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Alternative to Litigation: Court-Annexed Arbitration

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INTRODUCTION

No observer of the modern American judicial system can fail to notice the mounting frustration caused by the increasing congestion in our nation's courts. In many parts of the country, especially larger urban areas, the wait for trial in even moderately sized civil cases can be more conveniently measured in years than months.¹ Chief Justice Burger's remarks drawing attention to the explosion of litigation in this country, were a significant expression of that concern if only because of the widespread publicity they received.²

One method of dealing with court congestion has been court-annexed arbitration.³ In 1952, the civil courts located in large ur-

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1. For example, the time for civil cases to come to trial in Los Angeles county, California, currently stands at forty months and is continually growing with time. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF CALIFORNIA COURTS 89 (1982) [hereinafter cited as JUDICIAL COUNCIL OF CALIFORNIA, REPORT].

2. The Chief Justice stated:

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.

The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. . . . we should be alert to the need for better tools to serve our purposes.

. . . Against this background, I focus today on arbitration, not as the answer or cure-all for the mushrooming caseloads of the courts, but as one example of "a better way to do it."

Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274, 276 (March 1982).

3. Court-annexed arbitration is also known as compulsory or judicial arbitration. Court-annexed arbitration can be contrasted with consensual or contractual arbitration in that under court-annexed arbitration, state law *requires* the matter in dispute be resolved by arbitration. Therefore, claimants of the class included within a court-annexed arbitration statute, *must* go through arbitration and are prohibited from a judicial trial until they do so. On the other hand, parties not within the juris-

ban areas of Pennsylvania faced a three year backlog. In response, the legislature passed a statute enabling court-annexed arbitration in any county which approved its implementation.⁴ Similarly, in the late 1970's when California faced a civil court backlog of approximately three years,⁵ its legislature enacted a compulsory court-annexed arbitration system.⁶ Three federal districts have had compulsory arbitration on an experimental basis for the last five years.⁷

This Article will examine and critique the court-annexed arbitration systems of Pennsylvania and California. Analyzing the Pennsylvania system is appropriate since Pennsylvania has successfully used court-annexed arbitration for a considerable period of time. In addition, other states have used the Pennsylvania model as a basic framework in enacting their own compulsory arbitration systems. The California judicial arbitration system, on the other hand, is one of the newest in the nation,⁸ and differs substantially from the Pennsylvania scheme. After the two sections which discuss these differing approaches toward court-annexed arbitration, part three will critique the two systems. This critique will focus on major conceptual and procedural differences between the two systems. Significant variations in court-annexed arbitration systems of other states will also be evaluated. Finally, part four suggests a model compulsory arbitration system, drawing on the critique discussed in the previous section.

I. PENNSYLVANIA

The oldest established system of court-annexed arbitration ex-

dition of court-annexed arbitration can choose between the judicial trial or the arbitration hearing. Knight, *Private Judging*, 56 CAL. ST. B.J. 108 (March 1981); Butler, *Arbitration: An Answer to the Medical Malpractice Crisis?*, 9 BEV. HILLS B.J., 41, 42 n. 4 (Sept.-Oct. 1975).

4. CONNECTICUT LAW REVISION COMM'N, SECRETARY OF STATE, ALTERNATIVES TO THE COURTS FOR DISPOSITION OF MINOR CRIMINAL AND CIVIL CASES 56 (1978).

5. The median interval in months from the "at-issue memorandum" to trial in Los Angeles county was over twenty-four months as of June 1977, up from nine months in June 1968. Other large counties were experiencing similar delays, the longest at the time being San Bernardino county at more than thirty-two months as of June 1977. JUDICIAL COUNCIL OF CALIFORNIA, ANN. REP. TO THE GOVERNOR AND THE LEGISLATURE 94 (1978).

6. CAL. CIV. PROC. CODE § 1141.10-1141.32 (West 1982); CAL. R.C. 1600-1617.

7. The three federal districts participating in the experiment include: the district of Connecticut, the northern district of California and the eastern district of Pennsylvania. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (Jan. 1983).

8. CAL. CIV. PROC. CODE § 1141.10-1141.31 (West 1982) (added by statute in 1978, and became operative July 1, 1979).

ists in Pennsylvania,⁹ and that approach has been the model used by other states which have enacted compulsory arbitration statutes.¹⁰ Thus, it is useful to review the Pennsylvania system in some detail.

