

Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation†

John L. Barkai*
Gene Kassebaum**

I. INTRODUCTION

Court-annexed arbitration, one of the most popular alternative dispute resolution innovations,¹ is being used to combat the two most prevalent criticisms of the American civil justice system:² delay and high litigation costs.³ Although arbitration programs are currently operating in at least twenty states and ten United States federal dis-

† The evaluation of Hawaii's Court-Annexed Arbitration Program was funded by the judiciary of the State of Hawaii and the Program on Conflict Resolution at the University of Hawaii at Manoa.

* Professor of Law, William S. Richardson School of Law, University of Hawaii. J.D., University of Michigan, 1971; M.B.A., 1969; B.B.A., 1967.

** Professor of Sociology, Department of Sociology, University of Hawaii. Ph.D., Harvard University, 1958; M.A., 1950; A.B., University of Missouri, 1951.

The authors would like to thank the following individuals for their assistance on this project: our colleague and co-researcher, Professor David Chandler; the project staff of the Study of Arbitration and Litigation, Claudia Kamiyama, Thomas Webb, Hy Hue Lam, Fran Adams, and Ratana Ariyavisitakul; the Director of the Hawaii Judiciary's Program on Alternative Dispute Resolution, Peter Adler; Arbitration Administrator, Ed Aoki, and his staff of Susan Izumi and Lynn Nozaki; and Arbitration Judge Ronald T. Y. Moon. The opinions and analysis are those of the authors and do not necessarily represent the views of the Hawaii judiciary or any other organization or person.

1. CPR LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (1988).

2. For a critique of the problems with the civil justice system, see J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION 9-10 (1984); Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 RUTGERS L. REV. 279 (1985); Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 396 (1987).

3. Barkai & Kassebaum, *The Impact of Discovery Limitations on Cost, Satisfaction, and Pace in Court-Annexed Arbitration*, 11 U. HAW. L. REV. — (1989) (forthcoming).

strict courts,⁴ they usually are characterized as "experimental" and are under continuing evaluation.⁵

Hawaii first began experimenting with court-annexed arbitration in 1986. After some program modifications, for the past two years it has had a mandatory, nonbinding arbitration program for tort cases valued up to \$150,000. Like several other programs, it is proving that arbitration can increase the pace of litigation.⁶ The Hawaii program is unique, however, because unlike any other program, it is specifically designed to limit pretrial discovery. Most importantly, this discovery reduction is minimizing costs for litigants in Hawaii.

This article reports on an evaluation of Hawaii's Court-Annexed Arbitration Program (CAAP). This program has national significance for several reasons. First, the program is unique because its primary goal is cost reduction for litigants. Most other programs consider cost reduction as a secondary goal;⁷ no other program has reported success in this area. Cost reduction is achieved through program features designed to reduce pretrial discovery. Second, the program has a jurisdictional limit of \$150,000 which is higher than any other statewide program that offers full arbitration hearings.⁸ The success of CAAP signifies that an arbitration program need not be limited to low value civil cases. Third, other features of the program are unique and may be useful for other programs to consider.⁹

4. Conference of State Court Administrators, *1987 Alternative Dispute Resolution Survey* (July 17, 1987) [hereinafter COSCA Survey]; P. Ebener & D. Betancourt, *Court-Annexed Arbitration: The National Picture*, 1985 RAND INST. FOR CIV. JUST.; Keilitz, Gallas, & Hanson, *State Adoption of Alternative Dispute Resolution*, 12 STATE COURT J. 4, 6 (Spring 1988); Lind & Foster, *Alternative Dispute Resolution in the Federal Courts: Public and Private Options*, 33 FED. BAR NEWS & J. 127 (1986).

5. See Barkai & Kassebaum, *supra* note 3; Lind & Shapard, *Evaluation of Court-Annexed Arbitration In Three Federal District Courts*, 1983 FED. JUD. CENTER 79; Simoni, Wise, & Finigan, *Litigant and Attorney Attitudes Toward Court-Annexed Arbitration: An Empirical Study*, 28 SANTA CLARA L. REV. 543 (1988).

6. Simoni, Wise, & Finigan, *supra* note 5, at 547.

7. The Hawaii program differs from other programs in that its primary purpose is to decrease litigant costs through a reduction in discovery activity. The program accomplishes this goal by not allowing any discovery unless it is authorized by the arbitrator. See HAW. ARB. R. 14(A). Other programs focus only on the reduction of delay. Their arbitration rules discuss a time period at which discovery must be completed or determine that cases go to arbitration after discovery has been completed. If these programs hope to reduce costs, it will result from increasing the pace of litigation. Recent research indicates, however, that case processing time is not correlated with costs. See Trubek, Sarat, Lelstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 104 (1983).

8. Keilitz, Gallas, & Hanson, *supra* note 4, at 6.

9. The Hawaii program intervenes earlier in the case than other programs. Arbitrators are assigned after the answer is filed and before any discovery takes place. In addition, the Hawaii program uses: (1) volunteer arbitrators; (2) a "gatekeeping" procedure that presumes all cases to be eligible for arbitration (HAW. ARB. R. 8(A)); (3) a procedure that allows attorneys to seek an exemption from the program when their case may exceed the \$150,000 ceiling (HAW. ARB. R. 8(A)); (4) a required pre-hearing conference 30 days after an arbitrator has been assigned (HAW. ARB. R. 15(D)); and (5)

Finally, because the program is using a randomized comparison group in an extensive evaluation, the effects of arbitration can be isolated, analyzed, and compared to regular litigation.

This article will first discuss the general problems of delay and high litigation costs in America's courts. It then explains court-annexed arbitration, particularly the Hawaiian program. The article then presents and interprets data from the evaluation of the arbitration program. The evaluation shows that Hawaii's Court-Annexed Arbitration Program increases the pace of litigation and reduces litigation costs while maintaining adequate levels of satisfaction of the participants.

II. PRETRIAL DELAY, LITIGATION COSTS, AND LAWYER'S FEES

A. *The Pace of Civil Litigation*

Despite the fact that rule 1 of the Federal Rules of Civil Procedure concludes with, "[These rules of civil procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action,"¹⁰ virtually no one would seriously assert that America's civil justice system is either speedy or inexpensive. Delay and high costs,¹¹ often attributed to congested dockets and excessive discovery, are considered to be major problems in American courts.¹² Court-annexed arbitration programs have been implemented to combat these problems.

Delay is considered more serious¹³ and is most often criticized.¹⁴

an option for litigants to select and pay for their own arbitrator (HAW. ARB. R. 9(A)-(B)).

10. FED. R. CIV. P. 1.

11. Delay and high costs are usually discussed together:

Excessive cost and delay in the disposition of civil cases devalue judgments, cause the memories of witnesses and parties to fade, cause litigants to accept less than full value for their claims, prolong and exacerbate differences between people or entities, and make pursuing legal remedies prohibitively expensive for many people.

Attacking Litigation Costs and Delay, A.B.A. ACTION COMM'N TO REDUCE CT. COSTS AND DELAY (Final Rep. 1984) [hereinafter A.B.A. ACTION COMM'N]. See *Defeating Delay: Developing and Implementing a Court Delay Reduction Program*, A.B.A. LAWS' CONF. TASK FORCE ON REDUCTION OF LITIGATION COST AND DELAY xiii (1986) [hereinafter A.B.A. TASK FORCE].

12. The problems are not limited to the United States. See Falt, *Congestion and Delay in Asia's Courts*, 4 UCLA PAC. BASIN L.J. 90 (1985).

13. "Delay is the most significant single problem affecting the civil justice system." A.B.A. TASK FORCE, *supra*, note 11, at 1.

14. Adler, Felstiner, Hensler, & Peterson, *The Pace of Litigation*, 1982 RAND INST. FOR CIV. JUST. III [hereinafter Adler].

The number of lawsuits filed has increased dramatically in the past few years,¹⁵ but the number of judges has not risen in proportion.¹⁶ State and federal legislatures also have created new causes of action.¹⁷ Because case filings have increased even faster than the population growth,¹⁸ some commentators have suggested that Americans may be growing even more litigious.¹⁹

Although there is a clear consensus that delay exists, it is less clear when, why, and where delay occurs.²⁰ Some courts measure delay from the date of filing until the date the court can schedule a jury trial.²¹ A closer look, however, reveals that scheduling trial dates is not the true problem. The real problem is simply that cases are not resolved soon enough. Because most cases never reach trial,²² theoretically the scheduled trial dates should not be very significant in determining the pace of litigation. The focus on the trial date becomes important only because many cases do not get resolved until shortly before trial.²³ The pace of litigation may be the result of "local legal culture."²⁴

15. According to the former Chief Justice of the United States Supreme Court, "[t]he caseloads in both federal and state courts experienced a fantastic growth during the past sixteen years." Burger, *Introduction, Symposium: Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 201, 210 (1985).

16. Former United States Supreme Court Chief Justice Warren E. Burger said: In the federal system alone, for example, the number of new filings in District Courts have nearly tripled from 112,606 when I took office in 1969 to 307,582 in 1985; the number of judges had increased only about 50%. In short, 300% more cases are to be handled by 50% more judges.

