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or more than three decades, mandatory, non-binding arbitration has been a component of Arizona's civil court system. Its role was "to provide for the efficient and inexpensive handling of small claims."<sup>1</sup> Over the decades, arbitration has become the most common—and perhaps the most controversial—court-connected mechanism for resolving civil cases in Arizona's superior courts.

Pursuant to this system, cases under a prescribed jurisdictional limit must be submitted to a neutral attorney for adjudication under relaxed rules of evidence and procedure.<sup>2</sup> Absent an appeal and request for a trial *de novo*, the arbitrator's decision is entered as the judgment of record in the case.

Casual conversations with Arizona lawyers reveal a range of views about court-connected arbitration (CCA). To systematically examine the bar's views of CCA, the Supreme Court of Arizona commissioned a survey of lawyers as one of the main components of a study of Arizona's CCA program. This article summarizes some of the key findings from this survey of Arizona lawyers.

### Survey Procedure and Respondents

All members of the State Bar of Arizona were invited in June 2004 to participate in a Web-based and e-mail survey.<sup>3</sup> Surveys were sent to all 9,338 State Bar members who had a valid e-mail address, and a response was received from 4,868. To obtain the most useful information, participation in the survey was limited via screening questions to lawyers who had direct experience with CCA in Arizona. Substantive responses were obtained from 2,934 lawyers, or 31 percent of Bar members surveyed.

The proportion of lawyers responding from each of



# Lawyer Views on Mandatory Arbitration



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Arizona's 15 counties was similar to the proportion of State Bar members in each county; thus, the majority of respondents were from Maricopa County. Due to space limitations, we primarily present statewide findings here, with only a few examples of county differences in lawyers' views.<sup>4</sup>

The questionnaire consisted of three main sections. 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.

The first section focused on lawyers' experience as counsel in their most recent case assigned to arbitration (905 respondents). The second section focused on lawyers' experience in the most recent case in which they were appointed as an arbitrator (2,016 respondents). The final section sought the views of all lawyers with any experience with CCA about aspects of program structure, arbitrator service and program effectiveness (2,515 respondents). We report the findings of each section of the survey in turn.

To put the findings in context, it is important to recognize that the structure of arbitration programs varies across Arizona's counties. The jurisdictional limit ranges from \$10,000 to \$50,000. Some counties assign cases to arbitration after the pleadings, others assign cases after the motion to set the case for trial has been filed, and other counties assign cases at different times in between. Some counties draw arbitrators broadly from most members of the Bar, some draw from a more limited segment of the Bar, and others rely primarily on lawyers who volunteer to serve as arbitrators. A few counties assign arbitrators to cases according to their general subject matter expertise, but most do not.

## Lawyers' Experience as Counsel in CCA

Approximately half of the lawyers who responded to this section of the survey said that 25 percent or more of their caseload was subject to arbitration, and about two-thirds had served as an arbitrator in the prior two years.

Most lawyers had favorable assessments of the arbitration process and the arbitrator's performance in their most recent case (see Table 1).<sup>5</sup> Statewide, 93 percent of the lawyers felt they could fully present their case, 82 percent felt the hearing process was fair, 82 percent said the other side participated in good faith, and 79 percent felt the arbitrator was not biased.

However, only about half of the lawyers felt the arbitrator was very prepared, understood the issues involved in the case very well, or was very knowledgeable about arbitra-



tion procedures (see Table 2). Lawyers' perceptions of these characteristics differed from county to county. A majority of Pima County lawyers gave their arbitrator the highest rating on these dimensions, compared to about half of Maricopa County lawyers and fewer than half of the lawyers in the other counties. These differences might be explained in part by the way in which the courts assign arbitrators: In Pima County, the court generally assigns arbi-

felt it made no contribution to settlement negotiations.

TABLE 1

Arizona Attorneys' Views of the Hearing Counsel Representing Clients in Arbitration Thought:	
they could fully present case	93%
the hearing process was fair	82%
the other side participated in good faith	82%
the arbitrator was not biased	79%

trators to cases according to their area of practice, whereas Maricopa County does not, and the other counties' practices vary.

