No Frills Justice: North Carolina Experiments with Court-Ordered Arbitration

William Kinsland Edwards

NOTES

"No Frills" Justice[1]: North Carolina Experiments With Court-Ordered Arbitration

Public criticism of the inefficiencies and injustices[2] of the American legal system has burgeoned in recent years.[3] Frequent complaints include allegations that the present judicial system is "too costly, too painful, too destructive, [and] too inefficient for a truly civilized society."[4] Although governments do subsidize many costs of running the courts, "full use of the courts requires expensive lawyers and much time of disputants."[5] "The net result may be that the courthouse doors are . . . often closed for all practical purposes to the vast majority of individuals and businesses."[6] Thus, courts are ineffective in discharging their vitally important function of protecting citizens' private rights and concerns.[7] Unfortunately, this failure to provide adjudication services[8] is accompanied by an unwelcome rise in government expenditures necessary to maintain existing court systems.[9] Whatever the causes for the serious weaknesses in conventional litigation,[10] the present trends towards greater cost and delay, if unchecked,

---

1. J. ADLER, D. HENSLER & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 60 (1983) [hereinafter SIMPLE JUSTICE].

2. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

3. NORTH CAROLINA BAR FOUNDATION, DISPUTE RESOLUTION: A TASK FORCE REPORT 9 (1985) [hereinafter TASK FORCE REPORT] (report on dispute resolution compiled after two years of research, study, interviews, and visits to programs).

4. Speech by former Chief Justice Warren E. Burger, American Bar Association Meeting (Feb. 12, 1984), *excerpt reprinted in* 28 BOSTON B.J. May-June, 1984 (appears on cover); *see also* Friedman, *Alternative Dispute Resolution*, 1 WASH. LAW. 4 (1987) (noting litigants are increasingly frustrated by excessive delays and escalating costs of adjudication).

5. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 9 (1983) [hereinafter PATHS TO JUSTICE] (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy).

6. TASK FORCE REPORT, *supra* note 3, at 19.

7. PATHS TO JUSTICE, *supra* note 5, at 9; *see infra* note 145.

8. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System for Civil Cases*, 99 HARV. L. REV. 1808, 1811 (1986).

9. E. JOHNSON, A PRELIMINARY ANALYSIS FOR ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 3 (1978). Johnson noted the six principal deficiencies in the judicial system: (1) an overload of cases; (2) delay; (3) inaccessibility of the courts for many litigants and disputes; (4) economic costs of judicial resolution of disputes for disputants and government; (5) lack of equity in the results achieved through dispute processing; and (6) undesirable psychological outcomes from the court processing of disputes. *Id.* at 2-3; *see also* SIMPLE JUSTICE, *supra* note 1, at 1 (emphasizing problems of court congestion, delays in obtaining trial, and rising public expenditures).

10. Much has been written about the "litigation explosion." Some commentators posit that current litigation problems have resulted from an unprecedented increase in the number of citizens resorting to litigation. For instance, former Chief Justice Warren Burger has commented that "mass neurosis . . . leads people to think courts were created to solve all the problems of society." N.Y. Times, Aug. 22, 1985, at A21, col. 4.

Others, however, do not see the volume of cases filed as causing current problems. Instead, difficulties have resulted from "complexit[ies], prohibitive costs, and delay in using the courts." PATHS TO JUSTICE, *supra* note 5, at 7; *see generally* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litig-*

"will cause the average citizen to tire, run out of money and finally turn away from our courts, cynical and disillusioned."[11]

Alternative Dispute Resolution (ADR) is increasingly viewed as a solution to help solve court problems.[12] Within the wide range of ADR techniques and processes,[13] court-ordered arbitration[14] is gaining widespread support as an adjunct to traditional litigation.[15] Advocates see court-ordered arbitration as "promising simple, fast, and inexpensive adjudication to litigants and a means of reducing judicial workloads and controlling public expenditures for civil court administrators."[16] The usual form of court-ordered arbitration involves the referral of eligible cases (usually those under a set dollar amount and within certain subject matter limits) to mandatory, pretrial arbitration. This arbitration, typically conducted by one or more practicing attorneys, consists of an informal hearing and an award. The hearing is nonbinding, and either party may demand

---

ious Society, 31 UCLA L. REV. 4, 61-69 (1983) (providing overview of development of "litigation explosion" literature).

11. AMERICAN BAR ASSOCIATION, ATTACKING LITIGATION COSTS AND DELAY 1 (1984).

12. Edwards, *supra* note 2, at 668; TASK FORCE REPORT, *supra* note 3, at 10. ADR is defined as all methods for settling disputes other than by court adjudication. *See* PATHS TO JUSTICE, *supra* note 5, at 36. The basic premise of the ADR movement is that

> [society] cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.

Id. at 1. For a discussion of possible problems with ADR, see Weinstein, *Warning: Alternative Dispute Resolution May Be Dangerous to Your Health*, 12 LITIGATION 5 (1986).

13. See *infra* notes 21-36 and accompanying text for an overview of the ADR taxonomy; *see generally* S. GOLDBERG, E. GREEN & E. SANDER, DISPUTE RESOLUTION (1985) (providing basic overview of all ADR processes).

14. Court-ordered arbitration also is known as "court-annexed arbitration," "judicial arbitration," and "court-administered arbitration." NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, COURT-ORDERED ARBITRATION ISSUE, DISPUTE RESOLUTION FORUM 2 August 1985 [hereinafter FORUM]. This Note uses the term "court-ordered arbitration."

15. *Id.* at 3. Chief Justice Nix of the Pennsylvania Supreme Court characterized the role of court-ordered arbitration as an "adjunct" to the court system. *Id.* at 5. "Adjunct implies an extension or an arm of the courtroom system, and this indicates cooperation, or the idea of working together." *Id.* "[U]se of the word 'alternative' may be misleading (in the context of court-ordered arbitration) because it connotes a certain degree or an element of antagonism or separateness . . . ." *Id.*; *see also* SIMPLE JUSTICE, *supra* note 1, at 1 (court-ordered arbitration as one of the most attractive alternatives to traditional litigation).

16. SIMPLE JUSTICE, *supra* note 1, at 1. Many court-ordered arbitration programs seek the following objectives:

> * Reduce congestion on the civil trial calendar by diverting and disposing of cases through arbitration;
>
> * Reduce (or stabilize) court costs by reducing judicial time spent on the civil caseload;
>
> * Reduce time to disposition by providing an expedited process for arbitration-eligible cases and by removing these cases from the trial queue, thereby reducing time to trial for other cases;
>
> * Reduce litigation costs for parties;
>
> * Improve court access for diverse users by reducing the time and expense required and by providing a simpler and, perhaps, fairer form of dispute resolution.

Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 275 (1986).

a jury trial.[17]

On January 1, 1986, court-ordered arbitration commenced on an experimental basis in three North Carolina judicial districts.[18] This pilot program is being conducted pursuant to the Rules for Court-Ordered Arbitration in North Carolina, which the North Carolina Supreme Court originally promulgated on August 12, 1987.[19] Similar rules are now in effect for the United States District Court for the Middle District of North Carolina.[20]

This Note examines North Carolina's experimental court-ordered arbitration program. It discusses court-ordered arbitration's place in the ADR taxonomy, outlines the history of this alternative to traditional adjudication, and reviews the background of the North Carolina pilot program. The Note describes how court-ordered arbitration works in North Carolina, and analyzes the experiment through discussion of ADR objectives and the limited studies made of other state programs. The Note concludes that North Carolina's pilot project is well designed and incorporates positive features from other court-ordered arbitration programs.

To discuss North Carolina's experiment with court-ordered arbitration, it is necessary to identify court-ordered arbitration's place in the ADR taxonomy and to understand the common characteristics of this type of program. ADR may be divided into four primary dispute resolution models—negotiation, mediation, arbitration, and adjudication.[21] These processes may be conceptualized as a continuum ranging from the most informal to the most "rulebound and coercive."[22] Negotiation is at the former end of the continuum and court adjudication is at the latter.[23]

---

17. Alschuler, *supra* note 8, at 1839. See *infra* notes 37-57 and accompanying text for a more detailed analysis of program characteristics.

18. Walker, *Experimental Court-Annexed Arbitration Comes to North Carolina*, N.C. ST. B.Q., Fall 1986, at 11. The three districts were the Third District (Carteret, Craven, Pamlico, and Pitt Counties); the Fourteenth District (Durham County); and the Twenty-ninth District (Henderson, McDowell, Polk, Rutherford, and Transylvania Counties). *Id.* The first arbitration hearing was conducted on March 9, 1987. As of September 30, 1987, 124 hearings have been held. Telephone interview with Frank C. Laney, Dispute Resolution Coordinator with the North Carolina Bar Association (Jan. 4, 1988) [hereinafter Jan. Laney Interview].

19. *In re* Pilot Program of Mandatory, Nonbinding Arbitration, N.C. Sup. Ct. Order filed Aug. 28, 1986, *printed in* 317 N.C. Appendix (1986). The supreme court ordered a revision of these rules on March 4, 1987. *In re* Pilot Program of Mandatory, Nonbinding Arbitration, N.C. Sup. Ct. Order filed Mar. 4, 1987, *printed in* 319 N.C. Appendix (1987). The most notable changes in the rules have been the method of calculating the time period in which a hearing must begin and the method for continuing a hearing. *See* Preface to N.C. CT.-ORD. ARB. R., 319 N.C. Appendix. This Note refers to the revised rules of March 4, 1987 and discusses revisions of the original rules as appropriate.

20. Walker, *supra* note 18, at 11.

21. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 7.

22. PATHS TO JUSTICE, *supra* note 5, at 4.

23. PATHS TO JUSTICE, *supra* note 5, at 4-5. Differing ADR techniques are placed on this continuum through analysis of their characteristics. The characteristics identified by the Institute for Dispute Resolution include: (1) whether participation is voluntary; (2) whether parties represent themselves or are represented by counsel; (3) whether decisions are made by the disputants or by a third party; (4) whether the procedure employed is formal or informal; (5) whether the basis for the decision is legal or involves some other criterion; and (6) whether the settlement is legally enforceable. *Id.* Goldberg, Green, and Sander employ somewhat differing characteristics to examine "primary dispute resolution processes." S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 8. The characteristics of ADR techniques they identify are: (1) "voluntary/involuntary;" (2) "bind-

Negotiation, the most common form of dispute resolution, is a voluntary process that is usually informal and unstructured.[24] The disputants themselves determine the process and the criteria for decisionmaking; decisions occur without the assistance or intervention of a third party.[25]

Mediation also is a voluntary process in which an impartial third party is brought in to "assist the disputants in arriving at their own solution."[26] Similar to negotiation, mediation is informal and occurs under private auspices.[27] The role of the mediator is not to coerce the disputants,[28] but instead to help them form a better functioning relationship.[29] In addition to "[building] among disputants a sense of accepting and owning their own . . . settlement," mediation may "provide an opportunity to deal with [the] underlying issues in a dispute" and establish acceptable ways of handling future disputes.[30]

Adjudication is a formal dispute resolution process in which "disputants present proofs and arguments to a neutral third party who has the power to hand down a binding decision, generally based on objective standards."[31] In its most common forms—judicial and administrative hearings—adjudication is a compelled procedure decided by a judge or a hearing officer in accordance with accepted rules of law.[32] Closely related is the arbitration process, which is "less formal, proceeds under more relaxed rules, and may be binding or non-binding."[33] In traditional arbitration, parties submit their dispute to a self-selected third party who renders a binding decision after summarily hearing arguments and evidence.[34] This private alternative to court adjudication has been widely used to resolve commercial and labor disputes.[35] In the commercial-contractual context, arbitration typically refers to a voluntary process entered into by mu-

---

ing/non-binding;" (3) role, if any, of a third party; (4) "degree of formality;" (5) "nature of the proceeding;" (6) "outcome"—a "principled decision" as opposed to a "mutually acceptable agreement;" and (7) "public/private."

24. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 7-8.

25. PATHS TO JUSTICE, *supra* note 5, at 5; S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 7-8. For a discussion of negotiation techniques, see R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1983).

26. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 7.

27. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 7-8.

28. TASK FORCE REPORT, *supra* note 3, at 10-11. In mediation, the mediator has no power to impose an outcome on disputants. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 91.

29. *See* Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). Fuller defines the "central quality" of mediation as "its capacity to re-orient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." *Id.*

30. PATHS TO JUSTICE, *supra* note 5, at 14; *see generally* E. SANDER, MEDIATION: A SELECT ANNOTATED BIBLIOGRAPHY (1984) (bibliography of mediation literature).

31. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 149.

32. PATHS TO JUSTICE, *supra* note 5, at 5.

33. PATHS TO JUSTICE, *supra* note 5, at 5.

34. TASK FORCE REPORT, *supra* note 3, at 10. Several private arbitration systems exist, such as the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS). S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 189.

35. S. GOLDBERG, E. GREEN & E. SANDER, *supra* note 13, at 189.

tual consent of the parties, and the outcome is "usually binding."[36]

Court-ordered arbitration differs from traditional arbitration in several ways.[37] First, court-ordered arbitration is imposed on the disputants by operation of statute or court rules and never is voluntary.[38] "By requiring litigants to arbitrate, the courts hope to reach a greater number of cases than might volunteer for the process."[39] Second, the outcome of court-ordered arbitration is not binding; either participant may ask for a trial de novo.[40] Third, unlike traditional arbitration in which the disputants choose a neutral third party, the court may impose an arbitrator.[41] Finally, court-ordered arbitration is a "method of dealing with civil litigation *subsequent* to the filing of the case while traditional arbitration occurs *prior* to the institution of the law suit."[42]

In addition to common characteristics that differentiate court-ordered arbitration from traditional arbitration, there are key features that characterize individual court-ordered programs. First, although most courts limit court-ordered arbitration to claims seeking money damages,[43] the jurisdictional limits (determined by a monetary ceiling) vary among programs.[44] "The central argument for limiting arbitration's jurisdiction to smaller cases is the belief that these are most likely to be disposed of through arbitration."[45]

---

36. TASK FORCE REPORT, *supra* note 3, at 19. Arbitration by mutual consent has been used in North Carolina for many years. Walker, *supra* note 18, at 11. Walker notes:

> In 1925 the Federal Arbitration Act, now 9 U.S.C. §§ 1-14, was enacted; it was revised in 1947. In 1927 the General Assembly enacted the first Uniform Arbitration Act. In 1970 Congress passed legislation, 9 U.S.C. §§ 201-08, to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Three years later the General Assembly enacted the revised Uniform Arbitration Act, N.C.G.S. §§ 1-567.1 [to] 1-567.20. The Federal Arbitration Act and the state Uniform Act are practically identical in their terms.

Id.; *see* 9 U.S.C. §§ 201-08 (1982); N.C. GEN. STAT. §§ 1-567.1 to .20 (1985); *see also* C. FOSTER, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN NORTH CAROLINA (1986) (outlining terms of federal and state acts described by Walker). For a discussion of the advantages and disadvantages of all the ADR forms noted, see PATHS TO JUSTICE, *supra* note 5, at 12-14.

37. Levine, *Court-Annexed Arbitration*, 16 J.L. REFORM 537 (1983).

38. Hensler, *supra* note 16, at 271. "Court-administered arbitration programs may be established by statute, by supreme court rule, or by local court rule." *Id.*

39. P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY 49 (1981).

40. FORUM, *supra* note 14, at 3; Levine, *supra* note 37, at 537. Because disputants are required to arbitrate claims that meet program criteria, all programs provide the right of trial de novo to preserve parties' seventh amendment right to a jury trial. Constitutional challenges to court-ordered programs have proven unsuccessful. P. EBENER, *supra* note 39, at 49.

41. Levine, *supra* note 37, at 537. See *infra* notes 90-92 and accompanying text for a discussion of arbitrator selection in the North Carolina program.

42. Levine, *supra* note 37, at 537 (emphasis added).

43. P. EBENER & D. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE 7 (1985).

44. P. EBENER, *supra* note 39, at 52. State jurisdictional limits vary considerably, with the lowest set at $3,000 and the highest at $50,000. The limits for federal programs are higher than for state programs. The highest jurisdictional limit for a federal program is the $150,000 ceiling in the United States District Court for the Middle District of North Carolina ("Middle District Program"). P. EBENER & D. BETANCOURT, *supra* note 43, at 8-10. For a complete comparison of state program characteristics, see *id.* at 9-10 (Table 3). For a discussion of the characteristics of federal programs, see Center for Public Resources, *Ten Courts Try Arbitration*, ALTERNATIVES, Oct. 1986, at 16-18. *See also* Levin & Golash, *Alternate Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985) (describing ADR programs currently in use in federal courts).

45. P. EBENER, *supra* note 39, at 52. Ebener notes that if cases cannot be solved by arbitration,

The second key feature of court-ordered programs is the timing of case assignment.[46] Case assignment refers both to the "point in the pretrial process" at which cases are assigned and to the method of assignment.[47] Programs vary in how they structure this feature. It is clear that the timing and method of assignment affects a program's cost as well as a program's effectiveness in reducing delay.[48]

A third variable that shapes any court-ordered arbitration effort is the identity, selection, and compensation of the arbitrator personnel.[49] An arbitration hearing typically is conducted by a practicing lawyer, a retired judge, or a panel of lawyers.[50] Most state programs "require a minimum number of years experience as an attorney to qualify as an arbitrator."[51] Selection of arbitrators varies among state programs. Most states allow parties to select their arbitrators or have input in the selection process.[52] Arbitrator quality inevitably affects participants' confidence in the court-ordered arbitration process and the perception of "having one's day in court."[53]

The fourth key feature characterizing court-ordered arbitration programs is the utilization of a disincentive to discourage appeals from the arbitration award.[54] For court-ordered programs to achieve the goals of reduced cost and delay, the number of cases actually tried de novo must be fewer than the number of cases that would be formally tried in the absence of the arbitration program.[55] In keeping with this objective, most programs incorporate disincentives, which "usually involve payment by the appealing party of the arbitrator's fees and costs of arbitration."[56] However, appeal rates alone are an inadequate measure of program success because "many more cases request trial de novo than are ever actually tried."[57]

---

such a diversion program makes no sense. If cases eventually must be tried whether arbitrated or not, then arbitration has only succeeded in adding cost and delay. *Id.* at 52-54.

46. P. EBENER, *supra* note 39, at 54.

47. P. EBENER, *supra* note 39, at 54.

48. *See* E. ROLPH, INTRODUCING COURT-ANNEXED ARBITRATION: A POLICY MAKER'S GUIDE 21-28 (1984).

49. P. EBENER & D. BETANCOURT, *supra* note 43, at 8. For a discussion of the issues concerning arbitrator qualification and selection, see Hensler, *supra* note 16, at 277-78.

50. Alschuler, *supra* note 8, at 1839.

51. TASK FORCE REPORT, *supra* note 3, at 23.

52. TASK FORCE REPORT, *supra* note 3, at 21.

53. E. ROLPH, *supra* note 48, at 28-30; *see also* SIMPLE JUSTICE, *supra* note 1, at 77-80 (complaints about arbitrators' qualifications). The Middle District Program emphasizes the use of a highly qualified arbitrator; this provides litigants with a more meaningful experience. Speech by Trevor Sharp, Magistrate, United States District Court for the Middle District of North Carolina, Workshop: The Law and Practice of Court-Annexed Arbitration in the North Carolina State and Federal Courts (Jan. 28, 1987) [hereinafter Sharp Speech].

54. FORUM, *supra* note 14, at 3-4.

55. FORUM, *supra* note 14, at 6; Levine, *supra* note 37, at 541; *see infra* notes 200-04 and accompanying text.

56. P. EBENER & D. BETANCOURT, *supra* note 43, at 11; *see also* E. ROLPH, *supra* note 48, at 26-27 (discussing problems of imposing an appeal disincentive and its administration).

57. P. EBENER, *supra* note 39, at 55. To ascertain the success of a program, therefore, it is "important to examine the number of cases that are actually tried rather than the rate of requests for trial de novo." *Id.* The reasons for the disparity between requests for trial de novo and actual trials is unclear. Ebener speculates: "The [difference] may [occur] because the request for trial frequently

Court-ordered arbitration has expanded significantly in both state and federal courts since Pennsylvania instituted the first program in 1952.[58] The greatest increase in program expansion occurred between 1978 and 1984, when the number of jurisdictions with arbitration programs more than tripled.[59] As of late 1985, ten federal districts were experimenting with court-ordered arbitration,[60] and eighteen states had adopted the device.[61]

Expanded federal court experimentation with court-ordered arbitration began in 1983, when the Administrative Office of the United States Courts embarked on "an ambitious experiment with [this] procedure in ten federal district courts."[62] After expressing interest in the program, the United States District Court for the Middle District of North Carolina was selected as one of the ten districts. On October 24, 1984, the court promulgated Rules for Court-Annexed Arbitration[63] pursuant to its rulemaking authority in Title 28 of the United States Code[64] and Rule 83 of the Federal Rules of Civil Procedure.[65]

Simultaneous with the propagation of the Federal Rules, the North Carolina Bar Association formed the Task Force on Dispute Resolution "to investigate alternative methods to litigation to resolve disputes between North Carolina citizens."[66] In June 1985, the bar association published its *Task Force Report*, which included the establishment of a pilot project of court-ordered arbitration in three judicial districts.[67] On the last day of its 1985 session, the North Carolina General Assembly passed legislation enabling the North Carolina Supreme

---

acts as an additional leverage in settlement negotiations. Or sometimes an attorney may automatically file trial de novo requests to protect himself from subsequent complaints by his client, or to delay enforcement of the award." *Id.*

58. FORUM, *supra* note 14, at 3-4. For a detailed history and description of the Pennsylvania program, see SIMPLE JUSTICE, *supra* note 1, at 8-12. *See also* Walker, *Court-Ordered Arbitration Comes to North Carolina and the Nation*, 21 WAKE FOREST L. REV. 901 (1986) (providing an analysis of court-ordered arbitration in North Carolina and the United States).

