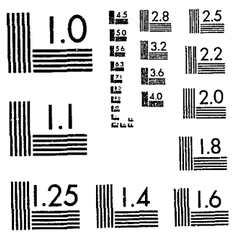

Evaluation of Court-Annexed Arbitration in Three Federal District Courts

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EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS

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FOREWORD

Court-annexed arbitration in the federal sector has been the subject of serious discussion and debate at least since 1976, when the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference") culminated in the creation of a Follow-Up Task Force chaired by Judge Griffin B. Bell. The task force recommended that federal district courts experiment with compulsory arbitration; subsequently the Department of Justice, under the leadership of then-Attorney General Bell, elicited the cooperation of three federal district courts (the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut) to act as pilot courts in undertaking court-annexed arbitration on an experimental basis. The Federal Judicial Center was requested to monitor and evaluate the use of mandatory arbitration in the three pilot courts.

In March 1981 the Center published Evaluation of Court-Annexed Arbitration in Three Federal District Courts. This original study analyzed the effects of the pilot project during its first two and one-half years. That analysis has since been updated to include a large number of cases that were still pending at the time the original study was published. Both the original report and the updated analysis are included in this volume.

The data collected and analyzed by the Center clearly demonstrate that court-annexed arbitration substantially reduces the proportion of cases that ultimately go to trial. The incidence of trial among cases mandatorily referred to arbitration in the Eastern District of Pennsylvania and the Northern District of California was reduced by 50 percent. A more dramatic finding, drawn from the same data, is that fewer than 2 percent of the cases referred to arbitration in the Eastern District of Pennsylvania in 1979--only 18 of 943--ever came to trial.

Acceleration of the pace toward final termination of a case is an additional benefit of court-annexed arbitration. In the District of Connecticut, which has since abandoned its mandatory arbitration program, cases reaching final disposition within one year of filing increased from 36 percent to 50 percent. Similarly, in the Eastern District of Pennsylvania, 59 percent of cases subject to the arbitration program terminated within one year of filing.

The reduction in elapsed time and the concomitant savings in expense to the parties as well as to the judiciary are integrally dependent on proper administration of the program. If there is insufficient effort to set time limits on the scheduling of hearings and no commitment to enforce those limits, procrastination can be expected, and arbitration may prove even slower than the normal pace of litigation. Arbitration programs must be monitored; judges and clerks of court must be mindful of delay

when it develops and be prompt to introduce appropriate corrective action.*

Reception of court-annexed arbitration by members of the bars has been overwhelming. By more than a 2:1 majority, counsel whose cases were terminated before a hearing or by acceptance of an arbitration award favored the arbitration proceedings. More than half of all counsel involved in arbitration programs agreed that the arbitration proceedings resulted in a more rapid termination of their cases. The evidence also points toward litigant satisfaction with the quality of justice dispensed.

The court-annexed arbitration experiment has proved so successful that the United States District Court for the Eastern District of Pennsylvania recently extended the scope of its program's subject-matter jurisdiction to include not only injury to seamen under the Jones Act, 46 U.S.C. { 688, contracts, negotiable instruments, and property damage but also actions arising under the Federal Employers' Liability Act. Understandably, a number of other federal courts are now considering adoption of a rule providing for court-annexed arbitration. Some of these courts have already made the decision to implement their own programs.

In summary, this study demonstrates that court-annexed arbi-

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*For a more extensive examination of the experience with compulsory arbitration in both federal and state systems, see Levin, Court-Annexed Arbitration, 16 University of Michigan Journal of Law Reform 537 (Spring 1983).

tration has been a dramatic success in some places and has produced significant results in others. The need for alternative mechanisms of dispute resolution is so great in our litigious society, and contemporary demands on the courts so heavy, that a procedure which demonstrably contributes to more efficient, more effective justice deserves to be tried.

A. Leo Levin
September 1983

EXECUTIVE SUMMARY

Experimental local rules providing for mandatory, nonbinding arbitration of certain classes of civil actions went into effect on February 1, 1978, in the Eastern District of Pennsylvania and on April 1, 1978, in the District of Connecticut and in the Northern District of California. This summary of the Federal Judicial Center's evaluation of these rules, in the interest of brevity, offers only general descriptions of the rules, the evaluation effort, and the results and conclusions of that effort, omitting special qualifications or exceptions to the general statements. Hence only the full report, and not this summary, may be relied upon for precise factual accuracy.

Although the three local rules differ in various respects, they typically provide for mandatory arbitration before a panel of three arbitrators for cases seeking money damages not exceeding $100,000 and generally involving personal injury or contract subject matter. The rules are intended to lead to an arbitration hearing no later than approximately seven months after the case is filed; the arbitrators' judgment on the merits (their "award") is entered as the judgment of the court unless, within prescribed time limits, a party rejects the award by filing a demand for trial de novo.

The evaluation report is based on information collected in

the course of approximately two years' experience with these rules. The sources of information include: 1) questionnaires from counsel in cases subject to the rules ("arbitration" cases) and from counsel in cases exempted from the rule in Connecticut for the purpose of statistical comparison; 2) docket information for these same cases and also for similar cases filed during the three years immediately prior to the effective dates of the rules; 3) questionnaires from persons who acted as arbitrators; 4) interviews with arbitrators, counsel, and court personnel; and 5) statistical records maintained by the Administrative Office of the United States Courts.

The goals of court-annexed arbitration are to decrease the time and expense required to dispose of civil litigation, without diminishing the actual or apparent quality of justice. The rationale of the arbitration rules is that they will lead to more rapid case disposition through more expeditious settlement of cases and through termination of most arbitrated cases by acceptance of an arbitration award. The results of the evaluation suggest that more expeditious settlement has been achieved, while frequent termination by acceptance of an award has not.

The evaluation produced strong evidence that the arbitration rules have caused a decrease in time from filing to disposition of arbitration cases (in two of the three districts), but this is attributable almost exclusively to settlement of cases prior to the arbitration hearing. In the third pilot court, no such ef-

fect was found. It appears that court-annexed arbitration can serve as an effective deadline for case preparation, substituting for trial not as a forum for case resolution but as a stimulus to settlement. Questionnaires from counsel whose cases were terminated prior to arbitration support the view that the arbitration rule expedited settlement and show general endorsement of the arbitration rules.

The lack of effect in one district might be remedied by assuring that hearings there are scheduled more promptly. Indeed, substantial numbers of cases in all three districts have remained pending and not arbitrated for more than twelve months, and this may have limited the rules' "deadline" value. Renewed emphasis on prompt scheduling of hearings is recommended.

It is much less clear that the arbitration rules had tangible consequences for cases that reached an arbitration hearing, but this lack of clarity may well be due to the limited time frame of the evaluation relative to the time required for a case to reach trial. About 40 percent of arbitrated cases were disposed of by the arbitration process; in the other 60 percent, the arbitration award was voided by a demand for trial de novo. Counsel in cases disposed of by arbitration were strongly supportive of the rules' success in achieving a faster, less expensive disposition.

For cases in which the arbitration award was rejected by a demand for trial de novo, the evaluation unfortunately cannot

suggest what consequences the rule might have. Counsel in cases terminated by settlement or trial after rejection of the arbitration award were equally divided on whether the rule resulted in more rapid termination of the case. Because the rules have been in effect for only two years, substantial numbers of arbitration cases remain pending and awaiting trial, and it cannot be determined what percentage of these will ultimately go to trial. The award entered by the arbitrators, as well as the hearing itself, may be useful to counsel and litigants during subsequent stages of the litigation, possibly promoting settlements. The report offers suggestions on how the effectiveness of arbitration for promoting posthearing settlement might be enhanced, but it cannot specify the frequency of such settlement.

Because substantial numbers of cases proceed beyond the arbitration hearing, the concept of arbitration as a mechanism to promote posthearing settlements may warrant special attention and emphasis. Effectiveness of the arbitration procedure might be enhanced if the role of arbitrators were not limited to the fact-finding and judgment function of judge or jury, but included advising counsel on the strengths and weaknesses of the case in order to maximize the possibility that they can achieve an acceptable compromise in appropriate cases. The positive influence that the arbitration hearing and award may have on litigation subsequent to a demand for trial de novo may need to be stressed.

Overall, the results of the evaluation paint a promising

picture, albeit only modestly promising and unavoidably incomplete. There is clear promise for court-annexed arbitration to expedite litigation for many cases. But it remains uncertain whether the rules will result in a decrease in the incidence of trials.

The evaluation provides substantially more knowledge on the effects of court-annexed arbitration than was available prior to the experiment, but important questions remain unanswered. Final judgment on federal court-annexed arbitration may need to await resolution of the present uncertainty about the effect of the rules on the incidence of trials and test of the suggested increase in emphasis on the prompt scheduling of arbitration hearings and on the settlement-encouraging role of the arbitrator. If resolution of these issues is believed to be crucial, we suggest that a cautious expansion of the use of arbitration, to include additional districts or additional case types and accompanied by a long-term and rigorous evaluation, may be worth considering.

I. INTRODUCTION

This report presents the Federal Judicial Center's evaluation of local rules for mandatory, nonbinding arbitration in three United States district courts: the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California. The three federal district courts implemented these rules in the belief that it might be possible to improve upon the conventional procedures of civil litigation for substantial numbers of lawsuits, in order to reduce delay, expense, and procedural complexity not warranted by the matter in dispute.

The precipitating events for federal experimentation with court-annexed arbitration were the 1976 National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice (the "Pound Conference"), the report of the Pound Conference Follow-Up Task Force, which was chaired by Judge Griffin B. Bell, and the subsequent appointment of Judge Bell as attorney general of the United States. Based on positive reports of experience with court-annexed arbitration in several states, arbitration was endorsed by several Pound Conference participants as a potentially beneficial alternative method of dispute resolution in both state and federal courts. The Follow-Up Task Force recommended experimentation with the concept in the federal

courts. Under the leadership of Attorney General Bell, the Department of Justice enlisted the cooperation of the three federal district courts to undertake the experiments and asked the Federal Judicial Center to evaluate them.

The Center's limited position in the partnership with the Justice Department and the three pilot districts is reflected to some extent in the perspective and limitations of this report. The report is limited in two substantive ways. First, the Center was not a party to certain initial decisions, including the choice of the participating districts and the drafting of local rules for arbitration, so this report cannot provide a complete history and explanation of these features of the project. Second, the Center and the Justice Department disagreed about the necessary design and duration of the evaluation effort, with the result that the choices on these matters often represented a compromise between the initial positions of the two institutions (although the authoritative decisions were, of course, those of the participating courts). The evaluation reported here is therefore limited to what could be learned after approximately two years of experience with the programs under study, and to what could be learned within the logical limitations of the experimental designs undertaken in the three districts. We have tried to supplement the report with theoretical analysis of issues for which the evaluation has not provided empirical evidence.

State courts in Pennsylvania, New York, and Ohio have had

substantial experience with arbitration provisions similar in concept to the rules of the three pilot districts. With few exceptions, these provisions have been claimed to be highly effective in reducing delay and court backlogs. For several reasons, however, one might be skeptical of these claims and of the extent to which similar benefits might accrue to civil litigation in federal courts.

First, we are not aware of any rigorous empirical evaluation of previous court-annexed arbitration programs. Moreover, even if it had been shown empirically that state arbitration provisions have substantially reduced delay and backlog, there might be reason to question whether those effects were accompanied by truly satisfactory justice for civil litigants. In light of the relatively small amounts in controversy in cases to which the state provisions have applied (not more than $10,000 for any provision that we have seen) and the relatively large penalties attached to rejecting the arbitration result (a nonrecoverable payment of arbitration costs or a penalty contingent on failure to obtain a superior result at trial), the success of some arbitration provisions may well be attributable to the burdens of cost and delay they place on litigants who seek trial. In contrast, the local rules of the federal pilot districts apply to cases with amounts in controversy of up to $100,000, a substantially higher limit than in the state court experience, and penalties associated with rejecting the result of the arbitration

are very modest in comparison (nonexistent in the District of Connecticut).

Second, the potential influence of arbitration on federal pilot court backlogs is necessarily slight, because the cases to which the rules apply represent a small proportion of case load. And because access to trial in the pilot districts does not appear to be impeded by congestion--it appears instead to be largely a function of the pace chosen by counsel--delay will not likely be reduced by the simple expedient of taking cases out of the queue. So the local rules examined here have put the concept of court-annexed arbitration to a severe test: the rules may not even appear to succeed unless they in fact result in arbitration awards that truly satisfy the parties or influence them to achieve settlement more easily or more promptly than they otherwise would.

