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Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes

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Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes

Roselle L. Wissler* and Bob Dauber**

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I. INTRODUCTION

Compulsory, non-binding arbitration has been a component of the civil court system in a number of jurisdictions for several decades.¹ These arbitration pro-

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1. Eighteen states and three federal districts currently have compulsory court-connected arbitration in their general jurisdiction trial courts. These courts include: Arizona (ARIZ. REV. STAT. ANN. § 12-133 (2006); ARIZ. R. CIV. P. 72-76), California (CAL. CIV. PROC. CODE § 1141.10-28 (2007); CAL. R. CT. R. 3.810- 3.878), Connecticut (CONN. GEN. STAT. § 52-549u-aa (2007); CT. R. SUPERIOR CT. CIV. § 23-60), Delaware (DEL. CT. C.P.R. 16.1), District of Columbia (D.C. R. CIV. ARB. R. I-XVI), Florida (FLA. STAT. § 44.103-108 (2007); F.S.A. ARB. R. 11.010-130), Georgia (FULTON CO. R. 1000), Hawaii (HAW. REV. STAT. § 601-20 (2006); HAW. ST. CIR. CT. ARB. R. 1-28), Illinois (ILL. SUP. CT. R. 86-95), Kentucky (ULCR Add. A, Arbitration Rules (Boone, Campbell, Gallatin, & Kenton Counties)), Minnesota (MINN. STAT. § 484.73-76 (2006); MINN. GEN. R. PRAC. DIST. CT. R. 114), Nevada (NEV. REV. STAT. § 38.250-259 (2005); NEV. ARB. R. 1-24), New Jersey (N.J. STAT. ANN. § 2A:23A-20 (West 1997); N.J.R.C. R. 4:21A-1), New Mexico (N.M. STAT. § LR2-601-603 & LR3-701-710), Ohio (OH. ST. R. SUP. R. 15; CUYAHOGA CO. R. 29; STARK CO. R. 16), Oregon (OR. REV. STAT. §

grams generally have the same basic structure: cases in which the amount in controversy is under the prescribed jurisdictional limit must be submitted to a neutral attorney for adjudication under relaxed rules of evidence and procedure.² Any party may appeal the arbitrator's award for a trial *de novo*; absent an appeal, the arbitrator's decision is entered as the judgment of record in the case. The goals of most court-connected arbitration programs include resolving cases faster, reducing the costs of resolution for the court and for litigants, reducing the caseload pending before judges and correspondingly expediting the disposition of cases that remain in the traditional litigation process, and providing a simplified hearing process that litigants and lawyers find to be fair and satisfactory.³

A number of empirical studies have examined whether arbitration programs achieved their goals. Most of these studies were conducted in the 1980s and early 1990s, and most examined the first year, or first several years, of the arbitration program's operation.⁴ This research tended to find: somewhat faster resolution for arbitration cases, but not for the remaining civil caseload; no reduction in litigants' costs; an inconsistent picture with regard to whether or not the use of court pretrial and trial resources was reduced; and that litigants and lawyers generally regarded the arbitration process and outcome favorably, but not necessarily more

36.400-36.425 (2005); UTCR, Ch. 13), Pennsylvania (42 PA. CONS. STAT. § 7361, PA. R. CIV. P. 1301-13), Rhode Island (R.I. GEN. LAWS § 8-6-5 (2006); R.I. R. ARB.), Washington (WASH. REV. CODE 7.06.010-080 (2005); Sup. Ct. Mandatory Arb. Rules and Local Rules), and the Federal District Courts of New Jersey (L.R. 201.1), Eastern District of New York (L.R. 83.10), and Eastern District of Pennsylvania (L.R. 53.2).

No new compulsory court-connected arbitration programs in general jurisdiction courts have been adopted in the past decade, and at least one state (COLO. REV. STAT. §§ 13-22-401-411) and seven federal districts have abandoned their programs. Personal communication with Donna Stienstra, Senior Researcher, Federal Judicial Center (July 6, 2005).

2. See *infra* Section II (other aspects of program structure).

3. SUSAN KEILITZ, *Court-Annexed Arbitration*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 35, 37 (Susan Keilitz ed., 1994).

4. See JOHN BARKAI & GENE KASSEBAUM, HAWAII'S COURT-ANNEXED ARBITRATION PROGRAM FINAL EVALUATION REPORT 2, 4 (1992); Craig Boersema et al., *State Court-Annexed Arbitration: What Do Attorneys Think?* 75 JUDICATURE 28 (1991); DAVID L. BRYANT, JUDICIAL ARBITRATION IN CALIFORNIA: AN UPDATE 2 (1989); LLOYD BURTON & JOHN MCIVER, THE IMPACT OF COURT-ANNEXED ARBITRATION ON THE ADMINISTRATION OF CIVIL JUSTICE IN COLORADO 8 (1990); JOHN N. COLLINS & NANCY L. FORD, ILLINOIS SUPREME COURT-WINNEBAGO COUNTY, MANDATORY COURT-ANNEXED ARBITRATION PROJECT: FINAL EVALUATION REPORT 35 (1989); JOHN N. COLLINS ET AL., ILLINOIS SUPREME COURT-LAKE COUNTY, MANDATORY COURT-ANNEXED ARBITRATION PROJECT: FINAL EVALUATION REPORT 3 (1991) [hereinafter COLLINS ET AL., LAKE COUNTY]; JOHN N. COLLINS ET AL., ILLINOIS SUPREME COURT-DUPAGE COUNTY, MANDATORY COURT-ANNEXED ARBITRATION PROJECT: FINAL EVALUATION REPORT 3 (1992) [hereinafter COLLINS ET AL., DUPAGE COUNTY]; JOHN S. DEWITT ET AL., THE IMPACT OF COURT-ANNEXED ARBITRATION ON THE PACE, COST, AND QUALITY OF CIVIL JUSTICE IN CLARK COUNTY, NEVADA *i* (1994); Roger A. Hanson & Susan Keilitz, *Arbitration and Case Processing Time: Lessons From Fulton County*, 14 JUST. SYS. J. 203, 208 (1991); JUDICIAL COUNCIL OF CALIFORNIA, REPORT AND RECOMMENDATION ON EFFECTIVENESS OF JUDICIAL ARBITRATION (1983), reprinted in PATRICIA A. EBENER & DONNA R. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE A-42 (1985) [hereinafter JUDICIAL COUNCIL]; E. ALLAN LIND, ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT (1990); E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS vii (1983); Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 231 (1991); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS *i* (1990); JANICE A. ROEHL ET AL., EVALUATION OF NEW JERSEY'S EXPANDED ARBITRATION PROGRAM: FINAL REPORT 1 (1991).

favorably than traditional litigation.⁵ Would current studies of arbitration find similar results, or have arbitration programs and the court and legal practice cultures in which they operate changed in ways that would alter the impact of arbitration? Would studies of more established programs find arbitration to be more effective than studies of the “start-up” phase of programs?⁶

Arizona has had compulsory arbitration in its general jurisdiction trial court, the Arizona Superior Court, for over three decades.⁷ In 2004, the Supreme Court of Arizona commissioned a study to examine arbitration’s efficiency and effectiveness, as well as user satisfaction with the process. This study provides the opportunity to revisit issues regarding the performance of court-connected arbitration in the context of a long-standing program.

The study, conducted by the present authors, included the following four components: (1) a review of the statewide structure of arbitration in Arizona and how individual counties administered their arbitration programs; (2) an examination of arbitration’s performance, including the arbitration caseload, the progression of cases through the system, arbitration’s potential impact on court resources, and the timeliness of case processing and disposition; (3) a survey of Arizona lawyers to obtain their views of the existing program and its various components; and (4) a review of the structure, performance, and perceptions of court-connected arbitration in other jurisdictions. The study findings corresponding to the first three of these components are reported, respectively, in Sections II through IV; comparisons to other jurisdictions are provided throughout those sections.

After the study’s completion, the Supreme Court of Arizona appointed the Committee on Compulsory Arbitration to review the study’s findings and explore possible modifications to court-connected arbitration. The Committee discussed a number of issues and developed a set of proposed changes to both the Arbitration Rules and the authorizing statute, presented in Section V. The Committee’s recommendations culminated in a Rule Change Petition currently pending before the Arizona Supreme Court.

II. THE STRUCTURE OF COURT-CONNECTED ARBITRATION

The Supreme Court of Arizona has recognized that the purpose of arbitration in superior court is “to provide for the efficient and inexpensive handling of small claims.”⁸ By reducing the number of cases pending before judges, court-

5. See *infra* Sections III & IV (discussing the research findings of the studies cited *supra*, note 4).

6. See CAROL H. WEISS, EVALUATION RESEARCH: METHODS OF ASSESSING PROGRAM EFFECTIVENESS 93-98, 107-08 (1972) (noting inevitable changes in program operation and its social context over time and the accompanying difficulties of program evaluation).

7. The statute authorizing court-connected arbitration, ARIZ. REV. STAT. ANN. § 12-133, was originally enacted in 1971. See Historical and Statutory Notes to ARIZ. REV. STAT. ANN. § 12-133 (2004). To implement this statute, the Supreme Court of Arizona adopted the Uniform Rules of Procedure for Arbitration in 1974. As part of the effort to consolidate various sets of procedural rules, those rules were blended into the Arizona Rules of Civil Procedure in 2000, becoming ARIZ. R. CIV. P. 72-76. See STATE BAR COMMITTEE NOTE TO 2000 PROMULGATION AND AMENDMENTS, ARIZ. R. CIV. P. 72.

8. ARIZ. R. CIV. P. 74(a); see also *Martinez v. Binsfield*, 999 P.2d 810, 811 (Ariz. 2000) (“Relatively small claims are subject to compulsory arbitration because it is thought that something short of a full-blown adversary proceeding is a more efficient and cost-effective way of resolving such disputes.”); *Lane v. City of Tempe*, 44 P.3d 986, 988 (Ariz. 2002) (“the primary goal of arbitration [is] a reduction of costs and delay associated with litigating smaller controversies.”). Amendments to the

connected arbitration also is intended to expedite the disposition of civil cases that remain in the traditional litigation process.⁹ Court-connected arbitration in Arizona has the same general structure statewide, based on the authorizing statute and the Arizona Rules of Civil Procedure. The superior court in each county, however, may decide whether to provide arbitration¹⁰ and what the jurisdictional limit will be.¹¹ The counties further differ in the structure and administration of their programs, such as when cases are assigned to arbitration and how arbitrators are selected and assigned to cases.

In this section, we describe the statewide structure of court-connected arbitration as well as the key differences among the counties in program administration. This description is based on the counties' local rules of practice, supplemented by information provided by judges and court administrators.¹² Throughout, we note how the structure of Arizona's programs compares to that of compulsory, court-connected arbitration programs in other jurisdictions.¹³

All civil cases seeking only a money judgment¹⁴ in an amount below the jurisdictional limit¹⁵ are automatically assigned to arbitration.¹⁶ Statewide, the jurisdictional limit for court-connected arbitration may not exceed \$50,000.¹⁷ Only

rules governing arbitration in 1990 and 1991, resulting in large part from the work of the Supreme Court's 1990 Committee to Study Civil Litigation Abuse, Cost and Delay (also known as "the Zlaket Committee"), were designed to address concerns about cost and delay in arbitration. See Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 14 (1993).

9. See REPORT OF THE ARIZONA SUPREME COURT COMMISSION ON THE COURTS, 1989 § 4.2, at 35.

10. ARIZ. R. CIV. P. 72(a).

11. ARIZ. REV. STAT. ANN. § 12-133(A)(1) (2006); ARIZ. R. CIV. P. 72(a).

12. Court personnel in most counties completed a questionnaire about the arbitration program in their court; in several courts, judges and court administrators were interviewed by telephone. Information was not received from Apache County and was not sought from the two counties that did not have an arbitration program. See *infra* note 19. The authors thank all those who provided information.

13. The structure of programs in most other states, as described here, is based on statewide statutes and court rules. See *supra* note 1. As in Arizona, however, there may be local variation in the application and enforcement of those statewide rules.

14. ARIZ. R. CIV. P. 72(b)(1). Programs in most other jurisdictions also exclude cases that seek non-monetary, injunctive, or other equitable relief. Programs in a few states (e.g., Hawaii) restrict arbitration to specific subject matters, such as tort.

15. ARIZ. R. CIV. P. 72(b)(2). The plaintiff is required to file a certificate with the complaint to advise the court whether the case is or is not subject to compulsory arbitration. The defendant is required to file a certificate with the answer to indicate agreement or disagreement with the plaintiff's certification. ARIZ. R. CIV. P. 72(c). Counties that assign cases to arbitration after the motion to set and certificate of readiness for trial [hereinafter motion to set for trial] is filed rely on the parties' certification of arbitrability that is part of that motion rather than the complaint. See *infra* note 21. If the parties disagree about arbitrability, the issue is decided by a judge. ARIZ. R. CIV. P. 72(e)(3).

16. Parties may opt out of compulsory arbitration if they stipulate to participation in a different alternative dispute resolution (ADR) proceeding approved by the court or for other good cause shown. ARIZ. R. CIV. P. 72(d); ARIZ. REV. STAT. ANN. § 12-133(B) (2006). Programs in several other jurisdictions (e.g., Minnesota, Nevada & Oregon) also allow parties to bypass court-connected arbitration by agreeing to participate in some other alternative dispute resolution process. Parties in Arizona may also opt *into* arbitration by stipulation, whether or not suit has been filed. ARIZ. R. CIV. P. 72(c); ARIZ. REV. STAT. ANN. § 12-133(D) (2006).

17. ARIZ. REV. STAT. ANN. § 12-133(A) (2006). Arizona's jurisdictional limit is in the middle of the range of maximum jurisdictional limits established by other states: five states have the same limit, five states have a lower limit (ranging from \$20,000 to \$40,000), and four states have a higher limit (ranging from \$100,000 to \$150,000). All federal district court arbitration programs have a jurisdictional limit of \$150,000. Several programs have no express dollar limitation prescribed by statute or court rule.

four counties have adopted that limit;¹⁸ the rest have a lower limit.¹⁹ The counties also differ in when they assign cases to arbitration: six counties assign cases to arbitration shortly after the answer has been filed,²⁰ four counties assign cases to arbitration only after the motion to set the case for trial has been filed,²¹ and two counties assign cases at intermediate points.²²

Each superior court is required to maintain a list of arbitrators that may include all residents of the county who have been active members of the State Bar of Arizona²³ for at least four years,²⁴ plus other members of the Bar who have agreed to serve as arbitrators in that county.²⁵ In most counties, virtually all law-

18. See Cochise County L.R. 11(a); Coconino County L.R. 17; Maricopa County L.R. 3.10(a); Pima County L.R. 3.9.

19. Eight counties, including Navajo County, have a jurisdictional limit between \$25,000 and \$40,000. See Gila County L.R. 13; Graham County L.R. 8; LaPaz County L.R. 10; Mohave County C.V. 7; Pinal L.R. 2.20; Yavapai County L.R. 10.3; Yuma L.R. 10. One county has a \$10,000 limit. Apache County L.R. 8. Two counties have set the arbitration jurisdictional limit at \$1,000. See Greenlee County L.R. 7; Santa Cruz County L.R. 5. Because cases below \$1,000 are not filed in the superior court, these latter two counties effectively have no arbitration program. Accordingly, these two counties are not included in the discussion *infra* of the structure or performance of arbitration.

20. Graham, LaPaz, Maricopa, Mohave, Pinal & Yuma Counties. The answer must be filed within twenty days after the summons and complaint are served, or within sixty days if formal service has been timely waived. See ARIZ. R. CIV. P. 12(a)(1). Programs in most other jurisdictions that specify in their statutes or court rules the time of assignment to arbitration also assign cases after the answer is filed.