A.B.A. TASK FORCE, *supra* note 11, at vii.

17. S. GOLDBERG, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* 4 (1985); Yamamoto, *supra* note 2, at 400-01.

18. See Hensler, Lipson, & Rolph, *Judicial Arbitration in California*, 1981 RAND INST. FOR CIV. JUST. 1, 4-7; Hensler, Vaiana, Kakalik, & Peterson, *Trends in Tort Litigation*, 1987 RAND INST. FOR CIV. JUST. 2.

19. See, e.g., Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977). For a contrary view suggesting that hyperlexis is a myth, see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 30 UCLA L. REV. 4 (1983). For the best explanation of these apparently contrary findings see Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 492 (1987).

20. Hensler, *supra* note 19, at 492.

21. CHURCH, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* 9 (1978).

22. Of course, not all cases that do not go to trial are settled. One of the few studies to examine case terminations found that only 63% of the cases filed terminated in settlements. Thirty percent of the cases were terminated by means other than trial or settlement. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163 (1986).

23. G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 78 n.23 (1983) (over 70% of all cases settled within 30 days of the trial date).

24. Sipes, *Managing to Reduce Delay*, 1980 NAT'L CENTER FOR ST. CTS. 1 ("The pace of litigation is more the result of 'local legal culture' rather than court structure, procedures, caseload or backlog.").

Because most cases terminate in a negotiated settlement without a trial, apparently delay could be decreased if lawyers and clients settled their cases earlier. It is not clear why cases do not settle earlier, but several possibilities exist. Some delay is legitimately inherent in the handling of a case. A certain amount of time is necessary to investigate a case, compile records, schedule discovery, or in some cases wait for the plaintiff's injuries to stabilize. On the other hand, delay may often result because lawyers are inefficient in managing their workload or someone is trying to gain an economic advantage. Lawyers may delay one case to work on another. Lawyers might not give serious attention to a case until the approach of a "doomsday" event, such as a scheduled deposition, a court hearing, a settlement conference, or even the trial.²⁵ Some lawyers may want to keep a case open because time spent working on a case produces income for the hourly-fee lawyers. Defendants may have little interest in the timely disposition of the case because they want to retain their money and invest it as long as possible,²⁶ or they may hope for the deterioration of the evidence in the case against them.²⁷ Finally, it is possible that the adversary system may create so much animosity between the parties that neither side is willing to extend a hand in compromise even if it might lead to a settlement.

B. Excessive Litigation Costs

Although learning the facts of a case is essential,²⁸ pretrial discovery can make a case very costly and may even deter ordinary people from pressing their legal claims.²⁹ Furthermore, more discovery may be conducted than is necessary for a fair and efficient resolution of the case. In fact, the word most often associated with discovery is

25. Lind & Shapard, *supra* note 5, at 79.

26. Adler, *supra* note 14, at vi; Alschuler, *Mediation With a Two-Tier System In Civil Cases*, 99 HARV. L. REV. 1808, 1823 (1986). "[P]reserving the status quo favors the defendant in almost every lawsuit." *Professional Responsibility in Pretrial Discovery—A Tale of Two Cities*, 64 MICH. BAR J. 298, 300 (1985).

27. Church, *Pretrial Delay: A Review and Bibliography*, 1978 NAT'L CENTER FOR ST. CTS. 13.

28. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

29. The cost of discovery, however, should not deter either side from litigating a tort lawsuit. Because plaintiffs' lawyers take personal injury cases on a contingent fee, injured plaintiffs with a good case should always be able to find a lawyer. Defendants, of course, will defend virtually all tort lawsuits because insurance companies are involved in most of these suits. Insurance companies have the financial resources to litigate in all appropriate cases.

"abuse."³⁰ Although discovery procedures are, in theory, designed to improve the exchange of information between the parties, discovery is frequently put to a more adversarial use by delaying and making the pursuit of a legal claim much more costly.³¹

Even though discovery is the target of criticism, it is actually lawyer's fees that are the larger³² but less discussed aspect of costs.³³ At least for the hourly-fee lawyers, discovery activity generally means an opportunity to bill more legal fees to the client.³⁴ The combined fees and expenses of plaintiff and defense lawyers in tort litigation range from 45% to 63% of the total amount of cost and settlement expended in litigation, including the amount received by the injured

30. A.B.A. LITIGATION SECTION, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, reprinted in 92 F.R.D. 137 (1980); C. ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 17 (1979); Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 274-75 (1978); Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789 (1980); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 230-35; *District of Columbia Survey: Hinkle v. Sam Blanken & Co.: Dismissal for Discovery Abuse—Toward a New Standard in the District of Columbia*, 36 CATH. U.L. REV. 761 (1987); Dombroff, *Objective Procedures Could Curb Discovery Abuse*, LEGAL TIMES, Sept. 6, 1982, at 15, col. 1, at 32; Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIGATION 1 (1982); Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597 (1981); Levine, "Abuse" of Discovery Abuse, N.Y.L.J., Aug. 16, 1982, at 1, col. 2; Lundquist & Flegal, *Discovery Abuse—Some New Views About an Old Problem*, 2 REV. LITIGATION 1 (1981); Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978); Rosenberg, *Discovery Abuse*, 7 LITIGATION 8, 9-10, (Spring 1981); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Sherwood, *Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567 (1981); Sofaer, *Sanctioning Attorneys for Utility of Punishment*, 57 ST. JOHN'S L. REV. 680 (1983); Tell, *Legal Fee Axed for Litton Case Discovery Abuse*, NAT'L L.J., Oct. 12, 1981, at 2, col. 4; Comment, *Preventing Abuse of Discovery in Federal Courts*, 30 CATH. U.L. REV. 273, 284-305 (1981); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978); Note, *Rule 37 Sanctions: Deterrents to Discovery Abuses*, 46 MONT. L. REV. 95 (1985).

31. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

32. A.B.A. ACTION COMM'N, *supra* note 11, at 60.

33. Lawyers' fees are part of litigation "transactions costs" which are "the sum of plaintiffs' costs, defense costs, and public costs. They are the 'overhead' costs of the system in the sense that the services purchased are not desired for themselves." S. Carroll & N. Pace, *Assessing the Effects of Tort Reforms*, 1987 RAND INST. FOR CIV. JUST. 22.

34. "Discovery is good for our business but has nothing to do with justice." Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 (1980); Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (1980).

plaintiffs.³⁵ After deducting lawyer's fees, discovery, and other costs of litigation, plaintiffs receive only about fifty percent of the money paid out in trial verdicts or money paid to settle claims in regular tort cases.³⁶

The relationship of discovery to lawyer fees differs for plaintiff and defense lawyers because of how fees are calculated. Plaintiffs' lawyers in tort litigation are paid on a contingent fee basis; defense lawyers, on the other hand, are usually paid on an hourly basis³⁷ by insurance companies. A large part of the defense lawyer's bill is for time spent conducting discovery. It is quite easy to see that a reduction in discovery will reduce the defense costs. Of course, any program that reduces the amount of discovery will have a corresponding effect of reducing the income of these hourly-fee lawyers. From a personal economic perspective, defense lawyers may be likely to resist an innovative arbitration program that limits pretrial discovery.³⁸

The arbitration program's impact on fees for the plaintiffs' lawyers is quite different. Plaintiffs' lawyers on a contingent fee receive nothing unless the plaintiff recovers. Typically, plaintiffs' lawyers take a 33-1/3% to 40% contingent fee, although the rates vary depending on the jurisdiction, the type of case, and the personal reputation of the lawyer.³⁹ Because plaintiffs' lawyers are not paid on an hourly basis, a reduction in discovery will not automatically diminish the

35. In auto torts, the defense legal fees are 19%, plaintiff legal fees are 26%, and the net compensation to the plaintiff is 52%. In non-auto torts, the defense legal fees are 30%, plaintiff legal fees are 24%, and the net compensation to the plaintiff is 43%. In asbestos cases, the defense legal fees are 37%, plaintiff legal fees are 26%, and the net compensation to the plaintiff is only 37%. Hensler, Vaiana, Kakalik, & Peterson, *Trends in Tort Litigation*, 1987 RAND INST. FOR CIV. JUST. 29.

36. Plaintiffs in automobile accident cases net about 52% of the total expenditures. In non-auto torts they only receive about 37% of the transaction costs. Hensler, *supra* note 19, at 492-94.

37. In arbitration cases, some lawyers are being paid to handle the case on a flat fee basis through the arbitration hearing. If there is an appeal of the arbitration award, a new fee arrangement will begin as the case heads towards trial de novo.

38. Insurance companies are aware that discovery reductions, which save expenses for the company, will reduce defense fees. In Hawaii, these companies are trying to avoid problems with their defense lawyers by promising that every time that a defense lawyer settles a case in arbitration, another new case will be given to the defense lawyer to replace the one that has settled.