However, we are able to report that, in our opinion, federal court-annexed arbitration has not failed its test. As long as the experience is regarded as a preliminary test, we would suggest that the test has been passed. We have found some positive effects in two of the three pilot programs, and we have found no evidence of substantial harm in any of the programs. But several important questions remain unanswered because of the scope and design of the evaluation. We do know much more about the operation and consequences of arbitration than we did prior to the experiment, and for this the pilot courts are to be commended. It may well be that the present knowledge is sufficient to guide

policy decisions. If, however, the issues that remain unresolved are believed to be crucial to a final decision on federal court-annexed arbitration, we suggest that a more extensive and rigorous experiment be considered.

The primary aim of the evaluation effort reported here was to determine whether these local rules produce the beneficial consequences anticipated without unacceptable adverse consequences. The anticipated benefits of the rules are that they will reduce both the time and expense of resolving certain civil cases and the burden these cases place on court resources. Potential adverse consequences are that the rules will result in dissatisfaction with the quality of justice or severe increases in litigation expense for some cases, that the arbitration hearings may be used only as devices for discovery, or simply that the rules may be ineffectual and thus add a new layer of complexity and inconvenience to the litigation process. In addition to offering some data on these issues, the report describes the administration of the rules in the three pilot courts and makes recommendations concerning possible improvements in their administration and operation.

This evaluation cannot, by itself, demonstrate whether court-annexed arbitration is a wise policy for continued operation in the federal court system. The wisdom of such policy is a matter of judgment on the part of policy makers, judgment that this evaluation can inform, but not replace. The evaluation is designed to elicit answers to a number of questions we believe

are relevant to the policy judgment. The report addresses these questions with empirical evidence derived from the evaluation effort and, where there are no data available, with a theoretical analysis of arbitration within the process of civil litigation. Chapter two offers a description of the arbitration rules and a discussion of the ways arbitration might influence litigation. Chapter three describes the evaluation design and the limitations imposed on our empirical conclusions by both the design and the limited time since the arbitration rules were implemented in the three pilot districts. Chapter four is a detailed report of the empirical data. Chapter five presents our analysis, conclusions, and recommendations regarding the effects of the rules as now implemented and potential means to improve their effectiveness.

II. DESCRIPTION AND THEORETICAL ANALYSIS

The local rules providing for court-annexed arbitration in the three pilot districts went into effect on February 1, 1978, in the Eastern District of Pennsylvania and on April 1, 1978, in the District of Connecticut and in the Northern District of California. The Eastern District of Pennsylvania amended its rule on July 31, 1979. (Appendix A contains the text of the three local rules.)

Although the rules vary in a number of their particulars, they generally have the same basic features. The rules require that certain classes of civil cases be referred to an arbitration hearing prior to trial. The arbitration hearing is conducted as an informal trial, in which a panel of three arbitrators hear evidence and arguments and render an "award" in the case. A party dissatisfied with the arbitrators' award may reject the award by demanding a formal trial, or "trial de novo." In Connecticut, no prejudice attaches to the demand for trial de novo, but in the other two districts the party demanding trial is subject to some form of penalty--imposition of costs or arbitrators' fees--unless the verdict at trial is more advantageous to that party than the arbitration award. Cases subject to the rule are generally those involving personal injury or contract actions, in which no more than $100,000 is demanded (the amount limit is

$50,000 in the Eastern District of Pennsylvania). Finally, the arbitration hearing is to be held according to an explicit time schedule in Connecticut and Eastern Pennsylvania; the rules in these districts provide for a hearing no later than roughly seven months after the case is filed. The scheduling of arbitration hearings in the Northern District of California is allowed to be more variable.

We can suggest two potential functions of court-annexed arbitration and consider the consequences, both beneficial and adverse, that these functions might produce. The first potential function of the rules is that they compel subject cases to obtain an advisory verdict through an informal, triallike proceeding. This advisory verdict might resolve the case prior to trial, either by being accepted by the parties or by serving as the basis of a posthearing settlement. The second potential function of the rules is that they set a time limit on preparing the case for the arbitration hearing, by requiring that the hearing be held within about seven months from the time the case is filed. The timetable may bring about more rapid settlements than would otherwise occur by prompting counsel to give attention to the case and by providing a disincentive for continuation of the case.

Potential Effects on Case Duration

The most obvious way in which the arbitration rules may reduce the time from filing to termination of subject cases is if all, or nearly all, cases reaching an arbitration hearing were

terminated by acceptance of the arbitration award and if a substantial number of cases reached an arbitration hearing in less time than it would normally take to resolve them. It must be recognized, however, that there are other ways that the arbitration rules may prompt early case dispositions.

The vast majority of civil cases filed in United States district courts are disposed of prior to trial, and a large proportion are disposed of through negotiated settlement (others are disposed of through orders on points of law, including dismissal for failure to state an actionable claim, summary judgment, transfer to another district, or remand to state court). But the predominance of settlement as a means of case disposition does not mean that settlement occurs shortly after filing; many cases last for a year or more before they are settled. It is reasonable to suppose that many settlements occur when, and only when, the attorneys in the case find it necessary to turn their attention to the case, prepare the evidence, and assess the case's strengths, weaknesses, and net monetary value. Trial is rarely an economically desirable method of case disposition, because it normally results in greater expense for all involved than would a settlement. Trial consumes a great deal of attorney time, the costs of which are usually borne by the individual litigants. Moreover, although the attorney fees from trials can be substantial, they may often provide counsel with a lesser return for time spent than settlement would provide.

But while there is strong motivation to achieve settlement,

there are also potentially serious barriers. First, as long as counsel are in financially sound positions, they may have no strong motivation to settle early rather than late. Their clients, of course, may have such motivation (or its opposite). Second, the adversary stance of counsel may make it difficult for them to either initiate settlement negotiations or attain an objective view of the value of the case to serve as a basis for such negotiation.

The two potential functions of court-annexed arbitration offer possibilities for diminishing these barriers. A prompt time schedule for the arbitration hearing provides a motivation for counsel to prepare their cases promptly, and the expense of attorney time spent in the arbitration hearing may motivate settlement in advance of the hearing. If the case goes to arbitration, the hearing itself may provide an excellent basis for assessing the strengths and weaknesses of the case, and the arbitrator's award may be regarded as a reliable estimate of the likely verdict at trial; both sorts of information may provide a sound foundation for negotiating a settlement. This may lead to acceptance of the arbitration award, or to settlement soon after the award is issued.

It should be noted, in regard to this last point, that even if the arbitration award is an accurate prediction of the verdict at trial, it may nevertheless be an inappropriate statement of the settlement value of the case. Settlement value is a function not only of the likely outcome at trial, but also of the probable

expenses each party must bear in proceeding to trial and the chances of unlikely, but possible, outcomes at trial. For instance, if plaintiff has suffered $10,000 in damages, but the arbitrators find for defendant, counsel may nevertheless realize that there is a chance--say a 20 percent chance--that a jury would find for plaintiff. In that instance, the logical value of the case prior to trial would be roughly $2,000, rather than the $0 awarded by the arbitrators. Plaintiff might be well advised to reject the arbitration award and seek settlement for $2,000. In another example, the arbitrators might accurately predict that trial would result in a verdict for $10,000, but the expense of trial or the cost of delay could be substantially greater for one party or the other. In that instance, the settlement value would be somewhat more or less than $10,000, depending on which party has the stronger bargaining position. These examples are not offered to suggest that litigation produces inequitable results, but simply to illustrate the realities of negotiation and settlement, in order to emphasize that the success or failure of court-annexed arbitration cannot be judged solely by the frequency of acceptance or rejection of arbitration awards.

If the rules provide a realistic and prompt time frame for the preparation of cases, or if the arbitration hearings produce reliable judgments of case value, then there is reason to hope that the rules will expedite settlement. The evaluation attempts to determine the effects of the rules on time from filing to termination by two methods: a direct comparison of the duration

of arbitration cases with an estimate of what the duration would have been in the absence of the rule, and a survey of attorney perceptions of the effects of the rule on case duration.

Potential Effects on Expense of Litigation

The obvious means by which court-annexed arbitration may reduce the expense of litigation is the inducement of settlement in cases that, in the absence of the rule, would have gone to trial. Insofar as trials are substantially more expensive than arbitration hearings, the success of the rule in substituting arbitration for trial should result in cost savings for litigants. Less substantial, but still important, savings may also be obtained if the arbitration rules produce settlement with less expenditure of attorney time than would unassisted negotiation.

On the other hand, it seems likely that arbitration will increase expenses for at least some cases, particularly those that proceed to trial. Unless the arbitration hearing, as a "dress rehearsal," expedites the preparation and conduct of a subsequent trial, the hearing itself is likely to result in expense in excess of what otherwise would have been necessary. It is also possible that some cases settled after an arbitration hearing would have settled in any event, without as much expenditure of attorney time. (But this might not be altogether bad; it is the expense and effort involved in an arbitration hearing that may motivate counsel to seek settlement in advance of the hearing.)

Potential effects of the rules on litigation expense thus appear to be closely related to effects of the rule in prompting

settlements. We would be confident that expenses are generally reduced if the rule both reduces the incidence of trials and causes a large number of settlements in advance of the arbitration hearing itself. Unfortunately, the duration of the evaluation itself was short in comparison to the time many cases take to reach trial, and we cannot assess an important potential effect of arbitration: the capacity of the program to reduce the incidence of trial. The evaluation did obtain attorney perceptions regarding the effect of the arbitration rule on matters related to the expense of litigation and permits inferences about costs to be drawn from data related to the timing of settlements. A more direct and objective measure of costs was attempted in the District of Connecticut, where counsel in arbitration cases and in comparable cases exempted from arbitration for purposes of statistical comparison were asked to report the number of billable hours expended. However, the limited number of cases in the Connecticut pilot program and the low rate of response to this inquiry preclude any inference from these data.

Potential Effects on the Quality of Justice

Analysis of the potential effects of court-annexed arbitration on the quality of justice was, in the present evaluation, a very difficult matter. One reason is that there is no way to ascertain objectively whether or not justice is done in a particular case. We cannot, for example, examine arbitration awards and determine which are "correct" and which "incorrect." It is tempting to think that some sense of the "correctness" of awards

could be gained by comparing the award with the ultimate outcome in the case, whether obtained by trial or settlement. But there are problems associated with any such comparison. Where a case is terminated by acceptance of the arbitration award, one might be inclined to infer that the parties must regard the award as acceptable, if not correct. Yet this inference is defensible only when acceptance of the award is not coerced to some degree, either by the general burden of carrying the case forward to trial or by the specific threat of penalty pursuant to the arbitration rule itself. A comparison of rejected arbitration awards with subsequent settlements is ambiguous because of the distinction between proper verdict and fair settlement value. Even if an arbitration award is a correct statement of the proper verdict, it may not be a rational figure for case settlement. Finally, comparison of arbitration awards with verdicts at trial presents the intractable ambiguity that the only cases for which such comparison can be made are those in which the award was expressly rejected. If the party demanding trial obtains a verdict more advantageous than the rejected arbitration award, we could posit that the award must have been "incorrect," but only if we are willing to regard a trial verdict as correct by definition. To do so would be defensible only as a matter of form, in that the trial verdict is the result to which litigants are constitutionally entitled. The right to trial does not guarantee correctness of the outcome, however, only fairness in arriving at it. Although close agreement between awards and subsequent ver-

dicts would bode well for the later acceptance of arbitration by attorneys and litigants, it would do so only through a rather indirect sense of the correctness of arbitration awards.

Although the evaluation attempted to obtain information about the relation between arbitration awards and subsequent settlements or trial verdicts, no definitive results were obtained, because too few cases have been disposed of after rejection of an arbitration award and because of the limited response by counsel to our inquiry about terms of settlement.