21. Cochise, Gila, Navajo & Pima Counties. Whether the parties are required to certify as part of the motion to set for trial that discovery is near completion depends on the county. The motion to set for trial could be filed as late as nine or more months after the commencement of the case and after discovery has largely been completed. See ARIZ. R. CIV. P. 38.1.

22. In Coconino County, within sixty days after the answer, the judge conducts a case management conference at which ADR routinely is discussed. If the case is below the jurisdictional limit and the parties have not agreed on another form of ADR, the judge assigns the case to arbitration at that time. In Yavapai County, the ADR Coordinator assigns cases to arbitration based on information contained in the Joint ADR Statements, which are to be filed within 120 days after the answer. See ARIZ. R. CIV. P. 16 (g)(2).

23. Programs in most other jurisdictions also require arbitrators to be licensed lawyers or retired judges; only two programs (Hawaii & Nevada) allow non-lawyers to be on the arbitrator roster and, thus, available for assignment to cases by the court. However, Arizona and several other jurisdictions permit parties, upon agreement, to use a non-lawyer arbitrator. See, e.g., ARIZ. R. CIV. P. 73(a); California, Delaware, Oregon & Washington.

24. ARIZ. R. CIV. P. 73(b)(1). Programs in most other jurisdictions also require arbitrators to have a certain level of legal experience by specifying a minimum number of years, typically five, of licensure or active law practice. Programs in some jurisdictions (e.g., Connecticut, District of Columbia, & Hawaii) additionally require that arbitrators have litigation experience.

25. ARIZ. R. CIV. P. 73(b)(2). This provision of the Rule, authorizing a superior court to require lawyers to serve as arbitrators, appears to be at odds with ARIZ. REV. STAT. ANN. § 12-133(c) (2002), which provides that "the court shall maintain a list of qualified persons within its jurisdiction *who have agreed to serve* as arbitrators, subject to the right of each person to refuse to serve in a particular assigned case . . ." (emphasis added). The question of whether the Court can require lawyers to serve as arbitrators, in light of this conflict with the statute, is being litigated in federal court, on remand from the Ninth Circuit. See *Scheehle v. Justices of Supreme Ct.*, 315 F.3d 1191 (9th Cir. 2003). In October 2005, responding to a question certified to it by the district court, the Supreme Court of Arizona held that, even though ARIZ. REV. STAT. ANN. § 12-133 does not authorize mandatory service, the Court has the inherent power to require lawyers to serve as arbitrators based on its exclusive authority to regulate the practice of law. *Scheehle v. Justices of Supreme Ct.*, 120 P.3d 1092 (ARIZ. 2005). Only two other jurisdictions (Delaware & New Mexico) permit the court to require attorneys to serve as arbitrators.

yers with the requisite years of experience are placed on the list of arbitrators,²⁶ and arbitrator service is mandatory for lawyers on the list.²⁷ The remaining counties rely primarily on lawyers who have agreed to serve.²⁸ The arbitrator is empowered to make most legal rulings, including rulings on discovery and dispositive motions.²⁹ None of the courts require or provide training for arbitrators.³⁰ Arbitrator compensation is set at “a reasonable sum, not to exceed seventy-five dollars” for each hearing day, paid by the county from its general revenues.³¹

In appointing an arbitrator in a case,³² most counties randomly select an arbitrator from their list.³³ Arbitrators on the list “may be designated as to the area of concentration, specialty or expertise,”³⁴ but only a few counties track that information and randomly select an arbitrator from among those with the relevant substan-

26. These include Gila, Graham, La Paz, Maricopa, Mohave, Yavapai & Yuma Counties. There are some categories of exclusion from the requirement of being on the arbitrator list, which vary across the counties but typically include government lawyers. In Yavapai County, although all attorneys are on the list, a single volunteer arbitrates most cases.

27. Statewide, an arbitrator on the list may be excused from serving in a particular case due to a conflict of interest or for other good cause shown, or if the arbitrator has already ruled in two contested arbitration hearings during that calendar year. ARIZ. R. CIV. P. 73(e).

28. These include Cochise, Coconino, Navajo & Pinal Counties. Pima County is somewhat of a hybrid: the arbitrator list consists of those bar members with four or more years experience who have appeared as counsel in a civil case in superior court or who have responded to a solicitation by the court. Lawyers in Pima County may have their names removed from the list upon request, although they are discouraged from doing so, and many appear to be under the impression that service is mandatory.

29. ARIZ. R. CIV. P. 74(a). Several jurisdictions also empower arbitrators to make most legal rulings. See, e.g., District of Columbia, Hawaii, New Jersey & Oregon. Other jurisdictions, however, specify that dispositive motions shall be decided by the court. See, e.g., Delaware, Nevada, Eastern District of New York, Eastern District of Pennsylvania & Washington.

30. Approximately half of the programs in other jurisdictions require or provide training for arbitrators, typically in the form of a one-day workshop. See, e.g., Hanson & Keilitz, *supra* note 4, at 205-06; BARKAI & KASSEBAUM, *supra* note 4, at 28 n.26; MINN. GEN. R. PRAC. 114.13b; Sophia I. Gatowski et al., *Court-Annexed Arbitration in Clark County, Nevada: An Evaluation of Its Impact on the Pace, Cost, and Quality of Civil Justice*, 18 JUSTICE. SYS. J. 287, 289-90 (1996).

31. ARIZ. REV. STAT. ANN. § 12-133(G) (2002); ARIZ. R. CIV. P. 75(d). Oral arguments on a dispositive motion count as a hearing. *Id.* Although the arbitrators' fees are subject to local rule, all counties have adopted the fee set by the statute. Court administrators reported that Maricopa and Pima Counties, respectively, paid approximately \$40,000 and \$20,000 in arbitrator compensation in 2003. Programs in most other jurisdictions that specify the amount of compensation in their statutes or court rules also pay the arbitrator a flat fee per case or per day; none have lower fees, and most have higher fees, than does Arizona. The fee is between \$75 and \$150 in approximately half of the jurisdictions and between \$200 and \$350 in the other half. A few programs (Delaware & Nevada) pay an hourly rate of \$100 or \$150. A slight majority of programs in other state courts require the litigants to pay the arbitrator's fee; in the rest of the state programs and all federal court programs, the court pays the arbitrator's fee. State court programs that require the parties to pay the arbitrator's fee tend to have higher rates of compensation than programs in which the court pays the fee.

32. In most counties, the court provides the parties the name of a single arbitrator. The court in several counties, however, provides the parties with the names of several arbitrators, allows each party to strike one or two names from the list, and then assigns an arbitrator from the remaining names. Although a panel of three arbitrators is permitted, all counties use a single arbitrator. See ARIZ. REV. STAT. ANN. § 12-133(C) (2002). Programs in most other jurisdictions also appoint a single arbitrator, but a few use a panel of three arbitrators. See, e.g., Georgia & Eastern District of Pennsylvania.

33. ARIZ. R. CIV. P. 73(c)(1).

34. *Id.*

tive expertise.³⁵ Within ten days of being notified of the assigned arbitrator, each party may exercise one peremptory strike.³⁶

Ten days before the arbitration hearing, counsel are required to submit a joint, written, pre-hearing statement to the arbitrator that identifies the nature of the claim and lists each party's witnesses and exhibits.³⁷ Most hearings take place in the arbitrator's office, although arbitrators may, upon request, use court facilities for arbitration hearings.³⁸ While the rules of evidence apply at arbitration hearings, many of the foundational requirements for the admissibility of documentary evidence are relaxed.³⁹ Failure of a party to appear at an arbitration hearing or to participate in good faith, absent a showing of good cause, constitutes a waiver of the right to appeal.⁴⁰

The arbitrator is responsible for scheduling the hearing, which is to be held not less than 60 days nor more than 120 days after his or her appointment.⁴¹ The arbitrator may shorten or extend the time period for the hearing, but may not de-

35. Mohave, Pima, Pinal & Yavapai Counties. In Pima County, for example, arbitrators are asked to designate their area of practice as tort motor vehicle, tort non-motor vehicle, contract, or other. Arbitrators who select one of the first three categories are assigned to cases in their respective areas; those who choose "other" are assigned to tort motor vehicle cases. Although Rule 13 of the Local Rules of Practice of the Superior Court in Gila County specifies that assignment of arbitrators shall be within the expressed areas of expertise of the attorneys, court staff indicate that this is not done. Programs in most other jurisdictions also do not require lawyers to have experience in the specific subject area in which they will serve as arbitrators, but a few do. *See, e.g., Delaware & New Jersey*. This practice in most court-connected arbitration programs is in sharp contrast to the practice in private arbitration, where the arbitrator needs to have substantive as well as process expertise in order to be considered "competent and qualified." *See Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 988-90 (2002) (listing the *Principles for ADR Provider Organizations* developed by the CPR-Georgetown Commission on Ethics and Standards in ADR).

36. ARIZ. R. CIV. P. 73(c)(2). Parties may also move to disqualify an arbitrator for cause. ARIZ. R. CIV. P. 73(e)(2). If an arbitrator is stricken or excused, a new arbitrator is randomly selected from the list. ARIZ. R. CIV. P. 73(e)(4).

37. ARIZ. R. CIV. P. 74(e). Programs in several other jurisdictions also require parties to file pre-hearing statements with the arbitrator. *See, e.g., Hawaii, Nevada, New Jersey & Washington*. *But see Delaware* (prohibiting the filing of pre-hearing statements, except upon request of the arbitrator).

38. Arbitration hearings are held in the courthouse in several other jurisdictions. *See, e.g., Connecticut, Eastern District of New York, New Jersey & Eastern District of Pennsylvania*.

39. ARIZ. R. CIV. P. 74(f), (g). Programs in most other jurisdictions also allow informal presentations of the parties' case at the hearing or direct that the rules of evidence should be liberally construed, particularly to allow certain documentary evidence to be admitted without rigid foundational requirements. A few programs try to further simplify and streamline the process by encouraging the parties to limit discovery voluntarily, by permitting the arbitrator to limit discovery, or by strictly limiting the amount of, or time available for, discovery. *See, e.g., ARIZ. R. CIV. P. 74(a); District of Columbia, Nevada, New Mexico & Washington*.

40. ARIZ. R. CIV. P. 74(k). Programs in some other jurisdictions also require that the attorneys and litigants (or persons with settlement authority) attend the hearing, and some impose a "good faith" participation requirement; violations may result in monetary sanctions, waiver of the party's right to trial de novo, or both. *See, e.g., Hawaii, Illinois, Nevada & Eastern District of Pennsylvania*.

41. ARIZ. R. CIV. P. 74(b). Programs in most other jurisdictions also specify a deadline by which the arbitration hearing is to take place. As in Arizona, most programs use the appointment of the arbitrator as the event triggering the deadline and typically require the hearing to be conducted within 45 to 120 days of appointment. However, because the length of time from case filing to arbitrator appointment is different in different courts, this can translate into the hearing taking place at substantially different points in the litigation process in different courts. Other programs use the complaint, service, or answer date as the trigger for the hearing deadline, with the deadline being four to twelve months thereafter. *See, e.g., Georgia, Hawaii, Illinois & Eastern District of New York*.

cide motions to continue cases on the inactive calendar.⁴² Most of the courts, however, do not systematically monitor the progression of the case or enforce compliance with the hearing deadline.⁴³ The arbitrator is required to render a decision within 10 days after the completion of the hearing⁴⁴ and must file an award or other final disposition with the court within 145 days after her or his appointment as arbitrator.⁴⁵ Although the case is to be referred to the judge “for appropriate action” if the award deadline is not met,⁴⁶ none of the courts routinely monitor or enforce that deadline. Absent an appeal,⁴⁷ the arbitrator’s award becomes binding as a judgment of the superior court.

Any party may appeal the arbitrator’s decision for a trial de novo in superior court by filing an “Appeal from Arbitration and Motion to Set for Trial” within 20 days after the filing of the arbitration award.⁴⁸ The appellant must deposit a sum equal to one hearing day’s compensation of the arbitrator.⁴⁹ If the judgment at the trial de novo is not at least 25% more favorable than the arbitration award, the appellant is required to reimburse the county for compensation paid to the arbitrator and to pay the costs, reasonable attorneys’ fees and expert witness fees incurred by the appellee in connection with the trial de novo.⁵⁰

42. ARIZ. R. CIV. P. 74(a). In Pima County, however, motions to continue the case beyond the 120-day deadline are decided by the arbitration judge rather than by the arbitrator. All cases, including those assigned to arbitration, are to be placed on the inactive calendar within nine months after the complaint is filed, and are to be dismissed with prejudice within two months thereafter, if a motion to set for trial has not been filed. *See* ARIZ. R. CIV. P. 38.1(d); *Martinez v. Binsfield*, 999 P.2d 810 (Ariz. 2000). Programs in some other jurisdictions limit the number of continuances or the amount of time the hearing may be continued. *See, e.g.*, District of Columbia, New Jersey & Eastern District of New York.

43. Pima County is the sole exception: If the case is still pending in arbitration ninety days after the arbitrator’s appointment, the court sends the arbitrator a request to submit a status report.

44. ARIZ. R. CIV. P. 75(a). Within ten days of receiving notice of the arbitrator’s decision, either party may submit a proposed form of award, including a request for attorneys’ fees and costs. The opposing party has five days to file objections, and the arbitrator must file an award and final disposition within ten days thereafter. *Id.* Thus, the arbitrator is to file the award or other final disposition within thirty-five days of the hearing. Programs in most other jurisdictions require the award to be filed within five to thirty days of the hearing.

45. ARIZ. R. CIV. P. 75(b). Programs in a few other jurisdictions also specify a deadline between arbitrator appointment and the filing of the award, typically from 120 to 180 days. *See, e.g.*, Nevada & New Mexico.

46. ARIZ. R. CIV. P. 75(b).

47. ARIZ. R. CIV. P. 75(c); ARIZ. REV. STAT. ANN. § 12-133(E) (2006). In most other jurisdictions, the arbitration award is automatically converted to a judgment if no party seeks a trial de novo. In three jurisdictions, however, the award is entered as a judgment only upon motion of the prevailing party. *See* Delaware, Illinois & New Jersey.

48. ARIZ. R. CIV. P. 76(a); ARIZ. REV. STAT. ANN. § 12-133(H) (2006). In all other jurisdictions, litigants also retain their right to a trial de novo if they wish to reject the arbitrator’s award. In most jurisdictions, the appeal must be filed within twenty to thirty days after the award is filed.

49. ARIZ. R. CIV. P. 76(b); ARIZ. REV. STAT. ANN. § 12-133(I) (2006). Programs in about half of the other jurisdictions also require a deposit or filing fee with the request for trial de novo, typically between \$100 and \$200 or equal to the arbitrator’s fee.

