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Compulsory Arbitration Changes Proposed

Time To Comment

In 2004, the Supreme Court of Arizona commissioned a study of court-connected arbitration in Superior Court to examine its efficiency and effectiveness, as well as user satisfaction with the process.¹ Late in 2005, after the study's completion, the Supreme Court appointed the Committee on Compulsory Arbitration in the Superior Court ("the committee") to review the study's findings and other relevant material and "make recommendations on ways in which the compulsory arbitration system in Arizona could be made more effective and efficient in the handling of claims."²

The 14-member committee—composed of judges, court administrators and other court personnel, as well as plaintiff and defense lawyers—discussed a number of issues and developed a set of proposed changes to both the Arbitration Rules and the authorizing statute. During the summer and fall of 2006, the committee's initial recommendations were presented for comment to the bar during a session at the State Bar Convention, to the Committee on Superior Court, to the Superior Court Clerks Association, and to the Superior Court Administrators. These

groups suggested a few changes, most of which the committee incorporated into its final recommendations, which the Arizona Judicial Council subsequently approved.

The committee's recommendations culminated in a Rule Change Petition filed with the Arizona Supreme Court in October 2006.³

This article summarizes the committee's discussions and the recommendations that form the basis of the Rule Change Petition.⁴

Considerations and Recommendations

Status of Arbitration

The committee's first recommendation was that compulsory arbitration be continued in Arizona's Superior Courts. The consensus was that the elimination of arbitration would likely increase the courts' workload, litigants' costs, and delays, and that these would have a negative impact on litigants' access to the courts. The committee declined to consider whether the courts should provide other mandatory ADR processes, in addition to arbitration, from which the parties could choose, viewing that issue as outside its charge.

Dollar Limits and Appeals

The committee recommended increasing the maximum jurisdictional limit for arbitration cases from \$50,000 to \$75,000 to adjust for inflation. Although the committee was aware that lawyers representing businesses are interested in more cases being eligible for arbitration, the committee did not increase the jurisdictional limit to its full inflation-adjusted value of \$91,000. It was concerned that the appeals might be more likely in higher-value cases and that the time and cost involved in litigating those cases might be at odds with arbitration's goals of resolving cases faster and less expensively.

The committee considered changes in various components of the disincentive for requesting a trial *de novo*, wanting to keep the rate of appeal in check without impeding litigants' right to trial. The committee also discussed whether the standard of review should be changed to address the problem of lawyers subverting the disincentive by presenting more complete evidence at the trial *de novo* than at the hearing. Ultimately, the committee recommended keeping both the current appeal disincentive and standard of review.

Mandatory or Voluntary Service

The committee addressed the central issue of whether arbitrator service should be mandatory or voluntary and ultimately recommended that arbitrator service be mandatory across the state. The committee recognized that the prevailing view among lawyers is that arbitrator service should be voluntary. Committee members also noted that voluntary service could potentially improve the quality of arbitration by having only arbitrators who wanted to serve and by permitting requirements, such as arbitration training, as a condition of service. The major consideration in opposition to voluntary service was that it would reduce the pool of arbitrators, which could result in a heavier caseload for arbitrators, increased hearing delays for litigants, and more conflicts arising from arbitrators repeatedly hearing cases involving the same lawyers.

Compensation

The committee agreed that the current rate of arbitrator compensation is inadequate and recommended increasing it to \$150 per hearing day to adjust for inflation. The committee also supported awarding CLE credit as an alternative form of compensation, leaving the number of credit hours to be determined by the Supreme Court, with input from the State Bar Board of Governors. Because changing the rate of arbitrator compensation is dictated by statute and, thus, would require legislative action, the committee offered two recommendations, in the alternative: That arbitrators receive both monetary compensation and CLE credit if the legislature does not change the rate of compensation, but that arbitrators would have to choose either monetary compensation or CLE credit if the legislature increases the fee.⁵

Arbitrator Qualifications & Assignment

The committee considered possible changes in the eligibility requirements for arbitrator service, including raising the number of years of State Bar membership and requiring civil litigation experience, but ultimately recommended retaining the current requirements. The consensus was that although these changes would increase arbitrators' level of experience, they also would reduce the arbitrator pool in some counties and increase the number of arbitrators who

would have conflicts or be stricken by the parties due to perceived bias. Although members did not see civil litigation experience as necessary for deciding cases, they acknowledged that non-civil litigators might have difficulty deciding discovery or dispositive motions and ruling on procedural or evidentiary issues.

The committee noted that arbitration training is important and could be particularly helpful for lawyers who did not have civil litigation experience, but felt that training could not be made mandatory given that arbitrator service is compulsory. The committee strongly recommended providing more training and support resources for arbitrators and proposed the creation of an arbitration training curriculum and written reference materials that could be accessed online as well as in a more traditional CLE context.

The committee considered, but ultimately recommended against, arbitrators being assigned to cases on the basis of subject matter. The committee raised concerns that this would reduce the pool of available arbitrators and increase the number of arbitrators who would have conflicts or be stricken by the parties due to perceived bias. In addition, some members felt that substantive expertise was not needed because lawyers for the parties should provide the necessary law; others felt that expertise could even be a disadvantage by making arbitrators less open to certain arguments and evidence.