59. P. EBENER & D. BETANCOURT, *supra* note 43, at 4. For a complete overview of the implementation of state programs, see *id.* at 5-6 (Table 2).

60. Center for Public Resources, *supra* note 44, at 16 (outlining the ten districts chosen by the Administrative Office of the United States Courts for the federal experiment).

61. Center for Public Resources, *North Carolina Approves Arbitration Project*, ALTERNATIVES, Nov. 1985, at 9; *see also* FORUM, *supra* note 14, at 4 (map plotting geographic locations of state and federal programs). Apparently, two more states have adopted court-ordered arbitration, bringing the total to 20. *See* Walker, *supra* note 58, at 901-02.

62. Center for Public Resources, *supra* note 44, at 1.

63. M.D.N.C. R. 601-11. The rules are reproduced in ANNOT. R. OF N.C. 574-80 (1985). The Middle District Program, like the North Carolina experimental program, is based on the "adjudication" model of court arbitration. Under the adjudication model, an arbitrator renders a judge-like decision after hearing the facts of the dispute as presented by the interested parties. Sharp Speech, *supra* note 53. The purpose of a hearing in the Middle District Program is to reach an award that can serve as a final order. *Id.* This model contrasts with the "negotiation" model used by some federal courts. *Id.* In the negotiation model, arbitration is viewed as a settlement technique. Hearings are conducted before the parties have engaged in much discovery. *Id.*

64. 28 U.S.C. § 2071 (1982).

65. FED. R. CIV. P. 83.

66. Letter from Larry B. Sitton, Chairman, Dispute Resolution Committee, & Allan B. Head, Executive Director to the Judges and Lawyers of the Twenty-Ninth Judicial District (Dec. 14, 1986) [hereinafter Bar Association Letter] (disseminating information about court-ordered arbitration and soliciting assistance and cooperation).

67. TASK FORCE REPORT, *supra* note 3, at 10-11.

Court to devise rules[68] for "an experimental, pilot program in three judicial districts selected by the Court, of mandatory, nonbinding arbitration of all claims for money damages of fifteen thousand dollars ($15,000) or less."[69] At the request of the supreme court, the Court-Ordered Arbitration Subcommittee of the Dispute Resolution Committee of the bar association drafted procedural rules for the pilot program. The supreme court adopted the proposed rules on August 12, 1986.[70]

The Rules for Court-Ordered Arbitration in North Carolina[71] (North Carolina Rules) became effective in the three participating judicial districts on January 1, 1987. Cases filed in these districts after that date, "or those referred by the appropriate court, or those referred by the parties' agreement," are subject to arbitration.[72]

North Carolina Rule 1 outlines the types of actions subject to arbitration and excepted cases. Under the basic rule, all actions filed "requesting a *monetary* recovery of $15,000 or less"—exclusive of interest, costs, and attorneys' fees—are subject to court-ordered arbitration.[73] The $15,000 limit was set because of a belief that "such claims are generally simpler and more amenable to an expedited process."[74] The North Carolina Rules also extend jurisdiction to appeals from the judgments of magistrates.[75]

North Carolina Rule 1 also excepts claims involving more than $15,000 and claims for other than monetary relief.[76] The exceptions include "injunctive or

68. Center for Public Resources, *supra* note 61, at 9.

69. N.C. GEN. STAT. § 7A-37 (1986). The enabling legislation provided that all claims fitting the criteria were subject to arbitration, but specifically directed the supreme court to ensure that "no party is deprived of the right to a jury trial and that any party dissatisfied with the arbitration award" be allowed to receive a trial de novo. *Id.* Additionally, the legislation directed an evaluation of the program "for a reasonable period of time" and a report of the results of the evaluation to the general assembly. No state funds were to be used to implement the program. *Id.* Although the unwillingness of the general assembly to fund the state experiment could have proved fatal, the bar association was able to raise private funds. *See* Bar Association Letter, *supra* note 66.

70. Bar Association Letter, *supra* note 66. The proposed rules were co-authored by Carmon J. Stuart, Chairman of the Subcommittee on Court-Ordered Arbitration, and George K. Walker, Professor of Law at the Wake Forest University School of Law. Walker, *supra* note 18, at 19. "The Committee and Sub-committee included representatives of constituencies within the bar . . . , minorities, age groups, the judiciary, the General Assembly, and the law schools." *Id.* Five drafts were prepared and submitted to numerous individuals; suggestions received were incorporated into the final draft. *Id.*

71. 319 N.C. Appendix (1987).

72. N.C. CT.-ORD. ARB. R. 9, 319 N.C. Appendix at 12; Walker, *supra* note 18, at 12.

73. TASK FORCE REPORT, *supra* note 3, at 20 (emphasis added); *accord* N.C. CT.-ORD. ARB. R. 1(a), 319 N.C. Appendix at 1. N.C. Rule 1(a) provides:

> All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules . . . .

Id. The comment to this rule notes that the $15,000 jurisdictional limit applies only to the claim actually asserted. *Id.* at 2 comment. A recovery for more than $15,000 would be possible in an action brought under a statute allowing for treble damages. *Id.*; *see also* N.C. CT.-ORD. ARB. R. 4(c), 319 N.C. Appendix at 8 (award may exceed $15,000).

74. Bar Association Letter, *supra* note 66; *see* N.C. CT.-ORD. ARB. R. 1(a), 319 N.C. Appendix at 2 comment.

75. N.C. CT.-ORD. ARB. R. 1(a), 319 N.C. Appendix at 11.

76. N.C. CT.-ORD. ARB. R. 1(a)(1) - (7), 319 N.C. Appendix at 1.

declaratory relief, family law cases, title to real estate, wills and decedents estates, or summary ejectment."[77] Another exception may occur if a claim involves an unspecified monetary recovery and the claimant certifies in the pleading that the claim will exceed $15,000.[78]

Because the North Carolina program generally determines the suitability of cases for court-ordered arbitration from the *ad damnum* clause of the pleadings, the cases are self-selected rather than judicially assigned to arbitration.[79] Nevertheless, the North Carolina Rules provide that, at any time before trial, the court may order a case into arbitration "if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed."[80] Further, the North Carolina Rules provide that

> [t]he court may exempt or withdraw any action from arbitration on its own motion or on motion of a party made not less than 10 days before the arbitration hearing and a showing that: (i) the amount . . . exceed(s) $15,000; (ii) the action is excepted from arbitration under Rule 1(a); or (iii) there is a strong and compelling reason to do so.[81]

Randomly selected cases routinely are exempted for inclusion in a control group of cases that are compared to arbitrated cases to evaluate the pilot program effectively.[82]

Selection of cases for court-ordered arbitration, notification of parties, and setting of the hearing date are the responsibilities of an arbitration coordinator who works in the trial court administrator's office.[83] When a complaint is filed, the clerk examines the *ad damnum* clause and makes a preliminary determination whether the case might be subject to arbitration under North Carolina Rule 1. If the case appears to be suitable for arbitration, the filing party is notified

---

77. Walker, *supra* note 18, at 12. "Class actions, special proceedings, and cases where an unspecified amount claim required by N.C. R. Civ. P. 8(a)(2) (amended effective January 1, 1987) is asserted [also] are excluded." *Id.*

78. N.C. CT.-ORD. ARB. R. 1(a)(6), 319 N.C. Appendix at 1. False certification may subject the claimant to sanctions under N.C. GEN. STAT. § 6-21.5 (1986), N.C. R. CIV. P. 11(a), or State Bar disciplinary action. 319 N.C. Appendix at 2 comment. Also excludable by certification are cases that are "companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue." N.C. CT.-ORD. ARB. R. 1(a)(7), 319 N.C. Appendix at 1.

79. The Bar Foundation Task Force Report noted: "Allowing litigants to value their own cases minimizes court involvement and promotes administrative efficiency. It eliminates delays which would be caused by having others value the cases. It allows the parties some flexibility to determine whether court-ordered arbitration is desirable." TASK FORCE REPORT, *supra* note 3, at 20.

80. N.C. CT.-ORD. ARB. R. 1(c), 319 N.C. Appendix at 2.

81. N.C. CT.-ORD. ARB. R. 1(d)(1), 319 N.C. Appendix at 2.

82. N.C. CT.-ORD. ARB. R. 1(d)(2), 319 N.C. Appendix at 2; *see infra* notes 135-38 and accompanying text.

83. Telephone interview with Frank C. Laney, Dispute Resolution Coordinator with the North Carolina Bar Association (Jan. 26, 1987) [hereinafter Jan. Laney Interview]. Drafters of the North Carolina program emphasized administrative considerations; their goal was to place no burdens on the court. Speech by Kathy Shuart, Trial Court Administrator, Fourteenth Judicial District, Workshop: The Law and Practice of Court Annexed Arbitration in the North Carolina State and Federal Courts (Jan. 28, 1987) [hereinafter Shuart Speech]. Additionally, the arbitration administrators relieve arbitrators from any incidental arrangements for hearings. NORTH CAROLINA BAR ASSOCIATION DISPUTE RESOLUTION COMMITTEE, BENCHBOOK FOR ARBITRATORS 2 (1987) [hereinafter BENCHBOOK]; *see also* N.C. CT.-ORD. ARB. R. 8(e), 319 N.C. Appendix at 11 (delegation of nonjudicial functions will "conserve judicial resources and facilitate effectiveness of these rules").

that the case is a potential arbitration case; the same notice is stapled to the paperwork that is issued to the defendant.[84] The arbitration coordinator then reviews all complaints marked as potential arbitration cases to ensure there are no false positive or false negative cases.[85] The coordinator tracks eligible cases and notifies eligible parties not selected for the control group that they are in arbitration.[86]

Under the current plan, definitive notification to parties not selected for the control group that they will participate in court-ordered arbitration occurs within twenty days of filing.[87] Under the North Carolina Rules as originally adopted, courts were required to set a date for arbitration which would ensure that hearings commenced within ninety days of filing.[88] However, revised North Carolina Rule 8(b)(l) stipulates that a court "shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading."[89]

The North Carolina Rules allow parties to "file a stipulation identifying their choice of an arbitrator" selected from a court list of qualified arbitrators.[90] Parties must make this selection within twenty days from the date of the docketing of an appeal from a magistrate's judgment or from the date the last pleading was filed or could have been filed.[91] If parties do not select their own arbitrator or cannot agree on an arbitrator within the specified time, the court will appoint an arbitrator, chosen at random from its list.[92]

An arbitrator in the North Carolina pilot program must have been a member of the North Carolina State Bar for at least five years. An additional re-

84. In its revision of the North Carolina Rules, the supreme court expanded the Rules notification provision. Rule 8(a) reads: "The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from the magistrate's judgment and give notice of such designation to the parties in all cases not exempted for comparison purposes pursuant to Rule l(d)(2)." N.C. CT.-ORD. ARB. R. 8(a), 319 N.C. Appendix at 10.