50. ARIZ. R. CIV. P. 76(f); ARIZ. REV. STAT. ANN. § 12-133(I) (2006). The court may waive these payments in cases of economic hardship. *Id.* Programs in most other jurisdictions also have an “appeal disincentive” (most commonly involving the forfeiture of the deposit or filing fee, or the assessment of the opposing party’s costs and fees, or both) if the trial outcome is not more favorable than the arbitrator’s award. Some programs require the appellant to improve its position by a specified percentage at trial, ranging from ten percent to thirty percent; others simply require a “more favorable” result in

III. ARBITRATION'S PERFORMANCE: CASELOAD, CASE DISPOSITION, AND TIMELINESS

This section examines the arbitration caseload and how cases progress through, and are concluded in, arbitration to provide a basic picture of the performance of the arbitration program. In addition, this examination provides a general indication of the resources used within the arbitration program, as well as arbitration's potential impact on the court's workload and resources. This section also examines the timeliness of case processing and disposition in arbitration to assess whether the program's goal of efficient case resolution is being met. These issues were addressed using data from a number of sources, including the courts' 2003 reports to the Administrative Office of the Courts,⁵¹ additional information provided by the courts,⁵² and case docket information from random samples of cases in Maricopa and Pima Counties.⁵³

A. Arbitration Caseload, Disposition, and Impact on Court Resources

To ascertain the size of the full arbitration caseload, one would need to determine the number of cases subject to arbitration—that is, cases the plaintiff certified at case filing as being subject to compulsory arbitration. Most of the courts, however, recorded and reported statistics on “arbitration cases” only after cases had been assigned to arbitration,⁵⁴ which was at some point after the answer was

order to recoup the filing fee or avoid liability for the opposing party's fees and costs. *See, e.g.*, California, Delaware, Hawaii, New Jersey, New Mexico & Eastern District of New York.

51. *See* Ariz. Sup. Ct., Ct. Programs Unit, Research and Statistics, FY2003 Data Report, Superior Court Case Activity [hereinafter FY2003 Data Report] (reporting superior court case activity for the individual counties), available at http://www.supreme.state.az.us/stats/Volume1_2003/Superior_Court/All.pdf. For most counties, the patterns reported here for 2003 were similar to those in 2002 and 2004. *See* Ariz. Sup. Ct., Ct. Programs Unit, Research and Statistics, FY2002 Data Report, Superior Court Case Activity [hereinafter FY2002 Data Report], available at http://www.supreme.state.az.us/stats/Volume1_2002/Superior_Court/All.pdf; Ariz. Sup. Ct., Ct. Programs Unit, Research and Statistics, FY2004 Data Report, Superior Court Case Activity, [hereinafter FY2004 Data Report], available at http://www.supreme.state.az.us/stats/Volume1_2004/Superior_Court/All.pdf.

52. Because the *Data Reports* showed no cases assigned to arbitration in some courts that in fact had an arbitration caseload, we requested the courts provide additional information from their computerized databases, records and reports. The authors thank the numerous court personnel who provided data, information and assistance.

53. Because the courts did not record or could not readily retrieve certain information, we examined the docket entries in individual cases in Maricopa and Pima Counties. Case docket information was obtained for different randomly selected samples of cases, described *infra*, to address different questions and was obtained only in these two counties; to examine the docket information in all cases or in all counties would have been prohibitive. Maricopa County's civil caseload represented 72%, and Pima County's civil caseload represented 14%, of the statewide civil caseload. *See infra* Appendix A. Subsequent to the collection of data for this study, changes were made in the configuration and structure of the Maricopa County Superior Court's civil database so that information previously not accessible could be obtained. The authors thank Katherine Winder, Anne Hardwick, and Susan Minchuk for their assistance in recording the docket information.

54. The courts reported monthly to the Administrative Office of the Courts the number of “cases filed for arbitration,” defined as the “number of cases assigned to arbitration during the month.” *See* ARIZONA SUPREME COURT ADMINISTRATIVE OFFICE OF THE COURTS, RESEARCH/STATISTICS UNIT, INSTRUCTIONS FOR COMPLETING THE SUPERIOR COURT MONTHLY STATISTICAL REPORT 5 (1996).

filed.⁵⁵ Only Maricopa County tracked the number of cases filed each month that were certified as subject to arbitration. Accordingly, it was possible to get a sense of the size of the arbitration-eligible caseload only in that county. Cases subject to arbitration comprised 42% of all civil cases, and 79% of tort and contract cases, filed in Maricopa County in 2003.⁵⁶ Thus, a substantial proportion of civil cases, especially tort and contract cases, were eligible for arbitration.

Approximately two-thirds of cases subject to arbitration in Maricopa County, however, concluded *before* the court assigned them to arbitration, shortly after the answer.⁵⁷ These cases concluded primarily by default judgment (36%), dismissal for lack of service or lack of prosecution (28%), or settlement (29%).⁵⁸ Thus, only about one-third of cases eligible for arbitration were assigned to arbitration and actually entered the arbitration program.⁵⁹

The number of cases assigned to arbitration in 2003 varied considerably across the counties, ranging from 3 cases in La Paz County to almost 5,000 cases in Maricopa County.⁶⁰ Nonetheless, cases assigned to arbitration comprised a similar, and relatively small, proportion of the total civil caseload across the counties: from 1% to 7% in most counties and from 10% to 14% in three counties.⁶¹ Three case types—tort motor vehicle, tort non-motor vehicle, and contract cases—accounted for more than 85% of cases assigned to arbitration in most counties.⁶²

55. See *supra* notes 20-22 and accompanying text.

56. The number of cases subject to arbitration was provided by the court. Case filing data were obtained from the *FY2003 Data Report*, *supra* note 51. Almost half of the filed civil cases consisted of “non-classified civil” cases, which included petitions for name change, domestications of foreign judgments, forfeitures, forcible detainers, and quiet title actions. *Id.* These cases typically would not be subject to arbitration because they generally do not seek monetary relief. See ARIZ. R. CIV. P. 72(b).

57. Similar percentages were obtained from court databases of closed cases and pending cases, as well as from a random sample of cases subject to arbitration, see *infra* note 58. Studies in other jurisdictions reported that from approximately one-third to two-thirds of cases that met the eligibility criteria for arbitration were not answered or were otherwise concluded before referral to arbitration. See, e.g., Gatowski et al., *supra* note 30, at 291; LIND, *supra* note 4; MEIERHOEFER, *supra* note 4, at 49.

58. The types of case dispositions were obtained from the docket entries in a random sample of 1,145 tort motor vehicle, tort non-motor vehicle, and contract cases subject to arbitration that terminated in 2003 in Maricopa County.

59. Contract cases subject to arbitration were more likely to conclude prior to assignment to arbitration (75%) than were tort cases (43%) ($\chi^2(2) = 126.51, p < .001$). To determine whether apparent differences between groups of cases (here, case types) were “true” differences (i.e., statistically significant differences) or merely reflected chance variation, tests of statistical significance were conducted. The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e., $p < .05$). RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 229-31 (5th ed. 1984).

60. See *infra* Appendix A (information for each county).

61. Maricopa, Navajo & Pima Counties. See *infra* Appendix A. There were no consistent patterns of differences in the proportion of cases assigned to arbitration when comparing counties that assigned cases to arbitration after the answer was filed to counties that assigned cases after the motion to set for trial was filed. However, conclusions about whether caseload and disposition patterns correspond to differences in arbitration programs based on comparisons across the counties should be considered tentative because the statistics in each county reflect the effects of a constellation of practices and factors, some of which may be related to the courts’ general case processing or factors other than their arbitration procedures.

62. Among the other civil case type categories, appeals from limited jurisdiction courts were not subject to compulsory arbitration, and most tax, eminent domain, and non-classified cases generally would not be subject to arbitration because they are likely to seek affirmative relief for other than a monetary judgment. See ARIZ. R. CIV. P. 72(b). Medical malpractice cases typically involve claim amounts above the arbitration jurisdictional limit.

Accordingly, cases assigned to arbitration accounted for a larger proportion of the case filings in these tort and contract categories: from 4% to 18% in most counties and approximately one-fourth in two counties.⁶³

Cases assigned to arbitration concluded at various points in the arbitration process. In a majority of counties, an award was filed in approximately one-third to one-half of cases assigned to arbitration.⁶⁴ This means that an arbitration hearing was held in fewer than half of the cases⁶⁵ in most counties.⁶⁶ Parties requested a trial de novo in a minority of cases (from 17% to 33% in most counties)⁶⁷ in

63. Maricopa & Pima Counties. See *infra* Appendix A.

64. See *infra* Appendix A. Looking across the counties, there were no consistent patterns of differences in the percentage of cases in which an award was filed that tracked differences in program structure, such as when counties assigned cases to arbitration, whether they relied on voluntary or mandatory arbitrator service, or whether they assigned arbitrators to cases according to subject matter expertise.

Based on data obtained from individual case dockets in random samples of tort and contract cases assigned to arbitration that concluded in 2003 (300 cases in Maricopa County and 204 cases in Pima County), there were no statistically significant differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract) in the proportion of cases in which an award was filed (Maricopa, $\chi^2(2) = 1.16, p = .56$; Pima, $\chi^2(2) = .90, p = .64$). Two studies in other jurisdictions found no differences between tort and contract cases in hearing rates. See BURTON & MCIVER, *supra* note 4, at 23-24; LIND, *supra* note 4.

65. The courts did not record whether a hearing was held and tended to use broad disposition categories (e.g., "dismissed prior to appeal") that included both cases concluded before and cases concluded after a hearing. Based on data from random samples of cases assigned to arbitration in Maricopa and Pima Counties, see *supra* note 64, in which we used more fine-grained disposition categories, the percentage of cases in which an arbitration hearing was held was likely to be between 5% and 10% higher than the percentage of cases in which an award was filed.

66. This is comparable to the hearing rate for cases assigned to arbitration reported in studies in most other jurisdictions, which ranged from 31% to 64%. See BRYANT, *supra* note 4, at 16 (averaged across counties); Hanson & Keilitz, *supra* note 4, at 214-25; JUDICIAL COUNCIL, *supra* note 4, at A-68 (averaged across courts); LIND, *supra* note 4; William P. Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. REV. 181, 186 (2002) (averaged over several years); MacCoun, *supra* note 4, at 236; MEIERHOEFER, *supra* note 4, at 49 (recalculated to exclude cases closed before referral; averaged across districts); NEW JERSEY STATE BAR ASSOCIATION AD HOC COMMITTEE ON ARBITRATION, NJSBA REPORT ON ARBITRATION (2003) [hereinafter NJSBA] (using only 2000-01 data), available at <http://www.njsba.com/activities/index.cfm?fuseaction=arbitration>; L. Christopher Rose, *Nevada's Court-Annexed Mandatory Arbitration Program: A Solution to Some of the Causes of Dissatisfaction with the Civil Justice System*, 36 IDAHO L. REV. 171, 178-79 (1999) (1992-1998 average).

67. See *infra* Appendix A. Based on data from random samples of cases, the appeal rate could be 10% to 15% higher than listed in court data due to the disposition categories used by the courts. See *supra* note 65. Looking across the counties, there were no consistent patterns of differences in the appeal rate that tracked differences in program structure, such as whether counties relied on voluntary or mandatory arbitrator service or assigned arbitrators to cases according to subject matter expertise. In fact, some counties with mandatory arbitrator service had among the lowest appeal rates, whereas some counties that relied primarily on volunteer arbitrators had among the highest appeal rates.

Based on data from random samples of cases assigned to arbitration in Maricopa and Pima Counties, see *supra* note 64, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract) in the proportion of cases in which an appeal was filed (Maricopa, $\chi^2(2) = .89, p = .64$; Pima, $\chi^2(2) = 2.26, p = .32$). Two studies in other jurisdictions also found no differences between tort and contract cases in the rate of appeal. See BURTON & MCIVER, *supra* note 4, at 23-24; LIND, *supra* note 4. Five other studies, however, found that tort cases were more likely to request a trial de novo than were contract cases. See CENTER FOR ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS, PILOT MANDATORY ARBITRATION PROGRAM EXPANSION - \$30,000 TO \$50,000 CASES, 18TH JUDICIAL CIRCUIT (last revised 8/24/04) [hereinafter CAADRS], available at http://www.caadrs.org/adr/DuPage_arb.htm; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 63;

which an arbitration award was filed.⁶⁸ Lawyers reported that the defense filed the request for trial de novo in 62% of cases appealed.⁶⁹ The majority of appealed cases, however, settled short of trial: in four counties, none of the appealed cases went to trial, and in another four counties, 14% to 19% of the appealed cases went to trial.⁷⁰

COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 63; Hanson & Keilitz, *supra* note 4, at 223; MEIERHOEFER, *supra* note 4, at 116-17.

Several studies in other jurisdictions looked at the relationship between appeal rates and other case characteristics. Two studies found no differences in appeal rate by case complexity. See COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 61; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 64. Several studies found that cases involving larger dollar amounts were more likely to request a trial de novo than were cases involving smaller claims. See CAADRS, *supra* note 67; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 60; ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM 26 (1988). *But see* COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 60 (finding no differences in appeal rate by claim amount).

68. Arizona's appeal rate was at the low end of the rate in other jurisdictions: in other studies, the appeal rate ranged from 22% to 78%, with approximately half of the programs below 50% and half above. See BARKAI & KASSEBAUM, *supra* note 4, at 58; BRYANT, *supra* note 4, at 24 (averaged across counties); BURTON & MCIVER, *supra* note 4, at 23 (averaged across districts); CAADRS, *supra* note 67; COLLINS & FORD, *supra* note 4, at 60-61; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 48; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 48; PAM DANIELS, EVALUATION OF THE EFFECTIVENESS OF THE EXISTING COURT-ANNEXED ARBITRATION PROGRAM 16-17 (1998); Gatowski et al., *supra* note 30, at 295-96 (of non-pending cases); Hanson & Keilitz, *supra* note 4, at 214-25; JUDICIAL COUNCIL, *supra* note 4, at A-68 (averaged across courts); LIND, *supra* note 4; LIND & SHAPARD, *supra* note 4, at 39-40 (averaged across districts); Lynch, *supra* note 66, at 186 (averaged over several years); MacCoun, *supra* note 4, at 236; MEIERHOEFER, *supra* note 4, at 49 (averaged across districts); NJSBA, *supra* note 66 (using only 2000-01 data); ROEHL, ET AL., *supra* note 4, at 38, 40 (averaged across counties); Rose, *supra* note 66, at 178-79 (1992-1998 average); BRAIN SMITH ET AL., COURT ANNEXED ARBITRATION EVALUATION STUDY: FINAL REPORT 63-64 (1992).

69. This information came from the lawyers' survey. See *infra* Section IV. Studies in most other jurisdictions also reported that a majority of trial de novo requests were filed by the defense. See BURTON & MCIVER, *supra* note 4, at 23-24; COLLINS & FORD, *supra* note 4, at 100; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 61; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 61; Gatowski et al., *supra* note 30, at 296; Lynch, *supra* note 66, at 187; MacCoun, *supra* note 4, at 234; NJSBA, *supra* note 66; Rose, *supra* note 66, at 178-79. *But see* JUDICIAL COUNCIL, *supra* note 4, at A-68 (45%, averaged across courts); LIND, *supra* note 4 (49%).

70. Only one county had a higher rate of trial on appeal (27%). See *infra* Appendix A. Arizona's rate of trial de novo in cases that filed an appeal was at the lower end of the rate in other jurisdictions: in most studies, the rate ranged from 3% to 44%, with approximately half of the programs reporting a trial de novo rate below 25% and half above. BARKAI & KASSEBAUM, *supra* note 4, at 59; BRYANT, *supra* note 4, at 24 (averaged across counties); BURTON & MCIVER, *supra* note 4, at 23-24, 28 (averaged across districts); CAADRS, *supra* note 67; COLLINS & FORD, *supra* note 4, at 61; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 49; DANIELS, *supra* note 68, at 17; Hanson & Keilitz, *supra* note 4, at 214-25; LIND, *supra* note 4; LIND & SHAPARD, *supra* note 4, at 39 (averaged across districts); MacCoun, *supra* note 4, at 236; MEIERHOEFER, *supra* note 4, at 49; NJSBA, *supra* note 66 (using only 2000-01 data). *But see* COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 48 (reporting a 56% trial de novo rate).