Motions

The committee noted that having arbitrators decide dispositive motions in cases not in their area of expertise might be counterproductive and inefficient if it resulted in inconsistent rulings between arbitrators and judges, leading parties to appeal and file the same motion for summary judgment with a judge. Some members, however, were concerned that referring motions to the judge would increase delay. The committee ultimately recommended that wholly dispositive motions be decided by the trial judge instead of the arbitrator. In addition, the committee recommended that motions for summary judgment be filed with the trial judge at least 20 days before the scheduled arbitration hearing and that the filing of the motion toll the time for conducting an arbitration hearing, but that the court shall impose sanctions

if it finds the motion was filed for the purpose of delay or harassment.

With regard to discovery motions, the committee adopted verbatim a rule change proposed by the Arizona State Bar Civil Practice & Procedure Committee that allows a party to appeal an arbitrator's ruling requiring the disclosure of information the party claims is privileged, confidential or otherwise protected from discovery. And with regard to other motions, the committee recommended that arbitrators no longer hear motions to withdraw as counsel.

Evidence Rules

The committee discussed whether the current requirement that the Arizona Rules of Evidence apply in arbitration hearings should be kept or whether admissible evidence should be expanded. Some members felt the Rules of Evidence were needed so that counsel would have grounds for objecting to evidence presented. Others felt that admitting all previously disclosed evidence and letting the arbitrator decide what weight to give it would benefit arbitrators, especially those whose practice does not involve civil litigation or those hearing cases involving *pro per* litigants, by reducing the need to rule on technical objections. The committee recommended that the Rules of Evidence serve only as a guide and that the arbitrator have discretion to admit other relevant and previously disclosed evidence.

Proposals Regarding Efficiency Issues

The committee considered a number of possible changes to enhance arbitration's efficiency, starting with the timing of assignment of cases to arbitration. The committee recognized that, in counties that presently do not appoint arbitrators until after the motion to set is filed, the early assignment of cases to arbitration would increase the number of cases assigned to arbitrators. There was general agreement that cases should be assigned to arbitration shortly after the pleadings in order to reduce the time to disposition, but members were reluctant to impose specific deadlines that might adversely affect courts that use early case-management procedures to address arbitrability. Accordingly, the committee recommended that counties assign cases to arbitration as soon after the answer as is feasible, but in no event later than 120 days after the answer.

The committee also discussed changing various deadlines, limiting discovery and continuances, and increasing court involvement in scheduling and enforcement of deadlines. Committee members with experience in personal injury litigation pointed out that the arbitration deadlines could not be shortened effectively unless the exchange of basic case information and the provision of medical releases for obtaining documents from third parties were accelerated. Members felt that plaintiffs typically would have much of the information needed to prosecute the case at the time of filing and, thus, could provide disclosure materials earlier than presently required. This, in turn, would enable the defense to evaluate the plaintiff's claims and to disclose information earlier, which ultimately would expedite the final resolution of the case.

Accordingly, the committee recommended the creation of new disclosure requirements and deadlines. Within 10 days of service of an answer, the plaintiff would have to provide a disclosure statement and answers to applicable uniform interrogatories and, in personal injury cases, additional medical records, names of health care providers and executed HIPAA-compliant medical releases. Within 30 days of filing an answer, the defendant would have to provide a disclosure statement, answers to applicable uniform interrogatories and a non-party at fault statement.


In an effort to streamline the post-hearing process, as well as to address an apparent problem of cases lingering on court dockets long after they have concluded, the committee recommended a new process involving the notice of decision, award, entry of judgment, and court dismissal of the case. The arbitrator would have to file the notice of decision with the court within 10 days after the hearing. If no further action were taken (e.g., no request for an award of fees), the notice of decision would automatically become the award. However, the award would not be converted into a judgment unless a party applied to have judgment entered on the award. If no application for judgment were filed and no appeal were pending, the court would dismiss the case 120 days after the notice of decision. In addition, the committee recommended that parties in cases that settle file an appropriate stipulation and order with the trial judge.

Committee members felt this process, in most cases, would involve less paperwork on the part of both arbitrators and parties, avoid having judgments unnecessarily entered on defendants' records, and provide a mechanism for the dismissal of cases that were informally resolved after the arbitration hearing.

Monitoring

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

Opportunity To Comment

The comment period for the Rule Change Petition runs through May 21, 2007. The petition is available on the Supreme Court's Web site, and comments may be posted there as well.⁶ In September 2007, the Arizona Supreme Court will decide whether to adopt the proposed changes, which would become effective in January 2008. 

endnotes

1. The findings of the study were summarized in *Lawyer Views on Mandatory Arbitration*, ARIZ. ATT'Y, July/August 2005, at 32, and *Mandatory Arbitration in Arizona: Structure and Performance*, ARIZ. ATT'Y, Oct. 2005, at 15. The full report is available at www.law.asu.edu/LodestarDisputeResolution/ArbitrationStudy2005
2. Supreme Court of Arizona, *Administrative Order No. 2005-79, Establishment of the Committee on Compulsory Arbitration in the Superior Court of Arizona* (Nov. 2, 2005).
3. R-06-0021, Petition to Amend the Rules of Civil Procedure, Section IX. Compulsory Arbitration Rules 72-76, available at www.supreme.state.az.us/rules.
4. This information is based on the authors' observations of the discussions, motions and votes that took place during the committee's meetings. See also Final Report of the Committee on Compulsory Arbitration in the Superior Court in Arizona, June 2006, available at www.supreme.state.az.us/courtserv/Arbitration/Committee_on_Compulsory_Arbitration_Final_Report.pdf
5. The proposed statutory changes to increase arbitrator compensation as well as the jurisdictional limit have been included in the Arizona Judicial Council's 2007 Legislative Proposals. See www.supreme.state.az.us/ajc/updatedappprop.pdf
6. www.supreme.state.az.us/rules.