85. Jan. Laney Interview, *supra* note 83; Shuart Speech, *supra* note 83.

86. Jan. Laney Interview, *supra* note 83; Shuart Speech, *supra* note 83. The Institute of Government, University of North Carolina at Chapel Hill, is responsible for conducting the pilot program evaluation. The Institute of Government provides the arbitration coordinators with "computer assigned slots" in which to place all cases. Thus, no clerk or administrator affects the selection of the control group. Jan. Laney Interview, *supra* note 83.

87. Jan. Laney Interview, *supra* note 83; *see* Form, Notice of Case Selection for Arbitration, *reproduced in* BENCHBOOK, *supra* note 83, at 35.

88. N.C. CT.-ORD. ARB. R. 8(a), 317 N.C. Appendix at 10.

89. N.C. CT.-ORD. ARB. R. 8(b)(1), 319 N.C. Appendix at 11. The supreme court also incorporated into Rule 8 a provision addressing the circumstances under which a party requests the hearing to be scheduled, rescheduled, or continued on a date after the time allowed in Rule 8(b)(2). Because the goal of these rules is to expedite disposition of claims, a hearing may be scheduled for, or continued to, a later date "only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so." N.C. CT.-ORD. ARB. R. 8(b)(2) & comment, 319 N.C. Appendix at 11.

90. N.C. CT.-ORD. ARB. R. 2(a), 319 N.C. Appendix at 3. The parties have the right to choose one arbitrator from the list "if they wish to do so," and the burden of taking the initiative to select an arbitrator is on the disputants. *Id.* at 4 comment.

91. *Id.* at 3. Revised Rule 2(a) reads in part: "Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within the first 20 days after the 60-day period fixed in Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list." *Id.*

92. *Id.*

quirement of eligibility is approval by the Senior Resident Superior Court Judge and the Chief District Court Judge.[93] These relatively high standards for arbitrators reflect the belief of the Subcommittee on Court-Ordered Arbitration that the success or failure of the North Carolina program depends to a great degree on the "abilities and dedication" of the arbitrators.[94] Arbitrators are paid a fee of seventy-five dollars by the court for each hearing, which they receive when they file their awards with the court.[95] The bar association acknowledges that the fee "represents an amount lower than that given to arbitrators in most jurisdictions."[96] Inherent in the decision to offer a low remuneration to arbitrators was "a decision that members of the bar should accept [such] service . . . as part of their *pro bono* responsibilities."[97]

The single arbitrator[98] in North Carolina's court-ordered arbitration experiment acts as "a sole juror in finding the facts, as a judge in applying the law and as an arbitrator in rendering an award."[99] Because the North Carolina program is based on an adjudication model, the arbitrator is empowered to make judge-like decisions. Arbitrators are not mediators, whose primary function is to encourage settlement.[100] North Carolina Rule 3(g) illustrates this fact, which grants arbitrators the authority of a trial judge in governing the conduct of hearings.[101] In addition, arbitrators have judicial immunity for actions in an arbitration proceeding to the same extent as a trial judge.[102] After conducting a hearing, an arbitrator may not be deposed or called as a witness concerning that hearing.[103]

The goal of ensuring that program hearings are informal, limited, and expe-

93. *Id.* As with many aspects of the pilot program, each participating district is free to establish its own mechanism for compiling a list of arbitrators. In the Fourteenth District, for example, the local bar association was very active in selecting arbitrators. It established a committee of five attorneys, who selected 45 attorneys based on their experience and temperament. The committee called all of the prospective arbitrators and asked them to serve. The district court judge and the chief judge were given a list of 30-35 arbitrators willing to serve. Fifteen arbitrators were chosen from this group to comprise the court list of qualified arbitrators. Shuart Speech, *supra* note 83.

94. BENCHBOOK, *supra* note 83, at 1.

95. N.C. CT.-ORD. ARB. R. 2(c), 319 N.C. Appendix at 3-4. "The Comment to State Rule 2 notes that state arbitrators may be able to schedule three cases a day, and State Rule 3(n) contemplates that the typical hearing will last one hour unless timely application for extension is filed with the arbitrator." Walker, *supra* note 18, at 14.

96. Bar Association Letter, *supra* note 66.

97. TASK FORCE REPORT, *supra* note 3, at 21.

98. North Carolina court-ordered arbitration hearings are conducted by a sole arbitrator. *See* N.C. CT.-ORD. ARB. R. 2 & comment, 317 N.C. Appendix at 3-4. Other state programs have a panel of three arbitrators. *See* P. EBENER & D. BETANCOURT, *supra* note 43, at 9-10 (Table 3).

99. BENCHBOOK, *supra* note 83, at 1.

100. BENCHBOOK, *supra* note 83, at 1. The Middle District Program also is based on the adjudication model. Some federal courts view arbitration as a settlement technique. In these programs hearings are conducted before discovery; parties in the informal hearings summarize their cases and the arbitrator attempts to devise a resolution. Sharp Speech, *supra* note 53.

101. N.C. CT.-ORD. ARB. R. 3(g), 319 N.C. Appendix at 5. This grant excludes the power to punish contempt, which should be referred to the court. *Id.*

102. N.C. CT.-ORD. ARB. R. 5(f), 319 N.C. Appendix at 9.

103. N.C. CT.-ORD. ARB. R. 5(e), 317 N.C. Appendix at 9. The revised North Carolina Rules state that an arbitrator may not be deposed or called as a witness "in a trial de novo, or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration." *Id.*

ditious is reflected by the procedures outlined for discovery, admission of evidence, and testimony of witnesses.[104] North Carolina Rule 3(b) requires that parties exchange information at least ten days prior to the hearing date. Parties should exchange "(1) lists of witnesses that parties expect to testify; (2) copies of documents or exhibits that parties expect to offer in evidence; and (3) a brief statement of issues and contentions."[105] Documents exchanged pursuant to this rule are considered authenticated; thus, no further authentication is needed when such documents are received into evidence at the hearing.[106] The arbitrator may, however, refuse to receive documents that have not been properly exchanged "if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise."[107] In addition, the North Carolina Rules encourage brevity by permitting written agreements "to rely on stipulations and/or statements, sworn or unsworn, rather than a final presentation of witnesses and documents, for all or part of the hearing."[108] Finally, the discovery period is limited by the requirement that hearings must begin sixty days from the filing of the last pleading, or the date when such pleading could occur.[109]

Arbitration hearings under the North Carolina Rules are designed to be "streamlined trials"[110] and are limited to one hour.[111] A courtroom setting and a procedural style of "dignified informality" are utilized in order to enhance litigants' perceptions of "fairness" and of "having their day in court."[112] Procedural details and the manner of conducting a hearing are "left largely to the individual arbitrator's discretion."[113] The arbitrator is "empowered and authorized" to administer oaths. Furthermore, "[w]itnesses may be compelled to testify under oath . . . and produce evidence by the same authority and to the same extent as if the hearing were a trial."[114] The North Carolina Rules provide that no official transcript of a hearing shall be made, but the arbitrator may permit

104. N.C. CT.-ORD. ARB. R. 3(b)-(e) & comment, 319 N.C. Appendix at 4-5; TASK FORCE REPORT, *supra* note 3, at 19; *see* Walker, *supra* note 18, at 14.

105. N.C. CT.-ORD. ARB. R. 3(b), 319 N.C. Appendix at 4-5.

106. N.C. CT.-ORD. ARB. R. 3(c), 319 N.C. Appendix at 5. North Carolina Rule 3(c) provides, however, that the party against whom the exchanged document is entered "may subpoena and examine as an adverse witness anyone who is the author, custodian or witness through whom the document might otherwise have been introduced." *Id.*

107. *Id.*

108. N.C. CT.-ORD. ARB. R. 3(b), 319 N.C. Appendix at 5; Walker, *supra* note 18, at 14.

109. In his speech, Magistrate Sharp described the period of discovery in the Middle District Program as "concentrated." Sharp Speech, *supra* note 53. Although discovery is more concentrated in arbitration, the Middle District Program does not anticipate less discovery than in other cases of similar complexity. Discovery can be accomplished within the allotted time if attorneys begin early and plan. Problems that occur in concentrated discovery are usually "sequencing" problems. *Id.* Magistrate Sharp noted that concentrated discovery, followed shortly thereafter by a hearing, may be a time-saver for attorneys. When there are lengthy delays in cases actually coming to trial, attorneys often may have to refamiliarize themselves with a case in which discovery occurred months or years before. Because arbitration hearings immediately follow discovery, this problem is reduced. *Id.*

110. Walker, *supra* note 18, at 16.

111. N.C. CT.-ORD. ARB. R. 3(n), 319 N.C. Appendix at 6. The arbitrator may determine that more time is necessary to ensure "fairness and justice to the parties." *Id.*

112. BENCHBOOK, *supra* note 83, at 3.

113. BENCHBOOK, *supra* note 83, at 3.

114. N.C. CT.-ORD. ARB. R. 3(e), 319 N.C. Appendix at 5.

parties to record the hearing at their expense.[115]

Hearings commence with a brief, preliminary conference between the arbitrator and counsel,[116] or a short opening statement by counsel[117] (or parties if *pro se*), during which the arbitrator is free to ask questions.[118] The preliminary conference or opening statements provide the arbitrator an opportunity to identify the issues in the case and to define and resolve procedural matters to expedite the hearing.[119] Following the opening statements or conference, plaintiffs and defendants present their cases. Direct and cross-examination of witnesses is permitted.[120] The law of evidence does not apply to arbitration hearings, except as to privilege, but is "considered as a guide toward full and fair development of the facts."[121] North Carolina Rule 3(h) directs the arbitrator to consider all evidence presented and to give such evidence "the weight and effect [the arbitrator] determines appropriate."[122]

"After rebuttal (if any) parties may make brief closing statements."[123] The arbitrator declares the hearing concluded when all the evidence has been presented and any arguments the arbitrator permits have been completed. An arbitrator may solicit or permit post-hearing briefs, but not evidence. The parties must submit these briefs within three days after the hearing has ended.[124] Awards must be "in writing, signed by the arbitrator, and filed with the court within 3 days after the hearing is concluded or the receipt of the post-hearing briefs, whichever is later."[125] The North Carolina Rules make no provision for

---

115. N.C. CT.-ORD. ARB. R. 3(k), 319 N.C. Appendix at 6. Any record of a hearing made by an arbitrator is privileged and not subject to discovery. N.C. CT.-ORD. ARB. R. 5(e), 317 N.C. Appendix at 9.

116. BENCHBOOK, *supra* note 83, at 4.

117. Walker, *supra* note 18, at 16.

118. BENCHBOOK, *supra* note 83, at 4.

119. BENCHBOOK, *supra* note 83, at 4. The Benchbook for Arbitrators notes that an arbitrator may

> [i]dentify and define the essential issues in the case; clarify existing stipulations and understandings and bring about others which may obviate some testimony; discover differences between the parties' settlement positions and possibly help narrow them; raise and resolve potential procedural problems, such as the authenticity of documents; and lay down any special "ground rules" in the particular case, such as time limitations under Rule 3(n) and permitted recording under Rule 3(k).

Id.