This translates into a trial rate for cases assigned to arbitration of zero to 3% in all but one county in Arizona. See *infra* Appendix A. This low rate of trial for cases assigned to arbitration was consistent with that found in studies in other jurisdictions: 4% or fewer cases assigned to arbitration were tried in most studies. See BARKAI & KASSEBAUM, *supra* note 4, at 59; BRYANT, *supra* note 4, at 14, 24 (averaged across counties); CAADRS, *supra* note 67; COLLINS & FORD, *supra* note 4, at 60, 62; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 48; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 47; DANIELS, *supra* note 68, at 16, 17; LIND, *supra* note 4; LIND & SHAPARD, *supra* note 4, at 42-44; MacCoun, *supra* note 4, at 236; MEIERHOEFER, *supra* note 4, at 49 (averaged across districts); NJSBA, *supra* note 66 (using only 2000-01 data); TASK FORCE ON THE QUALITY OF JUSTICE SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION AND THE JUDICIAL SYSTEM, ALTERNATIVE DISPUTE

The above information on the proportion of the civil caseload that arbitration cases comprised, and when in the arbitration process cases were resolved, provided a general indication of arbitration's potential impact on the court's workload.⁷¹ The large proportion of civil cases subject to arbitration would, at first blush, seem to suggest that arbitration could substantially reduce the court's caseload. However, the majority of cases *subject* to arbitration concluded before or shortly after the answer, with little or no use of court resources, and prior to assignment to arbitration. If there were no arbitration program, a similar, or perhaps even larger, proportion of cases would be expected to conclude early and with minimal court involvement.⁷² Thus, the smaller proportion of cases *assigned* to arbitration more accurately represents arbitration's potential to affect the court's caseload than does the proportion of cases *eligible* for arbitration.

The proportion of cases assigned to arbitration, moreover, merely represents the upper limit of arbitration's potential effect on the court's workload. Extrapolating from the caseload and case disposition findings discussed above, not all cases assigned to arbitration would be likely to use substantially greater court resources without an arbitration program than they presently do with it. More than half of the cases assigned to arbitration concluded without an arbitration hearing in a majority of counties; in the absence of an arbitration program, most of these cases presumably would conclude with limited use of court resources.⁷³ In addition, the small subset of cases that appealed the arbitration award, especially those that proceeded to trial de novo, used substantial judicial resources (hearings, settlement conferences, and trial) even with the arbitration program.⁷⁴ It is the subset of cases that had an arbitration hearing and accepted the arbitrator's award, or settled shortly after the award and without appeal, that consumed arbitration program resources and, in the absence of an arbitration program, might require

RESOLUTION IN CIVIL CASES 62 (1999) [hereinafter TASK FORCE] (averaged across counties). *But see* Hanson & Keilitz, *supra* note 4, at 214 (7%).

71. The impact of the arbitration program on court resources could not be assessed directly because, for the past three decades, all arbitration-eligible cases went through arbitration. This left no comparison group of arbitration-eligible cases processed outside of, or in the absence of, the arbitration program.

72. This hypothesis was supported by judges who attended a presentation of the study findings at the 2005 Arizona Judicial Conference. The availability of free court-connected arbitration may have prompted a certain number of complaints to be answered that otherwise would have been defaulted or settled if arbitration were not available. In fact, the only study to examine court-connected arbitration's impact on the answer rate found a higher answer rate for arbitration cases than for non-arbitration cases. *See* MacCoun, *supra* note 4, at 235.

73. The presumption is that cases that settled or were otherwise resolved without an arbitration hearing would likely conclude before trial if no arbitration program were available. In the absence of arbitration, however, some court resources probably would be expended on pretrial matters even in cases that do not proceed to trial. Based on data from the lawyers' survey, arbitrators decided motions in one-third of the cases assigned to arbitration that settled before a hearing. *See infra* Section IV. In the absence of arbitration, some of these cases might require judicial resources to decide motions before they conclude, on the order of between 10% and 20% of cases assigned to arbitration across the counties, or 3% or less of all civil cases filed. In addition, if the scheduled hearing provided the event that stimulated settlement, these cases might require court scheduling resources to set an "event" like a status or settlement conference. *See infra* note 106 and accompanying text.

74. It is possible, however, that these cases benefited in some way from an arbitration hearing and, thus, would consume more court resources if there were no arbitration program. Based on data from the lawyers' survey, a majority (61%) of lawyers who requested a trial de novo felt the award made no contribution to settlement negotiations. *See infra* Section IV.

other court resources. Thus, arbitration's primary potential to save substantial court resources would appear to be in this subset of cases, ranging from one-fifth to one-third of cases assigned to arbitration in most counties, which is approximately 5% of all civil cases filed and 10% of tort and contract cases filed.

Another way to explore the potential savings of court and litigant resources in arbitration is to compare the dispositions of arbitration and non-arbitration cases. Because these two groups of cases were inherently non-equivalent with regard to the amount in controversy (with cases subject to arbitration below, and cases not subject to arbitration above, the arbitration jurisdictional limit), this comparison would be more likely to overestimate than to underestimate differences in the type of disposition.⁷⁵ A substantial minority of cases (43% of cases subject to arbitration and 36% of cases not subject to arbitration) were either not prosecuted or not defended. A minority of cases subject to arbitration settled (39%), whereas a majority of cases not subject to arbitration (55%) settled. Twelve percent of cases subject to arbitration were resolved by the arbitration award. The trial rate for both groups of cases was 1%.⁷⁶ A small percentage of cases in both groups were resolved by summary judgment or some other non-trial judgment or order (3% of cases subject to arbitration and 8% of cases not subject to arbitration).

These findings show that more arbitration cases than non-arbitration cases had a hearing on the merits (including an arbitration award, trial, or other judgment),⁷⁷ suggesting that arbitration increased litigants' access to an adjudication of their case. In addition, when compared to non-arbitration cases, arbitration cases showed a larger decline in the settlement rate than in the trial rate. This pattern suggests that arbitration hearings diverted more cases from settlement than from trial⁷⁸ and that cases resolved by an arbitration award might be more likely to settle than to go to trial if there were no arbitration program. Thus, with regard to arbitration's potential for saving court resources, any savings seem more likely to involve pretrial resources devoted to hearings and conferences than to involve trial

75. Although far from ideal, this comparison was the only one available because no arbitration-eligible cases were processed outside of the arbitration program. Because the claim amount was not recorded in the case docket, it was not possible to reduce the disparity between the two groups by limiting the non-arbitration cases to claim amounts closer to the arbitration jurisdictional limit. To make the two groups more comparable for the analyses, we excluded case types not subject to arbitration from both groups and included only the three case types that comprised most arbitration cases, namely tort motor vehicle, tort non-motor vehicle, and contract cases. The case dispositions were obtained from docket information in a random sample of 1,802 tort and contract cases in Maricopa County that terminated in 2003 (1,145 cases subject to arbitration and 657 cases not subject to arbitration).

76. Three studies in other jurisdictions also found no differences in the trial rate between arbitration and non-arbitration cases. See BARKAI & KASSEBAUM, *supra* note 4, at 59; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 47; LIND, *supra* note 4. Four other studies, however, found an apparently lower trial rate in arbitration cases than in non-arbitration cases. See BURTON & MCIVER, *supra* note 4, at 30; COLLINS & FORD, *supra* note 4, at 62; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 47; Hanson & Keilitz, *supra* note 4, at 212, 214. All of these studies used more equivalent arbitration and non-arbitration groups than was possible in the present study, either by randomly assigning arbitration-eligible cases to arbitration and non-arbitration groups or by comparing arbitration cases with non-arbitration cases that met the eligibility criteria but were filed before the arbitration program began.

77. These findings were consistent with those of studies in other jurisdictions. See BARKAI & KASSEBAUM, *supra* note 4, at 59; BURTON & MCIVER, *supra* note 4, at 19; COLLINS & FORD, *supra* note 4, at 62; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 46-47; DEWITT ET AL., *supra* note 4, at 17; Hanson & Keilitz, *supra* note 4, at 212, 214; LIND, *supra* note 4.

78. See also, e.g., DEWITT ET AL., *supra* note 4 at 17; LIND, *supra* note 4.

resources.⁷⁹ In addition, the pattern of more hearings and fewer settlements suggests that arbitration's potential overall impact on litigants' costs depends largely on how the transaction costs associated with an arbitration hearing compare to the costs associated with settlement.⁸⁰ That is, unless it is cheaper to take a case to an arbitration hearing than to settle, arbitration will provide no overall cost savings for litigants.

B. *Timeliness of Arbitration*

For cases assigned to arbitration, the median length of time between the filing of the complaint and final disposition ranged from 154 days to 670 days across the counties.⁸¹ More specifically, the median time to disposition was five to seven months in three counties,⁸² ten or eleven months in another three counties,⁸³ and fourteen and twenty-two months, respectively, in two counties.⁸⁴ Differences across the counties in the median time to disposition did not appear to parallel the size of the courts' caseload (either the total civil caseload or the tort and contract caseload) or the number of cases assigned to arbitration.⁸⁵ However, the pattern of the median time to disposition across the counties did seem to parallel their practices with regard to the timing of case assignment to arbitration. Counties with shorter median times to disposition tended to assign cases to arbitration after the

79. Several studies in other jurisdictions that had more equivalent comparison groups, see *supra* note 76, were able to directly examine arbitration's impact on pretrial court resources. One study found that arbitration cases did not reduce the number of motions, pretrial conferences, or the court's estimated per-case processing costs relative to non-arbitration cases. See LIND, *supra* note 4. Another study, however, found that fewer status, pretrial and settlement conferences were held in arbitration cases than in non-arbitration cases. See BARKAI & KASSEBAUM, *supra* note 4, at 28-29. Three studies examined all actions that took the court's time: two found that arbitration cases involved fewer of these actions than did non-arbitration cases. See COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 196; COLLINS & FORD, *supra* note 4, at 177. *But see* COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 207-10 (finding no differences).

80. Several studies in other jurisdictions that had more equivalent comparison groups, see *supra* note 76, were able to directly examine arbitration's impact on litigants' costs. Several studies found no differences between arbitration and non-arbitration cases in the number of hours lawyers worked or in the amount of fees they billed. See BARKAI & KASSEBAUM, *supra* note 4, at 33-34 (tried cases were excluded from both groups); COLLINS & FORD, *supra* note 4, at 179, 180; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 211-12; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 201-02. *But see* LIND, *supra* note 4 (finding defense lawyers in arbitration cases reported somewhat lower legal fees and litigation costs than defense lawyers in non-arbitration cases, but finding no differences for plaintiffs' lawyers). Among arbitration cases, one study found that litigation costs and lawyers' hours worked and fees billed were lower in cases that settled before an arbitration hearing than in cases that had a hearing, and were slightly lower in cases that accepted the award than in cases that appealed the award and subsequently settled. See BARKAI & KASSEBAUM, *supra* note 4, at 19, 33-34.

81. This information was provided by the courts, but was not readily available in all counties. The median is the value corresponding to the fiftieth percentile (i.e., half of the cases were concluded in 154 days or less after the complaint and half concluded more than 154 days after the complaint). See RUNYON & HABER, *supra* note 59, at 95.

82. LaPaz, Pinal & Yavapai Counties.

83. Maricopa, Coconino & Cochise Counties.

84. Pima & Gila Counties.

85. See *infra* Appendix A (counties' arbitration and total civil caseloads).

answer was filed, and counties with longer median times to disposition tended to assign cases to arbitration after the motion to set for trial was filed.⁸⁶

One context in which to interpret what these time-to-disposition findings indicate about the efficiency of case resolution in arbitration is the Arizona Supreme Court's Case Processing Time Standards.⁸⁷ According to the standards, 90% of civil cases should be concluded within nine months of the complaint, and 95% of civil cases should be concluded within eighteen months.⁸⁸ Obviously, if not even half of the cases assigned to arbitration were resolved within nine months in a majority of counties, arbitration did not come close to meeting these time standards. In Maricopa and Pima Counties, for which more detailed analyses were possible, only 37% and 21%, respectively, of cases assigned to arbitration concluded within nine months of filing the complaint.⁸⁹ Arbitration's performance was better with regard to the eighteen-month standard, but it still was not met: 85% and 77% of cases assigned to arbitration in Maricopa and Pima Counties, respectively, concluded within eighteen months of the complaint.

These analyses, however, overstate the time to disposition in arbitration because they were based on only the subset of cases still active at the time of assignment to arbitration.⁹⁰ When examining cases subject to arbitration (i.e., cases that concluded prior to assignment to arbitration as well as cases still active at assignment), arbitration's performance relative to the Arizona Supreme Court standards improved somewhat. Fifty-six percent and 34%, respectively, of cases subject to arbitration in Maricopa and Pima Counties concluded within nine months of the complaint. Ninety percent and 82%, respectively, concluded within eighteen months.⁹¹

Another context in which to interpret the length of time to disposition in arbitration cases is to compare it to non-arbitration cases.⁹² Cases subject to arbitra-

86. See *supra*, notes 20-22 and accompanying text (indicating the timing of arbitration assignment in the different counties). Conclusions about whether time to disposition patterns correspond to differences in arbitration programs based on comparisons across the counties, however, should be considered tentative. See *supra* note 61.

87. The Arizona Supreme Court adopted voluntary case processing time standards for general civil cases in 1989. See HEATHER DODGE & KENNETH PANKEY, CASE PROCESSING TIME STANDARDS IN STATE COURTS, 2002-03, APPENDIX B, available at http://www.ncsconline.org/wc/Publications/KIS_CasManCPTSPub.pdf. According to the guidelines of the Conference of State Court Administrators, cases in court-connected arbitration should be held accountable to the same standards of timeliness as cases in litigation. See Roger Hanson et al., *Court-Annexed Arbitration: Lessons from the Field*, ST. CT. J., 4, 8 (1991).

88. See DODGE & PANKEY, *supra* note 87. There is one additional standard: 99% of cases should be concluded within twenty-four months of the complaint. *Id.*

89. These findings were based on random samples of cases assigned to arbitration. See *supra* note 64.

90. In a random sample of cases subject to arbitration in Maricopa County, see *supra* note 58, cases that concluded prior to assignment to arbitration had a shorter time to disposition, by almost five months, than did cases still active and assigned to arbitration ($F(1, 1143) = 126.62, p < .001$).

91. These findings were based on a random sample of cases subject to arbitration in Maricopa County, see *supra* note 58, and on a random sample of 270 tort and contract cases subject to arbitration in Pima County. By virtue of the logistics by which case information had to be obtained, the Pima County sample involved a more limited set of disposition types, with cases resolved early in litigation somewhat under-represented in the sample. Accordingly, these findings might somewhat overstate the time to disposition for cases subject to arbitration in Pima County.

92. See *supra* note 75 and accompanying text (describing the case samples and explaining the problems with this comparison).

tion were more likely to have a shorter time to disposition and to meet the case processing standards than were cases not subject to arbitration. In terms of the average time from case filing to final disposition, cases subject to arbitration in Maricopa County and Pima County, respectively, were resolved three and five months more quickly than were cases not subject to arbitration.⁹³ Cases subject to arbitration also performed better in terms of the case processing standards: only 40% and 17%, respectively, of cases not subject to arbitration in Maricopa and Pima Counties concluded within nine months of the complaint, and 76% and 61% concluded within eighteen months.⁹⁴ The apparently faster resolution of cases subject to arbitration, however, may well be due to differences in the amount in controversy, and the likely associated differences in case complexity and the amount of discovery, rather than to the arbitration process.⁹⁵

The long time from case filing to final disposition in arbitration cases prompted an examination of the length of time between various arbitration events in Maricopa and Pima Counties.⁹⁶ In both counties, the initial arbitrator was appointed, on average, within approximately one and one-half months of the event that triggered arbitration assignment. Approximately one-third of cases involved one or more reappointments of the arbitrator,⁹⁷ which added on average between one to two months before the final arbitrator was appointed in those cases in both counties. Sixty percent of the cases assigned to arbitration in Maricopa County had a final arbitrator appointed within four months after the complaint was filed; it took more than twice as long (nine months) for a comparable proportion of cases in Pima County to have a final arbitrator appointed, due primarily to differences in when the counties assigned cases to arbitration.⁹⁸ Thus, in some cases assigned to

93. Maricopa County: $F(1, 1800) = 59.90, p < .001$; Pima County: $F(1, 456) = 31.29, p < .001$. These findings were based on a random sample of cases in Maricopa County, see *supra* note 75, and on a random sample of 464 tort and contract cases (270 cases subject to arbitration and 193 cases not subject to arbitration) in Pima County.