39. In Hawaii, the fee is generally 33-1/3% in automobile accident tort cases, and 40% for all other torts. At the time of recovery, the lawyer receives the agreed upon percentage of the recovery. The costs of discovery are deducted from the plaintiff's share of the recovery, and the plaintiff's lawyer is reimbursed for the advance of the discovery costs. Finally, the plaintiff receives the net sum remaining. If there is a defense verdict at trial, the plaintiff still owes the plaintiff's lawyer for the costs of discovery; but in actuality, plaintiffs seldom pay back those advanced discovery costs, and

lawyers' fees.⁴⁰ In fact, in studies of fee structures, programs that saved plaintiffs' lawyers time did not result in a fee reduction for the client.⁴¹ Hence, it is possible that a reform that reduces discovery will neither significantly taper the total costs for the plaintiff nor lessen the income of plaintiffs' lawyers. In the Hawaii arbitration program, the plaintiffs' lawyers may actually make the same amount of money in fees from a case in less time than in regular litigation.⁴²

The contingent fee system is a major subject of controversy,⁴³ especially during discussions of "tort reform." Whether the contingent fee is "the poor man's key to the courthouse"⁴⁴ or simply an opportunity for "greedy attorneys . . . [to] generate suits that would not otherwise be brought"⁴⁵ remains a controversial question. In striking a balance between these two views, some jurisdictions have begun to place a limitation on the amount of fees that a plaintiff's lawyer can receive in medical malpractice cases.⁴⁶

plaintiffs' lawyers seldom pursue their claim against the plaintiff for the advanced discovery costs. Interview with a plaintiff's lawyer, Apr. 20, 1988.

40. Hensler, Lipson, & Rolph, *Judicial Arbitration in California: The First Year*, 1981 RAND INST. FOR CIV. JUST. 82; Note, *Compulsory Automobile Arbitration: New Jersey's Road to Reducing Court Congestion, Delay, and Costs*, 37 RUTGERS L. REV. 401, 430-31 (1985).

41. In contingent fee cases, with procedures that save attorney time, "lawyers are benefiting, but clients are not." A.B.A. ACTION COMM'N, *supra* note 11, at 66; Chapper & Hanson, *The Attorney Time Savings/Litigant Cost-Savings Hypothesis: Does Time Equal Money?*, 8 JUST. SYS. J. 258 (1983).

42. This fee analysis assumes that arbitration will not affect the value of cases settled in the program.

43. In concluding, we emphasize again our firm conviction that to the maximum degree possible litigants themselves should be the beneficiaries of reductions in the cost of litigation. At the same time, we are acutely aware that overall costs to litigants are in the main a reflection of how attorney's fees are structured in the United States and the various methods of calculating such fees. Whether those fees are fair to counsel and client and whether they can or should be changed substantially in amount or method of calculation pose fundamental issues of fairness and political feasibility that our mission and our resources could not encompass. We feel strongly, however, that the organized bar, at both the national and state levels, has an inescapable and immediate duty to address this overriding issue of how attorneys' fees affect litigant cost and access to justice.

A.B.A. ACTION COMM'N, *supra* note 11, at 67. See Clermont & Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Kriendler, *The Contingent Fee: Whose Interests are Actually Being Served?*, 14 FORUM 406 (1979).

44. Young, *Medical Malpractice in Florida: Prescription for Change*, 10 FLA. ST. U.L. REV. 593, 609 (1983) (citing FLORIDA ACADEMY OF TRIAL LAWYERS, SELF-PRESERVATION OF A PRIVILEGED CLASS 11 (1982)).

45. Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 670 (1976).

46. A.B.A. ACTION COMM'N, *supra* note 11; Klein, *Caps in the Hat: Legislative Lids on Runaway Verdicts*, 28 FOR THE DEFENSE 19, 22 (July 1986).

Section 6146 of California's Medical Injury Compensation Reform Act of 1975 (MICRA) limits contingency fees in actions against a health care provider based upon alleged professional negligence to: (1) 40% of the first \$50,000 recovered; (2) 33-1/3% of the next \$50,000; (3) 25% of the next \$100,000; and (4) 10% of any amount on which the plaintiff's recovery exceeds \$200,000. CAL. BUS. & PROF. CODE § 6146 (West Supp.

III. HAWAII'S COURT-ANNEXED ARBITRATION PROGRAM

A. Program Goals and History

Hawaii's Court-Annexed Arbitration Program (CAAP) is intended to "provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters."⁴⁷ It is generally agreed that the major goals of the program are: (1) to reduce litigant costs; (2) to increase the pace of disposing of tort cases; and (3) to improve or at least maintain the level of satisfaction for litigants and attorneys.⁴⁸ Although the statute establishing the arbitration program is specifically limited to tort cases,⁴⁹ the court rules provide that other civil cases may be submitted to the program if the parties agree.⁵⁰

CAAP has operated in two different forms. When the program first began in 1986, it was designed under the Hawaii Supreme Court's rulemaking power as a two-year experiment and was authorized by the Circuit Court Rules for the First Circuit.⁵¹ Initially, the program was voluntary. Any party could request that a tort case valued at or below a "probable jury award of \$50,000" be placed into the arbitration program.⁵² This first \$50,000 program is now referred to as Phase I.

The arbitration program was changed less than six months later into the Phase I experimental program. During a special legislative session on the "Tort Reform,"⁵³ the Hawaii Legislature passed Act 2 of 1986 which included an expanded arbitration program as part of the legislation.⁵⁴ The most significant program change required by this new law was a major increase in the jurisdictional ceiling to

1989); see DEL. CODE ANN. tit. 18, § 6865 (medical malpractice); TENN. CODE ANN. § 29-26-120 (medical malpractice). See also *Roa v. Lodi Medical Group, Inc.*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77, *appeal dismissed*, 474 U.S. 990 (1985) (upholding the limit on contingent fees paid to plaintiff's lawyer).

47. HAW. ARB. R. 2(a).

48. Letter from Janice Wolf, Administrative Director of the Courts and Peter S. Adler, Director, Program on ADR, to the President and Members of the Senate, and the Speaker and Members of the House of Representative of the Thirteenth State Legislature of the State of Hawaii (Dec. 30, 1986) (available in the office of The Study of Arbitration and Litigation).

49. HAW. REV. STAT. § 601-20 (1986).

50. Admission to the program also requires the consent of the Arbitration Judge. HAW. ARB. R. 6(B). To date, no non-tort cases have been accepted to the program.

51. HAW. CIR. CT. R. 34.

52. *Id.*

53. For a list of state tort reform laws passed in 1986, see S. Carroll & N. Pace, *supra* note 33, at 47-72.

54. HAW. REV. STAT. § 601-20 (1986).

\$150,000. Beginning on May 1, 1987, all tort cases with "a probable jury award value, not reduced by the issue of liability, exclusive of interest and costs, of \$150,000 or less" were included in the program.⁵⁵ With a \$150,000 ceiling, CAAP has the highest jurisdictional amount of any mandatory, full arbitration program in a state court.⁵⁶ Even in the Phase I (\$50,000) program, Hawaii's jurisdictional amount was as high as any state full arbitration program in the country,⁵⁷ and now it is three times higher. Only a few federal courts have jurisdictional amounts as high as Hawaii's.⁵⁸

B. Changes in Phase II of the Program

The Judicial Arbitration Commission,⁵⁹ a group empowered to oversee the arbitration rules, made several additional rule and procedural changes in order to accommodate the new jurisdictional amount. In the new Phase II program, a significant change occurred in the gatekeeping function. In Phase I, all tort cases valued at \$50,000 or less were supposed to enter the program. Cases, however, entered the program only if the plaintiff requested or the defendant demanded arbitration. In essence, cases were invited into the program; it was voluntary. As might be expected, many cases did not enter the program for reasons of ignorance, caution, suspicion, or strategy.⁶⁰ In Phase II, the gatekeeping function was changed so that all tort cases automatically enter the program once filed in court. Lawyers who think their cases exceed the jurisdictional limit must request exemption from the program.

55. *Id.*

56. Michigan has a mandatory program which has no jurisdictional limit. However, this program does not contemplate full arbitration hearings with testimony presented by witnesses. Each case is allocated approximately 30 minutes before a panel of three mediators (a plaintiffs' lawyer, a defense lawyer, and a neutral lawyer) who make an arbitration award. The award is more of a case evaluation based upon the short presentation by the opposing lawyers and answers to questions posed by the panel rather than an adjudicative result after hearing witnesses. Although it is called the Michigan "Mediation" Program, the panel of lawyers perform the service of arbitrators who propose a non-binding result, and not the service of mediators who assist the parties to reach their own decision. Interview with Robert K. Schweikart, Mediation Tribunal Clerk, Mediation Tribunal Association for the Third Judicial Circuit Court of Michigan, in Detroit, Michigan (Jan. 1987). See Shuart, Smith, & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (1983).

57. Kellitz, Gallas, & Hanson, *supra* note 4, at 4.

58. P. Ebener & D. Betancourt, *supra* note 4. In a newly initiated round of federal court experimentation with court-annexed arbitration, the jurisdictional ceilings will be limited to \$100,000, but the jurisdictions that are using a \$150,000 limit will be allowed to retain that ceiling. Court Reform and Access to Justice Act of 1988, 28 U.S.C. § 651(c) (Supp. V 1987).