120. Walker, *supra* note 18, at 16.

121. N.C. CT.-ORD. ARB. R. 3(h), 319 N.C. Appendix at 5. The Benchbook for Arbitrators suggests that "[b]efore presentation of evidence begins, the arbitrator may . . . remind counsel of . . . Rule 3(h) in the interest of avoiding unnecessary time consuming objections and 'laying ground' or foundation for testimony." BENCHBOOK, *supra* note 83, at 4. The rules for the Middle District Program do not suggest using the rules of evidence as a guide. *See* M.D.N.C. R. 607(g).

122. N.C. CT.-ORD. ARB. R. 3(h), 319 N.C. Appendix at 5. The "arbitrator may receive evidence in any form that would be received by a court, special master or administrative tribunal." BENCHBOOK, *supra* note 83, at 4. Additionally, "the Rules do not preclude observation or examination of places or property outside the hearing room . . . ." *Id.*

123. Walker, *supra* note 18, at 16. The Benchbook for Arbitrators suggests that a brief closing argument is beneficial for the arbitrator and the litigants, "who may gain a better understanding of their positions and thereby be more willing to accept the arbitrator's judgment and not . . . ask for a trial de novo." BENCHBOOK, *supra* note 83, at 5.

124. N.C. CT.-ORD. ARB. R. 3(o), 319 N.C. Appendix at 6; BENCHBOOK, *supra* note 83, at 5.

125. N.C. CT.-ORD. ARB. R. 4(a), 319 N.C. Appendix at 8. The North Carolina Rules state that the arbitrator is not required to support the award with findings of fact, conclusions of law, or

reconsideration or modification of awards after filing. In the case of an award made against a party who failed to obtain a continuance of a hearing and who failed to appear for reasons beyond his control, the court, not the arbitrator, orders a rehearing.[126] It is important to note that the arbitrator's responsibility for a case ends with the filing of an award.[127]

Any party not subject to judgment by default who is dissatisfied with the hearing award has a right to have a trial de novo.[128] To receive a trial de novo, the dissatisfied party must file a written demand with the court and serve the demand on all parties within thirty days after the arbitrator's award has been filed.[129] This thirty-day "cooling off" period allows parties to "assess positions and potential for settlement or for improving their situations by full trial."[130] A party demanding trial de novo is required to pay a filing fee equal to the arbitrator's compensation and expenses, although such a fee is waived for an indigent party.[131] The court holds the filing fee and returns it to the demanding party *only* "if there has been a trial in which, in the trial judge's opinion, the demanding party improved [his] position over the arbitrator's award. Otherwise, the filing fee shall be forfeited . . . ."[132]

If neither party demands a trial de novo, a case may be terminated in two ways. First, a party may file a stipulation of dismissal or consent judgment at any time before the court enters judgment on the award.[133] Second, if the parties do not terminate the case by agreement and there is no demand for a trial de novo within thirty days of the filing of the award, the court enters a judgment on the award.[134]

Program evaluation, an important component of court-ordered arbitration in North Carolina, was mandated by the enabling legislation.[135] The evaluation

---

opinions. N.C. CT.-ORD. ARB. R. 4(b), 319 N.C. Appendix at 8. However, a brief explanation of the reasons for the award may make the decision more acceptable to litigants. BENCHBOOK, *supra* note 83, at 6.

126. Walker, *supra* note 18, at 16; *see also* N.C. CT.-ORD. ARB. R. 3(j), 319 N.C. Appendix at 5 (addressing failure to appear, defaults, and rehearing).

127. BENCHBOOK, *supra* note 83, at 6.

128. The dissatisfied party who files for a trial de novo is entitled to a trial "conducted as if there had been no arbitration proceeding." N.C. CT.-ORD. ARB. R. 5(c), 319 N.C. Appendix at 9. A ban on the evidence of a previous arbitration hearing includes prohibiting any reference to the arbitration in the presence of the jury. *Id.* In addition, "[n]o evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any other proceedings, without the consent of all parties to the arbitration and the court's approval." N.C. CT.-ORD. ARB. R. 5(d), 319 N.C. Appendix at 9.

129. N.C. CT.-ORD. ARB. R. 5(a), 319 N.C. Appendix at 8.

130. Walker, *supra* note 18, at 16. In both the state program and the Middle District Program, the demand for a trial de novo will not serve as a demand for a jury trial. *Id.* Likewise, a demand for a jury trial will not serve as a demand for a trial de novo. *Id.*

131. N.C. CT.-ORD. ARB. R. 5(b), 319 N.C. Appendix at 9; Walker, *supra* note 18, at 17-18.

132. N.C. CT.-ORD. ARB. R. 5(b), 319 N.C. Appendix at 9.

133. N.C. CT.-ORD. ARB. R. 6(a), 319 N.C. Appendix at 9.

134. N.C. CT.-ORD. ARB. R. 6(b), 319 N.C. Appendix at 10. The comment to this rule notes that an award entered as a judgment is not appealable, "because there is no record for review by an appellate court." *Id.* at 10 comment. The right of appeal is waived by failure to demand a trial de novo. *Id.*

135. N.C. GEN. STAT. § 7A-37 (1986). For a discussion of measuring the success of court-ordered arbitration, see E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION

component is a rigorous, controlled design research study "with cases randomly assigned to an Arbitration Group (ordered into arbitration) or a Control Group (not ordered into arbitration)."[136] This controlled study allows a comparison of outcomes for the two groups.[137] The North Carolina arbitration program is apparently the first state program to be evaluated by a controlled study.[138]

Absent the benefit of controlled evaluations of any state programs similar to North Carolina's pilot program, it is impossible to determine whether court-ordered arbitration in North Carolina can expect to achieve the desired outcome of "[resolving] many civil disputes . . . in a manner that is quicker, more expeditious, and more easily understood than that presently in use, without compromising the quality of justice enjoyed by the parties."[139] Several programs, however, have operated long enough for studies to be made from existing data.[140] On the basis of these and other analyses suggesting areas for evaluation, it is possible to highlight some important issues surrounding court-ordered arbitration and to make limited observations concerning North Carolina's pilot program.

Various analytical approaches to an ADR program are possible, but inevitably the "bottom line" is a cost-benefit analysis[141] on which courts or legislative bodies base their decisions on whether to extend or abandon a program. Thus, the first goal of court-ordered arbitration often is to provide "prompt, relatively inexpensive, fair and less formal resolution of a great many civil cases."[142] Concomitant with this goal, however, is a second goal of any ADR program to "[preserve] the procedural and substantive rights of citizens involved in law suits."[143] A third, closely related goal of court-ordered arbitration is to ensure satisfaction of litigants, the legal community, and the courts. Without this ap-

---

IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center rev. ed. 1983), and Bedlin & Nejelski, *Unsettling Issues About Settling Civil Litigation: Examining "Doomsday Machines," "Quick Looks" and Other Modest Proposals*, 68 JUDICATURE 9 (1984).

136. Bar Association Letter, *supra* note 66.

137. Bar Association Letter, *supra* note 66. The study examines any influence of court-ordered arbitration on the following factors:

(1) The time from filing of a case to its disposition;
(2) The rate of termination of cases by other types of disposition, such as settlement or dismissal, before or after arbitration;
(3) Amount of recovery;
(4) Cost to court and litigants;
(5) Degree of satisfaction of attorneys and litigants;
(6) Costs and benefits to litigants; and
(7) The effect of attorney vs. non-attorney representation during arbitration.

Id.

138. *See* Bar Association Letter, *supra* note 66. The state evaluation component is similar to that of the Middle District Program being conducted by the Private Adjudication Center at the Duke University School of Law under the direction of Dr. E. Allen Lind, Senior Behavioral Scientist with the Institute for Civil Justice. *Id.*

139. *See* TASK FORCE REPORT, *supra* note 3, at 19.

140. *See, e.g.*, FORUM, supra note 14, at 3-4 (discussing the Pennsylvania program); SIMPLE JUSTICE, *supra* note 1, at 8-12 (same).

141. *See* Bedlin & Nejelski, *supra* note 135, at 10.

142. FORUM, *supra* note 14, at 3.

143. FORUM, *supra* note 14, at 3; PATHS TO JUSTICE, *supra* note 5, at 4. The Ad Hoc Panel on Dispute Resolution and Public Policy noted that "[ADR] must be fair and just to the parties to the

proval, an ADR program is liable to fail.[144]

An ADR program that does not, first, adequately ensure a citizen's vindication of private rights is an unacceptable alternative to traditional adjudication.[145] Therefore, an important issue surrounding the implementation of a court-ordered arbitration program is its effect on the quality of justice available to litigants. Although arbitration is a form of adjudication it is, nonetheless, a substitute for the traditional "combination of settlement and trial prevailing in most civil courts"[146] that has evolved into the American standard of justice. An important goal of research must be to determine whether the substitution of court-ordered arbitration for traditional standards of justice changes the distribution of litigation outcomes.[147]

The study of Pittsburgh's court-ordered arbitration program conducted by the Institute for Civil Justice provides a preliminary indication of the effects of arbitration on justice. In their analysis of outcomes, researchers examined the results of arbitration hearings and the outcomes of appeals from these awards. Neither the arbitration awards nor the appeals from the awards showed a bias in favor of any group of litigants or cases.[148] The study did suggest that one possible effect on outcomes was that neither plaintiffs nor defendants emerged as clear winners.[149] The researchers observed that "[a]lthough defendants fre-

---

dispute, to the nature of the dispute, and when measured against society's expectations of justice." PATHS TO JUSTICE, *supra* note 5, at 13.

144. *See* Glick, *The Politics of State-Court Reform*, in THE POLITICS OF JUDICIAL REFORM 30-31 (P. Dubois ed. 1982); *see also* Bedlin & Nejelski, *supra* note 135, at 19 ("Three . . . areas for program evaluation are (1) time and money invested, (2) justice and due process, and (3) participant satisfaction.").

145. *See* Alschuler, *supra* note 8, at 1809-10. Alschuler writes of the importance of adjudication to individuals:

> Adequate adjudicative services are central to the maintenance of a civilized society. This lesson is not confined to criminal proceedings. The vindication of private rights, no less than punishment for wrongs against society, is an essential part of the sensed social compact. By assuring individuals that claims of injustice will be heard, considered, and judged on their merits, the judicial branch of government performs a distinctive service. More than other governmental agencies, courts reinforce a sense of individual worth and individual entitlement. The promise that every person's claims of injustice will be taken seriously tends to lessen alienation and to foster an awareness of community obligation. When it is alleged that one member of a community has wronged another, someone must be available to hear both sides and to provide an impartial, authoritative resolution of the dispute.

Id. at 1810. In addition to individual needs for a fair method of resolving private disputes, ADR also must "give expression to the community's sense of justice . . . ." PATHS TO JUSTICE, *supra* note 5, at 13.

146. SIMPLE JUSTICE, *supra* note 1, at 31.

147. Hensler, *supra* note 16, at 272. Hensler notes:

> Supporters of court administered arbitration programs do not generally expect to change case outcomes. Instead, the distribution of outcomes prevailing prior to establishing an arbitration program is frequently viewed as the benchmark for assessing arbitration's effect on equity, and a program is viewed as successful if it does not perceptibly alter that distribution to the advantage or disadvantage of any of the major participants in the system.