In Pennsylvania, all civil actions become subject to compulsory judicial arbitration upon the filing of a complaint for less than \$20,000,¹¹ if the action does not concern title to real estate¹² or seek equitable relief.¹³ All other cases must, therefore, be resolved through the normal judicial process unless the parties themselves voluntarily consent or contract for arbitration.¹⁴

Arbitrators, who are selected from members of the bar practicing in that judicial district, hear cases in panels of three.¹⁵ The method of selecting the deliberation panel is subject to local rules.¹⁶ For example, in Philadelphia, the members of the bar willing to serve as arbitrators are divided into two groups; those capable of serving as chairmen of an arbitration panel,¹⁷ and all other potential arbitrators. Thereafter, the panels are chosen from the two lists in alphabetical order.¹⁸

Similarly, the procedures for fixing the date and time of the hearing are dictated by local rules.¹⁹ In Philadelphia, at the time of the initial filing, a hearing date is immediately assigned.²⁰ State rules require at least thirty days notice of the hearing to all parties regardless of the local rules.²¹

In contrast to a judicial trial, where the judge may exercise

9. Pennsylvania enacted a voluntary arbitration statute in 1836. This was amended by the legislature in 1952 to grant power to courts of common pleas to establish compulsory or court-annexed arbitration of small claims. The statute was further amended in 1981 to expand the jurisdiction of compulsory arbitration, and to standardize court-annexed arbitration rules throughout the state. 42 PA. CONS. STAT. ANN. §§ 1301-1314 (Purdon 1975 & Supp. 1983).

10. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 41 (1977) [hereinafter cited as *OUTSIDE THE COURTS*].

11. 42 PA. CONS. STAT. ANN. § 7361(b)(2) (Purdon 1982).

12. *Id.* at § 7361(b)(1).

13. PA. R.C.P. 1301 explanatory note, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983).

14. PA. R.C.P. 1302(b), 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983).

15. PA. R.C.P. 1302.

16. *Id.*

17. The requirement for eligibility as chairman of an arbitration panel is that the person must be a member of the bar admitted to the practice of law for at least three years. This is the minimum requirement, and local rules may establish greater restrictions. *Id.* at 1302(c).

18. PHIL. R. COMP. ARB., II B.

19. PA. R.C.P. 1303(a), 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983).

20. PHILADELPHIA COURT OF COMMON PLEAS, 1981 ANNUAL REPORT 45 (1982) [hereinafter cited as *PHILADELPHIA, 1981 REPORT*].

21. PA. R.C.P. 1303(a), 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983).

broad discretion regarding the legal conduct of the proceeding, Pennsylvania arbitrators have limited powers on such matters. Continuances, for example, may only be granted by a supervising judge.²² Therefore, if one party appears and the other does not, the panel must proceed to hear the matter and enter an award.²³ The board is also limited in its ability to issue subpoenas or compel the production of relevant documents. The authority to issue a subpoena or a subpoena *duces tecum* belongs solely to the supervising court.²⁴ The board, however, may place under oath any witness who does appear during the arbitration proceeding.²⁵

In a judicial trial, the rules of evidence must, of course, be strictly observed. In compulsory arbitration the rules of evidence are generally followed, although several liberal exceptions have been provided in order to expedite a judgment. For example, the following documents may be offered into evidence without any authentication:

- (1) bills, records, and reports of hospitals, doctors, dentists, registered nurses, licensed practical nurses and physical therapists, or other licensed health care providers,
- (2) bills for drugs, medical appliances and prosthesis,
- (3) bills or written estimates of value, damage to, cost of repair of or loss of property, and
- (4) a report of rate of earnings and time lost from work or lost compensation prepared by an employer.²⁶

As a protective qualification, however, the party offering such evidence must provide twenty days notice to all other parties of his intent to offer any of the above documents.²⁷ Thereafter, the opponents may subpoena the person whose testimony would otherwise be waived, and cross-examine him concerning the

22. *Id.* at 1303(b) explanatory note.

23. "This poses a delicate question," when the appearing party attempts to temporarily postpone the hearing out of professional courtesy. Such a postponement would be a continuance, and is not within the power of the arbitration board to grant. Local rules may attempt to regulate this problem, but it must be the court, and not the arbitrators who control the progress of the case. *Id.*

24. Under the original Arbitration Act of 1836, and the subsequent Act of 1947, the arbitrators were permitted some extended authority. In fact, the arbitrators were capable of requiring either party to produce books, papers and documents which they deemed material to the case. This was essentially a subpoena *duces tecum*, which under the new act is exclusively restricted to the court. *Id.* at 1304 explanatory note.

25. *Id.* at 1304(b).

26. *Id.* at 1305. During a civil trial the admissibility of any such similar evidence would necessitate appropriate authentication.

27. The relaxation of the traditional requirement for authentication is done only where the proponent has given the opponent at least twenty days advanced notice prior to the date of the hearing accompanied by copies of the bills, records, reports or estimates to be introduced. The opposing party may then take whatever steps necessary to object to or cross-examine witnesses upon these documents. *Id.* explanatory note.

document.²⁸ In addition, “an official weather or traffic signal report or a standard United States government life expectancy table” may be offered into evidence without formal proof of its authenticity.²⁹ Additionally, other official state documents may be introduced as evidence without further proof.³⁰

After completion of the hearing, the arbitration board is required to make an award “promptly,” but is under no specific time deadlines.³¹ It is also required that the award be signed by a majority of the arbitrators, and be filed immediately with the prothonotary, or court clerk.³² The prothonotary will then formally enter the award, and notify the parties by ordinary mail.³³