59. The Commission is a body of representatives of plaintiff and defense lawyers as well as one representative from the insurance industry.

60. Lawyer interviews on file in the office of The Study of Arbitration and Litigation, Department of Sociology, University of Hawaii at Manoa. See also *infra* note 82.

To better control the flow of cases through the Court-Annexed Arbitration Program, Phase II rules require that arbitrators schedule a prehearing conference within thirty days of the date a case is assigned.⁶¹ In addition, the arbitrator selection process has been changed. Under Phase I rules, initially one arbitrator was assigned to a case; if either party objected to the arbitrator, a list of five potential arbitrators was circulated to the parties and each party was allowed to strike two names.⁶² Under Phase II rules, five potential arbitrators are initially proposed, with each party receiving two peremptory strikes.⁶³ Lastly, during the summer of 1987, CAAP was extended to all circuit courts giving Hawaii a statewide arbitration program.⁶⁴

C. A Description of Hawaii's Arbitration Program

Hawaii's Court-Annexed Arbitration Program is a mandatory, non-binding arbitration procedure for tort cases with a probable jury award of less than \$150,000. For purposes of this program, all tort cases are presumed to be valued at \$150,000 or less.⁶⁵ In other words, all tort cases are initially assigned to the arbitration program; attorneys then must request that their case be exempted from the program if they believe the value of the case exceeds \$150,000.⁶⁶

After the last defendant's answer is filed, a volunteer arbitrator⁶⁷

61. HAW. ARB. R. 15(D).

62. HAW. ARB. R. 9 (repealed 1987).

63. HAW. ARB. R. 9.

64. Expansion to the neighboring islands offers new challenges to the program—most notably, ensuring a sufficient supply of lawyer arbitrators on each of the neighbor islands. Twenty-three percent of Hawaii's population lives on the neighboring islands of Maui, Kauai, and Hawaii (generally referred to as the "Big Island"), but only six percent of the state's lawyers live on those islands. 25 HAW. BAR NEWS 20 (July 1988). Furthermore, although the distances are not great between the islands, only air travel is available. Finally, a balance between plaintiff and defense lawyers in the arbitrator pool is more problematic on these neighbor islands. The Judicial Arbitration Commission recognizes that most potential arbitrators on the neighboring islands are plaintiff attorneys.

65. Under the Phase II program, all cases are presumed to be qualified for the program. HAW. ARB. R. 8(A). Under the earlier Phase I program, either the plaintiff or the defendant could request arbitration for cases valued at \$50,000 or less. HAW. ARB. R. 8 (repealed 1987).

66. HAW. ARB. R. 8(A). The arbitration administrator also automatically exempts wrongful death cases.

67. Over 400 lawyers now serve the program as volunteer arbitrators. After a brief group orientation, the new volunteers are added to the pool of arbitrators. Arbitrators are selected from members of the bar who have at least five years of experience in civil litigation (most of them practice tort litigation). Currently, all arbitrators are lawyers, although nonlawyers who have the equivalent qualifying experience "can be arbitrators." HAW. ARB. R. 10(B).

is assigned to the case. The arbitrator must schedule a prehearing conference within thirty days from the date a case is assigned⁶⁸ and determine what pretrial discovery will be allowed. Discovery is permitted only with the consent of the arbitrator.⁶⁹ The arbitrator can attempt to aid in the settlement of the case if all parties consent in writing.⁷⁰ If the case proceeds to an arbitration hearing, attorneys must file a prehearing statement⁷¹ thirty days prior to the hearing.⁷²

At the arbitration hearing, the rules of evidence can be relaxed⁷³ and no transcription or recording is permitted.⁷⁴ Arbitration awards must be in writing although findings of fact and conclusions of law are not required.⁷⁵ Awards are not limited to the jurisdictional amount of \$150,000. Awards must be filed within seven days of the conclusion of the arbitration hearing or within thirty days after the receipt of the final authorized memoranda of counsel.⁷⁶

The award becomes the final judgment if no party files a written Notice of Appeal and Request for Trial de Novo within twenty days after the award is served upon the parties.⁷⁷ If such Notice and Request are timely filed, the case is scheduled for a trial de novo. The case is then administered as if it had never been in arbitration. Complete discovery is permitted under the rules of civil procedure. However, no testimony elicited during the course of the arbitration hearing is admissible at the trial de novo.⁷⁸ There are disincentives attached to the appeal process in the form of sanctions for failure to prevail in the trial de novo. When parties appeal, they must be awarded an amount at least fifteen percent greater at the trial de novo than the arbitration award⁷⁹ or be subject to sanctions of attorney fees up to \$5000, costs of jurors, and other reasonable costs actually incurred.⁸⁰

IV. THE EVALUATION PROJECT

Researchers from the University of Hawaii are evaluating the arbi-

68. HAW. ARB. R. 15(D).

69. HAW. ARB. R. 14.

70. HAW. ARB. R. 11(A)(10).

71. The arbitration rules dictate the contents of the prehearing statement which includes material similar to what would be submitted in a pretrial settlement conference with a judge. HAW. ARB. R. 16.

72. HAW. ARB. R. 16.

73. HAW. ARB. R. 11(A)(2).

74. HAW. ARB. R. 17(B).

75. HAW. ARB. R. 19.

76. HAW. ARB. R. 20(A).

77. HAW. ARB. R. 21.

78. HAW. ARB. R. 23(C).

79. HAW. ARB. R. 25.

80. HAW. ARB. R. 26.

tration program in the First Circuit Court⁸¹ of Hawaii through an evaluation project called The Study of Arbitration and Litigation (SAL).⁸² Approximately 1000 tort cases per year are eligible for the program in this circuit. The evaluation is being conducted in a randomized⁸³ experimental design with two groups of cases. One-half of the cases are assigned to the arbitration program and one-half of the cases are designated as a "comparison group" and are assigned to traditional courtroom litigation.⁸⁴ Initially, all tort cases are presumed to be eligible for arbitration and are assigned to the arbitration program when they are filed in the clerk's office. Eligible cases are then assigned either to arbitration or to regular litigation by random numbers.

A comparison group of cases is necessary to measure the effects of arbitration against cases in regular litigation. A comparison group is also necessary to develop an adequate database on cases in regular litigation. Current court records are only partially useful in this regard because they are geared to tracking cases, but are not very helpful for evaluating the arbitration program.

Since the program began in 1986, more than 1500 cases have entered CAAP. The majority of cases settle in CAAP and do not result in an arbitration hearing. The ratio of settlements to awards is about three to one. Just over 50% of the awards are appealed, but so far virtually all of the appeals have resulted in settlements on appeal.

81. The evaluation effort is limited to the First Circuit because Phase I of the program was implemented only in this circuit. Furthermore, the majority of the tort cases in the state are filed in this circuit.

82. The Study of Arbitration and Litigation (SAL) is located in the Department of Sociology at the University of Hawaii at Manoa. This project is being funded by a three-year contract from the judiciary, a grant from the Program for Conflict Resolution at the University of Hawaii, and in-kind contributions from the Sociology Department and the William S. Richardson School of Law, all of the University of Hawaii at Manoa.

83. The randomized experiment has been referred to as "the most powerful of research designs." Lind & Foster, *supra* note 4, at 128. For more about random samples, see D. VINSON & P. ANTHONY, *SOCIAL SCIENCE RESEARCH METHODS FOR LITIGATION* 142-44 (1985).

84. This proportion of regular litigation cases to arbitration cases has changed because of program needs. Formerly, one-third of the cases were randomly assigned to the comparison group. Originally, one-third was decided upon as the random comparison sample by the Arbitration Commission, the Arbitration Administrator, and the evaluation team. It was later increased to one-half at the behest of CAAP to decrease the number of arbitrators needed. Some plaintiff lawyers whose cases fell randomly in the comparison sample have complained that they want their comparison case placed into the arbitration program. These comments suggest that the arbitration program is satisfactory to plaintiff lawyers.

Only one case out of over 750 which terminated after entering CAAP has resulted in a trial.

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

Data collected for the evaluation are drawn from five sources: (1) a case record database maintained by the arbitration administrator; (2) surveys of lawyers and arbitrators conducted after a case closes by settlement, award, or dismissal, sampling cases in arbitration⁸⁶ and in the comparison group; (3) surveys of lawyers conducted after an arbitration appeal is concluded; (4) a general survey of the lawyers most active in CAAP;⁸⁷ and (5) interviews and focus group sessions with lawyers,⁸⁸ arbitrators, insurance industry representatives and others involved in tort litigation.

The focus of the evaluation is on cost, pace, and satisfaction because these factors reflect the goals of CAAP. "Cost" includes discovery costs, time spent on cases by plaintiffs' lawyers, and hourly fees of defense lawyers. "Pace" measures the time necessary to terminate a case once it enters the arbitration program. "Satisfaction" is measured by questions asking lawyers how satisfied they were with the program and how satisfied they thought their clients were. The essence of the program evaluation is to determine if disposing of a case in the arbitration program can decrease cost and increase pace, while maintaining satisfaction.