A more practical basis for assessing the fairness of the rules is through the subjective judgments of counsel and litigants about the fairness of the procedure and outcome for arbitration cases. The evaluation employed questionnaires sent to counsel and, in the District of Connecticut, to litigants as well. Because the pilot courts were willing to have us question attorneys and because routine court records include the names and addresses of counsel, counsel in all three districts were asked about the fairness of the outcome of their cases. We were able to obtain a good picture of the opinions of counsel, especially with respect to cases that terminated before arbitration or by acceptance of the arbitration award. We were unsuccessful, however, in assessing the extent to which litigants felt the procedure and outcome were fair. Because the courts were hesitant to allow us to question litigants, we restricted our efforts to the District of Connecticut, where a strong evaluation design provided a potential for more dependable inferences, and we asked

counsel there to provide us with addresses for their clients. As it turned out, counsel were generally unwilling to provide us with this information, and too few questionnaires were completed by litigants for us to draw any inferences about their judgments.

Thus, the present study yielded no useful information on litigants' perceptions of the arbitration rules, and we have no basis for determining whether they like or dislike the arbitration procedure and outcome. It may be that litigants perceive arbitration as a form of "second class" justice and judge it unfair simply from this perception. On the other hand, arbitration hearings may appear more fair than negotiated settlements or trials if the lack of litigant participation in settlement or the formality of trials seem to preclude litigants from a full airing of their "side of the story." We simply do not know which of these possibilities actually occurred.

III. EVALUATION DESIGN AND METHODS

The evaluation in each district is based on court records provided by the clerk's office, certain docket information routinely reported by the courts to the Administrative Office, questionnaires from counsel and arbitrators,[1] and occasional observations of arbitration hearings and interviews with arbitrators and counsel.

Cases were monitored from the time they were declared eligible for arbitration.[2] Upon filing of an arbitration award, questionnaires were sent to the arbitrators, asking about the duration and nature of the hearing. Upon termination of the case, questionnaires were sent to counsel seeking their general opinion of the rule, their perceptions regarding effects of the rule on the case in question, and their assessment of the fairness of the outcome of the case. Comparison data are drawn from Administrative Office records, from a detailed study of a sample of past

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1. The questionnaires are reproduced in appendix B.

2. The point at which a case is "declared eligible for arbitration" depends on the provisions of the local rule and the practices of the clerk of court. We use the term to refer to the point at which the office of the clerk determined that a case appeared to meet the criteria of their rule, usually very shortly after the case is filed and somewhat earlier than formal referral to arbitration. Hence, cases we regard as "subject to arbitration" include some cases that were disposed of before they were ever formally referred to arbitration.

cases, and, in Connecticut, from a sample of current cases removed from the arbitration program for purposes of statistical comparison.

The arbitration rule in Connecticut permits the removal of cases from the program for purposes of comparison. This enabled the evaluation to approach the rigor of a randomized experiment, which provides for comparisons between arbitration cases and another group of contemporary cases that are clearly comparable, but are not subject to the arbitration rule. At the outset, among cases deemed eligible for arbitration as provided in the Connecticut local rule, every fourth case in the order of filing was exempted from the rule for purposes of statistical comparison. After this ratio of exempted to subject cases had generated an adequate population of arbitration cases for administrative purposes, the exemption ratio was changed so that every other arbitration-eligible case was exempted.[3]

This procedure does not guarantee comparability between the two groups of cases as firmly as would a truly random (not simply alternating) selection process. A truly random selection allows clear differences between the two groups to be unambiguously attributed to the consequences of the arbitration rule. Despite

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3. A substantial number (27 percent) of the cases originally placed in the arbitration group were subsequently removed from the program at the discretion of magistrates or judges. In order to prevent these discretionary removals from biasing the comparison and in order to assure a conservative analysis of the effects of arbitration on case terminations, these cases were included in the arbitration-group data. No questionnaires were sent to counsel in these cases, however.

the technically nonrandom basis for selection employed here, we are confident that the comparability of the two groups of cases is adequate to support the conclusions we report. Moreover, we understand that the alternating selection process was neither subject to manipulation by counsel nor deviated from by court personnel.

For the Connecticut cases not removed for comparison, an early status conference with a magistrate and, of course, an arbitration hearing are required; the removed-for-comparison cases also have an early status conference, but they are otherwise treated like any civil case not subject to arbitration. Because it is unlikely that comparison cases differ in any systematic way from cases that remain in the program, any differences between the outcome of comparison cases and the outcome of program cases can be attributed to the arbitration program..

In Eastern Pennsylvania and Northern California, all cases eligible for arbitration are subject to the rule, so there is no group of cases that can provide a clearly reliable comparison. An assessment of effects, of course, must be based not only on knowledge of what occurs with cases subject to the rule, but also on some estimate of what would have occurred with these cases in the absence of the rule. One source of comparison is data about cases processed by the pilot courts in the years prior to implementation of the rule. Although such data are available, there are serious difficulties involved in this sort of comparison. One difficulty is the possibility that some change unrelated to

arbitration, but occurring at about the same time the rules were instituted, could have produced effects that appear to be the result of the rules. A second problem is identifying past cases that are truly comparable, that is, those that would have been subject to the rule had it been in effect at the time the case was filed. The latter difficulty is best illustrated by an example.

Consider the comparison between cases now subject to the arbitration rule and cases from past years that would have been subject to the rule. If the rule applies to cases demanding no more than $100,000, the obvious comparison group consists of past cases demanding $100,000 or less. It is by no means clear, however, that these cases would in fact have been subject to the rule had it been in effect earlier. The primary reason is that the existence of the arbitration rule gives a particular relevance to the demand for relief, which heretofore had no obvious meaning. The relief demanded is not always an objective, measurable property of a case. Instead, particularly in personal injury cases, it may be no more than a guess at the potential upper limit of recovery. In the absence of the arbitration rule, and as long as the demand exceeds the jurisdictional requirement (for example, $10,000 for diversity jurisdiction), the demand serves no obvious purpose other than that of a strategic message to the defendant and defense counsel. In short, there is no reason to believe that demand is a reliable index of the amount at stake in cases filed before the arbitration rules took effect. The arbi-

tration rules, however, lend meaning to the demand: if it does not exceed $100,000, the case will be subject to arbitration.[4] Hence the arbitration rule very likely influences the demand, and makes uncertain the task of identifying those past cases that would have been arbitrated.

It is critical that the problems involved in comparing past cases with arbitration cases be well understood, because they limit our ability to assess many of the possible effects of court-annexed arbitration in Eastern Pennsylvania and Northern California. Consider, for example, the difficulty of interpreting a finding that median time from filing to disposition is nine months in a sample of present, arbitration-eligible cases and eleven months in a comparison sample of past cases. Although such a finding appears to favor the arbitration rule, there are several reasonable alternative explanations that lessen confidence in that conclusion. It is quite possible, for example, that some change in the practices of the court, the local bar, or some group of litigants, unrelated to arbitration but occurring at about the same time, has led to the difference in speed of disposition. The apparent difference might also be due to the inaccuracy of our selection of past comparison cases. It might

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4. This is not true in the Eastern District of Pennsylvania, where the monetary limit is $50,000. In that district, application of the rule is not based on the amount demanded; rather, the rule requires that cases be referred to arbitration unless plaintiff certifies the case involves an amount in excess of $50,000. The problem of identifying comparable past cases exists here also, because there was no such certification procedure in the past.

be that the comparison cases include cases that do not terminate rapidly and that would not have been subject to arbitration, but that have been included in the comparison group because we do not have sufficient information on the precise nature of these cases to identify them as inappropriate for the comparison. Only in Connecticut, where the removal of current cases for comparison eliminates these ambiguities, are these problems avoided.

Comparison with past cases, however, provides the only available basis for objective inference about the effects of court-annexed arbitration in Eastern Pennsylvania and Northern California. Therefore, conclusions about the effects of arbitration in expediting case disposition for these districts must be based on the uncertain comparison with selected past cases, as well as on the congruence of the results with those in Connecticut, where the evaluation design is much less ambiguous.

To ameliorate the problem of selecting comparable past cases, we have compared cases filed before the arbitration rule took effect ("past" cases) and cases filed after the rule took effect ("present" cases) chosen in the following fashion. First, we identified case characteristics for which we had Administrative Office data for both past cases and arbitration cases. Second, we determined which of these characteristics (for example, particular subject matter and basis of jurisdiction) were common among cases actually deemed subject to the arbitration rules. From among all cases filed in the two districts both before and after the effective date of the arbitration rule, we then se-

lected those cases with the chosen identifying characteristics. The two resulting groups of "past" and "present" cases, chosen according to identical criteria, are likely to be substantially comparable (although by no means as perfectly comparable as the two contemporary groups in Connecticut). This approach, although necessary in light of the problems explained above, introduces a new difficulty. A substantial number of the selected "present" cases were not in fact deemed eligible for arbitration, despite the fact that they "looked" like arbitration cases in terms of the objective identifying characteristics. Although the "present" group contains most of the arbitration cases, it also contains many nonarbitration cases. The result is that whatever effects the arbitration rule has had in these two districts are exhibited in the comparison in a "dilute" manner.[5]

Despite the dilution problem, we think that this analytic technique warrants substantial confidence in any effects of arbitration clearly apparent from the comparison. However, the possibility that apparent effects in this sort of comparison could have resulted from some change other than the arbitration rule should always be kept in mind.

In addition to assessing various potential effects of the arbitration rules, the evaluation attempts to examine the way the courts have put their rules into practice, with the goal of identifying problems in the operation of the rules and potential

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5. See note 9, infra, for a detailed explanation of the selection criteria and dilution factors.

solutions to these problems. For the most part, this analysis concentrates on the nature of the arbitration hearings themselves and on difficulties experienced by both arbitrators and counsel under the present operation of the rules. We have also maintained an informal communication with the clerk of each pilot court, seeking to understand their management of the arbitration process and the burden it imposes on their resources.

IV. RESULTS OF THE EVALUATION

This chapter provides a detailed description of the basic findings of the evaluation; it is intended simply to point out the features of the data. The implications of the results are discussed in chapter five.

Limitations of the Data

We noted earlier that certain questions that the evaluation addressed cannot be answered because of the small number of cases that have reached advanced stages of litigation, such as trial. The duration of the experiment--two and a half years--is not long in comparison to the duration of many cases. Because most of the data we need can only be obtained after the cases have terminated, the present data represent a sample that is decidedly over-representative of cases that terminate promptly. Assume, for example, that about 100 arbitration-eligible cases are filed each month. After sixteen months, we would have information on the vast majority of the cases that terminated within a month or two of filing, but on a very small minority of those cases that lasted fourteen months or more.

The results in this report are presented or analyzed, insofar as possible, in a manner that avoids misinterpretations that could result from the time-skewed character of the data. But no method of analysis can totally overcome the logical conse-

quences of the study's relatively short duration. The present data obtained from questionnaires sent to counsel, for instance, are overrepresentative of the views of counsel in cases of short duration, so it is important that the results be interpreted by categories: the perceptions of counsel in cases that terminate early (for example, prior to an arbitration hearing) and those of counsel in cases that terminate later (for example, after arbitration and demand for trial de novo).

We urge caution in drawing inferences without attention to the time-skewness problem. It might be misleading, for instance, to conclude that the vast majority of counsel believe the rule to be effective in expediting case dispositions, because the majority of counsel who have responded to our questionnaires were involved in cases that were disposed of relatively promptly and we have a relatively small sample of the opinions of counsel in cases that have remained pending for long periods.

It should be pointed out, for the benefit of those familiar with statistical reports prepared by the clerks of the pilot courts, that inevitable delay for case information or questionnaire responses to be communicated to us and to be recorded and analyzed has led us to report figures below that are not always concurrent either with other figures we offer or with the figures reported by the clerks. We have sought to report the most recent data available to us and to maintain as much consistency as possible between figures reported in more than one table. We regularly report the latest dates associated with the

information presented here, and we occasionally report in the text or in footnotes more recent information than that included in the table. We do this in the interest of providing an accurate and complete presentation of the data available to us from all sources. In no case, however, have these differences in data from different times or different sources suggested any changes in the overall implications of the study.

Cases Subject to Arbitration

This section presents the distribution of cases subject to the arbitration rules in each of the three test courts. Each court is distinctive in terms of the number and type of cases that are eligible for arbitration. Tables 1, 3, and 5 present the eligible cases categorized by nature of suit (contract, tort, or other) and basis of jurisdiction (taken from the codes on Administrative Office statistical forms). Tables 1, 3, and 5 may be compared with tables 2, 4, and 6, respectively, which show the distribution of tort and contract cases with demands under $150,000[6] from three calendar years prior to the year in which the rules were adopted.