In a judicial trial, appeals must be based on alleged errors in the record. In contrast, the opportunity for review by a dissatisfied party is less restricted in compulsory arbitration. Though the supervising judge may modify the award in the case of an obvious and unambiguous error,³⁴ the remedy provided for dissatisfaction with any portion of the award is an appeal for a judicial trial de novo.³⁵ Therefore, a party who is convinced an injustice has been done him by the arbitration award, may appeal for a judicial trial. This appeal for a trial de novo is a matter of right for any party,³⁶ and is considered an appeal by all the parties on all the issues, absent a contrary stipulation.³⁷ The appeal, however, must be filed with the prothonotary within thirty days of the entering of the award.³⁸ Unless an appeal is filed within the thirty day deadline, the arbitrators’ award constitutes a final judgment, and may be enforced as any other judgment of the court.³⁹ At the trial de novo, no arbitrator may be called to testify regarding matters covered at the arbitration hearing.⁴⁰

Notwithstanding the liberal opportunity to appeal, there is some disincentive; the appellant must pay the arbitrator’s com-

28. *Id.* at 1305(b).

29. *Id.* at 1305(d).

30. *Id.*

31. *Id.* at 1306.

32. *Id.*

33. *Id.* at 1307(a).

34. “Subdivision (d) is new. If a judge may modify the verdict of a jury, after the jury has dispersed, to correct obvious and unambiguous errors in language or in mathematics, the judge should have the equivalent power with respect to an award of arbitrators”. *Id.* at 1307(d) explanatory note.

35. *Id.* at 1307(d), 1311. This, therefore, provides that a party who is completely dissatisfied and further is convinced an injustice has occurred may in fact appeal, and be granted a *judicial* trial de novo, on the entire matter in dispute.

36. 42 PA. CONS. STAT. ANN. § 7361(d) (Purdon 1982).

37. PA. R.C.P. 1309, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983).

38. *Id.* at 1308(a)(1).

39. *Id.* at 1307(c).

40. *Id.* at 1311(b).

compensation.⁴¹ While such payment may not exceed fifty percent of the amount in controversy, it is not recoverable in any further proceedings regardless of the outcome.⁴² The appellant is not required, however, to pay any accrued costs or post any bond.⁴³ An additional disincentive to appeal is implicit in the system of court-annexed arbitration. Several studies have demonstrated that compulsory arbitration awards are essentially equivalent to amounts won at judicially supervised trials.⁴⁴ If the arbitrators' award is perceived by all the parties as being approximately equal to what would be won at trial, any incentive to appeal will be substantially diminished. Thus disincentives are in fact present, particularly when additional costs of appeal and delay until trial are considered.⁴⁵

II. CALIFORNIA

There are several ways in which civil actions may be submitted to arbitration in California: (1) The parties may voluntarily submit a case to arbitration by agreement and stipulation.⁴⁶ They may do so regardless of the amount in controversy, provided the dispute involves subject matter appropriate for consensual arbitration;⁴⁷ (2) The plaintiff may elect to arbitrate upon stipulation by him that any claim for damages will not exceed \$15,000;⁴⁸ (3) There is mandatory arbitration for all civil cases in each superior court with ten or more judges where the claim by any single party does not exceed \$15,000.⁴⁹ Certain types of cases not suitable or conducive to arbitration are excepted from inclusion by statute:

- (a) actions that include a request for equitable relief that is not frivolous or insubstantial;
- (b) class actions;

41. 42 PA. CONS. STAT. ANN. § 7361(d) (Purdon 1982).

42. The court may however, authorize an appeal *in forma pauperim*, which would not require payment of arbitrators compensation. PA. R.C.P. 1308(a)(2), 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983).

43. *Id.* at 1308(c).

44. JURISDICTIONAL COUNCIL OF CALIFORNIA, A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS 33 (quoting statistics from Philadelphia Court of Common Pleas, John G. Fall, Project Director) [hereinafter cited as *ROLE OF ARBITRATION*].

45. "The award when entered shall be a lien upon the party's real estate, which shall continue during the pendency of an appeal or until extinguished according to law." PA. R.C.P. 1307(b), 42 PA. CONS. STAT. ANN. (Purdon Supp. 1983). Therefore, as a further deterrent, there will be a lien, encumbering the appellants property throughout the time of appeal.

46. CAL. CIV. PROC. CODE § 1281 (West 1982).

47. CAL. R. CT. 1600(a).

48. *Id.* at 1600(b).

49. *Id.* at 1600(c).