94. These findings were based on random samples of cases which, in Pima County, might overstate the time to disposition. See *supra* note 75; *supra* note 91 and accompanying text (providing comparison data for cases subject to arbitration).

95. A majority of studies in other jurisdictions that had more equivalent comparison groups, see *supra* note 76, reported that arbitration cases were resolved from two to seven months faster, depending on the study and the types of dispositions included, than were non-arbitration cases. See BARKAI & KASSEBAUM, *supra* note 4, at 37; BURTON & MCIVER, *supra* note 4, at 17-18; COLLINS & FORD, *supra* note 4, at 70; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 68; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 68; Gatowski et al., *supra* note 30, at 294-95; LIND & SHAPARD, *supra* note 4, at 47. *But see* Hanson & Keilitz, *supra* note 4, at 216 (finding essentially no differences in the time to disposition between arbitration and non-arbitration cases); LIND, *supra* note 4 (same).

96. Unless otherwise noted, the findings in the rest of this section were based on random samples of cases assigned to arbitration. See *supra* note 64.

97. It is interesting that the proportion of arbitrator re-appointments was similar in the two counties, despite differences in their practices regarding arbitrator selection and assignment. See *supra* notes 26, 28 & 35 and accompanying text. Based on data from the lawyers' survey, the primary reason lawyers in both counties struck an arbitrator was concern about potential bias, with concern about lack of subject matter expertise a distant second. See *infra* Section IV. Nonetheless, lack of expertise was almost half as likely to be the reason for striking an arbitrator in Pima County (where the court made an effort to assign arbitrators to cases based on subject matter) than in Maricopa County (where the court did not).

98. Most cases had a final arbitrator appointed within nine months of the complaint in Maricopa County (93%) and within twelve months in Pima County (86%). In Maricopa County, assignment to arbitration was triggered by filing the answer, which occurred on average sixty-seven days after the

arbitration, especially in Pima County, a considerable amount of time passed before the arbitration process began and the deadlines under the compulsory arbitration rules started running.

According to court rules, the hearing is to take place within 120 days of the arbitrator's appointment, unless the time frame is extended for good cause shown.⁹⁹ In both counties, though, the scheduled hearing date met that deadline in only approximately 44% of cases.¹⁰⁰ Instead, the hearing was scheduled to take place within 180 days of the arbitrator's appointment in a majority of cases (76% in Maricopa County and 68% in Pima County) and within 270 days in virtually all cases (92% in both counties).¹⁰¹ It appeared that continuances accounted for this delay in a majority of cases,¹⁰² with difficulty scheduling the hearing also contributing to delay.¹⁰³

The rules prescribe that the arbitration award is to be filed within 145 days of the final arbitrator appointment.¹⁰⁴ In both Maricopa and Pima Counties, however, the award was filed within that time frame in only approximately one-third of cases. The award was filed within 180 days of arbitrator appointment in just over half of the cases, and within 270 days in most cases (approximately 85%) in both counties. In a majority of cases in both counties, arbitrators filed the notice

complaint was filed. In Pima County, by contrast, assignment to arbitration was triggered by filing the motion to set for trial, which occurred on average 176 days after the complaint was filed.

99. ARIZ. R. CIV. P. 74(b).

100. This probably overstates the proportion of hearings that took place within the deadline because arbitrators did not routinely file an amended notice of hearing when the hearing was rescheduled. In studies of arbitration programs in other jurisdictions, the proportion of cases in which hearings were held within the prescribed hearing deadline ranged from 9%, to almost 40%, to approximately two-thirds. See BARKAI & KASSEBAUM, *supra* note 4, at 38; LIND, *supra* note 4; BURTON & MCIVER, *supra* note 4, at 36.

101. It is interesting that the time from arbitrator appointment to the hearing was similar in the two counties, despite the fact that the court in Pima County monitored the hearing date but the court in Maricopa County did not. See *supra* note 43 and accompanying text. In all, the time from complaint to hearing was more than nine months in almost half of the cases assigned to arbitration in Maricopa County, and in 83% of cases in Pima County. Thus, in a sizeable number of cases, the hearing was scheduled to take place after the time at which cases should be ready to set for trial, suggesting that a fair number of cases in Maricopa County required judicial involvement in order to be continued long enough to have a hearing. See *supra* note 42 and accompanying text.

102. One or more continuances were granted in approximately two-thirds of cases in both counties, based on data from the lawyers' survey. See *infra* Section IV. The docket data were not a reliable source of information on continuances because they were not routinely recorded. The two main reasons lawyers sought a continuance were scheduling conflicts and the need for additional information for the arbitration hearing. It is interesting that the proportion of cases involving continuances was similar in the two counties, despite differences in who decided continuances (the arbitrator in Maricopa County and the arbitration judge in Pima County) and in how long after the complaint the arbitrator was appointed, which presumably gave lawyers in Pima County more time to conduct discovery before the hearing deadline started running. See *supra* note 98 and accompanying text.

103. Based on data from the lawyers' survey, almost half of the arbitrators reported that scheduling the hearing was somewhat difficult, and a small number said it was very difficult. See *infra* Section IV. In addition, a number of lawyers noted in their comments that they had difficulty getting the arbitrator to schedule the hearing or to rule on a summary judgment motion. For example: "The assigned arbitrator was not interested in the case, ignored deadlines, ignored motions, and the court repeatedly deferred to the arbitrator, who continues to this date to take no action on the case whatsoever." "The arbitrator was non-responsive. I had to ask the court to issue an order to show cause to get the arbitration scheduled."

104. ARIZ. R. CIV. P. 75(b).

of decision and the award by their respective post-hearing deadlines.¹⁰⁵ Thus, delay in holding the hearing appeared to be a greater contributor to not meeting the deadline for filing the award than was delay in the arbitrators' submission of the notice of decision or award after the hearing.

Cases assigned to arbitration that settled before the hearing tended to do so in rough unison with when the hearing was scheduled, suggesting that the hearing provided the event that stimulated settlement. Accordingly, cases that settled before a hearing did not consistently¹⁰⁶ conclude faster than cases that went to a hearing and did not appeal the arbitration award.¹⁰⁷ Cases in which an award was filed and not appealed concluded seven to eight months faster than cases in which a trial de novo was requested,¹⁰⁸ regardless of whether the case ultimately settled or was tried.¹⁰⁹

In sum, three factors seemed largely to explain the long time from complaint to final disposition in cases assigned to arbitration: the timing of assignment to arbitration, delays in the arbitration hearing, and requests for a trial de novo. Assigning cases to arbitration after the motion to set for trial was filed rather than after the answer delayed when the arbitration process began, without appearing to move case preparation along and correspondingly reducing the time to the arbitration hearing. Most cases assigned to arbitration did not meet the deadlines for holding the arbitration hearing or filing the award, largely due to continuances and the fact that most courts did not monitor or enforce those deadlines. The timing of

105. In cases in which these deadlines were not met, however, the delays sometimes were substantial. See *supra* note 44 and accompanying text (describing the steps and deadlines associated with filing the notice of decision and award).

106. In Maricopa County, cases assigned to arbitration that settled before an award was filed concluded, on average, approximately two months faster than cases resolved by the award ($F(1, 202) = 10.93, p < .01$), but in Pima County there was no difference in the time to disposition for these two groups of cases ($F(1, 166) = 1.67, p = .20$). Statewide, lawyers in just over half (52%) of cases that settled before an arbitration hearing said the case settled within a month of the hearing date. See *infra* Section IV.

107. Studies in other jurisdictions also found no or little difference in the time to disposition between cases that settled before an arbitration hearing and cases that did not appeal the arbitrator's award, generally from one to three months. See BARKAI & KASSEBAUM, *supra* note 4, at 37; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 71; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 71; Gatowski et al., *supra* note 30, at 294-96; Hanson & Keilitz, *supra* note 4, at 220-22. It is only when studies compared cases that settled before an arbitration hearing to *all cases* that went to a hearing (*i.e.*, including cases that appealed the award) that pre-hearing settlements were consistently found to be faster, generally by three to seven months. See BARKAI & KASSEBAUM, *supra* note 4, at 37; COLLINS & FORD, *supra* note 4, at 70; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 71; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 70; Hanson & Keilitz, *supra* note 4, at 221; MACCOUN ET AL., *supra* note 67, at 35.

108. Maricopa County, $F(1, 152) = 61.02, p < .001$; Pima County, $F(1, 93) = 25.78, p < .001$. Studies in other jurisdictions also found that cases that did not appeal the arbitration award were resolved faster than those that requested a trial de novo – from three to eleven months faster, depending in part on whether the comparison involved appealed cases that settled or that went to trial, or both. See BARKAI & KASSEBAUM, *supra* note 4, at 37; BURTON & MCIVER, *supra* note 4, at 30; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 71; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 70; Hanson & Keilitz, *supra* note 4, at 221; LIND, *supra* note 4.

109. There were no differences in the time to disposition for appealed cases that settled versus went to trial (Maricopa County, $F(1, 52) = 2.54, p = .12$; Pima County, $F(1, 31) = .081, p = .78$). Studies in other jurisdictions also found that appealed cases that settled before trial de novo did not conclude faster than the few cases that went to trial. See BURTON & MCIVER, *supra* note 4, at 30; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 71; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 70.

the arbitration hearing affected the time to disposition not only for cases resolved by the award but also for cases that settled before the hearing. And although only a small subset of arbitration cases appealed the award, the appeals process prolonged the time to disposition, even if the case ultimately settled.

IV. LAWYERS' VIEWS OF COURT-CONNECTED ARBITRATION

Given the arbitration program's reliance on lawyers in Arizona to serve as arbitrators, as well as the program's impact on those lawyers who represent clients in arbitration, lawyers' views are likely both to reflect and affect how well the arbitration system is performing. Casual conversations with lawyers, their articles and letters to the editor of the state bar's publication, *Arizona Attorney*,¹¹⁰ and their lawsuits challenging various provisions of the arbitration rules and statute¹¹¹ suggest that at least some lawyers are less than completely satisfied with court-connected arbitration.

To systematically ascertain lawyers' views,¹¹² all members of the State Bar of Arizona were invited in June 2004 to participate in a web-based and e-mail survey.¹¹³ In order to obtain the most useful information, participation in the survey was limited via screening questions to lawyers who had direct experience with court-connected arbitration in Arizona. Of the lawyers who responded, 2,934 had direct experience and contributed substantive responses.¹¹⁴ For the sake of brevity, statewide findings primarily are presented; the reader should bear in mind that, because the proportion of lawyers responding from each county was similar to the

110. See, e.g., David L. Abney & Mark E. Lines, *Arizona's Mandatory Arbitration: An Unworkable and Unconstitutional Program*, ARIZ. ATTY., Nov. 1, 2000, at 14; William W. Quinn, *On Forced Labor*, ARIZ. ATTY., Apr. 1, 2004, at 8.

111. See, e.g., *Scheehle v. Justices of Supreme Court*, 120 P.3d 1092 (Ariz. 2005) (challenging the court's authority to require lawyers to serve as arbitrators); *Graf v. Whitaker*, 966 P.2d 1007 (Ariz. Ct. App. 1998) (questioning whether compulsory participation in court-connected arbitration infringes on a party's right to a trial by jury).

112. We also interviewed judges and court administrators to obtain their views of the goals of court-connected arbitration and whether their programs were accomplishing those goals. All judges and administrators said their programs were successfully accomplishing their two primary objectives: (1) to provide litigants a more efficient and less expensive mechanism for resolving lawsuits in which the amount in controversy might not justify the costs associated with traditional litigation and (2) to relieve court congestion and delay by freeing up judicial resources to be used in cases with more at stake.

113. Surveys were sent to all 9,338 state bar members who had a valid e-mail address. The survey was preceded by an e-mail from the state bar president that included a request for participation from the Chief Justice of the Arizona Supreme Court. The authors gratefully acknowledge the assistance of the State Bar of Arizona in providing the names and e-mail addresses of its members. The initial request for participation provided a web site to which lawyers were directed to complete the survey. Due to difficulties some respondents had in accessing that survey version, a second request was sent that included a version of the survey that could be completed and returned via e-mail. A few lawyers who were unable to complete the questionnaire by web or e-mail either mailed their questionnaire or were interviewed by telephone. A follow-up e-mail was sent to those who had not responded to earlier requests. The authors thank Bill Edwards and the Arizona State University Survey Research Laboratory for administering the survey and compiling the responses.

114. Fifty-two percent of state bar members with valid e-mail addresses responded to the survey; 60% of those had experience with arbitration.

proportion of state bar members in each county, most respondents were from Maricopa County.¹¹⁵

The survey consisted of three main sections. The number of respondents for each section varied, as a given lawyer could be in a position to answer one, two, or all three sections. The first section, to which 905 lawyers responded substantively, focused on lawyers' experience as counsel in their most recently closed case, within the preceding two years,¹¹⁶ which had been assigned to arbitration.¹¹⁷ The second survey section, to which 2,016 lawyers responded substantively, focused on lawyers' experience in the most recent case, within the preceding two years, in which they were appointed as an arbitrator.¹¹⁸ The final survey section, to which 2,515 lawyers responded, sought the views of all lawyers with any direct experience with court-connected arbitration about aspects of program structure, arbitrator service, and program effectiveness.¹¹⁹

A. *Views of Arbitration: The Hearing, the Arbitrator, and the Award*

Most lawyers who had recently represented a client in arbitration had highly favorable assessments of the arbitration hearing.¹²⁰ Virtually all lawyers (93%) felt they could fully present their case;¹²¹ 82% percent felt the hearing process was

115. Each of the counties other than Maricopa and Pima Counties tended to have fewer than twenty respondents.

116. Experience was limited to the preceding two years so that responses would be based on the arbitration program as it currently is configured and so that respondents would be more likely to remember their experience and report it accurately. See FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 93-94 (2d ed. 1988). Having respondents provide perceptions based on their experience in a particular case rather than providing more global views of a program also can produce more accurate information as well as more meaningful relationships among various items in the survey. See CLAIRE SELLTIZ ET AL., *RESEARCH METHODS IN SOCIAL RELATIONS* 307 (3d ed. 1976).

117. Three-fourths of these lawyers had primarily a civil litigation practice, and approximately half had 25% or more of their caseload subject to arbitration. The lawyers were evenly divided between those who had represented the plaintiff and those who had represented the defendant in their most recent case in arbitration. About two-thirds of the lawyers who had been counsel in a recent arbitration case also had recently served as an arbitrator.

118. Most of these lawyers had served as an arbitrator in one to four cases in the prior two years, consistent with the courts' general practice of assigning each lawyer up to two hearings per calendar year. See ARIZ. R. CIV. P. 73(e)(3). These respondents were about equally likely to have a civil litigation practice as to have a transactional or criminal law practice. Most of these lawyers had little or no experience appearing as counsel in the arbitration process; only 30% had 10% or more of their caseload subject to arbitration.

