In its July/August issue, Arizona Attorney magazine published the results of a lawyer survey regarding court-connected arbitration. This article—the second in the series—examines how mandatory arbitration is designed to function and how it performs in reality.

Mandatory Arbitration in Arizona: Structure and Performance

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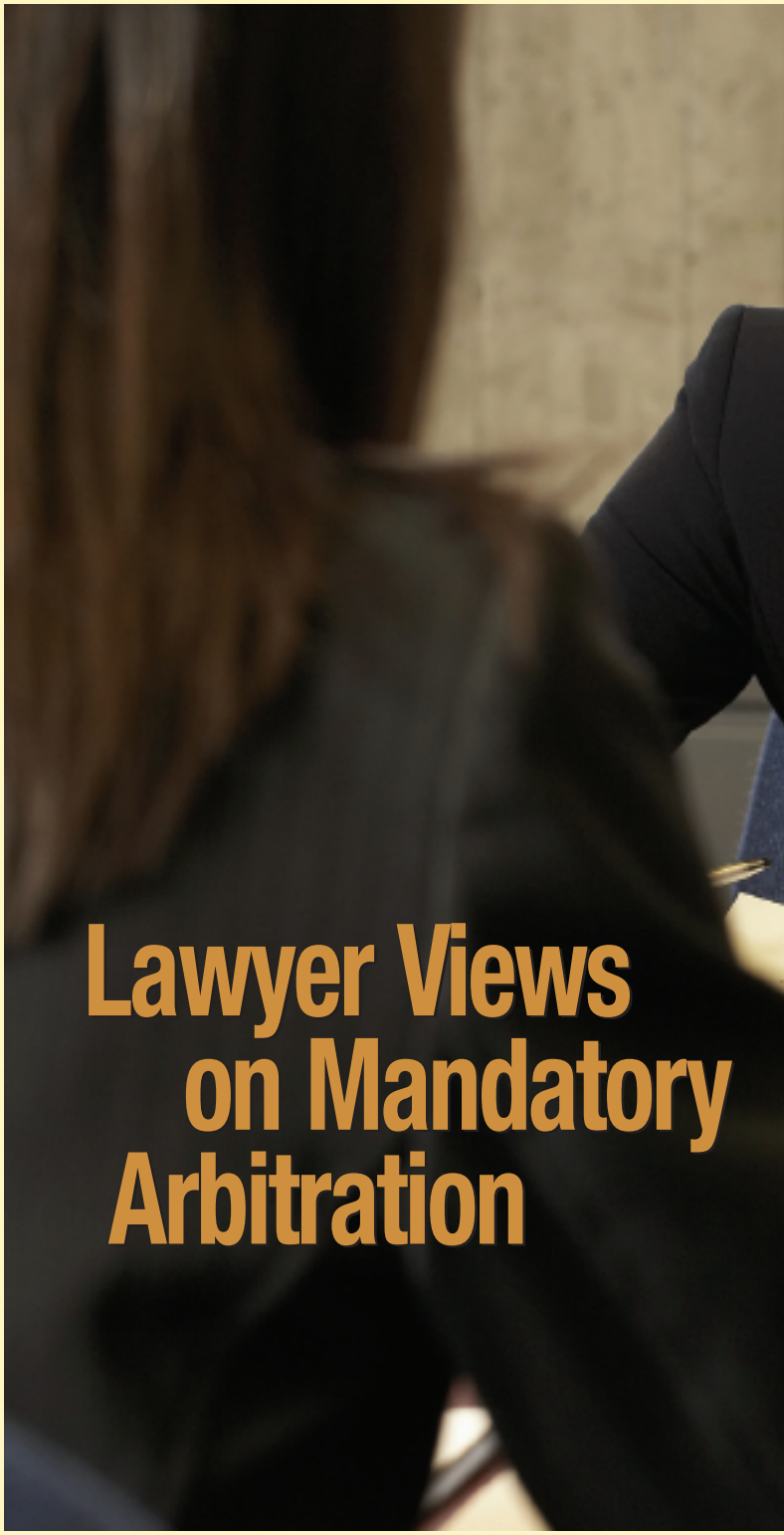

Lawyer Views on Mandatory Arbitration

Last year, the Supreme Court of Arizona commissioned a study of court-connected arbitration in Arizona's Superior Courts. The study included a survey of Arizona lawyers, an examination of the structure of arbitration programs in each county, an analysis of the performance of arbitration based on case processing data, and a review of the structure and performance of court-connected arbitration in other states.

