A Study of Court-Connected Arbitration in the Superior Courts of Arizona

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Executive Summary

I. Introduction: Arizona's Court-Connected Arbitration System

Arizona has had mandatory, non-binding arbitration as a component of its civil court system for over three decades. The purpose of this alternative dispute resolution process is to provide for the efficient and inexpensive handling of small claims. By reducing the number of cases pending before judges, court-connected arbitration also is intended to expedite the disposition of civil cases that remain in the traditional litigation process.

In early 2004, the Supreme Court of Arizona's Administrative Office of the Courts commissioned a study to examine the current arbitration system to determine its efficiency and effectiveness as an alternative dispute resolution tool, as well as to ascertain user satisfaction with the process and its outcomes. This study accessed various sources of information to answer the following questions:

1. How do the different courts in Arizona administer their arbitration programs?
2. How are the arbitration programs performing?
3. How is court-connected arbitration viewed by lawyers?
4. What is the experience with court-connected arbitration in other states?

The structure of court-connected arbitration in Arizona, and the different ways it is administered throughout the state, is addressed in Section II of this Report. Section III examines the performance of arbitration programs through an analysis of civil case data. Section IV addresses how court-connected arbitration is viewed by lawyers, based on a survey of members of the State Bar of Arizona. Section V describes the structure and performance of court-connected arbitration in other states and notes similarities and differences with Arizona's program. Section VI sets forth the conclusions regarding court-connected arbitration in Arizona's Superior Courts.

II. The Structure of Court-Connected Arbitration in Arizona and Differences Among the Counties

Court-connected arbitration is regulated statewide by its authorizing statute, A.R.S. §12-133, and by the Arizona Rules of Civil Procedure, Rules 72-76. The arbitration process is also governed by local rules of practice in each county. As a result, court-connected arbitration has the same basic structure across the state, but there are differences in how the programs operate from county to county.

Civil cases must be submitted to arbitration if no party seeks affirmative relief other than a money judgment and the amount in controversy is within the county's jurisdictional limit. Some counties, including Maricopa and Pima, set the jurisdictional limit for arbitration at $50,000, which is the maximum allowed by statute. Other counties set the arbitration limit as low as $10,000.

With every civil complaint, the plaintiff is required to file a certificate advising the court that the case is or is not subject to compulsory arbitration. If the defendant controverts the plaintiff's certificate, the issue of arbitrability is decided by the judge. In approximately half of the counties, including Maricopa, the court assigns the case to arbitration based on the certificates filed with the pleadings. In other counties, including Pima, cases are not assigned to arbitration until the motion to set and certificate of readiness for trial has been filed. A few counties assign cases to arbitration at points in between the pleadings and the motion to set.

Once a case is assigned to arbitration, court staff appoint an arbitrator from a list of arbitrators drawn from members of the state bar in that county with at least 4 years experience. In approximately half the counties, including Maricopa, arbitrator service is mandatory for most lawyers. In the remaining counties, arbitrator service is voluntary. Pima County adds lawyers to its arbitrator list when they make a civil court appearance or respond to a solicitation by one of the judges. Several counties, including Pima, attempt to match arbitrators with cases in their area of expertise; most counties, however, assign arbitrators on a random basis. Each party may exercise one peremptory strike or may disqualify the arbitrator for good cause. The arbitrator is empowered to make virtually all legal rulings in the case. Arbitrators may receive seventy-five dollars for each day spent hearing the case, to be paid from the county's general revenues.

According to the statewide rules, the arbitrator must fix a time for the hearing not less than 60 nor more than 120 days after his or her appointment. The arbitrator is required to file an award and final disposition of the case within a month of the hearing. Any party may appeal the arbitrator's decision for a trial *de novo* in Superior Court, but if

the judgment is not at least 25% more favorable than the arbitration award, the appellant may be required to pay the costs and fees incurred by the opposing party on appeal. If no appeal is taken, the arbitrator's award becomes binding as a decision of the Superior Court.

III. The Performance of Arbitration in Arizona's Superior Courts

Information regarding the number and types of cases assigned to arbitration, the progression of those cases through the arbitration process, and their average time to disposition was obtained from a questionnaire sent to each court. More detailed information on these issues, as well as on cases subject but not assigned to arbitration, the timing of arbitration events, and on the time to disposition for arbitration and non-arbitration cases was obtained in only Maricopa and Pima Counties from the courts' database, supplemented with information from several case samples. Comparisons conducted across the counties to explore whether patterns in the caseload and disposition statistics correspond to differences in the counties' practices regarding case assignment and arbitrator service are only rough comparisons, as each statistic reflects the effects of a constellation of practices and factors, some of which are undoubtedly related to the courts' general case processing rather than to their arbitration procedures.

The Arbitration Caseload

The courts typically collect and report statistics on "arbitration cases" only after cases have been assigned to arbitration; cases subject to arbitration that conclude before assignment generally are not tracked as part of the "arbitration" caseload but instead as part of the "non-arbitration" caseload. Information on cases *subject* to arbitration was available only for Maricopa County.