119. Consistent with the relative numbers of lawyers who responded to each of the prior two sections, a majority of the lawyers who responded to this section of the survey had no or few cases subject to arbitration.

120. The type of case (contract, tort motor-vehicle, or tort non-motor vehicle) in which the lawyers had been involved in arbitration did not affect their views of the hearing, the arbitrator or the award.

121. A majority of arbitrators (79%) reported the hearing lasted approximately two to four hours. Programs in some other jurisdictions had a comparable average hearing length. See, e.g., Boersema et al., *supra* note 4, at 30; DEWITT ET AL., *supra* note 4, at 25. Other programs, however, had an average hearing length of four to seven hours. See, e.g., BARKAI & KASSEBAUM, *supra* note 4, at 48; Lloyd Burton et al., *Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program*, 14 JUST. SYS. J. 183, 196 (1991); LIND, *supra* note 4; LIND & SHAPARD, *supra* note 4, at 54. *But see* NJSBA, *supra* note 66 (stating that hearings are calendared for thirty minutes).

fair;¹²² 82% said the other side participated in good faith,¹²³ and 79% felt the arbitrator was completely unbiased.

The lawyers' assessments of the arbitrator's competence and preparation were more equivocal.¹²⁴ Just over half of the lawyers thought the arbitrator understood the issues involved in the case very well (54%),¹²⁵ and half (50%) thought the arbitrator was very knowledgeable about arbitration procedures.¹²⁶ The lawyers

122. These findings were consistent with those of studies in other jurisdictions: most lawyers had highly favorable assessments of the fairness of the arbitration process, procedure and rules and the impartiality of the arbitrator. See BARKAI & KASSEBAUM, *supra* note 4, at 47; Boersema et al., *supra* note 4, at 30; BURTON & MCIVER, *supra* note 4, at 37-40; COLLINS & FORD, *supra* note 4, at 143; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 147, 162; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 146; DEWITT ET AL., *supra* note 4, at 38-39; LIND, *supra* note 4; MACCOUN ET AL., *supra* note 67, at 50; MEIERHOFER, *supra* note 4, at 68; ROEHLET ET AL., *supra* note 4, at 52-54. These studies generally found no differences, however, between lawyers in arbitration cases and lawyers in non-arbitration cases in their assessments of the impartiality of the third party and the fairness of the procedures. See COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 147; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 146; LIND, *supra* note 4.

Although the present study did not survey litigants, studies that have done so in other jurisdictions found that litigants' assessments of the fairness of the arbitration process, rules and arbitrator were highly favorable. See BURTON & MCIVER, *supra* note 4, at 45-49; COLLINS & FORD, *supra* note 4, at 121; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 114-16; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 114; DEWITT ET AL., *supra* note 4, at 61; LIND, *supra* note 4; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y. REV. 953, 966 (1990); MACCOUN ET AL., *supra* note 67, at 50; MEIERHOFER, *supra* note 4, at 66; ROEHL ET AL., *supra* note 4, at 62. Litigants whose cases went to an arbitration hearing were more likely to say the process or their litigation experience was fair than were litigants in cases that settled before a hearing. See LIND, *supra* note 4; Lind et al., *supra* note 122, at 966. However, the findings were mixed whether litigants in arbitration cases (when referring to the hearing and arbitrator) had more favorable assessments of the process and third party than did litigants in non-arbitration cases (when referring to the trial and the judge), or whether there were no differences. See COLLINS & FORD, *supra* note 4, at 121; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 114-16; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 114; LIND, *supra* note 4.

123. A similar proportion of arbitrators (89%) said that both parties had participated in good faith. A number of arbitrators, however, commented on things they felt were problems short of bad faith, including frivolous motions, last-minute requests for continuances, lack of preparation, lack of effort presenting the case or challenging the other side's case, not providing the facts or law needed to resolve the case, and appearing to have decided to appeal even before the hearing began.

124. These findings were largely consistent with those of studies in other jurisdictions: Generally a majority of lawyers, but a smaller proportion than those who thought the arbitrator was impartial, thought she or he was highly qualified, had sufficient skills, had appropriate experience, was adequately prepared, understood the factual and legal issues, applied the law correctly, and was knowledgeable about procedures. See BARKAI & KASSEBAUM, *supra* note 4, at 47; Boersema et al., *supra* note 4, at 30; BURTON & MCIVER, *supra* note 4, at 37-40; COLLINS & FORD, *supra* note 4, at 143, 150; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 147, 162; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 146, 160; DEWITT ET AL., *supra* note 4, at 41-42; MEIERHOFER, *supra* note 4, at 69; SMITH ET AL., *supra* note 68, at 48. Studies that surveyed litigants in other jurisdictions found that a majority thought the arbitrator was adequately prepared and understood the facts and the law. See BURTON & MCIVER, *supra* note 4, at 45-49; COLLINS & FORD, *supra* note 4, at 121; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 114-16; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 114; MEIERHOFER, *supra* note 4, at 66.

125. Thirty-nine percent of the lawyers thought the arbitrator understood the issues somewhat, and 7% thought the arbitrator did not understand the issues at all. Illustrative comments of the latter view included these: "The arbitrator wanted to inject legal concepts involving tort law that had nothing to do with contract law." "The arbitrator had no experience with the issues and was ill-equipped to make a reasoned determination."

126. Forty-three percent of the lawyers thought the arbitrator was somewhat knowledgeable about arbitration procedures, and 7% thought the arbitrator did not understand arbitration procedures at all.

were almost evenly divided between whether they thought the arbitrator was very (45%) or somewhat (47%) prepared.¹²⁷

Relatively few arbitrators themselves reported being very familiar with the area of law in the case they arbitrated (only 34%).¹²⁸ Nonetheless, approximately three-fourths of the arbitrators felt they had sufficient information about the facts and the law to reach an informed decision¹²⁹ and sufficient information about arbitration procedures to conduct an adequate hearing. Arbitrators who were not at all familiar with the area of law or with arbitration procedures spent, on average, over three hours more per case than did arbitrators who were very familiar with the law¹³⁰ or procedures.¹³¹ In addition, arbitrators who lacked sufficient information about the facts or the law to reach an informed decision spent, on average, over five hours more per case than did arbitrators who had sufficient information.¹³²

Regardless of the type of case they arbitrated, arbitrators in civil litigation practice were more likely than arbitrators in other practice areas, especially those in transactional or criminal law practice, to say that they were very familiar with the area of law in the case they arbitrated (58% versus 20%)¹³³ and that they had sufficient familiarity with arbitration procedures to conduct an adequate hearing (95% versus 66%).¹³⁴ Moreover, arbitrators who were very familiar with the area of law in the case they arbitrated were more than twice as likely to say they had sufficient information to reach an informed decision as were arbitrators not at all

Lawyers' comments indicated dissatisfaction with the arbitrators' lack of knowledge of arbitration procedures specifically, and of civil procedure generally: "The arbitration process was damaging to my client because the arbitrator failed to enforce the rules of arbitration against the [other side's] attorney concerning hearing dates, arbitration memos, preparedness, and presentation of evidence." "The arbitrator made decisions that were in clear violation of the rules of civil procedure."

127. Over half of the arbitrators (57%) spent one to two hours on the case before the hearing; all but 1% of the rest of the arbitrators spent three or more hours. This included time spent preparing for the hearing as well as scheduling the hearing and ruling on pre-hearing motions.

128. The following comments illustrate arbitrators' frustration when they were not familiar with the subject matter in the case or with civil litigation more generally. "As an attorney who has only practiced in criminal law, I felt totally out of touch with both the issues and the procedures." "I do not know the rules of evidence, I have no experience ruling on objections, and I have no background in the areas of law I must address. This is not fair to the litigants and it is not fair to me."

129. As the following comments indicate, however, this was not necessarily because the parties provided that information. "The only reason I had sufficient information was that I did my own homework - if I had to rely on counsel only, I would not have." "To be comfortable with my decision, I had to do some research of my own into the law to reach a decision." "I requested the parties provide me a memorandum of law in regard to an area of law I was not that familiar with. This assisted greatly in my being able to make rulings in the case." Several arbitrators noted they had difficulty getting the parties to submit the required pre-hearing statements.

130. $F(2, 1403) = 13.66, p < .001$.

131. $F(2, 1408) = 17.07, p < .001$.

132. $F(2, 1409) = 21.79, p < .001$.

133. $F(2, 1222) = 114.90, p < .001$.

134. $F(2, 1214) = 80.60, p < .001$. Not surprisingly, arbitrators in transactional or criminal law practice were more likely than arbitrators in civil litigation practice to report difficulty ruling on motions and dealing with evidentiary and procedural issues; the following comments illustrate their frustrations. "For me the most confusing part is the pre-trial motions. As a non-litigator, I can be a finder of facts but knowing the proper procedures to apply to motions, etc. is very difficult." "I am a transactional lawyer who has never stepped foot in a courtroom. Asking me to decide on objections regarding admissibility of evidence and other litigation matters is akin to asking a personal injury litigator to comment on the complexities of the documentation on a complex business transaction."

familiar with the subject matter (90% versus 42%).¹³⁵ Differences among the counties with respect to arbitrators' self-reports of their substantive and procedural knowledge paralleled differences among the counties in their practices regarding arbitrator selection and assignment. Most notably, twice as many arbitrators in Pima County as in Maricopa County (62% versus 30%) were very familiar with the subject area, and almost one-third fewer were not at all familiar with the area of law (8% versus 23%).¹³⁶

Considering that arbitration hearings tend to produce a "winner" and a "loser," the lawyers' views of the arbitration awards were surprisingly positive. Over two-thirds (69%) of the lawyers felt the award was fair in light of the facts and the law,¹³⁷ and 60% reported their client was satisfied with the award.¹³⁸ Approximately half of the lawyers (53%) said the award was about the same as the expected trial judgment; few said the award was better, and over one-third (38%)

135. $\chi^2(6) = 319.50, p < .001$. Among arbitrators who were somewhat familiar with the area of law, 78% felt they had sufficient information to decide the case.

136. $F(1, 1479) = 58.33, p < .001$. Though the difference was smaller, arbitrators in Pima County also were more likely to be very familiar with arbitration procedures (89% vs. 77%; $F(1, 1472) = 11.70, p < .01$). The court in Pima County drew arbitrators largely from lawyers with civil litigation experience and made efforts to match arbitrators to cases based on subject matter, whereas the court in Maricopa County drew more broadly from the bar and did not match by area of expertise. See *supra* notes 28, 35 and accompanying text.

137. This was consistent with studies in other jurisdictions, which found that a majority of lawyers thought the arbitrator's decision was fair and was based on the merits. See BARKAI & KASSEBAUM, *supra* note 4, at 51; Boersema et al., *supra* note 4, at 31; COLLINS & FORD, *supra* note 4, at 140; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 142; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 140; DEWITT ET AL., *supra* note 4, at 42; MACCOUN ET AL., *supra* note 67, at 55; ROEHL ET AL., *supra* note 4, at 52; SMITH ET AL., *supra* note 68, at 49. Interestingly, lawyers whose cases settled before an arbitration hearing tended to have more favorable views of the outcome than did lawyers whose cases had a hearing. See COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 139-42; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 137-40; DEWITT ET AL., *supra* note 4, at 35, 40.

Findings in studies in other jurisdictions were mixed with regard to whether lawyers in arbitration cases that had a hearing had less favorable, more favorable, or similar assessments of the outcome compared to lawyers in non-arbitration cases resolved by a trial judgment. See BURTON & MCIVER, *supra* note 4, at 35, 60; COLLINS & FORD, *supra* note 4, at 139; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 139, 142; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 137, 140; DEWITT ET AL., *supra* note 4, at 40, 52. However, lawyers in arbitration cases that had a hearing tended to have less favorable views of the outcome than did lawyers in non-arbitration cases that settled. See COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 139, 142; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 137, 140; DEWITT ET AL., *supra* note 4, at 40, 50-52.

138. Studies that directly assessed litigants' views in other jurisdictions generally found that a majority thought the arbitration award was fair and were satisfied with it. See BURTON & MCIVER, *supra* note 4, at 45-49; COLLINS & FORD, *supra* note 4, at 117; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 100-03; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 101-02; DEWITT ET AL., *supra* note 4, at 61-63; MACCOUN ET AL., *supra* note 67, at 55; LIND, *supra* note 4; Lind et al., *supra* note 122, at 966; MEIERHOEFER, *supra* note 4, at 66; ROEHL ET AL., *supra* note 4, at 62. The findings were mixed whether arbitration litigants whose cases settled before the hearing had more favorable, less favorable, or similar assessments of the outcome compared to arbitration litigants whose cases had a hearing. See COLLINS & FORD, *supra* note 4, at 115, 117; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 101, 103; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 101; DEWITT ET AL., *supra* note 4, at 59, 63; Lind et al., *supra* note 122, at 966; ROEHL ET AL., *supra* note 4, at 62-64.

Findings in studies in other jurisdictions were mixed with regard to whether litigants in arbitration cases that had a hearing had less favorable, more favorable, or similar assessments of the outcome compared to litigants in non-arbitration cases that went to trial. See BURTON & MCIVER, *supra* note 4, at 54, 60; COLLINS & FORD, *supra* note 4, at 117; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 100, 103, 116; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 101-02; LIND, *supra* note 4.

said it was worse than the expected trial judgment.¹³⁹ Lawyers who thought the hearing process was fair were more likely to think the award also was fair.¹⁴⁰

Lawyers' assessments of six different aspects of the arbitration process and the arbitrator were strongly related to their perceptions that the hearing process was fair and that the award was fair;¹⁴¹ the patterns of relationships were similar for both fairness measures. Lawyers' perceptions that the arbitrator understood the issues in the case,¹⁴² was not biased,¹⁴³ and was prepared for the hearing¹⁴⁴ were strongly related to their views that the hearing process and the award were fair. Lawyers' perceptions that the arbitrator knew arbitration procedure¹⁴⁵ and that they were able to fully present their case¹⁴⁶ also were related to their views of fairness. Lawyers' views that the other side participated in good faith had little relation with their perception that the hearing process was fair, but were not related to the perceived fairness of the award.¹⁴⁷

Lawyers who had more favorable assessments of the arbitration award, hearing process, and arbitrator were less likely to file a request for trial de novo than were lawyers who had less favorable assessments.¹⁴⁸ Lawyers' assessments of the award—whether it was fair, how it compared to the expected trial judgment, and especially whether their client was satisfied with it—were strongly related to whether they requested a trial de novo.¹⁴⁹ Lawyers' views of the fairness of the hearing process and of the arbitrator's bias, preparation, and understanding of the

139. This was consistent with studies in other jurisdictions, in which a majority of the lawyers generally thought the outcome in arbitration was about the same as they expected or as the expected trial outcome. See COLLINS & FORD, *supra* note 4, at 138; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 139; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 144; DEWITT ET AL., *supra* note 4, at 40; MACCOUN ET AL., *supra* note 67, at 55; MEIERHOEFER, *supra* note 4, at 68; SMITH ET AL., *supra* note 68, at 43.

140. $r(638) = .575, p < .001$. The value of the correlation coefficient (Pearson r) indicates the strength of the relationship between two variables and ranges from +1.00 to -1.00, with 0.00 representing no relationship between the variables. See RUNYON & HABER, *supra* note 59. Correlations tell us only that these measures are related; they do not tell us that one caused the other or the direction of the effect. *Id.* Accordingly, it is possible that perceptions of the award affected perceptions of the hearing process rather than vice versa.