Aside from whether or not the case was in CAAP, several major factors are expected to influence cost, pace, and satisfaction. The maximum dollar exposure, case complexity, experience of and confidence in the arbitrator, and whether the case proceeded to an award or was settled, may be significant factors. On an even more basic level, lawyers may have different views of arbitration because they see arbitration as impacting plaintiff and defense lawyers differently,

85. The fact that not many comparative cases but a large proportion of arbitration cases have closed suggests that arbitration has increased the pace of litigation relative to regular litigation.

86. The survey response rate has been 76% for arbitrators, 73% for plaintiff lawyers, and 59% for defense lawyers.

87. This was a one time survey sent to the 91 lawyers who had the most cases in CAAP. These lawyers were involved in 84% of all cases we surveyed, indicating that a limited number of specialists handle a large percentage of the cases. Sixty-two lawyers returned this survey.

88. We met separately with plaintiffs' lawyers and with defense lawyers.

especially in the area of lawyer's fees. Because the arbitration program seeks to reduce discovery, the effect of arbitration on contingent fee plaintiffs' lawyers, who do not obtain payment for the time they expend on discovery, may be different from the effect on the hourly-fee defense lawyers who may derive a large proportion of their fees from conducting discovery.

The evaluation attempts to answer the following questions:

- 1) Do arbitrators and lawyers comply with the basic concept of limiting discovery?
- 2) Is CAAP reducing litigant costs?
- 3) Are any cost savings being passed on to litigants?
- 4) Is CAAP increasing the pace of litigation?
- 5) Are cases closed within prescribed time limits?
- 6) Are participants satisfied with arbitration?
- 7) Is there an adequate supply of arbitrators?
- 8) Are arbitrators sufficiently experienced and impartial?

V. EVALUATION RESULTS

A. *Reducing Discovery*

Although more than thirty court-annexed arbitration programs operate across the country,⁸⁹ only Hawaii's program has significant program features designed to reduce discovery, and thereby reduce litigant costs. Most other arbitration programs begin after discovery is completed. At most, they limit the time for discovery, but not the amount.

The majority of lawyers and arbitrators who were surveyed reported that in CAAP discovery was voluntarily reduced. The reduction did not effect the outcome of the case. In cases that settled, 73% of plaintiffs' lawyers, 64% of defense lawyers, and 84% of arbitrators thought discovery was reduced.⁹⁰ In cases resulting in awards, 83% of plaintiffs' lawyers, 70% of defense lawyers, and 93% of arbitrators thought discovery was reduced.

Discovery can be reduced either because the arbitrator denies requests for discovery under the arbitration rules or because lawyers

89. See *supra* note 4.

90. The estimates made by the plaintiffs' lawyers, defense lawyers, and arbitrators that the arbitration program resulted in reduced discovery are reported below. Estimates are reported separately for cases that settled and cases that went to awards.

voluntarily agree to limit discovery.⁹¹ Discovery reduction appears to be derived mainly from lawyers voluntarily reducing discovery. For cases that settled, 86% of the plaintiffs' lawyers, 67% of the defense lawyers, and 85% of the arbitrators thought that discovery was voluntarily reduced. For cases that had an award, the estimate of voluntary reduction was very similar; 83% of the plaintiffs' lawyers, 71% of the defense lawyers, and 83% of the arbitrators thought that discovery was voluntarily reduced.⁹² Denials of discovery requests by the arbitrator seemed to be infrequent, taking place in approximately 20% of the cases.⁹³

One concern about the goal of discovery reduction is whether such a policy affects the outcome of the case. A significant percentage of lawyers hold that discovery reduction did affect or may have affected the outcome of their case. The percentage of lawyers reporting that it did affect the outcome is small, but a higher percentage of attorneys in every category thought that it may have affected the outcome. For settlements, 15% of plaintiffs' lawyers and 37% of defense lawyers thought that discovery reduction did or may have affected

Table 1: Estimates of Discovery Reduction

	<u>Plaintiff</u>		<u>Defendant</u>		<u>Arbitrator</u>	
	Settled	Award	Settled	Award	Settled	Award
DISCOVERY						
Reduced	73%	83%	64%	70%	84%	93%
Same	27	17	36	30	16	7
n =	67	51	53	56	56	94

91. Voluntary reduction of discovery does not mean that the lawyers cannot obtain the information that is normally garnered in pretrial discovery. In CAAP, informal and less expensive methods of discovery are encouraged. For example, documents may be exchanged between the parties rather than being subpoenaed. Informal interviews are encouraged instead of oral depositions. Conference telephone calls to the treating physician can be made rather than a long, costly deposition.

92. Table 2: How Discovery Was Reduced

	<u>Plaintiff</u>		<u>Defendant</u>		<u>Arbitrator</u>	
	Settled	Award	Settled	Award	Settled	Award
VOLUNTARILY REDUCED DISCOVERY						
Yes	86%	83%	67%	71%	85%	83%
No	14	17	33	29	15	17
n =	42	46	51	46	47	84

93. Table 3: Denial of Discovery

	<u>Plaintiff</u>		<u>Defendant</u>		<u>Arbitrator</u>	
	Settled	Award	Settled	Award	Settled	Award
ARBITRATOR DENIED DISCOVERY						
Yes	5%	22%	26%	23%	21%	32%
No	95	78	74	77	79	68
n =	42	46	39	52	62	93

the outcome.⁹⁴ Lawyers whose cases resulted in awards often thought that discovery reduction did or may have affected the outcome of the case. For awards, 50% of plaintiffs' lawyers and 47% of defense lawyers held such a belief. Nonetheless, considering the levels of satisfaction with the program reported in other parts of the survey, it appears that even with this concern about affecting outcome, the program is satisfactory to the majority of lawyers.

B. Using Discovery Reduction to Reduce Litigation Expenses

Discovery reduction is important because a decrease in discovery will lower discovery costs, which are a part of litigant costs. With the high percentage of lawyers reporting a reduction of discovery, it should not be surprising that the majority of lawyers report that discovery costs are lower in CAAP. Plaintiffs' lawyers more often see CAAP as saving costs than do defense lawyers. For awards, which are generally more costly than settlements, 67% of plaintiffs' lawyers and 52% of defense lawyers reported that discovery costs would have been higher if the case had not been in arbitration.⁹⁵ The one exception to the general opinion that discovery costs are lower in arbitration is that a majority of defense lawyers report that discovery costs for settlements are about the same in CAAP and regular litigation. Only 28% of defense lawyers who settled, but 56% of plaintiffs' lawyers thought CAAP was cheaper than regular litigation.

In the general survey, of the sixty-two lawyers with the most cases in CAAP, 83% reported that CAAP was cheaper than regular litigation.

94. Table 4: Effect of Discovery Denial

	<u>Plaintiff</u>		<u>Defense</u>	
	Settlement	Award	Settlement	Award
DISCOVERY DENIAL AFFECTED OUTCOME				
Yes	2%	7%	15%	17%
Maybe	13	33	23	30
No	85	60	63	53
n=	46	43	40	53

95. Table 5: Discovery Costs of CAAP

	<u>Plaintiff</u>		<u>Defense</u>	
	Settlement	Award	Settlement	Award
COSTS IF NOT IN ARBITRATION				
Greater	56%	67%	28%	52%
Same	41	24	62	31
Lower	3	7	9	17
n=	73	46	53	52

tion; 17% thought the cost was about the same. Not a single plaintiff or defense lawyer thought that CAAP was more expensive than regular litigation.

At this time we cannot verify the extent to which the program is actually reducing costs, and we cannot even confirm that such reduction is occurring. Answers will not be available until more comparison cases close. We do, however, have data on what the discovery costs have been for cases in CAAP.

The reported discovery costs for award cases underestimates the final discovery cost because more discovery is likely to be conducted if the case is appealed. The data shows that discovery is more expensive in cases that go to awards than in cases that settle, and that out-of-pocket discovery for the plaintiff and defendant is roughly comparable. For settlements, plaintiffs averaged \$322 in discovery costs and defendants averaged \$479; for awards, plaintiffs averaged \$980 and defendants averaged \$865.⁹⁶ Discovery costs for the majority of lawyers surveyed were below \$400 and approximately 90% of settlement discovery costs were below \$1000.⁹⁷ Slightly more than one-third of the awards had discovery costs in excess of \$1000.

Of course, discovery costs are just part of total litigant costs. For the majority of cases we surveyed, both plaintiff and defense discovery costs represented only ten percent or less of the total. The largest part of litigant costs is lawyer's fees, not the discovery costs. We estimated the fees for plaintiffs' lawyers by computing one-third of the settlement or award value, which is the standard contingent fee percentage in Hawaii. In the cases where we had the settlement or award amount, the lawyer's fees for plaintiffs' lawyers averaged \$10,946 for settlements (n=82) and \$9186 for awards (n=51). The average fee computed for awards includes defense awards for zero damages.⁹⁸ The plaintiff's lawyer would not earn a fee in such cases.