Cases subject to arbitration comprised 42% of all filed civil cases in Maricopa County. However, civil cases categorized as "non-classified" (*e.g.*, petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) typically were not subject and seldom were assigned to arbitration, although they made up a substantial proportion of the civil caseload. These non-classified civil cases seem likely to consume fewer judicial resources than would tort and contract cases. Accordingly, in assessing the arbitration program's potential effect on the courts' workload, it may be more meaningful to examine the proportion of the tort and contract caseload subject to arbitration, rather than the proportion of the total civil caseload. Cases subject to arbitration comprised 81% of the three primary case types: contract, tort motor vehicle, and tort non-motor vehicle cases. Using either calculation, cases *subject* to arbitration

accounted for a substantial portion of civil cases.

Not all cases subject to arbitration, however, are likely to affect the workload of the courts or the arbitration programs. Approximately two-thirds of cases subject to arbitration in Maricopa County concluded prior to assignment to arbitration, primarily by default judgment (36%), dismissal for lack of service or lack of prosecution (28%), or settlement (29%). Although information was not available on the extent of court involvement in these cases, it seems likely that most required little court time. Most contract cases subject to arbitration concluded prior to assignment to arbitration, but a majority of tort cases did not. Only approximately one-third of cases subject to arbitration were *assigned* to arbitration.

The number of cases per county that were *assigned* to arbitration in 2003 varied considerably, ranging from three cases in La Paz County to almost 5,000 cases in Maricopa County. Across the counties, however, cases assigned to arbitration comprised a similar, and relatively small, proportion of the overall civil caseload: less than 8% in most counties and less than 15% in all counties. Specifically in Maricopa and Pima Counties, cases assigned to arbitration comprised 14% and 13%, respectively, of the civil caseload. There was no consistent pattern of differences in the proportion of cases assigned to arbitration between counties that assigned cases after the answer was filed and counties that assigned cases after the motion to set was filed.

Three case types – tort motor vehicle, tort non-motor vehicle, and contract cases – accounted for the majority of cases assigned to arbitration in all counties and for more than 85% of cases assigned to arbitration in all but two counties. In Maricopa and Pima Counties, for which more detailed information was available, tort motor vehicle cases alone comprised the majority of cases assigned to arbitration. Cases assigned to arbitration accounted for one-fourth of contract, tort motor vehicle, and tort non-motor vehicle cases in Pima and Maricopa Counties, and 4% to 18% of tort and contract cases in the other counties.

Progression and Final Disposition of Cases Assigned to Arbitration

Based on data provided by the courts, an award was filed in a sizeable proportion of cases assigned to arbitration – in 31% to 63% of cases – in most counties. Specifically in Maricopa and Pima Counties, an award was filed in 43% and 42%, respectively, of cases assigned to arbitration. It is not clear why an award was filed in so many cases assigned to arbitration. As a basis of comparison, in most counties a trial was commenced in fewer than 5% of all civil cases and fewer than 9% of tort and contract cases.

There was no consistent pattern of differences in the proportion of cases in which an award was filed by whether counties assigned cases to arbitration earlier (after the answer was filed or at an early case management conference) versus later in the case (after the motion to set was filed). Nor were there consistent patterns of differences in the hearing rate by whether counties relied on voluntary versus mandatory arbitrator service or whether they assigned arbitrators to cases according to their subject matter expertise. And in both Maricopa and Pima Counties, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract cases) in the likelihood that cases assigned to arbitration settled before an award was filed.

Based on data from the courts, the percentage of cases in which the arbitration award was appealed ranged from 17% to 46%, and specifically was 22% in both Maricopa and Pima Counties. There was no consistent pattern of differences in the proportion of cases in which an appeal was filed by whether counties relied on voluntary or mandatory arbitrator service. In fact, some counties with mandatory arbitrator service had among the lowest appeal rates, whereas some counties that relied primarily on volunteer arbitrators had among the highest appeal rates. Nor was there a consistent pattern of differences in the proportion of cases in which an appeal was filed by whether the county assigned arbitrators to cases according to subject matter expertise. And in both Maricopa and Pima Counties, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract cases) in the likelihood that the award was appealed.

Only a small proportion of cases in which the award was appealed proceeded to trial. In four counties, none of the appealed cases went to trial. In another four counties, including Maricopa County, 14% to 19% of the appealed cases went to trial; only one county had a higher rate of trial on appeal (27%). When calculated instead as the proportion of cases *assigned* to arbitration that went to trial, the trial rate was less than 4% in every county except one, where it was 8%.

And if calculated as the proportion of cases *subject* to arbitration, the trial rate in arbitration cases would be even lower. We were able to directly compare the dispositions of tort and contract cases that were subject versus not subject to arbitration only in Maricopa County. For both groups of cases, the trial rate was 1%. Three percent of cases subject to arbitration were resolved by summary judgment or some other non-trial judgment or order, compared to 8% of cases not subject to arbitration. Thirty-nine percent of cases subject to arbitration settled, compared to 55% of cases not subject to arbitration. Twelve percent of the cases subject to arbitration were resolved by the arbitration award. These findings suggest that arbitration diverted cases from settlement, not trial, and might have diverted some cases from other types of judgments.

Time to Disposition

Data permitting the comparison of the time to disposition for tort and contract cases subject to arbitration versus not subject to arbitration were obtained only for Maricopa and Pima Counties. Because of differences between the courts in their disposition codes and the form in which the data were available, the types of dispositions included in these analyses in each county were somewhat different. Nonetheless, using a sample of tort and contract cases in both counties, cases subject to arbitration were resolved more quickly (on average, by three to five months) than were cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject versus not subject to arbitration, and the likely associated differences in case complexity and the amount of discovery, the faster resolution of cases subject to arbitration can not necessarily be attributed to the arbitration process.