- (c) small claims actions or trials de novo on appeal from the small claims court;
- (d) unlawful detainer proceedings;
- (e) Family Law Act proceedings;
- (f) any action, otherwise subject to arbitration that is found by the court not to be amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation;
- (g) any category of action, otherwise subject to arbitration but excluded by local rules as not amenable to arbitration on the ground that under the circumstances relating to the particular court, arbitration of such cases would not reduce the probable time and expense necessary to resolve the litigation;
- (h) actions involving multiple causes of action or a cross-complaint if the court determines that the amount in controversy as to either exceeds \$15,000;
- (i) certain actions in the Economical Litigation Project provided for in part 3.5 of the Code of Civil Procedure.⁵⁰

The mandatory court-annexed jurisdiction applies to all superior courts with ten or more judges.⁵¹ For superior courts having less than ten judges, and also for municipal courts, court-annexed arbitration may be made mandatory by local rules.⁵² While the above scheme is in effect state-wide, an important exception should be noted. In several counties, including the chronically backlogged Los Angeles county, the legislature has extended court-annexed mandatory arbitration to *any* claim not exceeding \$25,000.⁵³ This is consistent with the legislative intent behind the original mandatory arbitration plan, to require court-annexed arbitration in the large judicial districts which customarily suffered from serious backlogs and delay.⁵⁴

It should be noted, however, that filing a complaint for damages asserting an amount in controversy greater than \$15,000, or \$25,000 in appropriate counties, may not assure exclusion from court-annexed arbitration. A judicial determination of the actual amount in controversy will be made at the conference with all

50. *Id.* at 1600.5.

51. *Id.* at 1600(c).

52. *Id.* at 1600(d)(e).

53. CAL. CIV. PROC. CODE § 1141.11(e) (West 1982 & Supp. 1983).

54. The Legislature finds and declares that litigation involving small civil claims has become so costly and complex as to make more difficult the efficient resolution of such civil claims that courts are unable to efficiently resolve the increased number of cases filed each year, and that the resulting delays and expenses deny parties their right to timely resolution of minor civil disputes. The Legislature further finds and declares that arbitration has proven to be an efficient and equitable method for resolving small claims. . . .

Id. at § 1141.10(a).

necessary parties present,⁵⁵ and will be based on the total amount of damages. Where there are cross-complaints, the determination of the amount in controversy is as to each cause of action or cross-complaint.⁵⁶ If the determination at this required conference results in a finding that the amount in controversy is below \$15,000, the action will be submitted to mandatory arbitration.⁵⁷

Selection of the arbitrators in California is a relatively liberal process. Any person, including non-lawyers, may serve as an arbitrator if selected by the parties.⁵⁸ Additionally, the parties may stipulate to designate any person to serve as an arbitrator.⁵⁹ In those cases in which an arbitrator is not selected by mutual agreement, the arbitration administrator selects at random three names from a panel of arbitrators.⁶⁰ Each party is entitled to a certain number of peremptory strikes.⁶¹ If at the end of ten days after submission of this list, two or more names have not been rejected, the administrator appoints, at random, one of the arbitrators.⁶²

The arbitration hearings are to be scheduled no sooner than thirty-five days, but no later than sixty days, from the date the case is assigned to an arbitrator.⁶³ The court is charged with providing the appropriate facilities for the hearing; however, the arbitrator may select another site.⁶⁴ If the parties and arbitrator agree, the hearing may even be held on a Saturday or legal holiday.⁶⁵

The arbitrator is responsible for setting the time, date, and place of the hearing, notification of which is to be received by the parties at least thirty days prior to the hearing date.⁶⁶ After the hearing date is set, the parties may agree to a continuance with the consent of the arbitrator. If the arbitrator fails to approve the requested continuance, relief from a court may be sought by motion and a showing of good cause.⁶⁷ A request to the arbitrator for a continuance is the only exception to the general understanding that a party is not allowed *ex parte*, or independent, contact with

55. *Id.* at § 1141.16(a).

56. CAL. R. CT. 1600.5(h).

57. Of course, the plaintiff may stipulate that his damages are not to exceed \$15,000, thereby conferring automatic jurisdiction to arbitrate the controversy. *Id.* at § 1600(b).

58. CAL. CIV. PROC. CODE § 1141.18 (West 1982).

59. CAL. R. CT. 1602.

60. *Id.* at 1605(a).

61. The administrative committee, upon compiling a random list of potential arbitrators, will provide each party with an opportunity to reject a specific number of the potential arbitrators on this list. In other words, "peremptory strikes." *Id.*

62. *Id.*

63. *Id.* at 1611.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1607(b).

the arbitrator.⁶⁸

Discovery under California's court-annexed arbitration system is subject to the California Code of Civil Procedure. The sole exception is that all discovery must be completed no later than fifteen days prior to the date set for the hearing. The court, however, may permit an extension upon a motion and showing of a good cause.⁶⁹

As in Pennsylvania's arbitration scheme no official record of the arbitration proceeding is required to be kept.⁷⁰ Therefore, any records made by tape recorder, court reporter, or by the arbitrator himself are deemed to be the personal notes of the arbitrator and exempt from discovery or impeachment purposes in cases appealed to a trial court.⁷¹

The arbitrators powers respecting the hearing itself are limited to the following functions:

- (1) to administer oaths to witnesses;
- (2) to take adjournments on the request of a party or on his or her own initiative when deemed necessary;
- (3) to permit testimony to be offered by deposition;
- (4) to permit evidence to be offered and introduced as provided in the rules;
- (5) to rule on the admissibility and relevancy of evidence offered;
- (6) to invite the parties, on reasonable notice, to submit trial briefs;
- (7) to decide the laws and facts of the case and to make an award accordingly;
- (8) to award costs, not to exceed the statutory cost of the suit; and
- (9) to examine any site or object relevant to the case.⁷²

Therefore, procedural matters beyond the scope of the arbitrator's powers are explicitly reserved to the court.⁷³

The California rules of evidence governing civil actions also apply to the arbitration hearings with the following exceptions:

- (1) Any party may offer, and the arbitrator shall receive in evidence written medical and hospital reports, records and bills (including physiotherapy, nursing and prescription bills), docu-

68. The rule requires that the sole contact any parties should have with the arbitrator is the actual hearing; no other contact, except for requesting a continuance or regarding scheduling is permissible. *Id.* at 1609.

69. *Id.* at 1612.

70. *Id.* at 1614(b).

71. *Id.*

72. *Id.* at 1614(a).

73. Since the arbitrators powers are expressly limited to the nine functions so listed, where a dispute or conflict arises with regard to any procedural, evidentiary, discovery, or substantive law related matters, resolution of such must be brought to the attention of the supervising court. *Id.*

mentary evidence of loss of income, property damage repair bills or estimates, and police reports concerning an accident which gave rise to the case, if copies have been delivered to all opposing parties at least twenty days prior to the hearing.⁷⁴

(2) Testimony of witnesses is admissible in a written statement if the witnesses would be qualified to express such opinion if testifying in person. Portions of the statements which would be excluded, even if the witness testified in person, are to be disregarded by the arbitrator. The admissibility of the statements is conditioned on whether they are made by affidavit or by declaration under penalty of perjury, whether copies have been delivered at least twenty days prior to the hearing, and whether no opposing party has, at least ten days before the hearing, delivered to the proponent written demand that the witnesses testify in person at the hearing.⁷⁵

(3) The deposition of any witness may be offered by any party and shall be received in evidence even if the deponent is not unavailable as a witness. The opposing party may subpoena the deponent for cross-examination.⁷⁶

The California court-annexed arbitration statute provides that the arbitrator shall not be required to make findings of fact or conclusions of law in the award granted.⁷⁷ It is required, however, that the award be in writing, and filed within ten days of the hearing's conclusion. The arbitrator must make his determination on all issues properly raised by the pleadings, including determination of damages and, when appropriate an award of costs.⁷⁸ Additionally, the arbitrator's award may, if appropriate, validly exceed the limitation placed on the amount in controversy.⁷⁹

Twenty days after the award is filed it becomes a judgment, unless during that period any party files a request for a judicial trial de novo.⁸⁰ If no appeal is taken the arbitrator's award has the same force and effect as a judgment in a civil action, except that it cannot be appealed.⁸¹ A party against whom a judgment is entered may within six months, move to vacate the award on the following grounds:

(1) the arbitrator was subject to some disqualification not disclosed prior to the hearing of which the arbitrator was then aware;⁸²

74. *Id.* at 1613(b)(1).

75. *Id.* at 1613(b)(2).

76. *Id.* at 1613(b)(3).

77. *Id.* at 1615(a).

78. *Id.*

79. *Id.* at 1615(b).

80. *Id.* at 1615(c).

81. *Id.* The difference is that in a final judgment in a judicial court litigated dispute appealable error may still be present, thus allowing for further appeal by a party.

82. *Id.* at 1615(d).

(2) conditions provided for vacating an award pursuant to section 1286.2 of the California Code of Civil Procedure are relevant. This code section provides for vacating an arbitration award by the court if a party procured the award by fraud or corruption or if the arbitrators were corrupt or any other act by the arbitrators substantially prejudiced rights of the moving party.⁸³

Such a motion may be granted only after a hearing in which clear and convincing evidence is presented.⁸⁴ The motion must also be made as soon as practicable after the moving party has learned of evidence supporting the motion to set aside the award.⁸⁵

The central aim of California's court-annexed arbitration system is to provide both speedy and final resolution of most civil cases involving damage claims of less than \$15,000. To advance these objectives it is useful to discourage appeals to a trial *de novo*. Thus, as in Pennsylvania, California legislators have embodied, within the statutes, inhibitions for those inclined to appeal an arbitration award.

There are two such deterrents. The first, as in Pennsylvania, derives from the adequacy of the arbitration award itself. If the arbitration award is perceived as being essentially equivalent to the result of a judicial trial, there is little incentive to appeal.