Table 1 presents the available data on arbitration-eligible cases in the District of Connecticut. Because the court does not

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6. The demand ceiling of $150,000 was used here, as in other comparisons to past cases, because the analysis of "identifying characteristics" (see text accompanying note 5, supra) showed that a number of cases actually subject to arbitration were classified in the Administrative Office records as demanding somewhat more than $100,000.

TABLE 1

CASES ELIGIBLE FOR ARBITRATION IN THE DISTRICT OF CONNECTICUT: NATURE OF SUIT AND BASIS OF JURISDICTION*

Nature of Suit	Jurisdiction: U.S. Plaintiff	U.S. Defendant	Federal Question[a]	Diversity	Not Known[b]	Total
Contract	0 0.0%	4 1.5%	-- --	57 21.0%	96 35.4%	157 57.9%
Tort[c]	1 0.4%	13 4.8%	-- --	19 7.0%	38 14.0%	71 26.2%
Other	0 0.0%	0 0.0%	-- --	2 0.7%	41 15.1%	43 15.9%
Total	1 0.4%	17 6.3%	-- --	78 28.8%	175 64.6%	271[d] 100%

*This table is based on cases reported between April 1, 1978, and March 15, 1980.

[a]The local rule in Connecticut does not apply to cases based on federal question jurisdiction.

[b]Basis of jurisdiction is usually reported by Connecticut only upon termination of the case.

[c]Includes Federal Tort Claims Act category routinely reported by the court.

[d]This table includes cases removed for comparison purposes; it does not include 48 cases initially placed in the arbitration group but later removed by magistrate.

TABLE 2

PAST TORT AND CONTRACT FILINGS WITH AMOUNT DEMANDED LESS THAN $150,000 IN THE DISTRICT OF CONNECTICUT: NATURE OF SUIT AND BASIS OF JURISDICTION*

Nature of Suit	Jurisdiction: U.S. Plaintiff	U.S. Defendant	Federal Question	Diversity	Total
Contract	35 10.4%	7 2.1%	-- --	126 37.4%	168 49.9%
Tort	5 1.5%	22 6.5%	-- --	88 26.2%	115 34.2%
Total[a]	40 11.9%	29 8.6%	-- --	214 63.6%	283 84.1%

SOURCE: Administrative Office statistical tapes.

NOTE: The percentages shown are not true percentages, but indexes adjusted so that the total equals 84.1, the percentage of tort and contract cases among all arbitration cases shown in table 1. This facilitates comparison with table 1.

*This table counts all tort and contract cases (other than those based on federal question jurisdiction) filed between July 1, 1975, and March 31, 1978, that demanded less than $150,000 or for which no demand was noted.

[a]The cases counted in the table represented 14% of all civil cases demanding less than $150,000 for which valid data were available. Tort and contract cases based on federal question jurisdiction represented an additional 18% of such cases, and accounted for 16% of all contract cases and 75% of all tort cases.

send us detailed data on the nature of suit and the basis of jurisdiction of eligible cases in Connecticut until the case has closed, we are not able to provide this information on most of the cases that are currently active. The table does contain enough information, however, to show that the percentage of tort cases among the cases eligible for the arbitration program is somewhat less in Connecticut than in the other districts. This may be attributed to the fact that about 75 percent of all tort actions filed in Connecticut with demands under $150,000 are based on federal question jurisdiction, and are thus not subject to the Connecticut rule. Although we have data on basis of jurisdiction for only about one-third of the Connecticut cases, what information we do have suggests that about 81 percent of the eligible cases are based on diversity of citizenship jurisdiction. This percentage is slightly higher than the percentage of diversity cases in the data for past cases. About 8 percent of the civil filings in the District of Connecticut are declared eligible for the arbitration program. Comparison of tables 1 and 2 suggests that contract actions are somewhat overrepresented in the arbitration case load.

As shown in table 3, the cases eligible for arbitration in the Eastern District of Pennsylvania are about equally divided between contract and tort actions, and there are relatively few cases that do not fall into one of these two general categories. Most (84 percent) of the arbitration-eligible cases in this district are based on diversity of citizenship jurisdiction.[7] Of the three pilot districts, the Eastern District of Pennsylvania has the largest percentage of its civil cases declared eligible for arbitration (over 19 percent, based on figures for the first eighteen months of the program). This may be the result of the provision in that district's arbitration rule that a separate certification must be filed to invoke exclusion on the basis of the amount in controversy. Comparison of tables 3 and 4 suggests that federal question torts are underrepresented among arbitration cases, relative to their representation in the data for past cases.

Table 5 shows the distribution of eligible cases for the Northern District of California. Again, the eligible cases are divided about equally between contract and tort actions, with few cases outside these two general categories. A substantially larger percentage of the eligible cases in this district are based on United States party and federal question jurisdiction than in the other two pilot districts. Only 43 percent of the eligible cases in the Northern District of California are based on diversity jurisdiction. About 10 percent of the total civil filings in the Northern District of California during the first eighteen months of the arbitration rule were declared eligible

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7. The percentages reported in the text are based only on those current cases for which the relevant information is known at this time. The percentages reported in the tables are based on all identified current cases, including those for which certain information is unknown.

TABLE 3

CASES ELIGIBLE FOR ARBITRATION IN THE EASTERN DISTRICT OF PENNSYLVANIA: NATURE OF SUIT AND BASIS OF JURISDICTION*

Nature of Suit	Jurisdiction: U.S. Plaintiff	U.S. Defendant	Federal Question	Diversity	Not Known[a]	Total
Contract	14 0.7%	7 0.3%	95 4.5%	791 37.1%	2 **	909 42.6%
Tort	11 0.5%	53 2.5%	111 5.2%	983 46.1%	1 **	1,159 54.4%
Other	1 **	5 0.2%	10 0.5%	27 1.3%	21 1.0%	64 3.0%
Total	26 1.2%	65 3.0%	216 10.1%	1,801 84.5%	24 1.1%	2,132[b] 100%

*This table is based on cases reported between February 1, 1978, and December 1, 1979.

**Indicates less than 0.1%.

[a]Cases for which basis of jurisdiction has not been reported.

[b]This table does not include 538 cases initially reported but later removed by certification or at discretion of judge or magistrate.

TABLE 4

PAST TORT AND CONTRACT FILINGS WITH AMOUNT DEMANDED LESS THAN $150,000 IN THE EASTERN DISTRICT OF PENNSYLVANIA: NATURE OF SUIT AND BASIS OF JURISDICTION*

Nature of Suit	Jurisdiction: U.S. Plaintiff	U.S. Defendant	Federal Question	Diversity	Total
Contract	72 1.8%	26 0.6%	211 5.3%	1,229 30.7%	1,538 38.4%
Tort	12 0.3%	134 3.3%	555 13.8%	1,650 41.2%	2,351 58.6%
Total[a]	84 2.1%	160 3.9%	766 19.1%	2,879 71.9%	3,889 97.0%

SOURCE: Administrative Office statistical tapes.

NOTE: The percentages shown are not true percentages, but indexes adjusted so that the total equals 97.0, the percentage of tort and contract cases among all arbitration cases shown in table 3. This facilitates comparison with table 3.

*This table counts all tort and contract cases filed between July 1, 1975, and January 31, 1978, that demanded less than $150,000 or for which no demand was noted.

[a]Tort and contract cases represented 54% of all civil cases demanding less than $150,000 for which valid data were available.

TABLE 5

CASES ELIGIBLE FOR ARBITRATION IN THE NORTHERN DISTRICT OF CALIFORNIA: NATURE OF SUIT AND BASIS OF JURISDICTION*

Nature of Suit	Jurisdiction: U.S. Plaintiff	U.S. Defendant	Federal Question	Diversity	Not Known[a]	Total
Contract	27 4.5%	2 0.3%	114 18.9%	163 27.0%	9 1.5%	315 52.2%
Tort	11 1.8%	80 13.3%	64 10.6%	97 16.1%	7 1.2%	259 43.0%
Other	0 0.0%	6 1.0%	15 2.5%	2 0.3%	-- --	23 3.8%
Unknown	--	--	--	--	6 1.0%	6 1.0%
Total	38 6.3%	88 14.6%	193 32.0%	262 43.4%	16 2.7%	603[b] 100%

*This table is based on cases reported between April 1, 1978, and March 1, 1980.

[a]Early cases were reported without notation of basis of jurisdiction.

[b]This table does not include 46 cases initially reported but later removed from arbitration by amended complaint or at discretion of judge or magistrate.

TABLE 6

PAST TORT AND CONTRACT FILINGS WITH AMOUNT DEMANDED LESS THAN $150,000 IN THE NORTHERN DISTRICT OF CALIFORNIA: NATURE OF SUIT AND BASIS OF JURISDICTION*

Nature of Suit	Jurisdiction: U.S. Plaintiff	U.S. Defendant	Federal Question	Diversity	Total
Contract	502 21.4%	53 2.3%	266 11.4%	558 23.8%	1,379 58.9%
Tort	6 0.3%	207 8.8%	273 11.7%	364 15.5%	850 36.3%
Total[a]	508 21.7%	260 11.1%	539 23.0%	922 39.4%	2,229 95.2%

SOURCE: Administrative Office statistical tapes.

NOTE: The percentages shown are not true percentages, but indexes adjusted so that the total equals 95.2, the percentage of tort and contract cases among all arbitration cases shown in table 5. This facilitates comparison with table 5.

*This table counts all tort and contract cases filed between July 1, 1975, and March 31, 1978, that demanded less than $150,000 or for which no demand was noted.

[a]Tort and contract cases represented 36% of all civil cases demanding less than $150,000 for which valid data were available.

for arbitration. Comparison of tables 5 and 6 suggests that United States plaintiff contract actions are underrepresented among arbitration cases.

Thus, the cases eligible for arbitration in the three pilot courts provide an opportunity to assess the effects of the procedure on a variety of case types. Although tort or contract cases based on diversity jurisdiction make up the bulk of the cases studied in this evaluation, cases with other natures of suit and bases of jurisdiction have been included in the arbitration programs, particularly in the Northern District of California.

Timing of the Hearings

Table 7 presents data on the timing of the 147 completed arbitration hearings for which we have data. As table 7 shows, there was considerable variability in the length of time that elapsed between filing of the case and completion of the arbitration hearing. Hearings were held as early as two months and as late as eighteen months after filing of the case. The median time from filing to arbitration in these cases (that is, the time by which half the arbitrated cases had hearings) was nine months for the Northern District of California and eight months for the District of Connecticut and the Eastern District of Pennsylvania. Arbitration hearings have occurred most frequently in the seventh through the eleventh month after filing.

These statistics, however, very likely are biased by the time-skewness of the data. We can report the time from filing to hearing, of course, only for cases that have in fact reached a

TABLE 7

TIME FROM CASE FILING TO ARBITRATION HEARING*

Months from Case Filing to Hearing	Number of Hearings: District of Connecticut	Eastern District of Pennsylvania	Northern District of California
2	0	0	1
3	0	3	0
4	0	4	3
5	0	7	2
6	1	4	2
7	3	6	8
8	3[a]	13[a]	15
9	1	7	11[a]
10	1	5	8
11	2	7	8
12	0	5	1
13	0	2	3
14	0	2	2
15	0	0	2
16	0	0	2
17	0	0	1
18	0	0	2
Total number of hearings	11	65	71

*This table is based on all hearings reported before August 1, 1979, in the Eastern District of Pennsylvania and before April 7, 1980, in the District of Connecticut and in the Northern District of California.

[a]This is the median point for arbitrated cases in each district.

hearing. Substantial numbers of cases remain pending and have yet to be arbitrated. An examination of the cases that have remained open for at least twelve months revealed that, in each district, more than two-thirds had not had arbitration hearings. Thus, should the present trend continue, we must expect that the typical time from filing to arbitration hearing will be longer than is reflected in table 7. This is not certain, however, because these as yet unarbitrated cases may settle before they ever reach a hearing.

In any event, it is apparent that substantial numbers of cases do not reach an arbitration hearing nearly as promptly as was contemplated when the local rules were implemented. As we note below, in the discussion of our observation of arbitration hearings and our interviews with personnel in the clerks' offices, difficulties in scheduling arbitration hearings present a major problem in the administration of the rules. We defer further consideration of this issue until later, but it is important, in order to understand the implications of the following results, to note that the actual scheduling of arbitration hearings is later than the theoretical timetable in the rules.