141. Combined in multiple regression analyses, this set of six assessments accounted for almost half of the variation in lawyers' views of the fairness of the hearing process (47%) and the fairness of the award (42%) (process: $F(6, 666) = 98.02, p < .001, R = .68$; award: $F(6, 611) = 74.76, p < .001, R = .65$). The percentage of variation accounted for tells us how well a group of variables included in a predictive model (here, views of the arbitration process and arbitrator) accounts for what one seeks to predict (here, perceived fairness). Zero percent of variation accounted for would reflect a complete absence of predictive power, and 100% would reflect perfect predictive power. See RUNYON & HABER, *supra* note 59.

142. r 's of .53 for process and .55 for award; p 's < .001.

143. r 's of .52 for process and .51 for award; p 's < .001.

144. r 's of .49 for process and .44 for award; p 's < .001.

145. r 's of .42 for process and .35 for award; p 's < .001.

146. r 's of .36 for process and .27 for award; p 's < .001.

147. $r = .08, p < .05$ for process and $r = .03, p = .39$ for award.

148. $F(10, 578) = 37.09, p < .001, R = .62$. Combined in a multiple regression analysis, this set of assessments accounted for 39% of the variation in whether lawyers requested a trial de novo. Lawyers' assessments of these aspects of arbitration might account for a smaller proportion of the variation in whether they appealed the award than in their perceptions of fairness because considerations other than their views, such as the time and cost associated with an appeal, would enter into the decision to file an appeal.

149. r 's of .49 to .58, p 's < .001.

issues and procedure were moderately related to whether they requested a trial de novo.¹⁵⁰

When considering their general, overall experience with court-connected arbitration in Arizona, just over one-third of lawyers thought arbitration was effective in resolving disputes more quickly than traditional litigation (37%) and in keeping litigants' costs down (39%).¹⁵¹ With regard to arbitration's impact on cases not subject to arbitration, approximately half of the lawyers thought that arbitration was effective in allowing the court to devote more resources to those cases, but only 25% thought it was effective in reducing their disposition time.¹⁵²

Among arbitrators who held a hearing, a majority in most counties received seventy-five dollars for their service; few received more.¹⁵³ In Maricopa County, however, almost two-thirds of arbitrators (62%) did not bother to submit an invoice for payment; they commented that it would take more than seventy-five dollars of their time to complete the cumbersome form.¹⁵⁴ Approximately half (51%) of the arbitrators who held a hearing spent a total of five to eight hours on the case, and 38% spent more time. Approximately half of all arbitrators (51%) reported their support staff spent an additional one to two hours on the case. Arbitrators thought their compensation at its current rate was "absurd," "ridiculous," "insulting," and "a slap in the face."

B. Views of Arbitration Policies and Procedures

Almost two-thirds of lawyers with a caseload subject to arbitration (64%) felt that court-connected arbitration should remain compulsory in superior court. Only 35% said they would frequently or almost always recommend arbitration to clients if it were made voluntary but the program otherwise remained the same, and 37% said they would sometimes recommend arbitration. Over half (57%) of

150. r 's of .29 to .40, p 's < .001. Whether the lawyer was able to fully present the case was less strongly related to whether an appeal was filed ($r = .22$, $p < .001$); good faith participation by the other side was not related to appeal ($r = .06$, $p = .12$).

151. Studies in other jurisdictions generally found no differences between arbitration and non-arbitration cases in the actual number of hours lawyers worked or in the amount of fees they billed. See *supra* note 80. When asked about the amount of time spent on specific tasks, a majority of lawyers generally thought they spent the same amount of time on those tasks in arbitration as they would have if the case had not been in arbitration. See Boersema et al., *supra* note 4, at 31-32; COLLINS & FORD, *supra* note 4, at 146-48; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 159; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 157-58. Nonetheless, in most studies a majority of lawyers thought their fees or litigants' costs were lower in arbitration than if the case had not been in arbitration. See COLLINS & FORD, *supra* note 4, at 146-48; COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 160; COLLINS ET AL., DUPAGE COUNTY, *supra* note 4, at 157-58; DEWITT ET AL., note 4, at 69. But see BURTON & MCIVER, *supra* note 4, at 38; Boersema et al., *supra* note 4, at 31-32 (finding a minority of lawyers thought arbitration costs were lower).

152. Two studies in other jurisdictions found no significant reduction in the time to disposition for non-arbitration cases following the introduction of the arbitration program. See COLLINS ET AL., LAKE COUNTY, *supra* note 4, at 199; Hanson & Keilitz, *supra* note 4, at 217-18.

153. Arbitrator compensation is set at seventy-five dollars per hearing day. ARIZ. REV. STAT. ANN. § 12-133(G) (2000).

154. In Maricopa County, arbitrators may seek compensation by completing and submitting a two-page form that allows them to assign their compensation to the State Bar Foundation, which supports public service programs. Approximately half of the arbitrators who completed the form assigned their fee to the Foundation.

lawyers with cases subject to arbitration thought that the court should make compulsory an alternative dispute resolution process other than arbitration, such as mediation or early neutral case evaluation.¹⁵⁵ Thus, lawyers appeared to favor the courts' providing some type of compulsory alternative process, be it arbitration or other ADR processes instead of or in addition to arbitration.

Fifty-nine percent of lawyers with a caseload subject to arbitration thought that their county's current jurisdictional limit should stay the same. Among those who thought the limit should be changed, slightly more thought it should be raised (23%) than thought it should be lowered (18%). Sixty percent of lawyers with cases subject to arbitration felt the current time frame for the hearing was about right;¹⁵⁶ among those who disagreed, most (37%) thought the time frame was too short. Forty-four percent of lawyers with cases subject to arbitration thought the current disincentive to appeal arbitration decisions should stay the same. Among the lawyers who thought the disincentive should be changed, slightly more favored an increase in the percentage by which an appealing party would have to improve its outcome (31%) than favored either a decrease in that percentage or abolishing the disincentive altogether (25% combined).¹⁵⁷

The arbitration policies and procedures that lawyers most wanted to see changed and about which they offered the most comments involved issues of arbitrator service and assignment. Virtually all lawyers (94%)—both those with cases subject to arbitration and those who had served as arbitrators—thought that arbitrator compensation should be changed. Among the possible compensation options presented to them, most lawyers favored either a reasonable hourly rate for all time spent on the case (39%) or no pay but non-monetary benefits, such as

155. Some lawyers suggested mandatory settlement conferences; others felt that settlement conferences or other non-binding processes would not resolve cases and instead proposed binding processes such as shorttrial or binding arbitration. *See generally* Christopher M. Skelly, *Want a Shorttrial? Here's How*, 19 MARICOPA LAW. 16 (1999) (describing the shorttrial process). Because the right to a jury trial is guaranteed by Article 2, § 23 of the Arizona Constitution, the courts cannot impose a mandatory, binding ADR process on the parties absent their consent.

Parties in all civil cases presently are required to confer about whether their dispute might be resolved through negotiation or ADR and to report the results of that discussion to the court; those in cases subject to compulsory arbitration may opt out of arbitration if they stipulate to participation in a different ADR process approved by the court. *See* ARIZ. R. CIV. P. 16(g)(2), 72(d). However, in a sample of cases in Pima County, parties in only 16% of cases subject to arbitration agreed to use a different ADR process; in most cases (75%), the parties agreed that an ADR process other than arbitration was not appropriate. *See* Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 259-60 (2005). In cases not subject to compulsory arbitration, by contrast, parties agreed to use an ADR process in 57% of cases and agreed that ADR was not appropriate in only 29% of cases. *Id.* Court-connected ADR, other than arbitration, for general civil cases in Arizona currently is dominated by judicial settlement conferences which, depending on the court, are conducted by an active judge, a retired judge, or a volunteer attorney serving as a judge pro tem. Although some courts offer other voluntary processes, such as summary jury trials and shorttrials, they seldom are used. *Id.* at 255. Two counties offer voluntary mediation services through the court for a fee, but their use also is low. *See* COCONINO COUNTY L.R. 18; YAVAPAI COUNTY L.R. 19.

156. It is unclear how to square these views with the findings that a majority of cases involved one or more continuances and did not have a hearing within the time frame set by the Arbitration Rules. *See supra* notes 100-02 and accompanying text. The lawyers who said the current time frame was okay might have been thinking about the timing as practiced rather than as prescribed.

157. In their comments on this question, some lawyers suggested other changes in policies relating to appeals, including limiting the new evidence that can be introduced at trial, changing the standard of review, and eliminating altogether the opportunity to appeal.

continuing legal education credit, pro bono credit, or designation as a judge pro tem (36%).¹⁵⁸

A majority of lawyers (73% of those with no cases subject to arbitration and 62% of those with cases subject to arbitration) felt that arbitrator service should be voluntary.¹⁵⁹ If arbitrator service were made voluntary and the rate of compensation remained the same,¹⁶⁰ only 18% of lawyers said they would be very likely, and only 27% would be somewhat likely, to serve as an arbitrator; a majority said they would be either unlikely or very unlikely to serve.¹⁶¹ A larger proportion of lawyers with cases subject to arbitration said they would be very or somewhat likely to voluntarily serve as arbitrators than were lawyers who did not have cases subject to arbitration (51% versus 36%).¹⁶² Similarly, lawyers in civil litigation practice were more likely than lawyers in other practice areas to say they would be very or somewhat likely to serve voluntarily as an arbitrator (55% versus 37%).¹⁶³ Seventy-one percent of all lawyers surveyed felt that arbitrators should be assigned only to cases in which they had subject matter expertise,¹⁶⁴ and 55% felt

158. A small percentage of lawyers favored each of several other options, including no compensation, nominal hourly pay, or a higher daily or flat rate, typically between \$150 and \$300. In 1989, the Commission on the Courts recommended that the statutory arbitrator compensation limit be set at \$250 per day. THE COMMISSION ON THE COURTS, THE FUTURE OF ARIZONA COURTS 35-37 (1989).

159. A sampling of lawyers' comments on this issue revealed their depth of feeling: "These mandatory arbitrations are outrageous. I would like to send the judges some of my extra work for them to do. Why can't they do their own work?" "I resent very much being involuntarily appointed as an arbitrator and, as a sole practitioner, find it to be an extremely unreasonable burden on me and my law practice." "If more judges are needed, hire more judges." "I like serving in this capacity, but I resent being conscripted to do so." "If I don't want to be an arbitrator, no entity should have the power to force me." "It is unjust that attorneys are required to subsidize the civil court system with mandatory arbitration duties. There is no mandated pro bono assistance on [other types of] cases." There were, however, a few positive comments, like this one: "I actually enjoy serving as an arbitrator and consider it to be community and professional service." Some lawyers suggested that court-connected ADR should be conducted by pro tem judges, court commissioners, or other staff neutrals.

160. Some lawyers commented they would be more likely to serve as arbitrators if compensation were increased or if they were assigned to cases only in their areas of expertise.

161. Based on calculations using the proportion of lawyers who said they would be very likely to serve and the number of active state bar members in each county, if arbitrator service were voluntary, each potential arbitrator would have to be assigned an estimated five to six cases per year in Maricopa County and three cases per year in Pima County in order to meet the current volume of cases assigned to arbitration. Accordingly, each arbitrator would have to conduct a hearing in an estimated two to three cases per year in Maricopa County and one to two cases per year in Pima County.

162. $F(1, 2361) = 53.82, p < .001$.

163. $F(1, 1984) = 74.99, p < .001$. An almost equal proportion of lawyers in civil litigation practice said they would be very likely (26%) as said they would be very unlikely (28%) to serve voluntarily as an arbitrator. By contrast, more than three times as many lawyers in other practice areas said they would be very unlikely (40%) as said they would be very likely (12%) to serve voluntarily.

164. Lawyers' comments in favor of assigning cases based on subject matter included these: "Unless the arbitrator is viewed as having expertise or at least basic knowledge of the type of case in dispute, he/she will have no credibility with the parties." "The vast majority of the arguments [the parties] raise have been resolved, but the arbitrators usually don't know it." "When the arbitrator has little or no experience in this area of law it can require additional time to educate the arbitrator." "An arbitrator who does not know the area of law tends to award something to the other side because they feel bad and don't know." Those who did not favor subject matter matching expressed views like this: "Arbitrators hearing cases within their field of expertise are more biased than those unfamiliar with the subject matter of the case." One lawyer's comment summed up the dilemma regarding expertise: "Arbitrators are either completely unfamiliar with the litigation process (and thus vulnerable to ploys by parties to use this ignorance to their advantage) or are so personally entrenched in either plaintiff or defense work that they are incapable of hearing a case openly and fairly."

that arbitrators should receive training in arbitration procedures prior to serving as an arbitrator.¹⁶⁵

V. PROPOSED CHANGES IN COURT-CONNECTED ARBITRATION: RECOMMENDATIONS OF THE COMMITTEE ON COMPULSORY ARBITRATION

After the study's completion, the Supreme Court of Arizona appointed the Committee on Compulsory Arbitration in the Superior Court of Arizona (the Committee) to review the study's findings and other relevant material and to "make recommendations on ways in which the compulsory arbitration system in Arizona could be made more effective and efficient in the handling of claims."¹⁶⁶ The Committee was charged, more specifically, to consider changes to statutes, Supreme Court Rules, and local court policies and operations with regard to arbitrator service and compensation; arbitrator selection, training, and assignment; the jurisdictional limit; and "[a]ny other ways in which use of alternative dispute resolution may accomplish more efficient case processing, reduced litigant costs, and more effective use of judicial resources."¹⁶⁷

The Committee's initial recommendations were presented for comment to the bar during a session at the State Bar Convention, to the Committee on Superior Court, to the Superior Court Clerks Association, and to the Superior Court Administrators. These groups suggested a few changes, most of which the Committee incorporated into its final set of recommendations, discussed in this section.¹⁶⁸ The Committee's recommendations were approved by the Arizona Judicial Council and culminated in a Rule Change Petition filed with the Arizona Supreme Court in October 2006 and in a set of proposed statutory changes filed with the state legislature in January 2007.¹⁶⁹

165. Among lawyers who had served as an arbitrator, those who were not at all familiar with arbitration procedures were more in favor of arbitration training than were those who felt they had sufficient knowledge about arbitration procedures (89% versus 42%) ($\chi^2(2) = 121.56, p < .001$). In 1989, the Commission on the Courts recommended that "training in arbitration techniques and theory be provided to and required of all arbitrators." THE COMMISSION ON THE COURTS, *supra* note 158, at 36.

166. The Supreme Court of Arizona, Administrative Order No. 2005-79, Establishment of the Committee on Compulsory Arbitration in the Superior Court of Arizona (Nov. 2, 2005), available at <http://www.supremecourt.az.gov/orders/admorder/orders05/2005-79.pdf>. The fourteen-member Committee was composed of judges, court administrators and other court personnel, as well as plaintiff and defense lawyers. At the request of the Chair of the Committee, the authors attended the Committee's meetings to provide a briefing on the study's findings and to be available to provide additional information and answer questions as needed.

167. *Id.* Before the Committee held any discussions, the authors asked the Committee members to rate the importance of several common goals of court-connected arbitration. The Committee viewed the primary goals of arbitration as providing faster and less expensive resolution of cases while maintaining or enhancing the satisfaction of the litigants and lawyers who used the process. The Committee members consistently rated conserving court resources and increasing litigant access to a hearing on the merits as less important goals.

168. This information is based on the authors' observations of the Committee's discussions, motions, and votes. See also Final Report of the Committee on Compulsory Arbitration in the Superior Court in Arizona, June 2006, available at http://www.supreme.state.az.us/courtserv/Arbitration/Committee_on_Compulsory_Arbitration_Final_Report.pdf. See Roselle L. Wissler & Bob Dauber, *Compulsory Arbitration Changes Proposed: Time to Comment*, 43 ARIZ. ATTY. 26 (2007) (providing more details on the discussions).