Id.

148. FORUM, *supra* note 14, at 6; SIMPLE JUSTICE, *supra* note 1, at 90-91. *Cf.* E. LIND & J. SHAPARD, *supra* note 135, at 13-16 (declining to speculate on effects of arbitration on outcomes). In their report on the study of three federal programs, Lind and Shapard note the difficulty of measuring this data. They conclude that no analysis of the effects on the quality of justice is possible without a controlled study. *See id.*

149. SIMPLE JUSTICE, *supra* note 1, at 59.

quently lost at arbitration . . . the amount awarded to the plaintiff by the arbitrators was often less than what the plaintiff had demanded before the hearing."[150] Therefore, defendants seemed to benefit from contesting a demand.[151]

One possible exception to the finding that no group is at a disadvantage in court-ordered arbitration is the *pro se* litigant.[152] In the Pittsburgh study *pro se* parties "appeared to be systematically disadvantaged" when they faced opponents who were represented by counsel.[153] Because this disadvantage is endemic to the present legal system, *pro se* litigants may be no worse off under court-ordered arbitration and actually may fare better because of the informal, simplified hearing procedure.[154] However, as a result of the adversarial nature of arbitration and the ability of many litigants to afford counsel, it seems that court-ordered arbitration is not a "People's Court."[155]

Another criticism of court-ordered arbitration is that litigants with smaller civil disputes may be relegated to "second-class" justice.[156] However, the Pennsylvania study and others conducted by the Institute for Civil Justice found a high level of satisfaction among litigants and no perception of second-class status.[157] Both individual and institutional disputants shared this positive attitude toward court-ordered arbitration.[158] Furthermore, the reduction in trial delays offered by court-ordered arbitration may be of special benefit to the small-claim

---

150. SIMPLE JUSTICE, *supra* note 1, at 58.

151. SIMPLE JUSTICE, *supra* note 1, at 58.

152. A *pro se* litigant is a party who appears in her own behalf in court and does not retain a lawyer. BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

153. Hensler, *supra* note 16, at 275.

154. FORUM, *supra* note 14, at 6. *Pro se* litigants may be benefited by court-ordered arbitration, because the procedure is more informal and more comprehensible to those without legal education. The Benchbook for Arbitrators in the North Carolina pilot program emphasizes that "[a]rbitrators have special opportunities to show their concerns for the rights of people and their dedication to the simple and fair administration of justice by the manner in which they treat *pro se* litigants." BENCHBOOK, *supra* note 83, at 3.

155. SIMPLE JUSTICE, *supra* note 1, at 92-93. For example, the researcher's study of the California court-ordered arbitration program indicated that it would be "difficult, if not impossible, for the average individual to bring a case in arbitration without legal assistance." *Id.* at 93; *see also id.* at 83-84 (offering suggestions to help *pro se* litigants).

156. E. LIND & J. SHAPARD, *supra* note 135, at 75.

157. Hensler, *supra* note 16, at 275.

158. SIMPLE JUSTICE, *supra* note 1, at 83. Litigants interviewed were specific in their adjudication needs:

> Individual litigants who bring cases to arbitration in Pittsburgh have very simple requirements: They want a speedy, inexpensive procedure that provides a full hearing of their dispute before an impartial third party, and an opportunity to challenge if the outcome proves unacceptable. They are generally indifferent to the qualifications of the third-party adjudicators as long as they are neutral, and to the setting in which the hearing is held. But they appreciate the informality and privacy of the arbitration process. Most of those we interviewed found that their requirements were met.
>
> Institutional litigants who depend upon the arbitration program for routine resolution of large numbers of civil suits also have rather simple requirements. They too want a speedy, inexpensive procedure, but they are less sensitive than individual litigants to the qualitative aspects of the hearing process. They judge arbitration primarily on the basis of the outcomes it delivers. They attribute unfavorable outcomes to the judgment of the arbitrators, not to the lack of opportunity for discovery or for cross-examining witnesses, or to the absence of other attributes of the trial process.

Id.

litigant. Because delay often means more litigation costs[159] or settlement for a lesser amount,[160] delay could deny a small-claim litigant the opportunity for a meaningful award, if not an award altogether.[161] By imposing a relatively short time limit for the commencement of hearings under court-ordered arbitration, the small-claim litigant's costs are reduced and a more just settlement may be possible.[162]

The right to demand a trial de novo, present in all court-ordered arbitration programs,[163] may provide a safeguard for litigants' rights.[164] If a plaintiff or defendant is dissatisfied with the award, either may appeal. Further, any case heard in arbitration that involves unforeseen complexities or serves as an adjudication of public rights may be heard subsequently by a jury.[165] The Pittsburgh study, however, questioned whether litigants actually would file for a trial de novo in the face of a monetary disincentive.[166] Given the nature of the awards in which neither plaintiffs nor defendants were clear winners, the researchers speculated the program might ultimately deliver "reasonably acceptable" rather than "just" decisions.[167]

Assuming court-ordered arbitration can ensure justice, it must also promote the expeditious resolution of claims and demonstrate cost savings to individual litigants and courts.[168] Otherwise, court-ordered arbitration only serves

159. PATHS TO JUSTICE, *supra* note 5, at 31 (Table 1).

160. Alschuler, *supra* note 8, at 1814. Alschuler reasoned:

> In short, when justice is delayed, high priced, or inaccessible, the de facto rule of liability in negligence cases is not the Hand formula. It is the amount of the Hand Formula would award multiplied by a fraction, and every increase in the cost of purchasing justice make the fraction smaller.

Id.

161. *See* TASK FORCE REPORT, *supra* note 3, at 9.

162. *See* Alschuler, *supra* note 8, at 1814. Whether a program will reduce delay and speed disposition "depends on formal program rules and informal implementation practices." Hensler, *supra* note 16, at 274. "When courts want to use arbitration to speed case disposition, when they have the resources available to process cases efficiently, when they are not unduly constrained by statutory or other formal limits on the speed of disposition, and when attorneys cooperate in making the program work, arbitration can result in speedy case disposition." *Id.*

163. P. EBENER & D. BETANCOURT, *supra* note 43, at 11.

164. *See* E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES 4 (1977).

165. *See* Edwards, *supra* note 2, at 672-74. Edwards found that the greatest concern was the possibility that an ADR process, divorced from the court system, could decide a public right. *Id.* This fear does not exist in the court-ordered arbitration context, because arbitration is an *adjunct* to the courts. Furthermore, these arbitration hearings decide mostly "private disputes" limited to those below an established dollar ceiling. *Id.*

166. SIMPLE JUSTICE, *supra* note 1, at 94. Although "policymakers feel that some financial disincentives are necessary to discourage frivolous appeals from arbitration," "very little [is known] about how the average litigant decides whether to appeal." Hensler, *supra* note 16, at 278.

167. SIMPLE JUSTICE, *supra* note 1, at 94. Although this effect is certainly a possible outcome worthy of evaluation by the North Carolina study, it might not be present in the pilot program for several reasons. First, the ceiling amount is higher in North Carolina than in the Pittsburgh program. Second, the lower cost of appeal and a potentially different "legal culture" also could cause North Carolina litigants to react differently.

168. *See* Hensler, *supra* note 16, at 272-76. Arbitration promises "simple, fast, and inexpensive adjudication to litigants, and a means of reducing judicial workloads and controlling public expenditures for civil court administrators." SIMPLE JUSTICE, *supra* note 1, at 1.

to add one additional step to a complex adjudication system.[169] There are several potential benefits individual litigants and court systems can expect from the use of court-ordered arbitration. Litigants may experience greater levels of satisfaction[170] as a result of expedited hearings and, as previously noted, may be treated more fairly in settlement situations. Through a diversion of claims to a more expeditious process, courts can begin to reduce backlog.[171]

Preliminary data has suggested that court-ordered arbitration is a promising method to speed litigation in many cases.[172] In addition, courts with programs that have jurisdictional limits of $10,000 and above are able to divert substantial portions of their caseload through arbitration.[173]

Not all court-ordered arbitration programs, however, have produced this outcome. Researchers found that in some California courts, for example, cases in arbitration could "take slightly longer . . . to reach an arbitration award than to reach jury trial."[174] Additional delays occurred in courts with uncongested calendars as well. These delays occurred because statutory constraints mandated when a case could be assigned to arbitration.[175] Arbitration caused additional delay in congested courts "that assign cases late in the pretrial process."[176] These delays apparently were caused by

> the availability of judge time to assess case value, by statutory requirements that established relatively lengthy time intervals for different stages of the process, by the practice of placing administrative control over the hearing process in the arbitrators' hands, and by the lack of court resources to monitor the arbitrators' performance in carrying out these responsibilites.[177]

Additional investment of scarce resources, rather than "the diminution of court

---

169. P. EBENER, *supra* note 39, at 53.

170. *See* P. EBENER & D. BETANCOURT, *supra* note 43, at 17 (discussing satisfaction in the Washington arbitration program); *see also* TASK FORCE REPORT, *supra* note 3, at 9 ("most frequent criticism of the judicial process is that it takes too long"). However, researchers of the Pittsburgh program noted an interesting consequence of expeditious hearings. Litigants arrived when their emotions over the dispute were still "running high," and were disappointed when the hearing did not provide an opportunity to debate and confront their antagonists. SIMPLE JUSTICE, *supra* note 1, at 65.

171. P. EBENER, *supra* note 39, at xiii-xiv.

172. Hensler, *supra* note 16, at 274; *see also* E. LIND & J. SHAPARD, *supra* note 135, at xv ("there is clear promise for court-annexed arbitration to expedite litigation for many cases").

173. FORUM, *supra* note 14, at 5. The extent of the diversion, as well as the speed with which arbitration can process diverted cases, depends on the type and complexity of the cases involved. *Id.* Speed of disposition in arbitration and incidence of diversion, which is based on jurisdictional factors, are different concepts. However, most programs tie the speed with which an arbitration hearing disposes of a case to the success of diversion. Thus, if the arbitration process is not significantly faster than formal trial, less is gained by diversion. *See* Hensler, *supra* note 16, at 272-74. For a discussion of issues involved in setting valuation and other jurisdictional matters, see P. EBENER, *supra* note 39, at 51-54; E. LIND & J. SHAPARD, *supra* note 135, at 75; E. ROLPH, *supra* note 48, at 21-28.