Considering that arbitration hearings tend to produce a "winner" and a "loser," the lawyers' views of the arbitration awards were surprisingly positive. More than two-thirds of the lawyers felt the award was fair in light of the facts and the law, and a majority reported their client was satisfied with the award. Approximately half of the lawyers said the award was about the same as the expected trial judgment, and about one-third said it was worse; few said the award was better than the expected trial judgment. Among lawyers in cases that did not accept the award, however, a majority

## Lawyers' Experience as Arbitrators

Most lawyers who responded to this section of the survey had served as an arbitrator in one to four cases in the prior two years. Most, however, had little or no experience appearing as counsel in the arbitration process: Only 20 percent in Maricopa County and approximately one-third in the other counties reported that 10 percent or more of their caseload was subject to arbitration.

Twice as many arbitrators in Pima County (62 percent) as in Maricopa County (30 percent) said they were very familiar with the area of law in their most recent case, whereas 43 percent of arbitrators in the other counties said they were very familiar with the area. Notably, almost one-fourth of arbitrators in Maricopa County said they were not at all familiar with the area of law, compared to less than 9 percent of arbitrators in the other counties.

Those responses are consistent with differences in the courts' practices regarding assigning arbitrators to cases based on subject matter.

Statewide, approximately three-fourths of the arbitrators felt they had sufficient information about the facts and the law to reach an informed decision. A similar proportion of arbitrators felt they had sufficient information about arbitration procedures to conduct an adequate hearing.

Approximately half of the arbitrators who held a hearing spent a total of five to eight hours on the case. Relatively few arbitrators spent less time, and more than one-third spent more than eight hours on the case. How much time arbitrators spent on cases that went to a hearing was related to their familiarity with arbitration procedures and the area of law. Unfamiliarity with either arbitration procedures or the area of law added, on average, approximately three hours to the time arbitrators spent on cases.

Arbitrators may be compensated \$75 per day for time spent during the hearing or during oral arguments on a dispositive motion. Among arbitrators who held a hearing, a majority in Maricopa County did not submit an invoice for payment. By contrast, a majority of arbitrators in the other counties received \$75 for their service. Few arbitrators received more than \$75.

TABLE 2

Arizona Attorneys' Views of Their Arbitrator's Competence			
Counsel Felt the Arbitrator:	Maricopa County	Pima County	All Other Counties
was very prepared	45%	56%	33%
understood issues very well	54%	71%	42%
knew arbitration procedure very well	49%	68%	39%

## General Views of CCA Program Structure

Statewide, a majority of lawyers (60 percent) felt that court-connected arbitration should remain mandatory for cases under the



current jurisdictional limit (see Table 3). A similar percentage of lawyers thought that the court should make mandatory an alternative dispute resolution (ADR) process other than arbitration, such as mediation or early neutral case evaluation. Lawyers in

TABLE 3

Arizona Attorneys' Views on Arbitration Program Structure	
Arbitration use should remain mandatory	60%
Jurisdictional limit should stay the same	60%
Time frame for hearing is about right	65%
Should replace arbitration with other mandatory ADR	60%
Should change the appeal disincentive	53%

Pima County were more likely than those in other counties to favor continuing mandatory arbitration and were less likely to favor adopting a different mandatory ADR process. Similarly, lawyers with a caseload subject to arbitration were more likely than those with no arbitration caseload to favor continuing mandatory arbitration and were less likely to favor adopting a different mandatory ADR process.

A majority of lawyers felt their county's current jurisdictional limit should remain unchanged. Among lawyers who thought the jurisdictional limit should be changed, more thought it should be raised than lowered.

Almost two-thirds of the lawyers statewide felt the current time frame for the hearing (between 60 and 120 days after appointment of the arbitrator) was about right. Among those who disagreed, most thought the time period was too short. But there were no differences in the responses of counsel in Maricopa and Pima Counties, even though arbitration hearings in Pima County cases generally were held later in the course of litigation because they were not assigned to arbitration until after the motion to set was filed. Although 60 percent of lawyers with cases subject to arbitration said the current time frame for the hearing was sufficient, a similar proportion reported that one or more continuances had been granted in their most recent case.