Arbitration Awards

We have received data on 147 arbitration awards: 11 from the District of Connecticut, 65 from the Eastern District of Pennsylvania, and 71 from the Northern District of California. Table 8 presents the current status of these awards. As the

TABLE 8

CURRENT STATUS OF ARBITRATED CASES*

	District of Connecticut	Eastern District of Pennsylvania	Northern District of California	Total
De novo demanded				
Pending trial	5	18	3	26
Tried	0	9[a]	4	13
Settled	1	14	18	33
Total	6	41	25	72
Awards entered as judgment	5	20[b]	19	44
Time to file de novo demand not expired	0	4	27	31
Total awards filed	11[c]	65	71	147

*The data in this table are based on terminations before October 1, 1979, for the Eastern District of Pennsylvania; before January 30, 1980, for the District of Connecticut; and before April 1, 1980, for the Northern District of California. The latest date reported for filing of arbitration awards is June 12, 1979, for the Eastern District of Pennsylvania; June 25, 1979, for the District of Connecticut; and February 4, 1980, for the Northern District of California. The latest dates for filing of demand for trial de novo are June 14, 1979, for the Eastern District of Pennsylvania; July 5, 1979, for the District of Connecticut; and December 11, 1979, for the Northern District of California.

[a]Includes 2 cases settled during trial.

[b]Includes 2 cases settled at hearing.

[c]As of February 1, 1980, court statistics show 14 arbitration awards filed, 5 cases terminated by arbitration, 8 demands for trial de novo, and 1 case settled after demand for trial de novo.

table indicates, 44 awards (30 percent) became the judgment of the court by virtue of no demand for trial de novo, and 72 awards (49 percent) have been voided by demands for trial de novo. The remaining 31 awards (21 percent) have not yet run the allotted time for filing a de novo demand. Of the cases in which demands for trial de novo were filed, 46 percent settled before trial, 18 percent went to trial, and 36 percent are pending trial.

The rates of demand for trial de novo can be estimated by computing the percentage of such demands among all cases that have run the time limit for voiding the arbitration award. This computation results in a 55 percent de novo demand rate for the District of Connecticut (57 percent if the more recent summary statistics of the court are used), 67 percent for the Eastern District of Pennsylvania, and 57 percent for the Northern District of California.

Of the 147 awards, 127 were sufficiently simple to be classified as favoring either the plaintiff or the defendant. Of these, 92 (72 percent) favored the plaintiff and 35 (28 percent) favored the defendant. For cases with some award to plaintiff, the median award was $12,000; the range of these awards was from $250 to $95,000 (approximately one-third were less than $5,000, one-third between $5,000 and $20,000, and one-third in excess of $20,000). Of the awards favoring plaintiffs, 64 percent were voided by demand for trial de novo; of those favoring the defendant, 74 percent were voided by demand for trial de novo.

As noted above, the problematic nature of any comparison of

arbitration awards and subsequent outcomes, the practical problems resulting from the infrequency of trials of arbitrated cases during the evaluation, and the unwillingness of counsel to disclose settlement information preclude any attempt to assess the "accuracy" of arbitration awards.

Case Terminations

Tables 9, 10, and 11 present the methods of disposition for terminated cases subject to the arbitration rules. Most of the cases terminated to date never reached an arbitration hearing. This was expected, both because of the two-year duration of the study (which precludes the accumulation of much information about termination by trial) and because a substantial proportion of open cases do not reach an arbitration hearing within a year of filing. Consequently, the data presented below can address effects of the arbitration rules on terminations by means such as settlement with considerable certainty, but offer no information about the effects of the rules on terminations by trial.

Analyses were conducted to determine whether the termination information varied with particular groups of cases. We compared, for example, cases based on diversity jurisdiction with cases with other bases of jurisdiction and tort cases with contract cases in order to discover whether the consequences of arbitration that we describe below were limited to one group but not another. None of these preliminary analyses revealed any qualification to the general statements made below.

TABLE 9

CASE TERMINATIONS:
DISTRICT OF CONNECTICUT*

Arbitration Cases

Total cases reported	174[a]
Total cases not removed from arbitration eligibility	129
Total cases reported terminated	59
Cases terminated before answer	34
Cases terminated after answer but before arbitration hearing	19
Cases dismissed, settled, withdrawn, terminated by consent, or dismissed for want of prosecution	16
Cases terminated by motion	2
Cases remanded to state court	1
Cases terminated by arbitration award	5
Case terminated after arbitration hearing and demand for trial de novo but before trial	1

Comparison Cases

Total cases reported	145
Total cases reported terminated	33
Cases terminated before answer	20
Cases terminated after answer but before trial	12
Case terminated after jury trial began	1

*This table includes all filings and terminations reported prior to March 1, 1980.

[a]Includes cases later removed by amended complaint, statement of demand for nonmonetary damages, or at discretion of judge or magistrate; does not include cases removed for comparison purposes.

TABLE 10

CASE TERMINATIONS:
EASTERN DISTRICT OF PENNSYLVANIA*

Total cases reported	1,927[a]
Total cases not removed from arbitration eligibility	1,388
Total cases reported terminated	428
Cases terminated before answer	171
Cases terminated after answer but before arbitration hearing	214
Cases dismissed, settled, withdrawn, terminated by consent, or dismissed for want of prosecution	197
Cases terminated by judgment on motion	10
Cases remanded or transferred	5
Cases terminated, but nature of disposition unknown	2
Cases terminated by arbitration award	20
Cases terminated after arbitration hearing and demand for trial de novo but before trial	14
Cases terminated by trial or by settlement after trial began	9

*This table includes all filings and terminations reported prior to July 5, 1979.

[a]Includes cases later removed by amended complaint, statement of demand for nonmonetary damages, or at discretion of judge or magistrate.

TABLE 11

CASE TERMINATIONS:
NORTHERN DISTRICT OF CALIFORNIA

Total cases reported to date	649[a]
Total cases not removed from arbitration eligibility	603
Total cases reported terminated	320
Cases terminated before answer	158
Cases terminated after answer but before arbitration hearing	121
Cases dismissed, settled, withdrawn, terminated by consent, or dismissed for want of prosecution	98
Case terminated by judgment on motion	14
Cases remanded or transferred	9
Cases terminated by arbitration award	19
Cases terminated after arbitration hearing and demand for trial de novo but before trial	18
Case terminated by trial	4

*This table includes all filings and terminations reported prior to March 1, 1980.

[a]Includes cases later removed by amended complaint, statement of demand for nonmonetary damages, or at discretion of judge or magistrate.

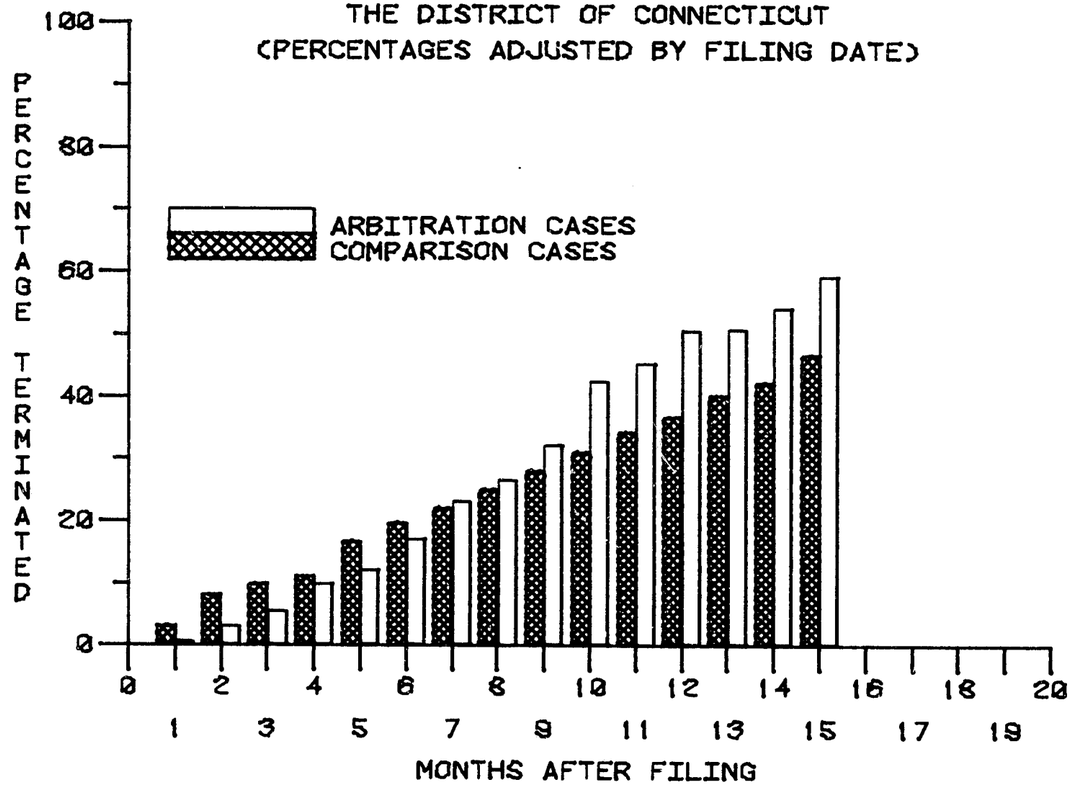
Figures 1, 2, and 3 present the evaluation's findings with respect to effects of the rules on the speed with which cases terminate. Each figure presents results for one pilot district, showing the percentage of cases that terminated by a given month after filing.[8] Consider first the results for the District of Connecticut. The open bars in figure 1 show the total (cumulative) percentage of arbitration cases terminated before the end of the first month after filing, before the end of the second month, and so forth. The crosshatched bars present the same information for cases removed for statistical comparison. Where the open bar is higher than the crosshatched bar, it means that a higher percentage of the arbitration-group cases had terminated than comparison-group cases.

Figures 2 and 3 present similar information for the Eastern District of Pennsylvania and for the Northern District of California. In these figures, the open bars show the termination rates for a sample of present cases that includes a substantial percentage of cases subject to the arbitration rule, and the

8. More precisely, the values in the figures are an estimate of the cumulative percentage of cases terminated, adjusted by the filing dates of the cases. Thus the values shown for the seventh month after filing in figure 1 show that our best estimate of the percentage of arbitration-group cases terminated is 22.9 and our best estimate of the percentage of comparison-group cases terminated is 22.1. The adjustment for the cases' filing dates is used to provide as large a sample of cases as possible at each point. The adjusted value for a particular month, "n," is the percentage of cases, among those that had been filed at least n+1 months before the date of the last termination data received, that had terminated before the n+1th month after filing.

FIGURE 1

CUMULATIVE TERMINATION RATES IN
THE DISTRICT OF CONNECTICUT
(PERCENTAGES ADJUSTED BY FILING DATE)



crosshatched bar presents the termination rates for the comparable sample of past cases.[9]

Figure 1 shows that, in the District of Connecticut, arbitration cases terminated substantially faster than comparison cases.[10] (The slight advantage in the termination rates of the comparison cases seen during the first six months after filing is not statistically significant.) The more rapid termination of arbitration cases becomes evident in the seventh month after filing and continues to increase through the twelfth month. By the end of one year after filing, 50 percent of the arbitration-group cases had terminated, while only 36 percent of the comparison-group cases had terminated.

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9. All the data reported in figures 2 and 3 are taken from statistical tapes supplied by the Administrative Office. Both the present and the past samples include all cases with basis of jurisdiction, origin, and nature of suit codes found with substantial frequency (greater than 2 percent) in the arbitration cases monitored in the present evaluation with the limitation that all cases with demand codes over $150,000 and all cases with obviously incorrect or incomplete data were excluded. The past cases were filed between July 1, 1975, and the day before the institution of the arbitration program in the district under consideration. The present cases were filed between the day on which the arbitration program was instituted and September 30, 1979 (the latest date for which termination data were available on the statistical tapes). Cases known to be eligible for arbitration made up 38 percent of the present sample in the Eastern District of Pennsylvania, and 19 percent of the present sample for the Northern District of California.

10. All statements concerning differences between termination rates are based on tests of statistical significance, at the ".05" level, using log-linear analyses of unadjusted termination frequencies. A result that does not reach this level of significance is one that could have occurred by chance more than once in twenty times. Differences that are not statistically significant are not sufficiently certain to be the basis of informed inferences.

