for malpractice insurance. The program offered, however, was on a claims-made form with no immediate assurance that protection against actions brought over three years after occurrence would be available. The program also lacked any reliable provision for excess coverage.

By January of 1975, it became apparent to the medical community in this State that legislative relief was required. Several factors contributed to this conclusion.

First, throughout the whole country, malpractice carrier insolvency, re-trenching insurance markets, extraordinary rate increases, growing malpractice judgements and rapidly increasing frequency of litigation was precipitating crises and legislative review at the federal level and in all states.

Second, the medical community in Alaska was becoming frustrated by the frequent shifting of markets, the lack of clear and reliable commitments of coverage and rates and misunderstanding about the degree of protection provided by the claims-made form of insurance.

Third, individual medical practitioners were expressing concern over the economic impact of the higher rates and restricted coverage on their own personal estates and making public announcements of discontinuing medical service unless relief was obtained.

Accordingly, the legislature, during the 1975 regular session considered and passed SB 361 which would, if enacted into law, provide for the immediate creation of a Joint Underwriting Association to which all casualty and disability insurers and health care contractors would be required to subscribe and which would be required to provide minimum limits of insurance to all doctors who wished it. On July 2, 1975, the Governor vetoed SB 361 for reasons outlined in the veto message.

Senate Bill 361 and the veto message are attached to this report as Exhibits 1 and 2.

In the veto message the Governor stated that because the problem of meeting the demands of the doctors without severely jeopardizing other important interests was so complex, he would appoint a commission "to develop a ——— thoroughly comprehensive package of legislation that [he planned] to introduce during the next session."

Appointment of Commission

In July, 1975, Governor Hammond appointed a representative group of Alaska citizens to serve on the Commission. The persons appointed were:

Langhorne A. Motley, Juneau, Chairman
Commissioner of Commerce & Economic Development
State of Alaska

Kenneth Atkinson, Esq., Anchorage
Atkinson, Conway, Young, Bell & Gagnon
Attorneys at Law

William bline, D.D.S., Anchorage
Dentist

Clyde Clary, Anchorage
President, Clary Insurance Agency, a division of
Bayley, Martin & Faye

Judy Hopkins, Anchorage
Legislative Representative
League of Women Voters

The Honorable Jalmar Kerttula, Anchorage
State Senator

William Kinn, M.D., Fairbanks
Ophthalmological Surgeon

Robert M. Libbey, Esq., Anchorage
Attorney at Law

Jamie Love, Anchorage
Alaska Public Interest Research Group

Robert Nestel, Anchorage
Risk Manager, Greater Anchorage Area Borough

Theodore M. Pease, Esq., Anchorage
Burr, Pease & Kurtz
Attorneys at Law

Donald Sharp, Anchorage
Vice President, Industrial Indemnity
Company of Alaska

The Honorable Theodore Smith, Anchorage
State Representative

Martin Tirador, Sitka
Administrator, Sitka Community Hospital

Jan Van Dort, Esq., Juneau
Faulkner, Banfield, Doogan & Holmes
Attorneys at Law
Legislative Counsel for American
Mutual Insurance Alliance

Barbara T. Walker, R.N., Duke Bay
Registered Nurse and Legislative Representative
Alaska Nurses Association

Robert Whaley, M.D., Anchorage
Internist, President Elect,
Alaska State Medical Association

Rodnan Wilson, M.D., Anchorage
Internist and immediate past President of the
Alaska State Medical Association

From time to time members of the Commission were unable to attend certain of the meetings and sent alternates. We are grateful for the participation of the following:

Thomas A. Stengl, M.D., Juneau
Physician

Richard Witt, M.D., Anchorage
Physician

Keith McGranahan, D.D.S., Anchorage
Dentist

Donald Chiles, D.D.S., Anchorage
Dentist

Josh Wright, D.D.S., Anchorage
Dentist and former legislator

Geraldine Morrow, D.D.S., Anchorage
Dentist

Thomas S. Redmond, D.D.S., Anchorage
Dentist

Ann Maiorello, R.N., Anchorage
Nurse

Arne Beltz, R.N., Anchorage
Nurse

Donna Brady, Anchorage
Alaska State Hospital Administration

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The Commission was served by a staff consultant,

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and by staff assistants:

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Meetings

The Commission held twenty-four meetings in Anchorage and Juneau and three more meetings are scheduled. The schedule of meetings is attached as Exhibit 3.

All meetings were open to the public and the press.

The work of the Commission represents over 162 hours of meetings a period of 64 days.

Testimony

The Commission took oral testimony from fifty persons whose range of testimony exemplified their diversity of background. The list of witnesses and their special qualifications are listed in Exhibit 4.