For defense lawyers, the average fee was \$2928 for settlements

96. Table 6: Discovery Costs Reported

	<u>Plaintiff</u>		<u>Defense</u>	
	Settlement	Award	Settlement	Award
AVERAGE DISCOVERY COST	\$322	\$980	\$479	\$865
n=	68	46	45	42

97. Table 7: Range of Discovery Costs

DISCOVERY COST	<u>Plaintiff</u>		<u>Defense</u>	
	Settlement	Award	Settlement	Award
\$0-399	75%	37%	60%	50%
400-999	16	24	27	7
1000 +	9	39	13	43
n=	68	46	42	45

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

(n=45) and \$5955 for awards (n=42). The fees for defense lawyers were taken from the figures reported by the defense lawyers on the surveys. However, if the award is appealed, both plaintiffs' lawyers and defense lawyers will continue to work on the case. The fee for the plaintiffs' lawyers will not change even though these lawyers work more hours on the case because they are working on a contingent fee basis. The lawyer's fees for plaintiffs are more likely to decrease because cases that settle on appeal often settle for somewhat less than the award.⁹⁹ On the other hand, defense lawyers will continue to earn more fees when the case is appealed because these lawyers are working on an hourly fee. We cannot estimate the defense lawyers' fees on appeal until more appealed cases close and can be surveyed.

For defendants, a reduction of discovery costs is likely to reduce lawyer's fees because defense lawyers generally charge an hourly rate. If less discovery is allowed, presumably the defense lawyers will bill fewer hours on each case. If discovery is being reduced by CAAP, defense lawyers are probably making less money on each case they handle in CAAP. One effect of CAAP, however, is that some insurance companies in Hawaii now pay defense lawyers a flat fee for handling cases through the arbitration hearing.

For plaintiffs, a reduction of discovery costs will not effect the lawyer's fees. Plaintiffs' lawyers work on contingent fee, typically receiving one-third of the total settlement as the fee. After the plaintiff's lawyer's fee is deducted, the discovery costs and any other litigation expenses are subtracted and the plaintiff receives the remaining amount. Put simply, the plaintiff's attorney's fee is purely a function of the size of the settlement. If CAAP reduces not only the number of calendar days that a case remains open but also reduces the amount of time a lawyer needs to spend preparing the case, plaintiffs' lawyers could be making more money per hour with CAAP. Additionally, because plaintiffs' lawyers often advance the discovery costs, CAAP will also benefit plaintiffs' lawyers because they will now advance costs for a shorter period of time.¹⁰⁰ Furthermore, earlier payment by the defendants to the plaintiffs will mean that plain-

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

100. Costs of discovery and other litigation costs are often advanced by the plaintiff lawyers. When the case terminates in a settlement or trial verdict, the plaintiff lawyers deduct one-third of the amount as a fee and then deduct the litigation costs which have been advanced. The plaintiff receives the amount remaining.

tiffs will have the use of their money sooner, which is an economic benefit.

C. Potential Savings in Litigation Costs

Although information from lawyer surveys indicates that the majority of lawyers think that CAAP is cheaper than regular litigation, we cannot directly estimate how much it is saving. We can, however, provide a rough guide as to the potential savings. The first step is to estimate the number of cases that could be in CAAP. If the comparison group continues, approximately 1000 cases would enter the program each year; without a comparison group, approximately 1500 cases would enter the program each year.¹⁰¹ Although purely hypothetical, we can project the potential costs savings produced by CAAP at various levels of reduction of litigation costs. For every \$100 that CAAP could reduce litigation costs, total litigation expenses annually in the state could be reduced by \$100,000 if the comparison group remains in place¹⁰² and by \$150,000 if all eligible tort cases are in the program. Total cost savings should be some multiple of \$150,000.

D. Pace of Termination

The majority of lawyers report that CAAP is reducing the time it takes to terminate their case. This conclusion is especially true for cases in which an award was rendered.¹⁰³ For awards, 76% of plaintiffs' lawyers and 77% of defense lawyers thought that it would have taken longer to close their case if it had not been in arbitration. Sixty percent of plaintiffs' lawyers whose cases terminated by settle-

101. In each of the fiscal years 1985-1986 and 1986-1987, there were approximately 1250 tort cases filed in the First Circuit. One-half of the cases are being placed in the comparison group and are not in CAAP. Approximately 500 tort cases are filed annually in all of the other circuits combined. Assuming that 10% of the cases in CAAP are exempted because they are estimated as being over the \$150,000 limit state-wide, approximately 1012 cases would be eligible for CAAP each year (625 cases from the First Circuit, plus 500 from the other circuits, minus 10% for exempted cases). If no comparison group existed, approximately 1575 cases would be eligible for the program each year (1750 cases from the First Circuit plus 500 from the other circuits, minus 10% for exempted cases).

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

103. Table 8: Estimates of Time Savings

	<u>Plaintiff</u>		<u>Defense</u>	
	Settlement	Award	Settlement	Award
TIME IF NOT IN CAAP				
Later	60%	76%	28%	77%
Same	39	14	67	17
Sooner	1	10	5	6
n =	72	50	57	53

ment also thought CAAP was more expedient. Defense lawyers, however, had a different opinion about settlement cases. Only 28% of defense lawyers thought settlements were more expeditious in CAAP.¹⁰⁴ The majority of defense settlements thought the pace in CAAP was about the same as the pace in regular litigation.

In the general survey, the lawyers reported that most cases in CAAP were completed faster than cases in regular litigation. Ninety-two percent of all lawyers thought CAAP was faster than regular litigation and 83% thought it was cheaper. Eight percent thought cases took about the same amount of time. Not a single plaintiffs' lawyer or defense lawyer thought CAAP was slower than regular litigation.

CAAP rules require that cases be completed within nine months (270 days) from the service of the complaint.¹⁰⁵ We use the term "pace" to refer to the time required to close a case,¹⁰⁶ although there can be several measures of pace.¹⁰⁷ The average pace is within the nine-month deadline for settlements (223 days from the answer) and just over nine months for awards (283 days from the answer).¹⁰⁸ All indications are that the pace of cases in regular litigation is much slower. One method of evaluating pace is to look at the cases scheduled for settlement conferences.¹⁰⁹ Numerous sources have indicated that cases in regular litigation go to settlement conferences eighteen to twenty months after filing.¹¹⁰ Only 7% of settlements and 19% of

104. One possible explanation has been learned in focus group interviews and other conversations with defense lawyers. Because formal discovery must be approved by the arbitrator, and because it takes 67 days on the average to assign an arbitrator to a case, some defense lawyers have complained that plaintiffs' lawyers will not provide even informal discovery until an arbitrator is appointed. In regular litigation, as soon as an answer is filed, the defense lawyer can subpoena the plaintiff's medical records and send interrogatories to the plaintiff.

105. HAW. ARB. R. 15(A).

106. Our data on pace is from case records of the first 567 cases that have closed in CAAP.

107. Pace can be measured from the date of filing the complaint, from the date the complaint is served, from the date the answer is filed, or from the date the arbitrator is assigned.

108. This data on pace excludes both dismissals and cases that terminated before the defendant answered, which are approximately one-third of all cases closed in CAAP. If the excluded case were included in the data, CAAP would appear to be even faster.

109. Under local procedure, settlement conferences are scheduled the month before a case is scheduled for trial.

110. This estimate was given by several judges and court clerks, but it is not one of the statistics the court compiles as a matter of course. Our evaluation team will be compiling the information by examining the monthly reports from the judges who are assigned to conduct settlement conferences. See HAW. CIR. CT. R. 12.1 (1984) (civil settlement conference).

awards in CAAP exceed one year from the defendant's answer.¹¹¹

While the overall program has a substantial number of cases that extend beyond the nine-month deadline, the arbitrators are able to terminate cases within nine months of their assignment. Once an arbitrator is assigned, the average settlement closes in 167 days and the average award closes in 197 days. A significant proportion of cases are closed much earlier: 61% of the settlements and 38% of the awards occur within six months or less.¹¹² It is the delay in assigning arbitrators to cases that accounts for almost ninety percent of the delays exceeding nine months. The average time to assign an arbitrator from the case entering CAAP was 117 days, and 67 days from the defendant's answer. The program administration reports that the delay occurs when all arbitrators are assigned to pending cases. Because the program assigns an arbitrator to only one case at a time, the program must wait for cases to close until five arbitrators are available to form a panel for each new case.

E. Satisfaction with CAAP

Although some evaluations focus their satisfaction inquiry on the litigants, we have chosen to focus on the lawyers at this time. We have not attempted to contact the individual litigants who have had cases in CAAP to ask them about their satisfaction with the program. The reasons for this choice are both theoretical and practical. First, we assume that lawyer satisfaction is a critical measure for the program. If the lawyers are dissatisfied with the program, they will resist this innovation and render it ineffective. Second, there are great practical difficulties with contacting litigants. Their addresses are not listed in the court record and our only access to them would be through their attorneys. Additionally, in most cases individual liti-

111. Table 9: Pace of Case Closings

	SETTLEMENT	AWARD
TIME FROM DEFENDANT'S ANSWER UNTIL CLOSING		
< 270 days	71%	52%
271-365	22	29
> 365	7	19
n=	186	117

112. Table 9: Pace—Arbitrator Assignment until Closing

	SETTLEMENT	AWARD
TIME FROM ARBITRATOR ASSIGNMENT UNTIL CLOSING		
< 90 days	10%	3%
91-180	51	35
181-270	32	52
271-365	6	8
> 365	1	3
n=	186	117

gants—especially injured plaintiffs—would not have had prior experience with other tort litigation. Even if they did have prior tort litigation experience, it is most likely that their other tort experience would not be contemporaneous with the present CAAP and, therefore, they could not compare CAAP to regular litigation.