Moreover, when the analysis of Connecticut cases is repeated removing all cases that reached an arbitration hearing from the data, there is virtually no change in the results. This implies that the faster termination rate observed in the arbitration-eligible cases is attributable to cases that terminated before they reached an arbitration hearing, rather than to cases terminated either by arbitration awards or by settlement following arbitration. Thus, the effect of the rule on the speed at which cases terminate appears to be due to more rapid settlements caused by the arbitration timetable, rather than to the termination of cases by arbitration awards or the termination of cases by settlement or trial after an arbitration hearing.

Figure 2, presenting the termination rates for present and past cases in the Eastern District of Pennsylvania, shows an increase in the speed with which present cases are terminated. In Eastern Pennsylvania, as in Connecticut, the results suggest that the arbitration rule caused cases to terminate more rapidly.[11] Figure 2 reveals an advantage for the present sample throughout the eighteen months of "case life" for which sizable amounts of data are available, with this advantage most strongly evident during the seventh through the twelfth months. As in

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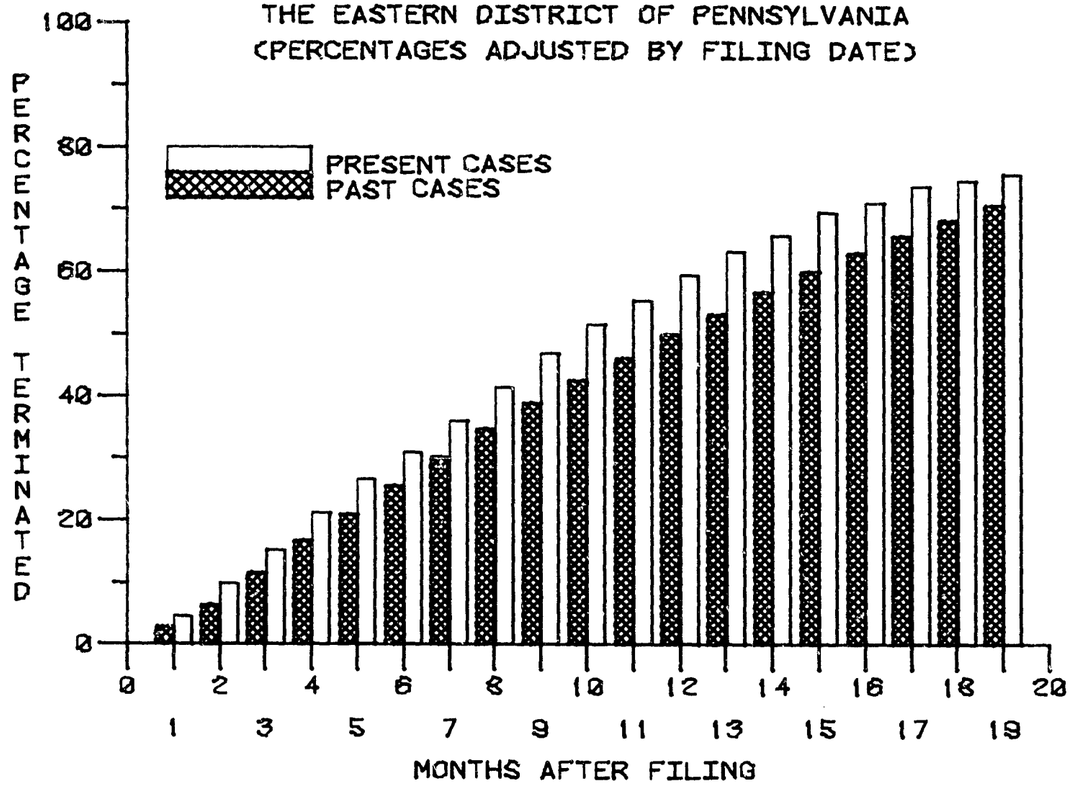
11. That the differences between present and past cases in the Eastern District of Pennsylvania are less striking than the differences between Connecticut arbitration and comparison cases is probably due to the "dilution" of the Pennsylvania samples by many cases that would not ordinarily be arbitrated but that were included in these results because of the relatively gross classifications coded on the statistical tapes. See note 9, supra.

FIGURE 2

CUMULATIVE TERMINATION RATES IN
THE EASTERN DISTRICT OF PENNSYLVANIA
(PERCENTAGES ADJUSTED BY FILING DATE)



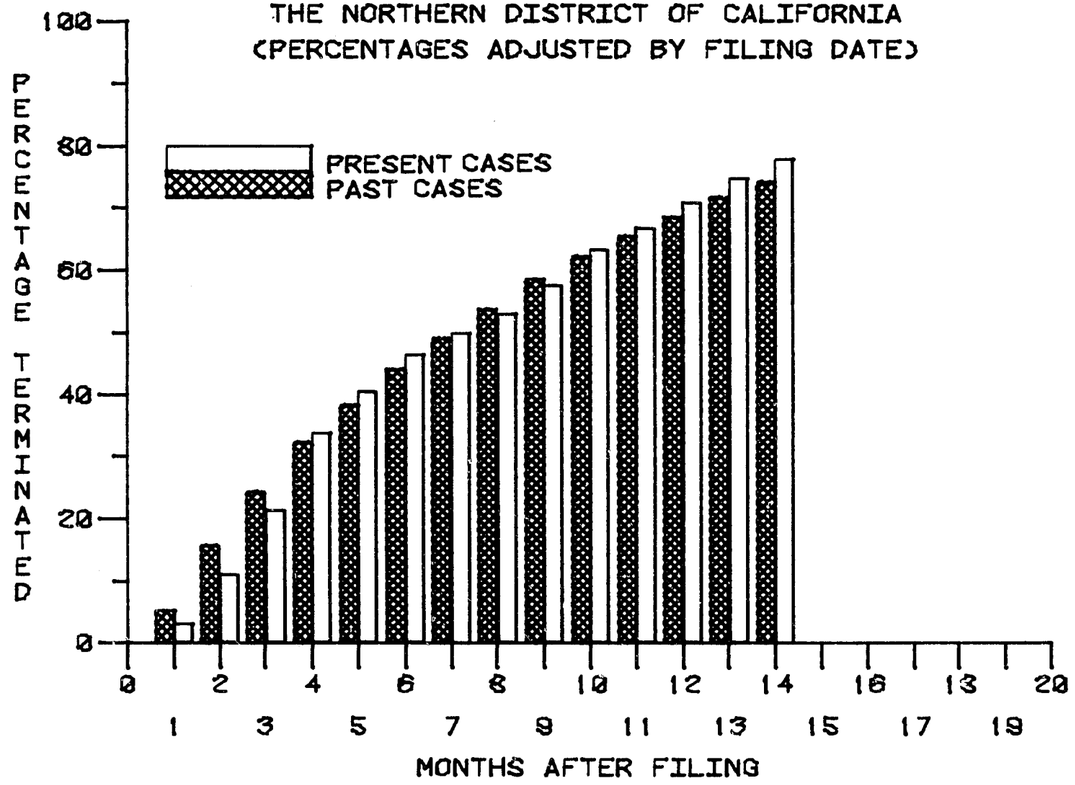
Connecticut, the advantage accruing to cases filed after the arbitration rule was adopted appears not to be due to terminations by arbitration award; the difference is almost entirely attributable to cases terminating before they reached an arbitration hearing. By the end of one year after filing, about 59 percent of the present sample and 50 percent of the past sample of cases had terminated.

Figure 3 presents the termination rates for present and past cases in the Northern District of California. Unlike the other two districts, Northern California showed no statistically significant difference in termination rates. By the end of one year, about 70 percent of both the past and the present sample had terminated. Chapter five discusses possible explanations for the absence of any apparent effect of the Northern California rule on termination rates in that district. For now we simply note that the occasional differences between the present and past samples in the Northern District of California are not of sufficient magnitude to draw reliable conclusions about the effects of the arbitration rule.

Thus, there are clear indications that the arbitration rules in the District of Connecticut and in the Eastern District of Pennsylvania have resulted in more rapid case termination. Further, these more rapid terminations are attributable to cases terminated before an arbitration hearing was held, although the effect is most evident during the months in which the case should

FIGURE 3

CUMULATIVE TERMINATION RATES IN
THE NORTHERN DISTRICT OF CALIFORNIA
(PERCENTAGES ADJUSTED BY FILING DATE)



theoretically have reached a hearing. We discuss the implications of these findings in chapter five.

Arbitration Hearings: Information from Arbitrator Questionnaires

Some of the characteristics of the arbitration hearings were investigated by sending questionnaires to arbitrators in each of the three districts. The rate of the arbitrators' response to the questionnaires was higher than usual for mailed questionnaires: 74 percent were returned.[12]

The arbitrator questionnaires asked for estimates of the time taken by the hearing itself, other time that the arbitrator had invested in the performance of his or her duties related to the case, and the time that would have been required to hear the case in a trial. The questionnaires also asked for the arbitrators' recollections concerning the number of witnesses who had testified in person at the hearing, the number of witnesses for whom testimony had been received by other than in-person means (for example, by deposition, medical report, or stipulation as to what the witness would say), and whether each party to the suit was present in person and represented by counsel. The questionnaires also asked whether the arbitrators had suggested that the parties negotiate a settlement to the case.

12. The 74 percent return rate includes arbitrators who could not be reached by mail. Two hundred ninety-four arbitrator questionnaires were mailed, 13 were returned because the arbitrator was no longer at the address used, and 217 were completed and returned by the arbitrators.

Table 12 presents some of the results from the arbitrator questionnaires. For each of the questions listed, the arbitrators' responses are averaged for each district separately and for all three districts together. The length of the arbitration hearings varied depending on the district in which they were held.[13] Hearings in the Eastern District of Pennsylvania averaged about three hours, which is about two hours less than in the other two districts. The arbitrators in the Eastern District of Pennsylvania also indicated that they spent less time on other related activities and they estimated that less time would be spent in hearing the case at trial than the arbitrators in the District of Connecticut and in the Northern District of California. Generally, arbitrators in all three districts estimated that the time necessary to try the case would be about triple the time spent in the arbitration hearing. Although the arbitrators' estimates of the time that would have been required to try the case may not be accurate, the divergence of these estimates from the time reported for the arbitration hearings makes clear that arbitrators believe the hearings to have been expeditious.

No statistically significant differences were found between the three pilot districts with regard to the number of witnesses testifying at the hearings; the average number of witnesses was

13. We make statements concerning differences between districts or between hearings that resulted in de novo demands and those that did not only when the responses have been shown to be statistically significant at the ".05" level by the appropriate analysis of variance or chi-square statistical tests.

TABLE 12

AVERAGE RESPONSES TO ARBITRATOR QUESTIONNAIRE*

Question	District of Connecticut	Eastern District of Pennsylvania	Northern District of California	All Three Districts
How many hours of your time were consumed by the hearing?	4.8	3.0	5.8	4.3
How many hours of your time were consumed by other duties related to the case?	3.2	1.7	4.7	3.0
How many hours would have been required to hear case at trial?	12.2	8.9	17.0	12.5
How many witnesses testified in person at the hearing?	4.8	3.0	2.9	3.1
For how many witnesses was testimony received in other than in-person means?	0.6	0.7	1.5	1.0
Number of hearings for which questionnaires have been received.	5	44	36	85

*This table is based on arbitrator questionnaires received before April 7, 1980.

three. The arbitrators in the Northern District of California did indicate, however, that more than a third of the testimony was received by means other than in-person testimony. In the District of Connecticut and the Eastern District of Pennsylvania, such indirect testimony does not appear to be a major feature of the hearings.

The responses to the arbitrator questionnaires were also examined to determine whether there were any differences between the thirty-six surveyed hearings that did not result in a demand for trial de novo and the thirty-seven hearings that did result in a de novo demand. No statistically significant differences were observed.

As noted above, one of the questions was whether the arbitrators had suggested that the parties negotiate a settlement. For twenty-seven (38 percent) of the seventy-two hearings with responses to this question, the arbitrators indicated that such a suggestion was made.[14] This suggests some variability in the extent to which the arbitrators see their role as encouraging compromise in addition to offering a judgment in the case. (The wording of this question was such that an affirmative answer might indicate anything from the briefest mention of settlement to an extensive discussion of bargaining options.)