In addition, substantial written material was reviewed by the Commission including legislation of other states, proposed legislation from several interested persons and groups, studies, reports, legal opinions, actuarial analyses, statistics and comments. Substantial portions of this material is listed as Exhibit 5.

Each Commission member, the Chairman and staff engaged in frequent deliberations and conferences with other Commission members, other interested persons and groups and shared with the Commission the results of such contacts. As a result of this supplemental activity by the Commission members, valuable information was obtained from the Providence Hospital, Blue Cross, Ad Hoc

groups of doctors including staff surgeons and anesthesiologists at Providence Hospital, insurance companies interested in providing coverage pursuant to the Commission's proposed plan and each of the interest groups which the Commission members represented.

Towards the last days of the Commission's deliberations the Commission conducted two briefing sessions. On September 3, 1975 the Commission presented the proposal to the legislators in conjunction with the meeting of the Western States Conference of Legislators in Anchorage. On September 5, 1975 the Commission presented the proposal to the medical profession at a meeting of doctors at Providence Hospital.

On Wednesday, September 25, 1975, the Commission presented the plan to the public in a widely viewed two hour television presentation over station KAKM, Anchorage. The taped presentation is scheduled for rebroadcast over station KUAC, Fairbanks and station KINY, Juneau.

Quest for an Immediate Solution

From the very beginning of the Commission's work, pressure from certain segments of the medical profession for an immediate solution mounted. Several surgeons and anesthesiologists had ceased performing routine surgery, the Providence Hospital was beginning to suffer from loss of revenue and public concern was growing.

After the first three days of meetings the urgency of the situation was recognized by the Commission and a tentative arrangement was suggested to

encourage the non-practicing doctors to return to work. An interim report to the Governor dated July 30, 1975 was submitted setting forth the sentiment of the Commission at that time. A copy of that report is attached in Exhibit 6.

The following week four more sessions were conducted, and although they were essentially fact finding sessions, collateral efforts by Commission staff led to an agreement with the broker for the Association malpractice insurance programs, which the Commission, including the doctor members, believed ought to temporarily relieve the pressure and permit the doctors to return to work while the Commission continued its study. That agreement is embodied in a letter from the broker attached as Exhibit 7 and was reported to the Governor on August 8, 1975 by a second interim report attached as Exhibit 8.

By August 14, 1975, the date of the Commission's next session, it became clear that the suggested interim solution was not acceptable to the non-practicing surgeons and anesthesiologists. Accordingly, the Commission discontinued any effort to solve the immediate problem and set about to design a solution which it could support as a permanent plan for improving the whole method of controlling, determining and indemnifying medical negligence.

Commission's Approach to the Problem

With the help of the staff consultant, the Commission developed topical outlines for its work which focused the Commission's efforts into an organ-

ized method of analyzing the problem.

It was early recognized that the medical malpractice insurance system involved three principal areas of concern.

First, malpractice, or professional negligence, requires the determination of questions such as defining a standard of due care by the professional, finding whether the services of the professional meet the standards of due care, whether, as a result of failure of the professionals to meet the standard, a person was injured and if so, to what extent, and finally the ultimate determination of whether, as a result of these findings, a money judgement ought to be made against the professional and in favor of the injured person, and, if so, in what amount.

These questions involve complex medical issues and require technical medical determinations, but the questions are resolved by the application of common and statutory law and are resolved according to established legal procedures for determining what allegations and evidence ought to be allowed as accepted fact.

These issues have traditionally been determined in common law civil courts applying the tort law principles of negligence or liability for fault.

If the evident difficulties with the availability of medical malpractice insurance are the result of the rules applied to determine whether an award should be made, or the current methods of determining the factual issues involved, then a change in the legal system would be necessary. A sub-

stantial amount of Commission time was devoted to analyzing the legal system, both as to the substantive rights of an injured person and the liability of an alleged tort-feasor, and as to the procedures and systems by which the facts are determined and the awards made.

The second area of concern was the method for distributing the costs of medical malpractice loss among the classes of persons available to pay the costs.

It became apparent to the Commission, after many hours of testimony, that, once, by error or omission of a medical professional, a person was injured, a loss of measurable amount was established. A decision was required as to who should bear the loss. The decision of how best to shift the burden of loss to the person or class of persons who ought to bear the loss must be deferred until the primary and, of course, more substantive policy question was decided.