The findings of the attorney survey portion of the study were summarized in the July/August 2005 issue of ARIZONA ATTORNEY. This article summarizes the findings of the other components of the study.

Differences Among Counties in the Structure of Arbitration

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

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A copy of the full report of this study is available at the Web site for the Lodestar Dispute Resolution Program at www.law.asu.edu/LodestarDisputeResolution.

county in several ways.

The jurisdictional limit for arbitration varies across the counties from the maximum allowed by statute, $50,000, to as low as $10,000 (and even $1,000 in two counties that effectively have no arbitration program). Whether cases are assigned to arbitration after the pleadings or later in the litigation also varies. In approximately half of the counties, including Maricopa, the court assigns the case to arbitration based on the certificate on compulsory arbitration filed by each party with the initial 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 drawn from members of the State Bar in

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that county with at least four years' experience. In approximately half of the counties, including Maricopa, arbitrator service is mandatory for most of these 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.

The Performance of Arbitration

The courts in most counties provided information on the number and types of cases handled by the arbitration programs in 2003, as well as how the cases progressed through arbitration to final disposition. Information on the timing of various arbitration events and the time from filing to final disposition was based largely on a review of docket information in a sample of cases in Pima and Maricopa Counties.

Cases resolved by the arbitration award were more likely to be diverted from settlement, and to a lesser extent from other types of judgments, than from trial.

The Arbitration Caseload

Although a sizable proportion of civil cases were subject to arbitration, the majority concluded before assignment to arbitration. Based on data from Maricopa County, only one-third of cases subject to arbitration were still active at the time of assignment to arbitration. Three types of cases—tort motor vehicle, tort non-motor vehicle, and contract cases—accounted for the majority of cases assigned to arbitration in all counties. Cases assigned to arbitration accounted for one-fourth of these three case types in Pima and Maricopa Counties, and 4 percent to 18 percent of these case types in the other counties.

Thus, one-fourth or fewer of the types of cases that tend to be actively litigated and use court resources were diverted to the arbitration program. However, these caseload figures only set the upper limit for arbitration's potential impact on the courts' workload; as discussed subsequently, not all cases assigned to arbitration would be likely to use more court resources if there were no arbitration program.

The Disposition of Cases Assigned to Arbitration

Although few civil cases outside the arbitration program advanced to trial, almost half of the cases assigned to arbitration had a hearing. In most of the counties, an award was filed in from 31 percent to 63 percent of cases assigned to arbitration, and in just over 40 percent of cases in both Maricopa and Pima Counties. The percentage of cases in which the arbitration award was appealed ranged from 17 percent to 46 percent throughout the state, and was 22 percent in both Maricopa and Pima Counties. Only a small proportion of appealed cases proceeded to trial de novo.

There was no consistent pattern of differences across the counties in the hearing rate or appeal rate associated with differences in program structure—when counties assigned cases to arbitration, whether they relied on voluntary or mandatory arbitrator service, or whether they 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 in the likelihood that the case had a hearing or appealed the award.

Because all cases within the arbitration jurisdictional limit are subject to arbitration, the only cases available to serve as a comparison are cases above the jurisdictional limit—even though they are inherently non-equivalent by virtue of the amount in controversy. A direct comparison of the dispositions of tort and contract cases subject to arbitration with tort and contract cases above the arbitration jurisdictional limit in Maricopa County found the trial rate for both groups of cases to be one percent. Three percent of cases subject to arbitration were resolved by summary judgment or some other non-trial judgment or order, compared to eight percent of cases not subject to arbitration. Thirty-nine percent of cases subject to arbitration settled, compared to 55 percent of cases not subject to arbitration. Twelve

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percent of cases subject to arbitration were resolved by the arbitration award. And 43 percent of cases subject to arbitration and 36 percent of cases not subject to arbitration were not prosecuted or defended.

These findings suggest that cases resolved by the arbitration award were more likely to be diverted from settlement, and to a lesser extent from other types of judgments, than from trial. Given that most actively litigated cases not subject to arbitration settled and few went to trial, most actively litigated cases subject to arbitration probably would do likewise if there were no arbitration program.