The arbitrator questionnaire also asked whether counsel for

14. The responses with respect to any given hearing were counted as a single affirmative answer if at least half of the responding arbitrators indicated that a negotiated settlement was suggested.

each party attempted to use the hearing as a tactical device in anticipation of further litigation rather than as a procedure for disposing of the case, and whether counsel for each party was as well-prepared and earnest as one would expect if the presentation were at trial rather than at an arbitration hearing. (The purpose of these questions was to determine whether the hearings were being taken seriously and whether they were being used for purposes other than those intended.) The responses of the arbitrators suggest that tactical use of the hearing is not a widespread practice. The arbitrators indicated that counsel's motivation was more tactical than otherwise for only 15 of the 176 counsel (8.5 percent) for whom these questions were answered. Counsel preparation for the hearing may be a more serious problem: the arbitrators indicated that the attorney was not as well-prepared and earnest as would be expected at trial for 48 of the 176 counsel (27.3 percent).[15]

Reactions of Counsel

Questionnaires were also sent to counsel in terminated cases in which there was reason to believe that the arbitration rule might have had some effect on the case (for example, when issue had been joined and counsel had received notification that the case was subject to the arbitration rule). The response rate was

15. The responses regarding a particular attorney were counted as indicating tactical motivation or lack of preparedness if at least half of the responding arbitrators from his or her hearing indicated that this was the case.

about standard for mailed questionnaires: 69 percent of the attorneys returned completed questionnaires.[16]

Because of the sizable percentage of questionnaires that were not answered and because the counsel questionnaires asked for statements of opinion rather than actual responses of the sort required by the arbitrator questionnaires, caution must be exercised in interpreting the results reported below. It is possible that the attorneys who did not respond held opinions different from those who did respond.

The questionnaires asked for ratings on five-point scales of the attorney's opinion of the rule generally, the extent to which they preferred that their case be subject to the rule, and the amount of time and effort devoted to the case in comparison with the time and effort they would have expended had there been no arbitration rule. Attorneys were also asked to use a five-point rating scale to compare their client's investment of time and effort to what it would have been absent the rule. Another five-point rating question asked whether the case had been terminated more rapidly than it would have been without the rule. Attorneys were also asked to rate on a four-point scale the fairness of the final outcome of the case, and, if there had been an arbitration hearing, whether they had an adequate opportunity to present their case. (The rating options for these questions

16. Of the 240 attorneys contacted, 165 responded. The response rate varied by district: 76 percent in the District of Connecticut, 79 percent in the Eastern District of Pennsylvania, and 52 percent in the Northern District of California.

are presented in the footnotes to table 13.)

Responses to the questionnaire were analyzed to determine the average judgments of all responding counsel with cases subject to the rules and to assess any differences between their reactions that might have occurred because they represented plaintiffs or defendants, because they were in one district or another, or because of the situation of the case at termination. Only the last of these factors, the situation at termination, produced statistically significant differences.[17] Table 13 reports the responses for a number of the counsel questionnaire items. The first three columns present the responses of counsel in cases that terminated either before a hearing was held or by acceptance of the arbitration award. The last three columns present the responses of counsel in cases that terminated by settlement or trial after a demand for trial de novo had been made. These groupings are based on the observation that, where differences between the responses of counsel in different termination situations were observed, these groupings seem to account for the differences. (The values in table 13 and those presented in the following discussion, unless otherwise specified, do not include the responses of counsel in the Connecticut cases removed for comparison. The comparison of these attorneys' ratings with those of counsel in the Connecticut cases subject to arbitration

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17. All effects and differences referred to here were found to be significant at the ".05" level by appropriate analysis of variance techniques. Responses are presented as percentages, rather than as means, for ease of comprehension.

TABLE 13

RESPONSES TO COUNSEL QUESTIONNAIRE*

Question	Cases Terminated: Before Hearing or By Arbitration Award			Cases Terminated: After Demand for Trial De Novo		
What is your general opinion of the rule?	57%[a] favorable	19% neutral	24% unfavorable	43% favorable	14% neutral	43% unfavorable
Would you have preferred that this case be subject to the rule or not?	55%[b] prefer rule	21% neutral	24% prefer no rule	50% prefer rule	7% neutral	43% prefer no rule
Did this case require more of your own time than it would have absent the rule?	41%[c] less	46% same	13% more	36% less	7% same	57% more
Did this case require more of your client's time than it would have absent the rule?	40%[c] less	51% same	9% more	21% less	29% same	50% more
Did the rule result in a more rapid resolution of the case than would have occurred in its absence?	68%[d] more rapid	27% same	5% less rapid	50% more rapid	29% same	21% less rapid
To what extent do you feel that the final outcome of this case was fair to all involved?	82%[e] fair	---	18% unfair	79% fair	---	21% unfair

*This table is based on counsel questionnaires received before June 8, 1979. See text for cautions regarding its interpretation.

[a]Rating scale was labeled as follows: 5 = "Strongly Approve," 4 = "Approve," 3 = "Neutral," 2 = "Disapprove," 1 = "Strongly Disapprove." The table combines the first two categories as "favorable" and the last two categories as "unfavorable."

[b]Rating scale was labeled as follows: 5 = "Prefer Rule Very Much," 4 = "Prefer Rule Somewhat," 3 = "No Preference," 2 = "Prefer No Rule Somewhat," 1 = "Prefer No Rule Very Much." The table combines the first two categories as "prefer rule" and the last two categories as "prefer no rule."

[c]Rating scale was labeled as follows: 5 = "Much More," 4 = "Somewhat More," 3 = "About the Same," 2 = "Somewhat Less," 1 = "Much Less." The table combines the first two categories as "more" and the last two categories as "less."

[d]Rating scale was labeled as follows: 5 = "Much More Rapid," 4 = "Somewhat More Rapid," 3 = "About the Same," 2 = "Somewhat Less Rapid," 1 = "Much Less Rapid." The table combines the first two categories as "more rapid" and the last two categories as "less rapid."

[e]Rating scale was labeled as follows: 4= "Very Fair," 3 = "Reasonably Fair," 2 = "Slightly Unfair," 1 = "Very Unfair." The table combines the first two categories as "fair" and the last two categories as "unfair."

is presented after the discussion of the results for cases subject to the arbitration rules.)

Overall, the responses to the general opinion item were more favorable than unfavorable: 56 percent of all respondents had favorable opinions, 19 percent had neutral opinions, and 25 percent had unfavorable opinions. No statistically significant differences were found among the general opinions of counsel whose cases terminated by settlement before the hearing, those whose cases terminated by arbitration awards, those who demanded trial de novo but subsequently settled, and those whose cases terminated by trial. (However, the infrequency of termination by trial, noted above, led to only five responses from counsel in cases so terminated, and any statements based on such a small number of responses should be treated with considerable caution.)

The item asking whether the attorney would have preferred that the particular case in question be processed under the arbitration rule or not also produced results in favor of the rule. Responses to this item, however, varied depending on the termination situation in the case. Counsel in cases that terminated before a hearing was held or that terminated by acceptance of the arbitration award were less likely to say that they would have preferred that the case not be subject to the arbitration rule, but even counsel in cases with de novo demands were as likely as not to say that they preferred that the case be subject to the rule.

Responses to the items asking counsel to compare their own

and their client's investment of time and effort with what would have been necessary without the rule also varied depending on when the case terminated. As might be expected, counsel in cases terminated by settlement or trial after a demand for trial de novo often estimated that more attorney and client time and effort was invested in the case than would have been necessary absent the arbitration rule. In contrast, very few of the counsel in cases terminated before or by arbitration saw the rule as increasing the time they or their client had to spend on the case; most counsel in these cases saw the rule as decreasing or not affecting the time required by the case.

On the item asking whether the case had been terminated more or less rapidly than it would have been without the rule, counsels' responses indicated that they thought the rule produced more rapid termination. This was due primarily to the responses of the attorneys whose cases settled before the arbitration hearing and those whose cases terminated by arbitration awards, although even counsel in cases with de novo demands often said that the case had terminated more rapidly because of the rule.

The attorneys generally reported that they believed the final outcome of the case was fair to all involved. There were no statistically significant differences among the termination situation categories. Cases terminated by arbitration award were seen as resolved as fairly as were cases terminated by trial or settlement; given the essentially voluntary nature of acceptance of an arbitration award, this result is not surprising.

Counsel whose cases went to an arbitration hearing were also asked about their opportunity to present evidence at the hearing. Responses to this question showed that only 9 percent of the attorneys who answered this question thought that they were not given adequate opportunity to present their evidence. The responses for cases terminated by arbitration award did not differ significantly from those for cases in which there was a demand for trial de novo.

In Connecticut cases, counsel were asked to indicate the number of billable hours spent on the case. Although a small number of attorneys responded to these questions, the responses indicate that an average of twenty-three attorney hours were spent on cases that terminated by settlement prior to the arbitration hearing and an average of thirty-seven attorney hours were spent on cases terminated by arbitration award. Insufficient data were received to compute statistics on the number of hours spent on cases terminated by settlement after demand for trial de novo or on cases terminated by trial.

The counsel questionnaires also solicited attorneys' opinions with respect to a number of possible effects of the arbitration rules. The responses to this questionnaire item are presented in tables 14, 15, 16, and 17. Because the effects listed in this question varied depending on the termination situation of the attorney's case, we will discuss the responses for each termination situation separately.[18]

18. There were no differences in the responses of plaintiffs' counsel and defendants' counsel of sufficient magnitude to support any conclusions.

Table 14 shows that a substantial percentage of counsel in cases that terminated before an arbitration hearing was held believed that the arbitration rule had no effect on their case. The second most common response was that the arbitration rule resulted in earlier settlement of the case because of the relatively rapid discovery required by the rule. Only a few of the attorneys in this group believed that the arbitration rule caused an overly hasty termination of the case or that the arbitration rule delayed settlement of the case.

The question sent to counsel in cases terminated by arbitration award focused on the reasons for acceptance of the arbitration award. Table 15 shows that very few attorneys in this group described the award as "generous," but about half said it was "reasonable." Some of the attorneys in this group said the award was disappointing but that the risk and expense of further litigation did not appear to be justified, or that they themselves thought a better net result could be obtained by rejecting the award but that their client was satisfied and elected to accept the award. These responses were given by a minority of counsel, albeit a sizable minority.

Table 16 shows that in contrast to attorneys whose cases settled before an arbitration hearing, attorneys whose cases settled after the hearing unanimously rejected the proposition that their case settled earlier because of the rapid discovery

TABLE 14

COUNSEL RESPONSES TO TERMINATION QUESTION:
VERSION 1--CASES SETTLED PRIOR TO AN ARBITRATION HEARING

Question: We seek here your views on the role, if any, that the arbitration rule had in the termination of this case. Please read all the options listed below, then check any that reflect your views.

Option	Percentage of counsel who checked each item
The relatively rapid discovery required by the arbitration timetable probably resulted in an earlier settlement than would have occurred in the absence of the arbitration rule.	37%
The early status conference with the magistrate probably led to an earlier settlement.	17%
The arbitration rule probably caused an overly hasty settlement of the case.	5%
The arbitration rule probably delayed settlement of this case.	3%
The arbitration rule had no effect on this litigation.	45%
Other.	10%

NOTE: The percentages may sum to more than 100% because the respondents were free to check more than one response.

TABLE 15

COUNSEL RESPONSES TO TERMINATION QUESTION:
VERSION 2--CASES TERMINATED BY ARBITRATION AWARD

Question: Below are several statements of possible reasons for your acceptance of the arbitration award. Please read all the options listed below, then check all that apply to this case.

Option	Percentage of counsel who checked each item
My client and I both viewed the award as generous to us.	3%
My client and I both viewed the award as reasonable.	52%
My client was unwilling to accept the delay that would have resulted if we had demanded a trial de novo.	12%
While I was of the opinion that we had a good chance of obtaining a better net result in settlement or trial, my client was unwilling to take the risk, and thus accepted the award with some reluctance.	9%
While I was of the opinion that we had a good chance of obtaining a better net result in settlement or trial, my client was satisfied with the award, and thus accepted the award.	15%
While the award was somewhat disappointing, I thought that the risks and expenses associated with further litigation were not justified. My client agreed, so the award was accepted.	24%
My client was inclined to demand trial de novo and seek a more favorable result in settlement or trial. I thought that unwise and convinced my client to accept the award.	3%
Other.*	33%

NOTE: The percentages may sum to more than 100% because the respondents were free to check more than one response.

*In explaining the "other" option, respondents usually remarked on some aspect of the arbitration hearing.