The second deterrent fostered in the California scheme is a provision that affects cases where an award is successfully appealed to a trial *de novo*. If the judgment at the trial is not more favorable to the appealing party than the arbitration award, that party must pay: (1) the arbitrator's fee, (2) statutory costs of the parties, (3) any fees charged by expert witnesses of the other party or parties, and (4) any compensation paid to the arbitrator by the other party or parties.⁸⁶ If an unsuccessful party at trial, however, who would otherwise be subject to such assessments, can convince the court that these additional costs create a substantial economic hardship, he may have such costs waived by the court.⁸⁷

III. CRITIQUE AND EVALUATION

Overall, the implementation of compulsory arbitration has been beneficial to both Pennsylvania and California. Court-annexed arbitration, when compared with traditional judicial trial processes, has proved to be fast, effective, fair, and economical.

83. *Id.*; CAL. CODE OF CIV. PROC. § 1286.2 (West 1982).

84. CAL. R. CT. 1615(d).

85. *Id.*

86. CAL. CIV. PROC. § 1141.21(a) (West 1982 & Supp. 1983).

87. *Id.*

Barring an appeal, an award in a court-annexed arbitration will generally come approximately nine months after a cause of action has been filed.⁸⁸ Additionally, a court-annexed arbitration hearing is usually completed in two to three hours, while the average length of a trial is two and a half days.⁸⁹

Court-annexed arbitration is also less expensive to implement than the typical judicial courts system⁹⁰ since costs consist primarily of administrative and arbitration fees. Large capital expenditures for buildings, as well as high overhead for maintenance and judicial personnel, are not required because court-annexed arbitration hearings are generally held in the arbitrator's office.⁹¹ Philadelphia's Arbitration Center, however, is an exception which the city estimates will save it over \$500,000 per year through more efficient scheduling of arbitration hearings, which should lower arbitrator's fees.⁹² At a time when expenditure control is critical to tight budgets, court-annexed arbitration has proven inviting to state and local governments.

The Pennsylvania system of court-annexed arbitration is serving its public well. In Pennsylvania, fifty to sixty percent of all civil cases fall under the jurisdiction of court-annexed arbitration.⁹³ Twenty percent of those cases are settled prior to a hearing, while the remaining eighty percent proceed to an arbitration hearing.⁹⁴ Only nine percent of the cases subject to court-annexed arbitration are appealed to a trial *de novo* and only forty percent of these ultimately proceed to a full trial.⁹⁵ When pre-arbitration settlements, final awards, and settlements prior to a full trial on appeal are taken into account the result is that a much smaller number actually end up in a full trial. In 1981, the latest year for which figures are available, less than one percent of the arbitration awards were successfully taken to trial.⁹⁶

Thus, it is not surprising that court-annexed arbitration in Pennsylvania helped reduce the entire civil case backlog from forty-eight to twenty-one months during a two year period from

88. STATE OF NEW YORK ANNUAL REPORT 335, Table A. (1978).

89. NEW YORK TWENTY-THIRD ANNUAL REPORT 339 (1978).

90. NEW YORK TWENTY-THIRD ANNUAL REPORT 347, Appendix (1978).
OUTSIDE THE COURTS, *supra* note 10, at 46.

91. New York Statute 28.6(a); CAL. R. CT. 1611; Philadelphia Court of Common Pleas Rule 180 III A.

92. PHILADELPHIA, 1981 REPORT, *supra* note 20, at 45.

93. Materials sent by Doug Dodge, Deputy State Court Administrator of Pennsylvania, to Carlton J. Snow (April, 1981) (material on file in the offices of California Western Law Review).

94. ROLE OF ARBITRATION, *supra* note 44, at 37.

95. *Id.*

96. PHILADELPHIA, 1981 REPORT, *supra* note 20, at 45.

1971 to 1973.⁹⁷ As a result of such reductions, some jurisdictions in the state are able to reassign civil court judges to handle criminal cases thereby reducing the criminal backlog as well.⁹⁸

Evaluation of the California system of court-annexed arbitration is more hazardous since the program has been in effect only since mid-1979. Thus, there is little data available on the program's effectiveness, and that which is available may be skewed because of re-orientation problems.⁹⁹ However, early data is discouraging. Approximately 22,000 cases were sent to judicial arbitration in 1980-81, the last year for which figures are available.¹⁰⁰ This is less than thirty percent of the applicable cases filed that year.¹⁰¹ Moreover, the institution of mandatory arbitration appears to have had only a small impact on the civil case backlog.¹⁰² Finally, it should be noted that five percent of the arbitration awards in California are successfully taken to trial.¹⁰³ While this is a relatively small percent in absolute terms, it is still several times higher than the one percent rate in Pennsylvania.¹⁰⁴

California's liberal access to court-annexed arbitration is consistent with the program's objective of relieving docket backlogs.¹⁰⁵ Such liberal access also encourages parties to seek court-annexed arbitration voluntarily. The inducement to seek arbitration is that voluntary cases get heard more promptly than those statutorily mandated to arbitration.¹⁰⁶

The arbitrary nature of maximum amounts for damages allowed under court-annexed arbitration is nowhere more evident

97. OUTSIDE THE COURTS, *supra* note 10, at 47.

98. ROLE OF ARBITRATION, *supra* note 44, at 37.

99. See D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA—THE FIRST YEAR (1981) [hereinafter cited as JUDICIAL ARBITRATION IN CALIFORNIA].