To permit no remedies to an injured person does not eliminate the loss; it only implements the policy that the injured person should bear the loss. To permit no change in the tort law and fail to provide physicians with adequate insurance only implements the policy to shift the burden completely to the negligent physician. To create a wholly State funded insurance mechanism only implements the policy that the taxpayers should bear the burden of the loss.

As the Commission proceeded through the multitude of recommendations it received it found that every change in the tort law required the conscious

recognition that the burden of loss was being wholly or partially shifted to a new or different class of persons and the Commission struggled hardest on the equities of who should bear the loss.

Despite the difficulties of reaching a decision on the question, a decision on who should bear the loss was made and the Commission then dealt with the issues of finding the most economical and efficient means of so distributing the loss costs.

State mechanisms, private insurance mechanisms, and systems that utilized features of several different mechanisms were all explored.

Basic to its analysis, however, was the Commission's criteria that the system recommended must have reliability and stability, must be efficient of operation and must have the flexibility to accommodate the growth of the State and the individual concerns of the several different classes of medical professionals using the system.

Finally, the Commission refused to accept the premise that the total costs resulting from the errors or omissions of medical professionals was uncontrollable and reviewed carefully the several causes of loss cost to find and correct abuses.

There are three principal ways in which loss cost can be controlled.

First, the Commission studied the expenses inherent in the system for

determining the liability and damages; more specifically, the costs of the insurancing system, defense costs, legal fees, court system delays, long trials, multiple expert witnesses, and the added burdens to an injured person incurred by reason of an inefficient system.

Second, the Commission studied the amount of total cost because of the frequency and severity of incidents of medical negligence and studied ways in which the cost could be reduced by effective loss control practiced by the hospitals and medical professionals.

Third, the Commission studied the amount of total cost because of the ineptitude of practitioners who cannot be properly disciplined or whose practices cannot be appropriately restricted resulting from inadequacies in the State's licensing and regulatory authority and because of the ineffectiveness of what regulatory authority there is resulting from inadequate budget or staffing of the appropriate agencies.

Although the Commission studied the substance of the matter in its three principal aspects, the legal, the insurance and the medical, or its other three principal aspects, who should bear the cost, how should the costs be shifted and how can the costs be reduced, the Commission also considered the feasibility of its proposals from three aspects. The Commission sought the counsel of the Attorney General and the administration of the State's judicial system to be sure that whatever system was recommended would be constitutional and fit within the existing framework of the executive and judicial branches of State Government.

The Commission also remained in communication with insurance carriers to be

certain that any assumed immediate involvement of the private insurance industry was justified.

Finally, the Commission sought and received the continued guidance of its own legislative members and interested legislators not on the Commission to be sure that the recommendations of the Commission could realistically be expected to pass legislative review.

Criteria for Study

The Commission became clearly convinced that, if the objective of the whole system is to assure availability of appropriate coverage at reasonable rates, the system is not working.

Two principal reasons were determined to be dissuading carriers from providing the coverage, the actuarial uncertainty in the exposure to long tail losses and the rapidly increasing total cost of the system.

Any solution, then, must have, as an ultimate objective, creating appropriate adjustments to the mechanisms for determining distributing and reducing malpractice losses to restore actuarial predictability and to contain total system cost.

II. THE SOLUTION

AN ANALYSIS OF THE LEGAL SYSTEM

The Commission began its study with a review of the listing of malpractice actions in Alaska. Attached as Exhibit 9 is a report compiled by the Alaska State Medical Association and made public during the first days of the Commission deliberations in a feature story in the Anchorage News.

The Commission believes that the report is neither complete nor absolutely accurate, but the Commission does accept the report as being substantially correct, and sufficiently reflective of the magnitude of the problem as to be very useful.

It should be noted that Alaska has not had a high frequency of suits, few if any judgements, and no extraordinary awards. Taking only the past fifteen years' experience, it appears that no significant problem exists in Alaska, yet insurance carriers complained of escalating frequency of litigation and exorbitant awards throughout the rest of the country.

Upon further study two significant facts were determined.

1. Trends in law or judicial practice identified in the other states, particularly the major states, eventually become the law or the practice in Alaska. For example: The Alaska Supreme Court within the last two weeks adopted the rule of comparative

negligence in lieu of contributory negligence only a few months after the California Supreme Court did so by court decision.

2. There is a striking spread of malpractice litigation in the other states and frequent large judgements. The awareness of this phenomena is beginning to manifest a claims consciousness among patients in Alaska which is evident in a recent increased frequency of actually filed or threatened new law suits against Alaska doctors.

For two reasons, then, the Commission found it appropriate and necessary to make changes in the substantive law and procedures.