174. D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR xiv (1981).

175. *Id.*

176. *Id.*

177. Hensler, *supra* note 16, at 274.

attention," was required to achieve speedy disposition when it did occur.[178]

To avoid the California dilemma and to produce expeditious outcomes, court-ordered arbitration programs should be tightly administered by the court or its agent.[179] One significant program feature requiring careful management is the system for the selection of cases.[180] Although valuation and exclusion criteria determine the number of cases actually diverted,[181] the method utilized to accomplish this diversion will affect disposition speed and cost.[182] Self-selection by attorneys or the use of clerical staff to assign cases can be fast and inexpensive; judicial valuation and assignment involves delay and expense.[183]

The most vital need for effective court supervision and administration is in the scheduling of hearings.[184] The court, through nonjudicial personnel, must set and enforce limits on the scheduling of arbitration hearings. If it does not, procrastination may occur and slow the pace of litigation to that of traditional adjudication.[185] By retaining full responsibility for setting hearing dates and by attending to miscellaneous administrative details, the court can ensure that claims are handled at a predetermined pace. In fully operational programs the ability to realize expeditious hearings may depend on the availability of an adequate supply of arbitrators, as well as an efficient use of arbitrators' time while they are serving.[186]

It is indisputable that significant cost savings from an expeditious claims resolution process will benefit litigants, courts, and taxpayers. Although the formal American judicial system delivers "a precise brand of justice," it does so at a high price to litigants and courts.[187] Courts must pay large amounts for judicial and administrative personnel to provide complex adjudication services. Although the cost borne by litigants usually exceeds the public burden, many litigants are faced with the unsatisfactory outcome of winning in court, yet losing in the pocketbook.[188] Court-ordered arbitration may reduce these costs for both litigants and courts. For instance, jury trials, which often are used in the formal system, are much more expensive than the average cost of an arbitration

178. SIMPLE JUSTICE, *supra* note 1, at 86-87.

179. *See* SIMPLE JUSTICE, *supra* note 1, at 87. Researchers found that the Pittsburgh program produced "extraordinarily rapid disposition of civil claims, without great expense to the taxpayers." *Id.* The Pittsburgh program also practiced centralized, tight management. *Id.*

180. E. ROLPH, *supra* note 48, at 21-28.

181. P. EBENER, *supra* note 39, at 52-54.

182. P. EBENER, *supra* note 39, at 54.

183. *See* P. EBENER, *supra* note 39, at 54; SIMPLE JUSTICE, *supra* note 1, at 88.

184. *See* E. ROLPH, *supra* note 48, at 20-22 (discussing benefits of different types of court arbitration management models).

185. Levine, *supra* note 37, at 545. Attorney-arbitrators, if allowed to schedule hearings and attend to incidental matters, will tend to continue hearings in order to accommodate colleagues. SIMPLE JUSTICE, *supra* note 1, at 87.

186. *See* SIMPLE JUSTICE, *supra* note 1, at 87. The availability of attorneys for arbitrator duty will be affected by multiple factors including experience criteria, the geographic location of the program, willingness of the bar to support the program, and compensation. *Id.* If arbitrators are going to hear the maximum number of cases on the days they serve, court administration must ensure a steady supply of cases. *See id.*

187. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *supra* note 164, at 77.

188. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *supra* note 164, at 4.

hearing.[189] Other cost reductions might include attorney's fees and other usual costs, such as the cost of transcripts.[190]

Data concerning the impact of court-ordered arbitration on litigant costs are inconclusive.[191] For example, in the Pittsburgh program some attorneys charged individual litigants an hourly fee or a flat fee per hearing.[192] These litigants seemed to pay a reasonable amount in relation to their claims.[193] Other attorneys, however, continued to charge their usual contingency percentage regardless of whether a case was diverted to arbitration.[194] Thus, cost savings among litigants in a program may vary. Furthermore, this component of litigant expense probably is determined by practices common to the local legal culture.[195]

Some courts have claimed that significant savings resulted from the use of court-ordered arbitration.[196] Although the savings potential is suggested by empirical data,[197] it has not been proven that state programs actually can realize this potential.[198] Despite the inconclusive nature of prior efforts to examine the outcome of court-ordered arbitration, however, these studies have generated analyses sufficient for defining the issues that must be understood in order to evaluate the ultimate success of court-ordered arbitration.[199]

If courts are to realize savings from court-ordered arbitration, a significantly greater number of cases must be finally disposed of at arbitration hearings than go on to trial.[200] To encourage the acceptance of the arbitration award, most programs incorporate disincentives to appeal,[201] but the effect of these de-

189. FORUM, *supra* note 14, at 5. The cost for a jury trial in 1982 ranged from $2,790 to $8,649 in state trial courts; nonjury trials cost roughly half this figure. James, *The Cost of Civil Litigation*, 22 JUDGES J. 24 (Spring 1983); *see generally* J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM (1982) (analyzing court expenditures for processing tort cases). It is unlikely that costs have declined since 1982.

190. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *supra* note 164, at 4.

191. FORUM, *supra* note 14, at 5.

192. SIMPLE JUSTICE, *supra* note 1, at 37-38. Some litigants incurred no costs, because insurance companies employed their attorneys. *Id.* at 38.

193. FORUM, *supra* note 14, at 5.

194. SIMPLE JUSTICE, *supra* note 1, at 38.

195. For a discussion of research of lawyers' fees in the California, New Jersey, and Pittsburgh programs, see Hensler, *supra* note 16, at 274-75.

196. *See* FORUM, *supra* note 14, at 3. According to Chief Justice Nix of the Pennsylvania Supreme Court, "[s]ince a new arbitration center opened in Philadelphia in 1982, 48,500 cases were disposed of by way of arbitration settlement at an estimated savings of more than $50 million." *Id.* In its report on the effectiveness of judicial arbitration, the Judicial Counsel of California reported positive effects on both court and litigant costs. P. EBENER & D. BETANCOURT, *supra* note 43, at 67.

197. *See* Hensler, *supra* note 16, at 273. Hensler summarizes data from studies conducted by the Rand Corporation's Institute for Civil Justice of court-ordered arbitration programs in Pennsylvania, New Jersey, and California.

198. E. LIND & J. SHAPARD, *supra* note 135, at 90-95; *see also* FORUM, *supra* note 14, at 5 (no assessment possible of how well court-ordered arbitration saves taxpayers money until more information is available).

199. For an excellent summary of current court-ordered arbitration data, see Hensler, *supra* note 16.

200. Levine, *supra* note 37, at 541.

201. Demand for a trial de novo is often referred to as an "appeal." *See* FORUM, *supra* note 14, at 6. The appeal amounts to a rejection of the award.

vices on the finality of awards is unclear.[202] Currently reported appeal rates range from "the 20 percent level for many long-established programs to around 50 percent for some new programs . . . ."[203] However, data on appeal rates are not a helpful measure of outcomes, because an appeal does not necessarily mean the case will be tried.[204]

Thorough analysis of outcomes in court-ordered arbitration must go beyond determining the incidence of cases appealed from arbitration that ultimately reach trial.[205] The "Acid Test"[206] for court-ordered arbitration may be a comparison of the incidence of trial de novo with cases that regularly go to trial. To make this comparison, it is necessary to determine the incidence of trials of similar cases in the absence of the arbitration program.[207] A finding that the incidence of trials de novo is equal to or greater than the incidence of actual trials of similar cases in the regular trial track would raise serious questions concerning the efficiency of a program. A higher incidence of trials de novo would create increased demands on judicial time, and may indicate the program costs more than regular adjudication.[208] A rate of trials de novo equal to the trial rate of cases in the regular adjudication process may indicate that the court system is absorbing the administrative costs for arbitration without the corresponding benefits.[209]

In addition, a thorough analysis of outcomes must help define the influences that determine whether or not a case is tried de novo.[210] For example, two factors may have a greater effect on the incidence of trials de novo than appeal

202. *See* P. EBENER, *supra* note 39, at 55-56. Appeal disincentives vary from program to program; research is needed to determine which disincentives, if any, decrease the incidence of trial de novo. Some critics do not feel disincentives provide much deterrence. *See, e.g.*, Levine, *supra* note 37, at 538.

203. FORUM, *supra* note 14, at 6. Apparently, the 50% appeal rates represent some programs on the West Coast "where appealing seems to be more in style." *Id.* Lind and Shapard reported the appeal rate in three federal programs as 60%. E. LIND & J. SHAPARD, *supra* note 135, at xiii.

204. FORUM, *supra* note 14, at 6. Similarly, inferences of cost savings based on the number of cases resolved by arbitration are not particularly meaningful. Many cases that are arbitrated "would never have been tried either at civil jury trials or bench trials." *Id.* at 5. Most civil cases settle before reaching trial. Galanter, *The Emergence of the Judge As a Mediator in Civil Cases*, 69 JUDICATURE 257, 257 (1986). Actual trial figures may vary according to jurisdiction and the age of the program. FORUM, *supra* note 14, at 6. The North Carolina Bar's Task Force Report found that "the frequency of requests for trials *de novo* usually varied between 10% and 30%." TASK FORCE REPORT, *supra* note 3, at 19. This report noted that in the California program, the request for trial de novo was 50%, but trial rates were below 10%. *Id.* For statistics from other programs, see *id.* at 29 n.37.

205. Levine, *supra* note 37, at 543.

206. FORUM, *supra* note 14, at 6; E. LIND & J. SHAPARD, *supra* note 135, at 91 (noting the importance of gathering information on the effects of trials).

207. J. SHAPARD, UPDATED ANALYSIS OF COURT ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1982), *reprinted in* E. LIND & J. SHAPARD, *supra* note 135, at 135. This type of evaluation should also be utilized to study the effects on outcomes from a litigant's perspective. "The investigation would compare both the distribution of award dollars and plaintiffs' and defendants' costs to litigate." SIMPLE JUSTICE, *supra* note 1, at 31.

208. E. LIND & J. SHAPARD, *supra* note 135, at 93. Either an increase or a decrease in the incidence of trials "would have consequences for the workload of judges and thus would be important for its influence not only on the expense of litigation in arbitration cases but also for the judicial resources available for cases not subject to arbitration." *Id.*

209. *See* E. ROLPH, *supra* note 48, at 32-34 (discussing court-related research questions).

210. FORUM, *supra* note 14, at 5 (understanding requires a "careful analysis" of cases that move between arbitration and trial division).

disincentives.[211] First, a disputant's belief in the fairness of the arbitration hearing may be a decisive component of finality.[212] In the Pittsburgh study fairness did not correspond simply to winning or losing.[213] Instead, the litigants' perceptions of fairness depended heavily on the ambience of the program, especially the hearing.[214] A litigant who "has her day in court" may be more inclined to accept the arbitration outcome even if not totally satisfied with the award.[215]

Second, settlement appears to play a large role in reducing the incidence of trial de novo.[216] Court-ordered arbitration may serve to give parties an advisory verdict that forms the basis for a post-hearing settlement.[217] Some writers view the arbitration hearing as primarily a forum to foster settlement.[218] Others caution that excessive emphasis on settlement, rather than an adjudication of the merits, undermines litigants' perception of the finality of hearings and increases appeals.[219]

Ultimately, the success of court-ordered arbitration will depend on the satisfaction levels of litigants, attorneys, and court personnel.[220] Although experiments with court-ordered arbitration are relatively recent, the procedure is merely one of a series of court reforms attempted during this century.[221] Past experience teaches that the implementation of a court reform involves more than a mechanical application of new procedures by users and court personnel. Instead, implementation of reforms will require these groups to adjust to changes in established patterns of interaction and uncertainties about how the system will operate.[222] Individual users of court-ordered arbitration generally report a

211. Disincentives to appeal are not very strong in most programs, and stronger disincentives may be unconstitutional. P. EBENER, *supra* note 39, at 56. In the North Carolina program, for example, the only disincentive to appeal is a possibility of having to pay the $75 arbitrator fee. *See* N.C. CT.-ORD. ARB. R. 5(b), 319 N.C. Appendix at 9.