The seemingly faster resolution of cases subject to arbitration does not mean that those cases were resolved quickly. In fact, tort and contract cases subject to arbitration did not meet the case processing time standards set by the Arizona Supreme Court. In Maricopa County, where data were available for most disposition types, 56% of cases subject to arbitration were resolved within nine months, compared to the standard specifying that 90% of cases should be resolved within that time period.

Of course, for the subset of cases *assigned* to arbitration, the time to disposition was longer than for all cases subject to arbitration. In three of the eight counties for which time to disposition data were available, half of the cases assigned to arbitration concluded within five to seven months of the complaint. In four counties, including Maricopa and Pima Counties, half of the cases assigned to arbitration concluded within ten to fourteen months of the complaint. And in one county, half of the cases assigned to arbitration concluded within twenty-two months of the complaint. Assigning cases to arbitration after the answer was filed was often, but not always, associated with a shorter average time to disposition than later assignment. The findings of some relationship between the timing of assignment to arbitration and the time from complaint to disposition, however, might be an artifact of analyzing timing data only for cases *assigned* to arbitration.

In Maricopa and Pima Counties, more detailed information was available on the time to disposition for a sample of cases assigned to arbitration. In Maricopa County, 60% of cases assigned to arbitration concluded within one year of the complaint, 85% concluded within 18 months, and 94% concluded within two years. In Pima County, 38% of cases assigned to arbitration concluded within one year of the complaint, 77% concluded within 18 months, and 90% concluded within two years.

For these two counties, differences in the time to disposition of cases that concluded at different points in the arbitration process also were examined. In Maricopa County, cases assigned to arbitration that settled before an award was filed concluded, on average, about two months faster than cases resolved by the award. In Pima County, however, there was no difference in the time to disposition for these two groups of cases. Although the information in the case docket did not permit a systematic examination, in both counties most of the cases that settled tended to do so in unison with when hearings were scheduled. This pattern suggests that the hearing provided the event that stimulated settlement. Twenty-two percent of cases in Maricopa County settled within two months of the arbitrator's appointment; however, only 9% of cases in Pima County settled within that time period. Because the arbitrator is appointed much later in Pima County, this difference suggests that it was the stage of the litigation, rather than the appointment of the arbitrator, that produced the initial burst of settlement in Maricopa County.

In both counties, cases that were resolved by the filing of the arbitration award did not conclude faster than cases that settled after the award was filed but prior to appeal. However, in both counties, cases in which an award was filed and not appealed concluded six to eight months faster than cases in which the award was appealed and ultimately either settled or tried. In Maricopa County, for instance, cases that were resolved by the award concluded, on average, within 344 days of the complaint, compared to within 565 days for cases that settled after appeal. In Pima County, cases that were resolved by the award concluded, on average, within 416 days of the complaint, compared to within 642 days for cases that settled after appeal.

The longer-than-expected time to disposition for arbitration cases prompted a detailed examination of the progression of cases through the arbitration process and the length of time between the various arbitration events.

Time Between Arbitration Events

To examine arbitration case processing in more detail, the length of time between various arbitration events was obtained from the case docket in a sample of tort and contract cases assigned to arbitration in Maricopa and Pima Counties. In Maricopa County, filing the answer triggered assignment to arbitration, and that occurred 67 days, on average, after the complaint was filed. In Pima County, by comparison, filing the motion to set triggered assignment to arbitration, and that occurred 176 days, on average, after the complaint was filed.

The initial arbitrator was appointed, on average, within approximately 47 days of the event that triggered arbitration assignment in both counties. Approximately one-third

of cases in both counties (29% in Maricopa County and 36% in Pima County) involved one or more re-appointments of the arbitrator. The similar rates of arbitrator re-appointment are interesting in light of differences between the counties in practices regarding arbitrator selection and assignment based on practice area. In cases that involved one or more arbitrator re-appointments, the average length of time between the first and final appointment of the arbitrator was 55 days in Maricopa County and 38 days in Pima County.

In all, the final appointment of the arbitrator took place, on average, within 129 days of filing the complaint in Maricopa County and within 238 days of filing the complaint in Pima County. This suggests, not surprisingly, that appointing the arbitrator after the answer (in Maricopa County) rather than after the motion to set (in Pima County) can start the arbitration process and its associated deadlines sooner.

After the arbitrator is appointed, the hearing is to take place within 120 days, unless the time frame is extended for good cause. The hearing was scheduled to take place by that deadline in under half of the cases in both counties (43% and 45%). These figures probably overestimate the number of hearings that took place within the 120-day deadline because arbitrators did not routinely file an amended notice of hearing when the hearing was rescheduled. In both counties, the hearing was scheduled to take place within 270 days of the final arbitrator appointment in 92% of cases. This similar pattern was observed, even though cases in Pima County had more time to conduct discovery prior to the appointment of the arbitrator. The case docket did not have sufficient information on continuances to examine what role they played in when the hearing took place.

The average length of time between the final arbitrator appointment and the scheduled hearing date was similar in the two counties (152 days and 148 days) despite differences in their practices. Maricopa County did not monitor the arbitrators' scheduling of the hearing, and requests for a continuance (other than to extend on the inactive calendar) were decided by the arbitrator. By contrast, the court in Pima County routinely sent a request for a status report if a hearing had not been held by the 120-day deadline, and requests for continuances were decided by a judge.