Accordingly, arbitration's potential impact on litigant costs would appear to depend largely on the transaction costs associated with an arbitration hearing compared to settlement in the absence of the arbitration program. And with regard to arbitration's potential for saving court resources, any savings seem more likely to involve pretrial resources devoted to hearings and conferences than trial resources.

The subset of cases assigned to arbitration that seem most likely to make the biggest contribution to reducing the use of court resources are those cases that have a hearing. Although without arbitration these cases probably would settle, they might use more court resources before they settle than they do under arbitration.

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.

Time to Disposition

Based on a sample of tort and contract cases in Maricopa and Pima Counties, cases subject to arbitration were resolved several months more quickly, on average, than were cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject to arbitration versus those 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 cannot necessarily be attributed to the arbitration process.

The seemingly faster resolution of cases subject to arbitration does not mean that arbitration cases were resolved quickly. In fact, arbitration cases did not come close to meeting the Arizona Supreme Court's civil case processing time standard of resolving 90 percent of cases within nine months of the complaint. Statewide, counties that assigned cases to arbitration after the answer was filed often, but not always, had a shorter average time to disposition for cases assigned to arbitration than did counties who assigned cases to arbitration later.

Although the information in the case docket did not permit a systematic examination, in both Pima and Maricopa Counties most of the cases assigned to arbitration that settled tended to do so in unison with when hearings were scheduled, suggesting that the hearing provided the event that stimulated settlement. As a result, cases that settled before a hearing did not consistently conclude faster than cases that went to a hearing. However, cases in which an award was filed but not appealed concluded six to eight months faster than cases in which the award was appealed.

Time Between Arbitration Events

The longer-than-expected time to disposition for arbitration cases prompted a detailed examination of the length of time between various arbitration events in a sample of tort and contract cases assigned to arbitration in Maricopa and Pima Counties. 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 involved one or more re-appointments of the arbitrator, adding on average another one to two months before the final arbitrator was appointed in those cases.

The hearing is to take place within 120 days of the arbitrator's appointment, unless the time frame is extended for good cause. The hearing was scheduled to take place by that deadline in only approximately 44 percent of cases in both counties. This probably overestimates the number of hearings that took place within the deadline because arbitrators did not routinely file an amend-

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ed notice of hearing upon rescheduling. The award is to be filed within 145 days of the final arbitrator appointment. In both counties, in only approximately 35 percent of cases was the award filed within that time frame; in approximately 85 percent of cases, the award was filed within 270 days of the final arbitrator appointment.

Thus, most cases assigned to arbitration did not meet the statutory deadlines. It is interesting to note that once cases were assigned to arbitration, the length of time between arbitration events was similar in Maricopa and Pima Counties despite differences in their practices regarding arbitrator service and assignment, requests for continuances, monitoring of hearing dates, and timing of assignment to arbitration.

Court-Connected Arbitration in Other States

To assess the structure and performance of court-connected arbitration in other states, we reviewed statutes and court rules as well as caseload statistics and empirical studies.

Program Structure

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.

Most states set a deadline by which the arbitration hearing must be conducted, either six to twelve months after filing or two to four months after the arbitrator is appointed. Many states allow arbitrations to be conducted without strict adherence to the court rules governing discovery and the presentation of evidence. And although every state allows parties the right to appeal the arbitration award to court for a trial de novo, most have an "appeal disincentive"—either a filing fee as a condition of appeal or the assessment of the opposing party's costs and fees if the appeal does not produce a more favorable result. In each of these respects, Arizona's program is typical.

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 arbitrators at the highest levels typically require the parties to pay the arbitrator's fee.

Program Performance

The findings from empirical studies of arbitration programs in other states were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation.

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, but three other studies found no differences. The programs that reported arbitration was faster tended to limit discovery, set a short hearing deadline, and have court staff schedule the hearing. The trial rate for arbitration cases was lower than for comparable non-arbitration cases in four studies, but two other studies found no differences.

The introduction of an arbitration program did not appear to reduce the pending caseload or the time to disposition for non-arbitration cases. Nor did arbitration reduce the hours lawyers worked or the fees they billed on the case. An examination of case processing statistics from other arbitration programs showed that the rates at which cases went to a hearing, appealed the award, and proceeded to trial de novo in Arizona were comparable to these rates in other states.

Conclusion

The primary goals of court-connected arbitration in Arizona's Superior Courts include providing 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.

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

The Arizona Judicial Council has established a task force to explore what changes to the arbitration program, if any, should be implemented based on this study. AZ