212. SIMPLE JUSTICE, *supra* note 1, at 91.

213. SIMPLE JUSTICE, *supra* note 1, at 91. "Simply winning his case does not ensure that the litigant will believe he has been treated fairly, nor does losing necessarily lead to a perception of *un*fairness." *Id.*

214. *See* SIMPLE JUSTICE, *supra* note 1, at 91.

215. This acceptance based on fairness may occur only when small amounts are at stake in the litigation. The higher the amount, the more likely an appeal. *See* Levine, *supra* note 37, at 543 n.29.

216. E. LIND & J. SHAPARD, *supra* note 135, at xiv; Alschuler, *supra* note 8, at 1840. Alschuler writes: "Even litigants who do initially seek trial following arbitration commonly settle, and lawyers report that the arbitrators' resolution of disputed issues has aided the settlement process." Alschuler, *supra* note 8, at 1840.

217. E. LIND & J. SHAPARD, *supra* note 135, at 83-87. In their recommendations Lind and Shapard urge arbitrators to enhance this process by providing more than a simple statement of the award. Instead, arbitrators are encouraged to provide counsel a basis for negotiation and settlement. *Id.* at 85.

218. *See, e.g.*, E. LIND & J. SHAPARD, *supra* note 135, at 84.

219. Levine, *supra* note 37, at 541.

220. SIMPLE JUSTICE, *supra* note 1, at 60; *accord* E. ROLPH, *supra* note 48, at 34-35 (user satisfaction is crucial to a program's ultimate success).

221. *See* Glick, *supra* note 144, at 52-53 ("legal change in a modern society is a continuing phenomenon," and "court reform has been an ongoing activity of bar leaders, prominent academics, and organizations").

222. *See* Glick, *supra* note 144, at 17-31. The Ad Hoc Panel on Dispute Resolution and Public Policy suggested that "[i]ncentives will have to be developed for lawyers and clients alike to ensure the acceptance and use of alternatives to litigation." PATHS TO JUSTICE, *supra* note 5, at 20.

high level of satisfaction.[223] Further, litigants tend to perceive arbitration programs as fair.[224]

Attorneys, on the other hand, have voiced responses ranging from high approval[225] to mild support.[226] On the whole, studies perceive attorneys as more skeptical of the implementation of court-ordered arbitration programs. In some jurisdictions attorneys are reported to "have contributed to [the] defeat of proposals to authorize programs."[227] Whether or not these perceptions are true, there can be little doubt that the successful implementation of an arbitration program depends on the support of the local bar.[228]

The North Carolina pilot program appears to be a well-planned effort to implement an alternative to traditional adjudication. As adopted by the North Carolina Supreme Court, this program incorporates positive features found in other court-ordered arbitration efforts. These features should enhance the program's ability to achieve the objectives of court-ordered arbitration, assuming the ADR process can be successful in some form or context.

An accurate understanding of the procedural and substantive justice litigants may expect in North Carolina's experiment must await the results of the controlled study.[229] Nevertheless, because the program embodies basic features

---

223. P. EBENER & D. BETANCOURT, *supra* note 43, at 16-17 (reporting an 80% approval rate in the Washington program); SIMPLE JUSTICE, *supra* note 1, at 61 (most litigants interviewed were satisfied with the Pittsburgh program); Bedlin & Nejelski, *supra* note 135, at 13 (reporting high satisfaction level in the Rochester, New York program).

224. D. HENSLER, COURT-ANNEXED ARBITRATION IN THE STATE TRIAL COURT SYSTEM 11 (1984) (suggesting that most litigants find court-ordered arbitration fair); A. LIND & J. SHAPARD, *supra* note 135, at 61.

225. P. EBENER & D. BETANCOURT, *supra* note 43, at 16. The Seattle, Washington program is reported to have a 90% approval rate among attorneys. *Id.*

226. E. LIND & J. SHAPARD, *supra* note 135, at 77 (finding that counsel generally favored the program, but not overwhelmingly so).

227. *See* P. EBENER & D. BETANCOURT, *supra* note 43, at 17.

228. P. EBENER, *supra* note 39, at 10; *see* Glick, *supra* note 144, at 23-26.

229. Based on the Middle District Program experience, the results of the pilot program's controlled experiment will not be available for some time. Although the Middle District Program started on January 1, 1985, *preliminary* research findings were not available until December 19, 1986. Even after two years of program operation, the status report expressed uncertainties about the program's consequences; these uncertainties about the program's consequences stemmed from "the relatively small case samples available" and "the substantial proportion of cases not yet terminated." E. Lind, Status Report to the Court: Current Findings of Research on the Program for Court-Annexed Arbitration in the Middle District of North Carolina (Jan. 28, 1987).

The Status Report summarized the preliminary findings as follows:

* It is unclear whether the arbitration program hastens case termination. Different ways of approaching the question of early termination yield different answers, none of which show a strong effect in favor of arbitration.
* Many cases are not reaching arbitration hearings within the timetable mandated by the rules.
* The arbitration hearings are of substantial length, averaging nearly eight hours.
* The hearing process and arbitrators have received very high marks from attorneys and litigants in arbitrated cases.
* The rate of demand for trial de novo appears to be stable at about 70%.
* Demands for trial de novo do not appear to lessen the positive reactions of counsel or litigants to the arbitration process.
* There is a suggestion in the data, but not yet a clear finding, that the arbitration program reduces the private costs of litigation.

common to court-ordered arbitration, it is likely the program will provide litigants with the level of justice discernible in the Pittsburgh program.[230] Similar to the Pittsburgh program, the North Carolina pilot program is centralized and functions under court supervision. Case selection is monitored, and the North Carolina Rules except cases that are not amenable to arbitration.[231] In addition, the pilot program places importance on obtaining experienced arbitrators who are obliged to conduct hearings in a dignified, authoritative manner.[232] If outcomes should prove to be "reasonably acceptable" rather than "precisely just," this fact inevitably must be balanced against program advantages accruing to the small-claim litigant. Finally, although no specific provisions of the North Carolina Rules address the plight of the *pro se* litigant, a duty to assist this type of disputant has been recognized.[233]

North Carolina's court-ordered arbitration program also incorporates characteristics that may lead to cost efficiency and a quick pace for hearings. First, although attorneys are permitted to value their own cases, the experiment provides for the tightly controlled administration of case selection and scheduling of hearings by arbitration coordinators.[234] In addition to ensuring that hearings are set within the time limits stipulated by the rules, these coordinators also relieve the arbitrators of miscellaneous details that could be a source of inefficiency or procrastination.[235] The North Carolina Rules limit the time for discovery and contain provisions for expediting testimony.[236]

Second, the North Carolina program incorporates features to promote the finality of hearing awards. The North Carolina Rules require the use of experienced attorneys as arbitrators.[237] In addition, the North Carolina Bar Association has emphasized that arbitrators should conduct hearings that give the litigants the perception of "having their day in court."[238] Creating this perception of finality is important, because the appeal disincentive in the pilot program is minimal.

Third, a basic component of the North Carolina program is a rigorous evaluation.[239] Through evaluation, planners and administrators are able to make adjustments in the program design aimed at achieving maximum efficiency.[240] In addition, data on outcomes can be used to guard against trading justice for speed and cost savings.

---

* Counsel and litigants are very favorable indeed in their opinions of the program. *Id.*

230. *See supra* notes 148-62 and accompanying text.

231. N.C. CT.-ORD. ARB. R. 1(a)(1)-(7), 319 N.C. Appendix at 1; *see supra* notes 73-82 and accompanying text.

232. *See* BENCHBOOK, *supra* note 83, at 3.

233. BENCHBOOK, *supra* note 83, at 5; *see supra* notes 152-55 and accompanying text.

234. *See supra* notes 83-86 and accompanying text.

235. BENCHBOOK, *supra* note 83, at 2.

236. *See supra* notes 104-09 and accompanying text.

237. N.C. CT.-ORD. ARB. R. 2(b), 319 N.C. Appendix at 3. The North Carolina Bar Association also provides training for the designated arbitrators in the three judicial districts.

238. BENCHBOOK, *supra* note 83, at 3.

239. *See supra* notes 135-38 and accompanying text.

240. E. ROLPH, *supra* note 48, at 42.

Despite these positive features of the North Carolina program, several potential problems also must be considered. First, although court-ordered arbitration has met with some success in other localities, there is no guarantee that the success of the ADR process is transferable.[241] Arbitration programs are uniquely shaped by the objectives sought in a particular jurisdiction and by the contours of the local legal culture.[242]

Second, the North Carolina program requires a high level of arbitrator experience, yet provides only token compensation. In addition, the projected time commitment of one hour per hearing may be a low estimate. Therefore, the success of the North Carolina program depends not only on its general acceptance by the bar, but also on the extensive *pro bono* investment of individual bar members.

Third, the designers of the state program chose not to incorporate into the pilot program the postaward settlement conference required in the Middle District program. If research confirms that a major benefit of court-ordered arbitration is the stimulation of settlement, the state program may be lacking a vital component.

As with the introduction of any ADR program, there is the risk that court-ordered arbitration will be viewed as a panacea for all of North Carolina's litigation woes.[243] By itself, court-ordered arbitration cannot solve the tremendous problems facing the court system.[244] However, as part of a more comprehensive ADR package, court-ordered arbitration may be one weapon to combat the current problems endemic to the American system of justice.[245]

WILLIAM KINSLAND EDWARDS

241. Bedlin & Nejelski, *supra* note 135, at 10.

242. E. ROLPH, *supra* note 48, at 70.

243. *See* Edwards, *supra* note 2, at 668.

244. SIMPLE JUSTICE, *supra* note 1, at 94-96.

245. The North Carolina Supreme Court and the North Carolina Bar Association appear committed to pursuing a comprehensive ADR package. In late June 1987 Chief Justice James Exum convened a meeting of attorneys, trial court administrators, and judges from Buncombe, Wake, and Mecklenburg Counties to develop a procedure for conducting summary jury trials in these counties on an experimental basis. The experimental period lasted from July to December 1987; five summary jury trials were conducted successfully. Jan. Laney Interview, *supra* note 18. For a discussion of summary jury trials in North Carolina, see NORTH CAROLINA BAR ASSOCIATION DISPUTE RESOLUTION COMMITTEE, INTRODUCING SUMMARY JURY TRIALS TO THE NORTH CAROLINA STATE SUPERIOR COURTS (1987). Summary jury trials involve a summarized presentation of a civil case to an advisory jury for the purpose of showing the parties how a jury reacts to the dispute in an effort to promote settlement. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (1986). The procedure is nonbinding unless otherwise agreed by the parties. *Id.*