In Maricopa County, the scheduled hearing date was more than 270 days after the complaint in approximately half of the cases and more than 330 days after the complaint in approximately one-fourth of the cases. Thus, a motion to set the case for trial or to continue the case on the inactive calendar (which would require judicial involvement) must have been filed in a sizeable number of cases before the hearing was held. The issue of continuing the case on the inactive calendar did not apply in Pima County because a motion to set had to already be filed in every case in order to be assigned to

arbitration. However, an even larger proportion of cases in Pima County, 62%, had a scheduled hearing date more than 330 days after the complaint.

After the hearing, the arbitrator is supposed to notify the parties of his or her decision in writing within 10 days. With the caveat that these data are likely to underestimate compliance with that deadline, particularly in Maricopa County, the notice of decision was filed within that time period in 43% of cases in Maricopa County and 60% of cases in Pima County. After the notice of decision, the award is to be filed within 25 days, and was filed within that time period in 63% of cases in Maricopa County and 81% of cases in Pima County. It is not clear whether the differences between the two counties in the apparent compliance with these deadlines reflected differences in their practices regarding arbitrator selection and assignment or in the data available in each county.

Overall, the award is to be filed within 145 days of the final arbitrator appointment. Only approximately 35% of awards in both counties were filed within this time frame. The award was filed, on average, within 191 days of the final arbitrator appointment in Maricopa County and within 199 days in Pima County. Most awards in both counties, 86% in Maricopa County and 83% in Pima County, were filed within 270 days of the final arbitrator appointment.

In sum, once cases were assigned to arbitration, the length of time between arbitration events was similar in Maricopa and Pima Counties. Thus, the longer time from complaint to final disposition observed in cases assigned to arbitration in Pima County versus Maricopa County appeared to be due largely to differences in the timing of the assignment of cases to arbitration (*i.e.*, after the motion to set versus after the answer, respectively).

IV. Lawyers' Views of Court-Connected Arbitration

All members of the State Bar of Arizona were invited in June 2004 to participate in a web-based and e-mail survey about court-connected arbitration in Arizona. The survey findings are based on the responses of 2,934 lawyers who had direct experience with the program *(i.e.*, 31% of State Bar members contacted). The proportion of lawyers responding from each of Arizona's fifteen counties was similar to the proportion of State Bar members in each county; thus, the majority of respondents were from Maricopa County. In this summary, we primarily present statewide findings with only a few examples of county differences.

The survey consisted of three main sections: the first focused on lawyers'

experience as counsel in arbitration, the second focused on lawyers' experience as an arbitrator, and the third sought lawyers' views about aspects of arbitration program structure, arbitrator service, and program effectiveness. The number of respondents for each section varied, as a given lawyer could be in a position to answer one, two, or all three sections. We summarize the findings of each section of the survey in turn.

Lawyers' Experience as Counsel in Arbitration

The first section of the survey was directed at lawyers who represented clients in arbitration and focused on their experience in their most recent case assigned to arbitration. A total of 905 lawyers responded to this section, half of whom had 25% or more of their caseload subject to arbitration and a majority of whom had a civil litigation practice. The lawyers were evenly divided between those who represented the plaintiff and those who represented the defendant in their most recent case in arbitration, except in Pima County, where almost two-thirds had represented the plaintiff.

In their most recent case in arbitration, almost one-third of the lawyers struck an arbitrator, primarily due to concern about the arbitrator's potential bias. A majority of lawyers reported that one or more continuances were granted, which were primarily sought because of scheduling conflicts or the need for additional information for the hearing. There were no differences between Maricopa and Pima Counties in the proportion of cases involving a strike or a continuance, even though Pima County matched arbitrators to cases based on subject matter and assigned cases to arbitration later in litigation.

Most counsel had highly favorable assessments of the arbitration process: they felt they could fully present their case during the hearing, the hearing process was fair, the arbitrator was not biased, and the other side participated in good faith. Lawyers' views of the arbitrator's level of preparation and knowledge of the issues and arbitration procedures were more mixed; few, however, had unfavorable assessments of either the process or the arbitrator.

A majority of the lawyers said that the award was fair and was the same or better than the expected trial judgment, and that their client was satisfied with it. A sizeable minority of lawyers, however, had unfavorable assessments of the award. Among lawyers in cases that did not accept the arbitrator's award, a majority felt the award made no contribution to settlement negotiations.

Lawyers' views of the extent to which the arbitrator understood the issues, was unbiased, was prepared, and knew arbitration procedures were strongly related to

lawyers' perceptions that the hearing process and the award were fair. And lawyers' perceptions of the award, the arbitrator's understanding of the issues, and the neutrality and fairness of the arbitrator and the hearing were related to whether lawyers appealed the award.

Lawyers in Pima County tended to have more favorable assessments of the arbitrator and the process than did lawyers in Maricopa County and the other counties. There were no county differences, however, in lawyers' views of the award. Although Pima and Maricopa Counties employed different practices regarding arbitrator selection and assignment, the composition of survey respondents in the two counties also differed. A larger proportion of survey respondents in Pima than in Maricopa County were plaintiffs' counsel and had not appealed the award, both of which were associated with more favorable views. Analyses suggested that differences among the counties in lawyers' views of arbitration were largely, but not entirely, due to these differences in the composition of the survey respondents.