100. JUDICIAL COUNCIL OF CALIFORNIA, REPORT, *supra* note 1, at 44.

101. *Id.* at 64.

102. *Id.*

103. *Id.* at 44.

104. PHILADELPHIA, 1981 REPORT, *supra* note 20, at 45.

105. In the early 1970's, the Los Angeles bar created a voluntary binding arbitration program that quickly spread to other large trial court jurisdictions. Despite its popularity, the voluntary program was never able to draw more than a few thousand cases per year. Under the new mandatory arbitration program, more than 24,000 cases were diverted to arbitration in the first year. Forty-eight percent of the arbitration caseload resulted from litigants stipulating to or volunteering for arbitration. JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 99, at 95.

106. The Institute for Civil Justice has determined that on the average, arbitrators made awards to litigants who elected or stipulated to arbitration in about seven months, while at the same time it took twenty-three months to get a jury verdict. For the litigants ordered to arbitration, the Institute found that in all but one of the courts studied, cases ordered to arbitration were heard no faster than cases going to trial. JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 99, at 95. More recent data indicates, however, that the vast majority of all judicial arbitration awards are now made within one year. JUDICIAL COUNCIL OF CALIFORNIA, REPORT, *supra* note 1, at 44.

than in California. In California, two statutory maximums are in force, \$25,000 in Los Angeles, San Bernadino, Santa Barbara, and Ventura counties and \$15,000 in the rest of the state.¹⁰⁷ The higher limits for these four counties were undoubtedly meant as an attempt to deal with the extraordinary delays in those four jurisdictions.¹⁰⁸ However, the small percentage of cases which qualify for mandatory arbitration in comparison to the number of new superior court cases, indicates that perhaps California's access to court-annexed arbitration is not liberal enough, and an even greater maximum amount might be in order.

The use of arbitrators to schedule the hearings in Pennsylvania and California and to handle motions for continuances in California may give rise to an appearance of impropriety. This is because prehearings can erroneously dramatize favoritism among arbitrators. The problems associated with *ex parte* contacts between parties and arbitration panel members, however, can be avoided. This may be accomplished by using a supervisory arbitration judge to schedule hearings, as Pennsylvania uses them to handle motions for continuances.

In Pennsylvania a hearing may not be scheduled sooner than thirty-five days from the date a case is placed on the hearing list.¹⁰⁹ This mandatory period has been established to encourage settlement prior to the hearing date. However, since court-annexed arbitration was adopted in Pennsylvania, experience with waiting periods has shown that settlement chances did not vary with the length of the waiting period. Thus a waiting period shorter than thirty-five days is plausible, and would accelerate hearing and further the expeditious advantages of arbitration.

The Pennsylvania system, in which arbitration panel members are selected from two lists, based solely on their potential and ability to serve as panel chairmen, suffers from two weaknesses. First, arbitrators are not keyed to their specialties. For example, an individual who may be particularly adept in personal injury cases could be selected to be an arbitrator in a contract case. This is a waste of expertise rather than effective allocation. Second, an alphabetical selection provides no guarantees against a biased arbitration panel, philosophically favoring either a plaintiff or defendant's position.

California arbitration statutes specifically provide that a list of arbitrators who are personal injury specialists be developed, with

107. CAL. CODE CIV. PROC. § 1141.11(a)(e) (West 1982 & Supp. 1983).

108. JUDICIAL COUNCIL OF CALIFORNIA, REPORT, *supra* note 1, at 89.

109. Philadelphia Compulsory Arbitration Rules, III(A).

other lists to be developed when necessary.¹¹⁰ This promotes an appropriate use of arbitrators and, in theory, results in more meaningful awards. In addition, only a single arbitrator is used to hear each case¹¹¹ since "California personal injury lawyers largely prefer a single rather than a three-man tribunal, predicated upon an arbitrator's experience in the subject matter of the dispute."¹¹² The parties select an arbitrator through a preemptive strike system similar to the one which provides for preemptory challenges of prospective jurors in a courtroom trial.¹¹³ This last feature provides a safeguard against arbitrators who are blatantly inappropriate under the circumstances.

Finally, it should be recognized that the California system provides a very weak statutory disincentive to appeal for a trial de novo. In fact, a system where the appealing party pays no costs if the new judgment is more favorable to him, can encourage gambling on his part. The cost to the state in offering this convenient and speedy forum are lost in the face of possibly quite small¹¹⁴ monetary gains for the appellant. While California's scheme might appeal to legislative concerns for equity, its effect on the high rate of appeal to trials de novo is an undesirable consequence.

IV. COURT-ANNEXED ARBITRATION: A PROPOSED MODEL

The model court-annexed arbitration proposal discussed below has been developed in response to problems, actual and theoretical, encountered in existing systems.