Our goal is to compare randomly assigned CAAP and regular litigation cases. For all of the above reasons, we have asked the lawyers, virtually all of whom have had cases in both CAAP and in regular litigation, to indicate their level of satisfaction with the program. To obtain a measure of client satisfaction, however, we also asked lawyers to indicate what they think the level of satisfaction was for their clients.

The majority of lawyers reported being satisfied with the way their case was handled in CAAP when they were surveyed about a specific case.¹¹³ Perhaps not surprisingly, attorneys are less satisfied with awards than with their voluntary settlements. Interestingly, defense lawyers were more critical and dissatisfied than were plaintiffs' lawyers.¹¹⁴ Ninety-six percent of the plaintiffs' lawyers and 75% of defense lawyers were satisfied with their settlements; 75% of plaintiffs' lawyers and 63% of defense lawyers were satisfied with the program when an award was rendered in their case.

In the general survey, 78% of all lawyers reported that they were satisfied with the program, and 29% were dissatisfied. Again, a major difference in satisfaction was found between plaintiffs' lawyers and defense lawyers. Ninety-one percent of the plaintiffs' lawyers were satisfied with the program, but only 46% of the defense lawyers were satisfied.

1. Defense Satisfaction

In both the case-specific and the general surveys, the defense lawyers are less satisfied with the arbitration program than are plain-

113. Table 10: Lawyer Satisfaction

	Plaintiff		Defense	
	Settlement Award		Settlement Award	
SATISFIED	96%	75%	75%	63%
DISSATISFIED	4	26	25	37
n=	52	47	40	51

114. At least one other arbitration evaluation has found that plaintiffs' lawyers are more satisfied with arbitration than are defense lawyers. Maccoun, Lind, Hensler, Bryant, & Ebener, *Alternative Adjudication: An Evaluation Of The New Jersey Automobile Arbitration Program*, 1988 RAND INST. FOR CIV. JUST. 70.

tiffs' lawyers. Even though the majority of the most active plaintiff and defense lawyers who have responded to the general survey agree that CAAP is both faster and cheaper than regular litigation, a considerable percentage of defense lawyers express dissatisfaction with the program.

The source of the defense dissatisfaction is not clear, but at least two hypotheses can be derived from the data. First, if CAAP truly is reducing discovery and therefore discovery costs, hourly-fee defense lawyers may realize decreasing income from working fewer hours on each case. Furthermore, court records do not indicate that tort filings have increased.¹¹⁵ The bottom line on costs is that not a single plaintiff or defense lawyer reported that CAAP was more expensive than regular litigation.

Second, even if economic considerations are not the prime source of dissatisfaction, the manner in which cases are terminated within CAAP could result in dissatisfaction for defense lawyers. For example, lack of sufficient discovery might cause defense lawyers to feel obligated to settle cases and conduct the arbitration hearings "in the dark." Such a process might be less professionally satisfying for these lawyers.

Another possible explanation for defense dissatisfaction is that defense lawyers might believe that insurance companies are now settling cases at an inflated value and that justice is no longer being done. In the general survey, lawyers were asked their opinions as to what effect the arbitration program has had on the settlement value of tort cases eligible for the program. Thirty-three percent of lawyers believed that the settlement value has remained the same; 35% thought the impact was unclear; 7% thought the value decreased; and 25% thought the value increased. Again, the major differences are between plaintiff and defense lawyers. Only 14% (three of twenty-two) of plaintiffs' lawyers, but 42% (eight of nineteen) defense lawyers, thought values had increased. Hence, dissatisfaction by the defense lawyers is correlated to the opinion that the value of cases has increased.

F. Arbitrator Workload and Compensation

Practicing lawyers who serve as arbitrators are the backbone of the program. Without the hours of work provided by the lawyers, the program could not function. Arbitrators are central to the Hawaiian

115. When CAAP began, one opinion was that plaintiffs' lawyers would file more cases because CAAP offered a low-cost opportunity to test cases with questionable liability. While a lawyer might decline to take a plaintiff's case because questionable liability meant that the lawyer would be advancing a considerable amount of time and money in discovery activity, CAAP allows a quick low-cost case evaluation.

program because the arbitrator is appointed so early in the life of the case.¹¹⁶ No deposition or other formal discovery can be undertaken without the approval of the arbitrator.¹¹⁷

Just how much and what kind of work do the arbitrators perform in an arbitration case? Although most arbitration programs use the arbitrators only to hold hearings and issue awards, Hawaii arbitrators are appointed at the beginning of the case and manage it until termination. The Hawaii procedure means that arbitrators are involved in cases that settle. Arbitrators averaged less than five hours of work on settlements and about fifteen hours on awards.¹¹⁸

The amount of time that arbitrators spend on a case varies widely. Half of the settlements are achieved in three hours or less, but ten percent take from nine to thirty hours.¹¹⁹ Similarly, twenty percent of the awards take eight hours or less and seventeen percent of the awards take from twenty-one to fifty hours. This data suggests either that cases vary considerably in the problems they present, or that arbitrators vary considerably in their style and skill at managing the case, or perhaps both.

Arbitration hearings are the largest single block of time spent by the arbitrators and serve as a "day-in-court" for the parties. The lawyers reported that the majority of the arbitration hearings took less than four hours to complete.¹²⁰ However, thirty percent of the hear-

116. HAW. ARB. R. 9.

117. HAW. ARB. R. 14(A).

118. Table 11: Arbitrators Work Hours

	Settlement	Award
AVERAGE HOURS OF WORK BY ARBITRATOR	4.5	14.9
n=	63	94

119. Table 12: Arbitrator Workload

	Settlement	Award
HOURS PER CASE BY PERCENTAGE OF CASES		
0-3 hours	52%	1%
4-8	38	20
9-15	6	41
16-20	2	20
21-30	2	14
31-50	0	3

120. Table 13: Hours of Arbitration Hearing

HOURS OF ARBITRATION HEARING (n=53)	
1-4 hours	62%
5-8 hours	31%
9+ hours	7%

ings took five to eight hours and seven percent took longer than nine hours.

The arbitrator is allowed to engage in the settlement process with the signed consent of all parties.¹²¹ However, less than half of the arbitrators report being formally involved in settlement efforts. This is a proportion that seems to be declining.¹²² Of course, even if the arbitrators engage in settlement discussions it does not mean that they were successful in facilitating settlement.¹²³

We have determined from interviews and focus groups that some lawyers are not willing to allow the arbitrator to engage in settlement discussions because if a mediated settlement fails, then the arbitrator might be improperly influenced by information acquired during the settlement discussions. Some lawyers believe that arbitrators would simply "split-the-difference"¹²⁴ between the plaintiff's demand and the defense's offer. We have only recently included a "split-the-difference" question in the arbitration surveys. Although not many cases have been surveyed on this issue, we can report that only a small percentage of lawyers thought that the arbitrator had "split-the-difference" in their case.

Data from CAAP records indicate that the average case is valued at about \$30,000 even in an arbitration program that takes all cases

121. HAW. ARB. R. 11(A)(10).

122. Table 14: Arbitrator Settlement Activity

	PHASE I		PHASE II	
	Settlement	Award	Settlement	Award
ARBITRATOR ENGAGED IN SETTLEMENT				
YES	71%	51%	41%	50%
NO	29	49	59	50
n=	49	51	64	94

The percentage of cases in which arbitrators engaged in settlement has decreased in Phase II as compared to Phase I. One explanation for the change is that lawyers, and particularly insurance companies, are more concerned with the "split-the-difference" problem. For a definition of "split-the-difference," see *infra* note 124.

123. Obviously, all settlement attempts failed in those cases that eventually resulted in an award. Furthermore, as indicated in the table below, even when the arbitrator engaged in settlement discussions, the arbitrator often did not think she actually assisted in the settlement.

Table 15: Settlement Activities

	PHASE I Settlements	PHASE II Settlements
ASSISTED IN SETTLEMENT	55%	25%

124. "Splitting-the-difference" is a common negotiating technique. See H. EDWARD & J. WHITE, *THE LAWYER AS A NEGOTIATOR* 121 (1976). In a two-party negotiation, the best prediction of the final settlement is the midpoint between the offers of both parties. H. RAIFFA, *THE ART & SCIENCE OF NEGOTIATION* 48 (1982).

valued up to \$150,000.¹²⁵ Because most arbitration programs are limited to small cases or, at most, cases valued at less than \$50,000,¹²⁶ the following information is very interesting about the setting of jurisdictional limits of a program. In Hawaii's program, which has a jurisdictional limit of \$150,000, almost 90% of the cases have settlements or awards of \$50,000 or less.¹²⁷

G. Complexity

Most arbitration programs are limited to lower valued and presumably simpler cases. When the jurisdictional limit was raised to \$150,000 in Hawaii, many people speculated that higher valued cases would be more complex and inappropriate for an arbitration program. Very few cases in Hawaii's \$150,000 program, however, were considered by the lawyers to be complex.¹²⁸ This finding runs counter to the hypothesis that arbitration is appropriate only for simple, lower valued cases.