Lawyers' Experience as Arbitrators

The second section of the survey focused on lawyers' experience in the most recent case in which they were appointed as an arbitrator. A total of 2,016 lawyers responded to this section, most of whom had served as an arbitrator in one to four cases in the preceding two years. However, unlike the lawyers who responded to the counsel section of the survey, a majority of the arbitrators had little or no experience as counsel in the arbitration process and did not have a civil litigation practice.

Consistent with differences in the courts' practices regarding assigning arbitrators to cases based on subject matter, a majority of arbitrators in Pima County, but fewer than half in Maricopa County and the other counties, said they were very familiar with the subject area in the most recent case they arbitrated. Statewide, a majority of arbitrators felt they had sufficient information about arbitration procedures to conduct an adequate hearing and sufficient information about the facts and the law to reach an informed decision. Not surprisingly, arbitrators in transactional/criminal law practice were less likely than arbitrators in civil litigation practice to be familiar with the law and arbitration procedures and were more likely to report difficulty ruling on motions and dealing with evidentiary and procedural issues.

A majority of arbitrators reported some or a great deal of difficulty scheduling the hearing. One-third ruled on one or more pre-trial motions in their most recent case. Although most arbitrators felt both parties participated in good faith, a number remarked on other problems, including the lawyers' lack of preparation, minimal case presentation,

and intent to appeal regardless of the award. A majority of the arbitration hearings lasted two to four hours.

Most arbitrators who did not hold a hearing spent two hours or less on the case. Approximately half of the arbitrators who held a hearing spent a total of five to eight hours on the case, and over one-third spent more than eight hours on the case. Arbitrators who were unfamiliar with arbitration procedures or the area of law or who felt they did not have sufficient information to decide the case spent on average three to five hours longer on cases. A majority of arbitrators in Maricopa County did not submit an invoice for payment, while a majority in the other counties received $75 for their service.

Lawyers' General Views of Arbitration

The final section of the survey sought lawyers' views regarding aspects of program structure, arbitrator service and compensation, and program effectiveness. A total of 2,515 lawyers who had direct experience with court-connected arbitration, primarily as arbitrators rather than as counsel, responded to this section.

Lawyers thought that several aspects of the structure of court-connected arbitration should remain unchanged. A majority of lawyers thought arbitration use should remain mandatory, the jurisdictional limit should remain unchanged, and the time frame for the hearing was about right. Interestingly, there were no differences between lawyers in Maricopa and Pima Counties in their views of the time frame, even though arbitration hearings in Pima County cases generally were held later in the course of litigation. If arbitration use were made voluntary, a majority of lawyers said they would sometimes or often recommend arbitration to their clients.

However, a majority of lawyers thought arbitration should be replaced by a different type of mandatory ADR process, such as mediation, settlement conference, early neutral case evaluation, or short-trial, to be conducted by *pro tem* judges, commissioners, or other staff neutrals. And just over half of the lawyers thought the appeal disincentive should be changed, although they were split between favoring an increase in the percentage by which an appealing party must improve its outcome versus favoring a decrease in that percentage or abolishing the disincentive altogether.

And a majority of lawyers did not support the current approach to arbitrator service and compensation used in most counties. Most lawyers thought that arbitrator compensation should be changed, either to a reasonable hourly rate for all time spent on the case or to no pay but non-monetary benefits, such as CLE credit or designation as a *pro tem* judge. And a majority of lawyers thought that arbitrator fees should be obtained

from sources other than the court's budget, either split equally by the parties or assessed as a taxable cost against the losing party. In addition, a majority of lawyers thought that arbitrators should serve voluntarily, be assigned to cases based on subject matter expertise, and receive arbitration training before serving. Fewer than half of the lawyers said they would be somewhat or very likely to serve voluntarily at the current rate of pay.

Just over one-third of the lawyers thought arbitration was effective in reducing litigant costs, resolving cases faster, ensuring a fair hearing, or providing an evaluation to facilitate settlement. Approximately half of the lawyers felt arbitration was effective in allowing the court to devote more resources to cases not subject to arbitration, but only 25% thought it was effective in reducing disposition time in those cases. Although for most of the goals the percentage of lawyers who thought arbitration was effective was larger than the percentage who thought it was ineffective, a fairly sizeable proportion gave neutral responses. Lawyers in Pima County tended to rate arbitration as more effective than did lawyers in the other counties. To some degree, however, county differences in lawyers' views reflected differences in the composition of the survey respondents.

V. Court-Connected Arbitration Programs in Other States

The Structure of Court-Connected Arbitration

Court-connected arbitration in most other states is similar in scope to that in Arizona. To exclude the more complex civil cases, a majority of programs establish jurisdictional limits at or below $50,000, and most programs exclude cases that seek injunctive or other equitable relief. Although participation in court-connected arbitration is mandatory within the jurisdictional limit, several states, including Arizona, allow parties to bypass arbitration by agreeing to participate in some other alternative dispute resolution process.

Almost all states require their arbitrators to be experienced lawyers or retired judges, but only two require their arbitrators to have expertise in the subject area of the cases they will hear. Most states require their arbitrators to have more experience than Arizona does, either by requiring more years of experience or specifying litigation or trial practice experience. Notably, only two other states have a provision like the one in Arizona that allows courts to require lawyers to serve as arbitrators, and only two other states pay their arbitrators less than or the same as Arizona does. States that compensate their arbitrators at the highest levels typically require the parties to bear the expense of the arbitrator's fee.