Fifty-one percent of lawyers with no arbitration caseload, but 44 percent of lawyers with cases subject to arbitration, thought

TABLE 4

Arizona Attorneys' Views of Arbitrator Service by County				
Views:	Maricopa County	Pima County	All Other Counties	Statewide
Arbitrator service should be voluntary	67%	59%	77%	67%
Arbitrators should be compensated differently	94%	88%	96%	94%
Arbitrators should be assigned according to subject matter expertise	70%	83%	78%	71%
Arbitrators should receive arbitration training	53%	52%	72%	55%

the current disincentive to appeal arbitration decisions should remain unchanged (*i.e.*, that the appealing party must obtain a judgment that improves by 25 percent its outcome as a result of the arbitrator's award or must pay the other party's costs and fees associated with the appeal). Lawyers who favored changing the appeal disincentive 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.

## Arbitrator Service and Compensation

Statewide, a majority of lawyers felt that arbitrator service should be voluntary (see Table 4). Lawyers in Pima County (59 percent) were less likely than lawyers in Maricopa County (67 percent), who in turn were less likely than lawyers in the other counties (77 percent), to think that arbitrator service should be voluntary. Statewide, however, fewer than 20 percent of the lawyers said they would be very likely to serve as an arbitrator at the current rate of \$75 per hearing day if arbitrator service were voluntary. When asked which one method of arbitrator compensation they would most like to see their county adopt, lawyers tended to choose either a reasonable hourly rate for all time spent on the case or no pay but non-monetary benefits, such as CLE credit or designation as a judge pro tem.



Almost three-fourths of the lawyers statewide felt that arbitrators should be assigned only to cases in which they have subject matter expertise. Fifty-five percent felt that arbitrators should receive training in arbitration procedures prior to serving as an arbitrator.

### Arbitration's Effectiveness

Lawyers also were asked how effective the court-connected arbitration program in their county was in achieving a number of goals. Just more than 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 percent 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.


### Summary

Most Arizona lawyers who participated as counsel in arbitration felt the arbitration process and the award were fair. Their ratings of the arbitrator's level of preparation and knowledge of the law and arbitration procedures, however, were less favorable. Most arbitrators spent a considerable amount of time on the case, for little or no pay. Lawyers appeared to be skeptical about CCA's ability to provide a more efficient and effective dispute resolution process for smaller cases.

A majority of lawyers thought that arbitration should remain mandatory for cases below the current jurisdictional limit and that the present time frame for the hearing was adequate. However, a majority also thought that arbitration should be replaced by a different type of mandatory ADR process, and about half thought the appeal disincentive should be changed.

With regard to aspects of arbitrator service and compensation, a majority of lawyers thought that arbitrator service should be voluntary, arbitrators should be assigned to cases based on subject matter expertise and should receive training, and arbitrators should be compensated at a reasonable hourly rate or provided with some non-monetary benefits such as CLE credit or designation as a pro tem judge.

The views of the lawyers who are involved in CCA on a regular basis are critical to any assessment of the program's success. They are, however, only part of the picture. In a subsequent issue of ARIZONA ATTORNEY, we will set out the key findings of other components of

the study of Arizona's CCA system, including how and when cases are resolved in arbitration, as well as the experience of other jurisdictions with CCA. 

### endnotes

1. ARIZ.R.CIV.P. 74(a).
2. *See* ARIZ.R.CIV.P. 72-76; A.R.S. § 12-133.
3. The survey was preceded by an e-mail from State Bar President Charles Wirken that included a request for participation written by Chief Justice Charles Jones. The initial request for participation provided a Web site to which lawyers were directed to complete the survey. Due to difficulties some respondents had in accessing that survey version, a second request was sent that included a version of the survey that could be completed and returned via e-mail. A few lawyers who were unable to complete the questionnaire by Web or e-mail either mailed their questionnaire or were interviewed by telephone. A follow-up e-mail was sent to those who had not responded to earlier requests.

The authors thank Bill Edwards and the Arizona State University Survey Research Laboratory for administering the survey and compiling the responses. The authors also gratefully acknowledge the assistance of the State Bar of Arizona in providing the names and e-mail addresses of its members.

4. Because of the small number of respondents in each of the counties outside Maricopa and Pima Counties, we report their responses combined across the 13 counties.
5. Fewer than one-third of the lawyers in Maricopa and Pima Counties, but over half of the lawyers in the other counties, exercised their peremptory strike of the assigned arbitrator. Concern about the arbitrator's potential bias was the primary reason lawyers struck an arbitrator; the arbitrator's lack of subject matter expertise was the next most common reason.