First, because Alaska would soon be faced with the same frequency and severity problems which are genuinely threatening the system in many of the other states; and, second, many carriers have designated certain tort law reforms as a necessary precondition to underwriting malpractice in a state.

LIMIT OF DISCOVERY PERIOD

One of the most repeated recommendations to the Commission, and the one which has commanded legislative appeal in many other states, is the cutting off of liability after a relatively short time after the date of incident. To understand this phase of the problem, one must remember that even though the law is clear that no action can be filed after a period of two years, the two year period is measured from the date the injured person knew or should have known that he was injured -- not from the date on which the injury was inflicted. In most kinds of injury, such as traffic accidents or property loss, the date of occurrence and discovery of the injury are for the most part simultaneous. In medical negligence cases, however, it is frequently the case that a patient may incur an injury but not become aware of it until many years later. Typical examples are negligent acts during obstetrical procedures not discovered until the child is old enough for the parents or doctor to detect brain or bodily impairment; injury in radiological therapy not discovered until the first symptoms of skin deterioration which may not become noticeable for many years; leaving a sponge, clamp, tool or towel in a surgery patient, which, because it causes no pain, is not discovered until a subsequent surgery, an Xray or later developed pain, none of which may necessarily be experienced for several years after the first surgery. The Commission heard examples of cases discovered as long as seven to twenty years after the date of incident.

When an insurance carrier sells a policy covering all negligent conduct of the physician occurring during the policy period, the carrier must respond

to and defend and indemnify whenever those cases are legally brought. Thus, carriers are exposed to liability for unknown losses for upwards of twenty years when they issue a policy to a health care provider. This actually incurred liability with respect to policies issued many years ago and the recognized need to post adequate reserves for the future contingencies on current policies has been the principal reason for the large rate increases in malpractice insurance and the reason some relief has been sought in a new policy form which covers only claims made during the policy period instead of claims incurred during the policy period.

The suggestion of strictly limiting the period of discovery is made to reduce the otherwise unlimited exposure or tail exposure to the carriers or insureds.

The Commission found that a limit on the discovery period is a very necessary part of any meaningful program and has included this as an integral part of its proposal; but for two reasons, the Commission rejected making the limit an absolute preclusion of patients' rights.

First, the Commission did not believe it equitable to shift to the injured patient any segment of loss because, for some reason beyond the patient's control, he could not discover the fact of loss until after the arbitrary date, and second, the Commission was concerned about real constitutional questions raised by such an absolute cut-off of rights.

To harmonize the desire to reduce the contingent exposure of the physicians without arbitrarily terminating legitimate rights, the Commission made the following recommendation:

Recommendation: [No. 1]

The liability of the health care provider should terminate three years after occurrence (two years statute of limitations and one year limit on discovery). Any reported cases after the third year ought to become the responsibility of a special fund and not the liability of the health care provider.

Reducing Ultimate Awards

The Commission studied several proposals which, would cut the total cost of the system by reducing the size of the awards.

The advocates of mandatorily limited awards cited two identifiable impacts. First, it is believed limited awards would have the obvious impact of reducing the now unlimited exposures on legitimately filed actions. The Commission reviewed limits on total awards, limits on general damages, scheduled benefits and several variations of each of these concepts. It is true that any such proposal has the potential for reducing exposure, but the amount of the reduction is speculative at best. By the same token, there was concern expressed that any schedule of benefits or arbitrary limits on awards would become, in practice, minimums rather than maximums and defeat the purpose of the proposal.

More importantly, however, it was recognized that there existed examples where a seriously injured person would suffer extreme loss that would only

be adequately compensated by an award that might exceed any limit prescribed.

The second predicted impact is that by eliminating the portion of the awards which is in excess of the patient's actual out-of-pocket losses, the incentive of patients and the incentive of lawyers to bring suit would be eliminated. The limitation of the award might have some impact on a lawyer's willingness to take a malpractice case, however, the Commission was unwilling to place arbitrary roadblocks that would preclude the legitimate claimant from having recourse to counsel and the courts for redress.

The Commission, thus, rejected arbitrary limits on awards.

On the other hand, it was discovered that frequently a person would be allowed an award predicated upon out-of-pocket losses which, in fact, were wholly or partially compensated from other or collateral sources. The result is potential for double recovery, and the presentation of the additional complications of subrogation and collateral source liens.

In determining how to approach eliminating the double recovery or subrogation problem, it was determined that overall cost would be reduced if the patient was required to first utilize the first party coverages to which he is entitled, which are much more efficient forms of distribution than allowing the full measure of damages in an expensive third party proceeding, and then deny the patient the right of alleging, in the malpractice action, the items of damage which were compensated by the collateral sources.