Almost all states have adopted rules to make the hearing and appeal process more efficient and less expensive than traditional litigation while preserving the parties' right to have their case tried in court. This is accomplished in several ways. First, most states impose a deadline by which the arbitration hearing must be conducted, either within six months to a year of filing or within two to four months after the arbitrator is appointed. Second, many states allow arbitrations to be conducted without strict adherence to the court rules governing discovery and the presentation of evidence. Third, every state allows parties the right to appeal the arbitration award to court for a trial *de novo*. However, to discourage appeals from being filed routinely, states often impose a requirement that the appealing party must improve its position at trial or be liable for the opposing party's fees and costs. In each of these respects, Arizona's program is typical.

The Performance of Court-Connected Arbitration

On every dimension of program performance, the research findings were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation. Our ability to draw conclusions about the relative effectiveness of court-connected arbitration versus traditional litigation was limited by the small number of studies with reliable comparative data for arbitration-eligible cases that did not go through arbitration. Few studies have systematically assessed the impact of different program structures on case processing or program performance. Because the arbitration programs differed on multiple dimensions, clear conclusions about the effects of any single program feature cannot be drawn by comparing findings across the programs. Most of the studies were conducted over a decade ago; thus, their conclusions about the arbitration programs' performance may not apply to the programs as they currently operate.

Case processing statistics were examined to get a sense of the progression of cases through the arbitration process. The percentage of arbitration cases that went to a hearing ranged from 15% to 64%, the percentage of awards appealed ranged from 19% to 78%, and the percentage of appealed cases that had a trial *de novo* ranged from 3% to 45%. In most programs, defendants filed the majority of appeals, and they tended to improve their position at trial *de novo*. Both the hearing rate and the appeal rate tended to be higher for higher dollar-value cases, but did not vary by case type. The trial *de novo* rate, but not the appeal rate, seemed to vary depending on the appeal disincentive.

Five studies reported that the time to disposition was shorter for arbitration cases than for comparable cases not in arbitration, typically by three to seven months. Three studies, however, found no differences in the time to disposition. The program features that were more likely to be present in programs in which arbitration reduced the time to disposition than in programs that reported no time savings included discovery limits or

arbitrator control of discovery, relatively short deadlines by which the arbitration hearing was to be held, and court coordination or scheduling of the arbitration hearing.

The point in the arbitration process at which cases were resolved affected their time to disposition. Arbitration cases that settled before the arbitration hearing tended to conclude two to six months faster than cases that went to a hearing. And cases that accepted the arbitration award were resolved three to ten months faster than cases that requested a trial *de novo*. Among appealed cases, those that settled before trial did not tend to conclude faster than those that went to trial.

Few studies examined arbitration's impact on court resources, and the findings of those that did tended to be mixed. The trial rate in arbitration cases was lower than in non-arbitration cases in four studies, but two other studies found no differences. More arbitration cases than non-arbitration cases had a hearing on the merits in all studies; whether the settlement rate in arbitration was lower or the same as in non-arbitration cases varied across the studies. The introduction of an arbitration program did not appear to reduce the time to disposition for non-arbitration cases or the pending caseload.

Arbitration did not reduce the hours lawyers worked or the fees they billed. In a program in which the arbitrator controlled discovery, the number of depositions and discovery costs was lower in arbitration than in non-arbitration cases. Lawyers were fairly evenly split between whether they thought their hours, fees, or litigation costs were the same or were lower in arbitration than if the case had not been in arbitration. Lawyers tended to think they spent as much time on various litigation tasks in arbitration cases as they would have if the cases were not subject to arbitration. Among arbitration cases, discovery costs and lawyers' hours and fees were lower in cases that settled before an arbitration hearing than in cases that had a hearing, and were slightly lower in cases that accepted the award than in cases that appealed the award and subsequently settled.

Lawyers who represented clients in cases in court-connected arbitration had highly favorable assessments. Most thought the arbitration rules and procedures were fair, the arbitrator was impartial, and the award was fair. A majority of lawyers had favorable ratings of the arbitrator's level of preparation, understanding of the factual and legal issues, and knowledge of procedures, but these ratings tended to be slightly lower than their fairness ratings. Where there were differences in their views, plaintiffs' lawyers had more favorable views than defense lawyers. In addition, the lawyers tended to have more favorable views than their clients. Lawyers whose cases settled before an arbitration hearing were more satisfied with the outcome than were lawyers whose cases went to the hearing. Studies that compared the views of lawyers in arbitration cases with those of lawyers in non-arbitration cases, however, either found no differences in their views or found that

lawyers in arbitration cases had less favorable assessments than lawyers in non-arbitration cases.

A majority of litigants whose cases went to an arbitration hearing thought the arbitration process was fair and that the arbitrator was impartial, adequately prepared, and understood the facts and the law. Fewer litigants, though still a majority, thought the arbitration award was fair and were satisfied with it. Arbitration litigants whose cases settled before an arbitration hearing tended not to differ in their assessments of the outcome from litigants whose cases were resolved at or after a hearing, but litigants whose cases were resolved by trial *de novo* had more favorable views than did litigants whose cases were resolved by the award. Studies that compared the views of litigants in arbitration cases with those of litigants in non-arbitration cases reported mixed findings with regard to which group had more favorable assessments.