Since the most significant purpose behind court-annexed arbitration is to relieve backlogged judicial systems, access to the arbitration alternative should be both convenient and attractive. Thus, entry into court-annexed arbitration should be *mandated* for most types of civil actions involving a claim for less than a statutory amount of damages, e.g., \$15,000 and should be *permitted* by voluntary election of the parties respecting claims exceeding the statutory limit. This approach is similar to California's, but should not confine mandatory court-annexed arbitration to large counties.

110. CAL. R. CT. 1604(a).

111. *Id.* at 1603(a).

112. ROLE OF ARBITRATION, *supra* note 44, at 84.

113. *Id.* In some courts, e.g. Los Angeles and Orange counties, litigants have waived their right to strike if they have not informed the court within ten days of being notified that their case has been sent to arbitration, that they desire to exercise the use of a preemptive strike. See JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 99, at 49.

114. Yakutis, Superior Court Arbitration, L. A. LAW., November, 1978 at 35.

Additionally, the statutory maximum should be high enough so that a substantial portion of all civil cases would be subject to compulsory arbitration. Only then will court-annexed arbitration make a real contribution towards decreasing court backlog and delay.

When a case is claimed not eligible for compulsory arbitration, there should be a judicial determination as to whether the damages claimed are realistic. In cases in which such damages are reasonably found to fall below the statutory limit the judge would insist the case go to court-annexed arbitration.

Discovery should be completed sufficiently in advance of the hearing to promote pre-arbitration settlement and should not be exploitable as a ploy to stall arbitration. Accordingly, it is sensible to require as California does, that discovery be completed at least fifteen days prior to the hearing.

Actions seeking equitable relief, such as injunctions, and actions raising real property issues should be excluded from arbitration. Since the basic purpose of court-annexed arbitration is to provide a forum for quick resolution of relatively small, uncomplicated claims, providing arbitrators with equity jurisdiction and the concomitant necessary authority could be inconsistent with such an aim. Authorizing an arbitrator to provide injunctive relief presupposes continuing jurisdiction of the arbitrator incompatible, from a practical point of view, with professional commitments of temporary *ad hoc* arbitrators or active lawyers.

The model set-up should favor one arbitrator with relevant expertise rather than a system, such as in Pennsylvania, of randomly selecting a panel of three arbitrators. The selection method should permit one or possibly two peremptory strikes per party. This would provide the parties with some control over the selection of the arbitrator and also provide the type of flexibility trial lawyers are typically provided in court trials. Further, being an attorney should not be a prerequisite to serve as an arbitrator. Although attorneys provide a strong contingent from which arbitrators can be selected, past experience has manifestly demonstrated that people other than attorneys make fine arbitrators. In certain types of cases non-attorney arbitrators might even be preferable. Additionally, the court should develop a monitoring system so that prejudiced, biased, or incompetent arbitrators can be removed from eligibility without much difficulty.

The informality of court-annexed arbitration is more apt to create an appearance of impropriety than does the formality of a judicially supervised trial. Therefore, *ex parte* contacts between parties and the arbitrator, regardless of legitimacy, should be pro-

hibited. Hearings should be scheduled by an arbitration administrative office of the court. Requested continuances should not involve contacts between the parties and the arbitrator. Only on a showing of good cause, before the supervising judge, should they be granted.

There are no significant contrasts among various court-annexed arbitration systems regarding the conduct of hearing. All such systems provide that the arbitration hearing is to be less formal than a trial and that the rules of evidence should be less stringently applied than in a law court. However, while the hearing should provide an atmosphere conducive to resolving a conflict, it should not be so relaxed as to appear casual or disrespectful of the issues in dispute.

Filing for an appeal should be perfected within a reasonably short period, for example, within twenty days of receiving an award. An appeal should be for a trial *de novo* and ought to be permitted by any of the parties. While the right to appeal for a trial *de novo* should not, and probably cannot¹¹⁵ be withheld, the proposed model must contain some disincentives to appeal in order to help accomplish the goals of court-annexed arbitration. Such disincentives would promote the finality of these arbitration awards, and would prevent slightly dissatisfied parties from continuing the litigation of these small claims.

CONCLUSION

While Pennsylvania's court-annexed arbitration is the classic system with a proven record of success, California's court-annexed arbitration program offers several innovative changes. While it is undoubtedly too early to pass judgment on the California system, the data available is somewhat discouraging.

A radical departure from either system is not advocated here. Rather, it is suggested that the strengths of each be combined while the weaknesses are avoided. Thus, the proposed court-annexed arbitration model is a fine tuning of an alternative to a traditional trial, which has already proven its social utility.

Mounting trial backlogs portend that ultimately some modification of our current court systems will be demanded by both citizens and legislators. Thus, in order to accelerate the litigation process, and lessen the present burden on courts, a court-annexed arbitration system offers a sound alternative.

115. Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955).