169. R-06-0021, PETITION TO AMEND THE RULES OF CIVIL PROCEDURE, SECTION IX. COMPULSORY ARBITRATION RULES 72-76, available at <http://www.supreme.state.az.us/rules>. The proposed statutory

The Committee recommended that compulsory arbitration be continued in superior court, noting that any potential, albeit small, increase in the courts' workload or in litigation costs and delays that might accompany arbitration's elimination was unacceptable and that a majority of lawyers surveyed in the study had expressed general support for the program. Though noting that the lawyers also indicated an interest in the courts' providing additional mandatory ADR processes from which the parties could choose, the Committee felt that issue was outside their charge and declined to consider it.

The Committee recommended increasing the maximum jurisdictional limit for arbitration cases from \$50,000 to \$75,000 to adjust for inflation, but not to the full inflation-adjusted value.¹⁷⁰ The proposed limit reflected an effort to balance the interest expressed by businesses in having more cases be eligible for arbitration with the concern that higher-value cases might involve more time and cost to litigate and might result in more appeals, which would be at odds with arbitration's goals of faster and less expensive case resolution. The Committee recommended retaining the current structure of the appeal disincentive as well as the de novo standard of review because it thought the current procedures keep the rate of appeal in check without impeding litigants' right to trial.

Noting that lawyers surveyed in the study strongly favored voluntary arbitrator service, the Committee nonetheless recommended that arbitrator service should remain mandatory and that this practice should be made uniform across the state. Their primary concern was that voluntary service would reduce the pool of arbitrators, which could result in a heavier caseload for arbitrators, increased hearing delays for litigants, and more conflicts arising from arbitrators repeatedly hearing cases involving the same lawyers. The Committee acknowledged that the existing rate of arbitrator compensation is inadequate and recommended increasing compensation to \$150 per hearing day to adjust for inflation,¹⁷¹ as well as permitting CLE credit as an alternative form of compensation.¹⁷²

The Committee recommended retaining the existing eligibility requirements for arbitrator service and did not endorse for statewide use the practice in some counties of assigning arbitrators to cases based on subject matter. Members agreed that increasing the minimum number of years of bar membership and requiring arbitration training would increase arbitrator quality, but disagreed about whether civil litigation experience or subject matter expertise is helpful or necessary to decide cases. Most important in the Committee's decision making was the consensus that any potential benefits from such changes would be outweighed by

changes that would be needed to increase arbitrator compensation and the jurisdictional limit were included in the Arizona Judicial Council's 2007 Legislative Proposals, available at <http://www.supreme.state.az.us/ajc/updatedapprop.pdf>.

170. Using the Consumer Price Index, Committee staff calculated the inflation adjustment of the \$50,000 jurisdictional limit, established in 1986, to 2006 levels would set the limit at \$91,000.

171. Committee staff provided two sets of calculations based on the Consumer Price Index: adjusting the \$50 rate set in 1978 to the 2006 level would be \$153; adjusting the \$75 rate set in 1984 to the 2006 level would be \$144.

172. Because the rate of arbitrator compensation is dictated by statute and, thus, would require legislative action to change, the Committee offered two recommendations, in the alternative: that arbitrators receive both monetary compensation and CLE credit if the legislature does not change the rate of compensation, but that arbitrators would have to choose either monetary compensation or CLE credit if the legislature increases the fee.

unduly limiting the arbitrator pool in some counties and by increasing the number of arbitrators who would have conflicts or be stricken by the parties due to perceived bias. Although the Committee felt they could not make arbitrator training mandatory, given that arbitrator service is compulsory, they strongly recommended the development of a training curriculum, reference materials, and other support resources for arbitrators.

Additional changes were proposed to address other potential difficulties that might arise due to arbitrators' lack of subject matter expertise or civil litigation experience. The Committee noted that having arbitrators decide dispositive motions in cases outside their area of expertise might be counterproductive and inefficient if their rulings were inconsistent with judges' rulings and resulted in more appeals in the long run. Accordingly, the Committee recommended that all wholly dispositive motions be decided by the trial judge instead of the arbitrator and, to prevent such motions from being filed for the purpose of delay or harassment, that the court shall impose sanctions for frivolous motions. Although the Committee noted that arbitrators who are not civil litigators might have difficulty ruling on discovery motions and procedural or evidentiary issues, they left those rulings within the arbitrators' realm. In part to reduce arbitrators' having to rule on technical objections, the Committee relaxed the standards for admissible evidence by recommending that the rules of evidence serve only as a guide and that the arbitrator have discretion to admit other relevant and previously disclosed evidence.

The Committee devised several changes designed to enhance arbitration's efficiency. Starting with the timing of assignment of cases to arbitration, the Committee recommended that counties assign cases to arbitration as soon after the answer as is feasible, but in no event later than 120 days after the answer.¹⁷³ The Committee also recommended requiring the earlier disclosure of more information,¹⁷⁴ but did not change the existing arbitration hearing deadline. Members felt that plaintiffs typically would be able to provide disclosure materials earlier than presently required,¹⁷⁵ which in turn would enable the defense to evaluate plaintiffs' claims and to disclose information earlier, ultimately expediting the final resolution of the case. In addition, in an effort to address an apparent problem of cases lingering on court dockets long after they have concluded, as well as to streamline the post-hearing process, the Committee recommended (1) requiring

173. While there was general agreement that, to reduce the time to disposition, cases should be assigned to arbitration shortly after the pleadings and not after the motion to set for trial is filed, Committee members were reluctant to impose specific deadlines that might adversely impact those courts that utilize early case management procedures to address arbitrability.

174. Under the recommended changes, the plaintiff would have to disclose information within ten days of service of an answer, and the defendant within thirty days of filing an answer, instead of the current requirement of mutual disclosure within forty days after the defendant files an answer. *See* ARIZ. R. CIV. P. 26.1. In addition to providing the currently required Rule 26.1 disclosure statement, the recommended changes would require (a) the plaintiff to provide answers to applicable uniform interrogatories and, in personal injury cases, additional medical records, names of health care providers and executed HIPAA-compliant medical releases; and (b) the defendant(s) to provide answers to applicable uniform interrogatories and a non-party at fault statement. This additional information must be submitted at the same time as the parties' disclosure statements.

175. However, Arizona lawyers surveyed in another study reported that in almost one-third of their cases, on average, disclosure had not taken place even within 120 days of the answer. *See* Wissler & Dauber, *supra* note 155, at 260.

parties to notify the court of settlement and (2) a new process involving the notice of decision, award, entry of judgment, and court dismissal of the case.¹⁷⁶

In light of their recommended changes to the arbitration system, the Committee suggested that the Administrative Office of the Courts determine whether and how it would be feasible to monitor the efficacy of the changes.

VI. CONCLUSION

The study of compulsory, court-connected arbitration in the Arizona Superior Court suggested that the program's primary goals—providing faster and less expensive resolution of cases, reducing the court's workload, and maintaining or enhancing the satisfaction of users—were not entirely being met.

Cases subject to arbitration were resolved only several months faster than higher dollar-value cases not subject to arbitration, and a sizeable number of arbitration cases did not conclude within the time specified by the Arizona Supreme Court's case processing standards.¹⁷⁷ In some cases, particularly in counties that assigned cases to arbitration after the motion to set for trial was filed, a considerable amount of time passed before the arbitration process began and the deadlines prescribed in the arbitration rules started running. Those hearing and award deadlines, which were not monitored or enforced in most counties, were not met in a majority of cases, largely due to continuances. Cases assigned to arbitration that settled without a hearing often did so only shortly before the hearing; in cases that had a hearing, rejecting the award substantially extended the time to final disposition, even if the case ultimately settled.

Although a substantial proportion of filed civil cases were subject to arbitration, most concluded before an arbitrator was appointed and before a hearing was held; those cases that had a hearing seemed more likely to have been diverted from settlement than from trial.¹⁷⁸ An examination of how, when, and with what court resources arbitration cases concluded suggested that the arbitration program likely had an impact on the court's workload in a relatively small proportion of cases and primarily reduced the use of pretrial rather than trial resources. The pattern of case dispositions also suggested that arbitration's overall impact on litigants' costs would depend largely on how transaction costs associated with an arbitration hearing compared to costs associated with settlement. Arbitration did appear to increase litigants' access to a hearing on the merits, though that was not an express goal of this program.¹⁷⁹

176. The arbitrator would have to file the notice of decision with the court within 10 days after the hearing. If no further action were taken, that notice of decision would automatically become the award. However, the award would not be converted into a judgment unless a party applied to have judgment entered on the award. If no application for judgment were filed and no appeal were pending, the court would dismiss the case 120 days after the notice of decision.

177. See *supra* Section III.B.

178. See *supra* Section III.A.

179. A few programs in other jurisdictions included among their goals giving litigants the opportunity to have their "day in court" in a fair, informal proceeding. See, e.g., BARKAI & KASSEBAUM, *supra* note 4, at iii; BRYANT, *supra* note 4, at 1. But in only one program was "[p]roviding increased third party review" in order to give "attention to cases that would otherwise be disposed by settlement, withdrawal, or abandonment" the primary goal. See Hanson & Keilitz, *supra* note 4, at 207-08 (emphasis added). MacCoun argues that increasing access to third-party adjudication is "arbitration's

Lawyers who represented clients in arbitration had favorable assessments of the fairness of the arbitration process, arbitrator and award.¹⁸⁰ But they, as well as many arbitrators themselves, expressed concerns about the adequacy of arbitrators' knowledge of the issues, arbitration procedures, and civil procedure more generally. Accordingly, a majority of lawyers felt that arbitrators should be assigned to cases based on their substantive expertise and should receive arbitration training before serving.¹⁸¹ A majority of lawyers did not think arbitration resolved cases faster or with less cost for litigants, and many were skeptical that it benefited the processing of non-arbitration cases. Nonetheless, a majority of lawyers who represented clients in arbitration favored the continuation of compulsory arbitration, or some other compulsory ADR process, and the retention of some of its basic components, such as the jurisdictional limit and hearing time frame. But most lawyers thought that arbitrator service should be made voluntary and that arbitrator compensation should either be increased or replaced with non-monetary benefits.

These findings were not unique to court-connected arbitration in Arizona; they generally were consistent with the findings of studies of arbitration in other jurisdictions, most conducted more than a decade ago and most examining newly implemented programs.¹⁸² And the subset of those studies that involved comparisons of relatively equivalent arbitration and non-arbitration cases generally found that although arbitration tended to resolve cases somewhat faster, there was no reduction in lawyers' work or litigants' costs, no consistent reduction in the use of court pretrial or trial resources, and no consistent enhancement of lawyers' or litigants' views of the process and outcome. Thus, both in Arizona and in other jurisdictions, both in long-standing and in newly implemented programs, and both currently as well as over a decade ago, court-connected arbitration does not appear to have negative consequences, but also does not consistently or substantially improve the effectiveness and efficiency of dispute resolution.

The fact that some studies found that arbitration outperformed traditional litigation on some dimensions while other studies found no differences between arbitration cases and non-arbitration cases on those same dimensions suggests that arbitration's effectiveness might depend on the structure of the arbitration program or the larger court case management context and legal practice culture in which it operates. The impact of aspects of program or court structure on arbitration's performance has received little systematic empirical study. Seldom has a particular program component been varied within a given jurisdiction. Comparisons across jurisdictions can be misleading because the programs and courts often differ on multiple characteristics, any of which could mask or enhance the effects of the particular component at interest. A few studies have examined whether claim type or size affects the likelihood of pre-hearing settlement or post-hearing appeal, but the impact of those as well as other factors on other aspects of program performance remains largely unexamined. For instance, what qualifications (e.g.,

greatest asset." MacCoun, *supra* note 4, at 242. Litigants viewed the hearing process as more fair than the settlement process, but did not consistently view arbitration awards as more fair than pre-hearing settlements. See *supra* notes 122, 138.

180. See *supra* Section IV.A.

181. See *supra* Section IV.B.

182. See *supra* Sections III, IV.

substantive expertise, civil litigation experience, or training in arbitration rules and procedures) enhance arbitrators' ability to conduct a fair and adequate hearing? The present study's correlational data provide suggestive findings that civil litigation experience was related to greater familiarity with the area of law and with arbitration procedures, and that greater substantive and procedural knowledge in turn were related to lawyers' assessments that the hearing process and award were fair. Unfortunately, research to date provides little information to guide arbitration program design with regard to arbitrator qualifications or other aspects of program structure.

The Committee on Compulsory Arbitration, appointed by the Supreme Court of Arizona to recommend potential changes in court-connected arbitration to enhance its performance, weighed the available research findings along with practical and policy considerations.¹⁸³ The Committee endorsed the existing overall approach to arbitration in superior court,¹ but conceived several ideas for how the program might better achieve its goals. The Committee recommended retaining the current compulsory nature of both arbitration use and arbitrator service, the structure of the appeal procedure, and the qualifications of arbitrators and their random assignment to cases. The Committee recommended the following changes be made: (1) increase the jurisdictional limit, (2) increase arbitrator compensation, (3) permit arbitrators greater discretion over evidence, (4) redirect dispositive motions back to the court, (5) require earlier disclosure of information, and (6) streamline the post-hearing process.

The Committee's recommendations were approved by the Arizona Judicial Council and culminated in a Rule Change Petition filed with the Arizona Supreme Court in October 2006 and proposals to the state legislature in January 2007.¹⁸⁴ The comment period for the Rule Change Petition runs through May 21, 2007. In September 2007, the Arizona Supreme Court will decide whether to adopt the proposed changes, which would become effective in January 2008. It remains to be seen what impact any changes adopted will have on the performance of court-connected arbitration in Arizona.

183. *See supra* Section V.

184. *See supra* note 169.

APPENDIX A

County	Statistics on Civil Filings and Cases Assigned to Arbitration, 2003, By County ¹⁸⁵					
	civil cases filed	tort ¹⁸⁶ & contract cases filed	# cases assigned to arbitration (% of all civil)	# (%) of arb cases with arb award filed	# (%) of arb awards appealed	# (%) of appeals with trial de novo
Apache	170	51	not available	--	--	--
Cochise	754	267	32 (4%)	10 (31%)	3 (30%)	0
Coconino	701	317	46 (7%)	16 (35%)	7 (44%)	1 (14%)
Gila	311	164	11 (4%)	6 (55%)	1 (17%)	not available
La Paz	239	77	3 (1%)	3 (100%)	1 (33%)	0
Maricopa	35,956	18,716	4,920 (14%)	2,118 (43%)	460 (22%)	89 (19%)
Mohave	909	507	68 (7%)	14 (21%)	4 (29%)	0
Navajo	324	212	32 (10%)	not available	4 (N/A)	0
Pima	6,934	3,656	908 (13%)	380 (42%)	84 (22%)	(15%) ¹⁸⁷
Pinal	1,370	438	38 (3%)	18 (47%)	6 (33%)	1 (17%)
Yavapai	1,372	751	38 (3%)	24 (63%)	11 (46%)	3 (27%)
Yuma	976	347	66 (7%)	28 (42%)	7 (25%)	1 (14%)

185. The information on case filings was based on the courts' *FY2003 Data Report*, *supra* note 51. The information on cases assigned to arbitration was provided by the courts. Graham County was not included in the table because its arbitration program was newly implemented in 2004. Greenlee and Santa Cruz Counties were not included because they essentially had no arbitration programs due to their low jurisdictional limits.

186. This excludes medical malpractice cases, which were categorized separately.

187. Disposition on appeal could not be ascertained from the court database. This estimate of the rate of trial de novo is based on a sample of tort and contract cases assigned to arbitration.