VI. Conclusion

The primary goals of court-connected arbitration in Arizona's Superior Courts include providing the faster and less expensive resolution of cases within the arbitration jurisdictional limit, as well as freeing up judicial resources to help relieve court congestion and delay for cases above the jurisdictional limit. Given the arbitration program's reliance on members of the State Bar of Arizona to serve as arbitrators, as well as the program's impact on those lawyers who represent clients in arbitration, lawyers' views are likely both to reflect and affect how well the arbitration system is performing.

Does arbitration resolve cases faster? Because there is no comparison group of cases under the arbitration jurisdictional limit that is resolved without the arbitration program, it is necessary to compare the time to disposition for cases subject to arbitration with cases above the jurisdictional limit that are resolved via the traditional litigation track. Tort and contract cases subject to arbitration are resolved several months faster than tort and contract cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject versus not subject to arbitration, and the likely associated differences in case complexity and the amount of discovery, the faster resolution of cases subject to arbitration can not necessarily be attributed to the arbitration process. Moreover, cases subject to arbitration are not resolved quickly; in fact, they do not come close to meeting the Arizona Supreme Court's case processing time standard of resolving 90% of cases within nine months of filing the complaint. And the time to disposition is even longer for the subset of cases subject to arbitration that are still active at the time of assignment to arbitration.

What explains the long time to disposition for cases assigned to arbitration? First,

it takes several months for an arbitrator to be appointed in a majority of cases; in the one-third of cases in which an arbitrator is struck or excused, it takes another month or two before a final appointment is made. Second, a sizeable proportion of cases do not settle before a hearing, and those that do tend to settle close to the hearing date. Third, fewer than half of the cases meet the statutory deadline by which the hearing is to take place; a majority of cases involve one or more continuances. Fourth, in a minority of cases the statutory deadlines for the arbitrator's filing the notice of decision and the award are not met. Fifth, a request for trial *de novo* (which is filed in 17% to 46% of cases, depending on the county) adds six to eight months to the time to disposition, even though few appeals proceed to trial.

What is arbitration's impact on court resources? Because there is no comparison group of cases under the arbitration jurisdictional limit that is resolved without the arbitration program, it is necessary to estimate arbitration's impact on court resources from caseload and case processing statistics. The percentage of the courts' civil caseload that is diverted from the traditional litigation track to the arbitration program can provide a sense of arbitration's potential impact on the courts' caseload. Based on data from Maricopa County, the only county for which data on cases subject to arbitration were available, cases *subject* to arbitration comprise approximately 40% of all civil cases and 80% of tort and contract cases. Thus, a substantial proportion of the civil caseload is diverted to the arbitration program. Not all cases subject to arbitration use a substantial amount of court resources or would be likely to do so if there were no arbitration program. Thus, the *caseload* figures are not sufficient to provide a sense of arbitration's impact on the court's *workload*. Among cases subject to arbitration, there are three categories of case dispositions that impact court resources differently.

The first category of cases consists primarily of cases that are abandoned, dismissed or settled without assignment to arbitration. Based on a sample of Maricopa County tort and contract cases, these cases comprise the majority of cases subject to arbitration (61%). Cases that conclude prior to assignment to arbitration are resolved with presumably little involvement of the court and with no involvement of the arbitration program. If there were no arbitration program, it is reasonable to assume that most of these cases would resolve in the same fashion and with a similar, minimal level of court interaction, although a few might resolve even earlier. Thus, the arbitration program is unlikely to affect the amount of court resources used by this set of cases. An additional 5% of cases subject to arbitration are abandoned or dismissed after assignment to arbitration and before a hearing; presumably, the arbitration program also has no net effect on the court resources used by those cases.

The second category of cases are those in which parties appeal the arbitration

award for a trial *de novo*. These cases represent a small proportion of tort and contract cases subject to arbitration (4%), and they presently consume considerable court resources. Most appealed cases are resolved before trial; however, some of them probably use court resources – either through settlement conferences or pretrial hearings – before they are dismissed. Again, it seems reasonable to assume that if there were no arbitration program, most of the appealed cases would resolve in the same fashion and with no less court interaction than at present. Some of these cases might in fact require additional court involvement as they would not have had the potential benefit of an arbitration hearing and award to help in the settlement process. However, the main savings in court resources the arbitration program provides for this group of cases is probably limited to pre-trial motions decided by the arbitrator, which occurs in approximately one-third of cases.

This leaves a third category of cases – those that settle after assignment to arbitration but before a hearing (14% of tort and contract cases subject to arbitration) and those that proceed to an arbitration hearing and either accept the award (12%) or settle before appeal (4%). At present, these cases use few court resources. Given that most contested tort and contract cases that are *not* subject to arbitration settle before trial, it seems reasonable to assume that these cases that presently settle without appeal also would settle if there were no arbitration program. The uncertainty is what level of court resources they would use before they settle. The arbitration program reduces court resources that would be required to decide pre-trial motions currently heard by arbitrators, which is in approximately one-third of these cases. Cases that presently settle prior to the arbitration hearing probably would settle without judicial intervention, although some might not settle until some court event has been scheduled. Cases that presently have an arbitration hearing and either accept the award or settle before appeal probably would use more court resources before they settle, and some might need a settlement conference or even a trial to reach resolution. Thus, the arbitration program's main potential for reducing court resources is for this subset of cases subject to arbitration (16%) that go to hearing but do not appeal.