H. Hearings

Accelerated pace and cost containment in CAAP do not prevent litigants from having their "day-in-court." Plaintiffs were able to tell their stories to a neutral fact-finder by testifying in virtually all (96%) of the arbitration hearings. Defendants also had an opportunity to personally respond. Their testimony was heard in 68% of

125. Table 16: Average Settlement or Award

	SETTLEMENT	AWARD
PHASE II	\$28,191	\$31,426

In Phase I of the program, which took only cases valued up to \$50,000, the average case terminated at about \$21,000 (\$20,880 average for settlements and \$21,244 average for awards).

126. Keilitz, Gallas, & Hanson, *supra* note 4, at 6.

127. Table 17: Amount of Settlement or Award

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

128. Table 18: Case Complexity

	Plaintiff		Defense	
	Settlement	Award	Settlement	Award
Not Complex	40%	40%	50%	47%
Average	53	44	42	47
Complex	7	16	8	5
n=	55	50	60	57

those cases. Even though the plaintiff testified at almost every hearing, expert testimony was heard in only one-third (36%) of the cases. Low levels of expert testimony at the hearings may represent an important cost saving for CAAP as well as resulting in less inconvenience for doctors and other professionals.

I. Arbitrator Fairness

In any arbitration program, it is essential that the arbitrator be perceived as competent, fair, and impartial. When arbitrators hear cases and issue awards, they are acting like a judge. Arbitrators need to be seen as neutral third-parties if the participants are to have confidence in the program. The necessity for the perception of fairness may be even more important in Hawaii's program than in other arbitration programs because the CAAP arbitrators not only hold arbitration hearings, but control the case from the beginning because they must approve any pretrial discovery.¹²⁹

The perception of fairness might be even more problematic because the arbitrators have law practices that concentrate almost exclusively on either representing plaintiffs or representing defendants in tort cases, and they are asked to serve as third-party neutrals for only a few hours each year. For our purposes, arbitrators whose own law practice concentrates on representing plaintiffs are called "plaintiff's" arbitrator, and of course, defense lawyers are called "defense" arbitrators.¹³⁰ The concern is that plaintiff's arbitrators might give a better, and presumably higher, award to the plaintiffs and that defense arbitrators might be better for the defense. This assumption of arbitrator bias can be seen in the arbitrator selection process. When an arbitrator panel of five names is presented to the lawyers in each case, perhaps not suprisingly, plaintiffs' lawyers mainly strike defense lawyers and defense lawyers mainly strike plaintiffs' lawyers. The assumption is that plaintiffs' lawyers would favor plaintiffs and defense lawyers would favor defendants.

129. HAW. ARB. R. 14(A).

130. This labeling of the third-party neutral can also be seen in criminal courts. When a judge has formerly been a prosecuting attorney, that judge is often considered a "prosecution oriented" judge. Discretionary rulings of the judge, particularly on such matters as search and seizure motions to suppress evidence or sentencing, are often decided in a pattern that appears to favor the prosecution. In other words, when the judge has the ability to exercise discretion in decisionmaking, those decisions often reflect the partisan views developed through years of partisan law practice. "Defense oriented" judges refers to lawyers whose experience before becoming a judge was that of representing criminal defendants.

A similar bias could be expected from arbitrators who are full-time partisan advocates, and who are only in the role of a third-party neutral a few hours per year. Arbitrators will have to make decisions in which their practice bias could effect their decision when they apportion negligence between the parties and when they determine damages.

Despite informal comments from lawyers that some of the lawyers on the arbitrator list might not be qualified to handle cases or might be biased toward one side, the survey evidence is overwhelmingly the opposite. Lawyers reported that the arbitrator in their case was experienced and impartial. In cases that settled, 97% of plaintiffs' lawyers and 88% of defense lawyers thought the arbitrator was experienced enough to handle the case.¹³¹ In cases that actually required an arbitrator's decision in the form of an award, 83% of plaintiffs' lawyers and 89% of defense lawyers thought the arbitrator was sufficiently experienced. The ratings for impartiality were even higher than for experience.¹³² In settlements, 98% of plaintiffs' lawyers and 97% of defense lawyers rated the arbitrators as impartial; in awards, 89% of plaintiffs' lawyers and 90% of defense lawyers rated the arbitrators as impartial.

This disparity between the general lore of partiality and assessments of impartiality on specific cases may result from the CAAP procedure that allows each side to exclude the two most unacceptable arbitrators on the panel.¹³³ While some arbitrators on the panel may be considered unqualified by some lawyers, the lawyers are usually able to exclude such arbitrators from their case with their peremptory challenges.

An examination of the zero dollar or defense awards also suggests that bias does not exist. The defense awards have been almost identical for plaintiff's arbitrators and defense arbitrators. In fact, on the basis of defense awards, a defense lawyer has a marginally better chance of getting a defense award from a plaintiff's arbitrator. Plaintiff's arbitrators made thirteen defense awards out of fifty awards

131. Table 18: Rating Arbitrators' Experience

ARBITRATOR EXPERIENCE	Plaintiff		Defense	
	Settlement	Award	Settlement	Award
Not enough	3%	17%	13%	11%
Yes, enough	97	83	88	89
n=	36	42	32	44

132. Table 19: Ratings of Arbitrator Partiality

	Plaintiff		Defense	
	Settlement	Award	Settlement	Award
Impartial	98%	89%	97%	90%
Partial, but No Effect	2	—	—	6
Partial, and Effect	—	11	3	4
n=	41	46	32	49

133. HAW. ARB. R. 9.

rendered; defense arbitrators made eleven defense awards out of fifty-four awards. Furthermore, the average dollar amount of awards also suggests either no bias or at most a slight reverse bias. The average awards were lower for plaintiff's arbitrators (\$31,769) than for defense arbitrators (\$32,735). Our conclusion is that there is no indication that arbitrators are biased in favor of the side they normally practice.

J. Compensation of Arbitrators

The issue of arbitrator compensation is complicated. Arbitrators are performing a service and could reasonably expect to be compensated for their efforts. Paying arbitrators for the market value of their time would likely drive up the costs of the program to the point that there would be no cost savings from arbitration.¹³⁴

CAAP currently operates through the volunteer efforts of several hundred lawyers who serve as arbitrators. This "pro bono" aspect of court-annexed arbitration is rare. Although no arbitration program in the country pays the arbitrators at a rate matching the income of a lawyer in private practice, most programs do at least offer an honorarium or stipend. Some people have suggested that CAAP should compensate arbitrators in some way to attract and retain arbitrators. In fact, our general survey indicated that one-third of the lawyers responding thought paying arbitrators would improve the program. This was the most common suggestion.

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

Economic benefits may accrue to the person or corporation (typically an insurance company) who pays the defense costs, and who might save costs under CAAP; to the plaintiff who might receive both a larger share of the settlement if litigation costs are reduced and who might receive the settlement earlier; and to the plaintiffs' lawyers who might save the time value of money by advancing the costs of litigation for a shorter period of time. With reduced discovery, defense lawyers and private court reporters who record depositions might be making less money on tort cases with CAAP. If these

134. The Michigan Mediation Tribunal may be the only program in the country that compensates lawyers at the market value of their time.

people are not making less money, then CAAP is probably not saving any costs.

Second, an honorarium or other reward may be necessary to attract, motivate, and retain arbitrators. Although lawyers might be willing to temporarily volunteer their time, some lawyers might stop arbitrating unless they derive some personal or professional benefit.¹³⁵

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

In addition to the economic argument against paying arbitrators, there are other arguments as well. CAAP might be a means of encouraging "pro bono" activity by lawyers whose practice expertise would not otherwise lend itself to traditional forms of "pro bono" activity. Furthermore, the amount of time that a lawyer is likely to spend as an arbitrator each year is small. Many arbitrators might even be willing to contribute more time to the program voluntarily.

K. Program Capacity

The long-term capacity of the Hawaii arbitration program is a significant concern. Currently, the program is assigning one-half of the eligible cases to a control group for evaluation purposes. Under the present program, policies, and conditions, CAAP is strained to handle all the cases assigned to arbitration within the nine month deadline. If the control group were eliminated, the current supply of arbitrators would be inadequate to handle all the cases eligible for arbitration. The Judicial Arbitration Commission, a group charged with the responsibility to "develop, monitor, maintain, supervise and evaluate the [p]rogram"¹³⁶ is considering program changes to remedy this problem.

135. In a novel proposal to both provide an honorarium and improve the program, a budget request is being sent to the Hawaii Legislature to provide funds to pay the arbitrators a \$100 honorarium to attend a one-day arbitrator training program. Discussions with Peter Adler, Executive Director of the Program on Alternative Dispute Resolution for the Hawaii Judiciary (Feb. 1989).

136. HAW. ARB. R. 4(A).

VI. CONCLUSION

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