What is arbitration's impact on litigants' costs? The present study could not examine this question directly; however, the preceding discussion of case processing provides some basis for estimating it. Arbitration is unlikely to have an impact on the litigation costs of most cases subject to arbitration that resolve without a hearing, as they would be likely to involve the same level of litigation activity as at present if there were no arbitration program. Thus, arbitration's primary potential to affect litigants' costs involves the 20% of tort and contract cases subject to arbitration that have a hearing. Given that most contested tort and contract cases that are *not* subject to arbitration settle without trial, it seems reasonable to assume that most of these cases would also settle

without trial if there were no arbitration program. Accordingly, arbitration's impact on the costs for these litigants would depend on the relative transactional costs associated with an arbitration hearing versus settlement in the absence of the arbitration program. Overall, arbitration seems unlikely to decrease litigants' costs and could potentially increase costs, especially for the small group of litigants who appeal the award.

How do members of the State Bar of Arizona view court-connected arbitration? Lawyers who represent clients in arbitration have highly favorable assessments of the fairness of the arbitration process and neutrality of the arbitrator, and a majority think the awards are fair. A majority of lawyers feel arbitration use should remain mandatory, the jurisdictional limit should remain the same, and the time frame for the hearing is about right (despite the fact that a majority seek continuances). If arbitration use were made voluntary, a majority of the lawyers who represent clients in arbitration say they would sometimes or often recommend arbitration to their clients.

However, a majority of lawyers think arbitration should be replaced by a different type of mandatory ADR process, such as mediation, settlement conference, early neutral case evaluation, or short-trial, to be conducted by *pro tem* judges, commissioners, or other staff neutrals. And just over half of the lawyers think the appeal disincentive should be changed, although they are split between favoring an increase in the percentage by which an appealing party must improve its outcome versus favoring a decrease in that percentage or abolishing the disincentive altogether.

Both counsel representing clients in arbitration and lawyers serving as arbitrators express concerns about the adequacy of arbitrators' knowledge of the issues, arbitration procedures, and civil procedure more generally, and a majority support training for arbitrators and assignment based on subject matter expertise. Although most arbitrators feel both parties participate in good faith, a number identify other problems, including the attorneys' lack of preparation, minimal case presentation, and intent to appeal regardless of the award.

Many lawyers are dissatisfied with being required to serve as arbitrators, especially given the time they put into these cases and the pay they receive. A majority of arbitrators report difficulty scheduling the hearing. Most arbitrators spend more than half a day on cases that go to a hearing, and over one-third spend more than a day. Arbitrators who are unfamiliar with arbitration procedures or the area of law spend more time on cases than those with greater familiarity. A majority of arbitrators in Maricopa County do not bother to submit an invoice for payment, while a majority in the other counties receive $75 for their service. A majority of lawyers think arbitrator service should be voluntary, and most think arbitrator compensation should be changed, either to a reasonable hourly rate for all

time spent on the case or to no pay but non-monetary benefits. Fewer than half of the lawyers say they would be somewhat or very likely to serve voluntarily at the current rate of pay.

Are variations in program structure across the counties associated with differences in program performance? Whether courts assign cases to arbitration after the answer is filed or after the motion to set is filed does not seem to affect the proportion of civil cases assigned to arbitration, the hearing rate, or the speed with which cases progress once assigned to arbitration. Earlier assignment to arbitration, however, generally is related to a shorter time interval between the complaint and final disposition. Courts that monitor the hearing date and require a judge rather than the arbitrator to decide requests for a continuance do not find enhanced compliance with arbitration deadlines. Whether courts rely on voluntary versus mandatory arbitrator service or whether they assign arbitrators to cases according to their substantive expertise does not seem to affect the proportion of cases that strike an arbitrator, go to hearing, or appeal the award. Assigning arbitrators based on subject matter is related to arbitrators' familiarity with the law in the case and familiarity with arbitration procedures, but not with counsels' assessments of the award.

How does the structure of Arizona's court-connected program compare to that of programs in other states? Arizona's program is fairly typical in terms of its jurisdictional limit, exclusion of cases seeking equitable relief, deadline for scheduling a hearing, relaxed hearing procedures, and disincentive for requesting a trial *de novo*. However, Arizona's program tends to differ on most aspects of arbitrator service, including allowing courts to require lawyers to serve as arbitrators, setting lower experience requirements for its arbitrators, and paying arbitrators less than most other states.

What light do studies conducted on arbitration programs in other states shed on the performance of court-connected arbitration generally? The research findings were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation on every dimension of program performance – time to disposition, use of court resources, litigant costs, and lawyers' and litigants' views of arbitration. This suggests that arbitration's effectiveness might depend on the structure of the arbitration program as well as the larger court case management context and legal practice culture in which it operates. Unfortunately, studies have not systematically examined the effect of these factors on arbitration program performance.

In sum, both in Arizona and in other states, court-connected arbitration does not appear to have a negative effect on the speed or cost of dispute resolution, use of court resources, or satisfaction of participants in most cases. It is less clear, however, whether court-connected arbitration substantially improves the efficiency or effectiveness of dispute resolution.