TABLE 16

COUNSEL RESPONSES TO TERMINATION QUESTION:
VERSION 3--CASES SETTLED AFTER AN ARBITRATION HEARING

Question: We seek your views on the role, if any, that the arbitration procedures had in the termination of this case. Please read all the options listed below, then check any that reflect your views.

Option	Percentage of counsel who checked each item
The relatively rapid discovery required by the arbitration timetable probably resulted in an earlier settlement than would have occurred in the absence of the arbitration rule.	0%
The arbitration rule probably delayed settlement of this case.	22%
The arbitration hearing was a useful disclosure of the strengths and weaknesses of the case, and as such was of significant assistance in reaching settlement.	67%
The arbitration hearing was an efficient method of discovery.	33%
The arbitration award was viewed as a reasonable valuation of the case, and became the focus around which a settlement was reached.	22%
The arbitration award or hearing led my opponent to an unrealistic view of the case, which probably made settlement more difficult to reach.	11%
The arbitration hearing was a needless exercise. It had no positive effect on this litigation.	22%
Other.*	44%

NOTE: The percentages may sum to more than 100% because the respondents were free to check more than one response.

*In explaining the "other" option, respondents usually remarked about some aspect of the arbitration hearing or noted that it had been the opponent in the case who had demanded trial de novo.

required by the arbitration rule. (This finding seems, at first glance, to be inconsistent with responses to the question on whether the rule resulted in more rapid resolution of the case, but note that the item referred to here specifies that any increase in speed of termination is due to rapid discovery.) Substantial percentages of the attorneys in this group indicated that the arbitration hearing provided a useful disclosure of the strengths and weaknesses of the case and that the arbitration hearing was an efficient method of discovery. The other potential responses to the question sent to this group were not answered with sufficient frequency to draw any conclusions from them.

Only five attorneys with cases terminated by trial responded to the question presented in table 17; any temptation to draw conclusions from such a small number of responses should be resisted. It is worth noting, however, that none of these attorneys said that the arbitration hearing resulted in an unnecessary trial. Two considered the hearing a needless exercise; three endorsed the proposition that the arbitration hearing was an efficient method of discovery.

The removal of cases for comparison purposes in the District of Connecticut provides an opportunity to compare opinions of counsel in arbitration cases with opinions of counsel in similar cases not in the program. But only five questionnaires were received from counsel in the comparison cases, so this opportunity could not be realized. (The lack of responses from this group is

TABLE 17

COUNSEL RESPONSES TO TERMINATION QUESTION:
VERSION 4--CASES TERMINATED BY TRIAL

Question: We are interested in the effects, if any, that you think the arbitration rule had on the termination of this case. Please read all of the options listed below, then check any that reflect your views.

Option	Percentage of counsel who checked each item
The arbitration hearing, by offering a good view of all sides of the case, probably resulted in a better presentation of the evidence and arguments at trial than might otherwise have occurred.	40%[a]
I thought that the arbitration award was reasonable, and thus that it should have led to settlement, but my opponent apparently had an unrealistic view of the case which was not altered by the opinion of the arbitrator(s).	20%
The arbitration hearing probably resulted in an unnecessary trial by leading my opponent to an unrealistic view of the case.	0%
The arbitration hearing was an efficient method of discovery.	60%
The arbitration hearing was a needless exercise, since it was inevitable that this case would go to trial.	40%
Other.	0%

NOTE: The percentages may sum to more than 100% because the respondents were free to check more than one response.

[a]Only 5 counsel responded to this question; see text for caution with regard to interpretation.

due for the most part to the small number of comparison cases that have terminated.) Although statistics can be computed, the small numbers on which they are based make them so unlikely to be stable that no definite conclusions can be reached. We note simply that no statistically significant differences are seen between counsel in cases in the program and counsel in comparison cases with respect to their overall opinions of the rule, their belief that the final outcome of the case was fair to all involved, or the number of hours that they report having spent on the case.

The Arbitrators' Role: Observation of Arbitration Hearings

Arbitration hearings were observed on six occasions during the course of the evaluation, followed by interviews or correspondence with arbitrators and counsel. These observations were intended to give us some first-hand knowledge, however limited, of what took place in arbitration hearings. Few generalizations can be made from these observations, except to say that hearings varied widely in several respects.

We observed hearings that represented extremes in the apparent competence and orderliness with which they were conducted. On several occasions, both the arbitrators and counsel appeared to be very well prepared and organized, and the hearing was conducted in a fashion as orderly, serious, and judicious as any court trial. In another hearing, the conduct of nearly all participants appeared so countereffective that it would be hard

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to imagine either party assigning credibility to the arbitrators' judgment. This hearing was dominated by plaintiff's counsel, who was permitted to hold forth repetitiously, and an arbitrator who had developed such an interest in the subject matter of the case that he behaved more like an expert witness than an impartial fact-finder. This incident can perhaps only underscore the importance of assuring that the arbitrators are qualified, competent, and committed to perform the judicial function that arbitration hearings require.

Along with direct observation of hearings, other sources of information, including comments accompanying questionnaires and discussions or correspondence with arbitrators and counsel, have revealed several areas of uncertainty that warrant examination in future applications of court-annexed arbitration. First, except in the Eastern District of Pennsylvania, there was some obvious uncertainty on the part of the arbitrators about how they should proceed at the hearing. Hearings often began with discussion about general aspects of the hearing procedure to be used. There was often some uncertainty about the meaning of the local rules' admonition that the Federal Rules of Evidence do not govern, but merely guide, questions of admissibility. Minor oversights, such as failure to swear a witness, were common. It is not surprising that Eastern Pennsylvania is an exception, because the Pennsylvania state courts have long provided for court-annexed arbitration, and arbitrators and counsel in that district may have come to the federal arbitration hearings with some common assumptions

about how the hearing should be conducted. One may expect that, as arbitration becomes a shared experience among attorneys in the other pilot districts, a common understanding about how they should proceed will evolve.

In addition, questions have arisen on a number of technical points about the jurisdiction of the arbitrators. Do they have power to enter an award in excess of the limitation on amount in controversy that governs referral to arbitration (that is, $50,000 or $100,000)? Do they have jurisdiction to award injunctive relief? Do they have jurisdiction to "dismiss" the arbitration proceeding when it appears that the matter is not within the jurisdiction of the district court? Although all of these may be viewed as questions of minor importance by virtue of the litigants' power to vacate the arbitrator's award by demanding trial de novo, their resolution would aid arbitrators whose time might be unnecessarily consumed in addressing them.

Another type of question that seems to warrant resolution was posed by a defense attorney who was concerned that acceptance of an arbitration award might have collateral estoppel effect in subsequent litigation arising from the same transaction. The source of concern was the local rule's provision that, failing demand for trial de novo, the arbitration award shall be entered as the judgment of the court, and shall "have the same force and effect as a judgment of the court in a civil action." Again, the question might be simple to resolve, but the fact that it arose suggests that it and similar questions could interfere with the

success of arbitration in achieving expeditious dispositions. Anticipation and resolution of such questions in the rules themselves, or provision for publication of subsequent interpretations, may help assure continuing effectiveness of arbitration as an expeditious means of case resolution.

Although there is reason to expect that uncertainties about the jurisdiction and role of arbitrators and questions about the consequence of arbitration awards will be resolved through a normal process of accumulated experience, this does not necessarily mean that the courts should be content to allow the substance and customs of court-annexed arbitration to evolve as they will. What an arbitration hearing is or should be in order to best facilitate prompt and inexpensive resolution of civil cases is an issue that requires additional consideration.

Management of Arbitration by the Clerk of Court

Different management philosophies characterize the administration of arbitration rules in the three pilot districts. All of the rules demand a similar type of clerical management, because they provide for automatic assignment to arbitration when eligible cases reach a particular procedural stage. This entails monitoring the procedural progress of cases that are potential candidates for referral to arbitration, followed by notification of counsel or parties and appointment of arbitrators when cases are actually referred to arbitration. The Northern District of California is distinctive in its management of this process; it has developed a computer program for the Courtran computer

system that handles most of these tasks. The program not only monitors the lapse of time limits for assignment of cases to arbitration, but also prepares notices to counsel and lists randomly selected arbitrators for assignment in accordance with the local rule's provisions. This task is very well suited to automation, and future continuation or expansion of arbitration in federal district courts could undoubtedly benefit from a management program of general applicability available through the computer system. However, this would require substantial uniformity among local rules.

The Northern District of California also differs markedly in its management of cases after referral to an arbitration panel. That district, in large measure, simply transfers the case to the jurisdiction of the arbitrators, and relies on the arbitrators to take responsibility for the case until the arbitration hearing is complete. Arbitrators are expected to schedule the arbitration hearing at a time satisfactory to themselves and counsel, and to arrange for space in which to conduct the hearing. In contrast, arbitrators in the District of Connecticut and the Eastern District of Pennsylvania are given more administrative support, with court personnel scheduling hearings and providing hearing space.

Because scheduling a date convenient to three arbitrators and at least two attorneys is often a difficult task, the difference in management of arbitration cases translates to a substantial difference in the impact of the arbitration rules on

personnel needs of the three districts. In the Eastern District of Pennsylvania, three full-time clerks are engaged in managing the arbitration case load; in the Northern District of California, one full-time deputy clerk is required. In the District of Connecticut it is estimated that if cases were not removed from the arbitration program for comparison purposes, the task of managing the arbitration case load would increase to the level of requiring three-quarters of one clerk's time. Differences in the management philosophies make it difficult to determine whether these personnel costs would hold for other courts adopting different approaches to court-annexed arbitration. Nonetheless, these estimates are probably reasonable indexes of the personnel costs of operating court-annexed arbitration rules in the manner adopted by the three pilot districts. These costs warrant attention by the courts in their decisions regarding continuance of the existing rules and by the Administrative Office in assessing personnel needs should court-annexed arbitration be continued in these districts or adopted in others.

Finally, we learned that none of the courts had experienced any major problems in creating and maintaining a pool of arbitrators sufficient for the needs of their programs.

V. ANALYSIS AND CONCLUSIONS

Although this evaluation is able to report certain overall consequences of arbitration rules now in effect in the three pilot districts, it cannot determine with similar certainty what particular features of the rules, of their implementation, or of the arbitration proceedings themselves are responsible for desirable or undesirable consequences. But the evaluation does offer some evidence along these lines, and it is possible to draw inferences about how arbitration works and about how it might be made to work better. Before these conclusions are presented, though, a restatement of the findings of the evaluation will be helpful.

1. What types of cases are currently subject to arbitration in each of the three pilot districts? Arbitration has been tested with a variety of case types. Large numbers of diversity tort and contract actions are subject to arbitration in each district. The districts differ in the extent to which cases involving other subject matter or other bases of jurisdiction are eligible for arbitration. There are substantial numbers of nondiversity cases in the arbitration program in the Northern District of California, and a modest number in the District of Connecticut and in the Eastern District of Pennsylvania.

2. How long does it take cases to reach arbitration? The

scheduling of arbitration hearings appears to be a major problem. Relatively few cases reach arbitration hearings within the seven-month period envisioned by rules in two of the test courts. More than two-thirds of the cases that remain open one year after filing have not yet reached arbitration hearings.

3. How likely is it that the arbitration of a case will result in termination of the case by acceptance of the arbitration award? About 40 percent of arbitrated cases terminate by acceptance of the arbitration award; about 60 percent demand trial de novo. Of the cases in which there was a demand for trial de novo, 46 percent settled before trial, 18 percent have gone to trial, and 36 percent are still awaiting trial.

4. Do the arbitration rules result in more rapid termination of cases? It appears that court-annexed arbitration can lead to more rapid disposition of cases, but this benefit was evident in only two of the three pilot courts. In the District of Connecticut, where the evaluation design was strongest and where, therefore, the strongest estimate of the effect of the rule is possible, the rule resulted in an increase in the percentage of cases terminated within one year of filing, from 36 percent to 50 percent. In the Eastern District of Pennsylvania the increase was from 50 percent to 59 percent (but this probably underestimates the true effect of arbitration, as mentioned in note 9, supra). These higher termination rates are most evident between seven and twelve months after filing, and they are due primarily to more rapid termination of cases that do not reach

arbitration. In the Northern District of California, there is no evidence that the arbitration rule either speeded up or slowed down the pace at which cases terminated.

5. What are the characteristics of arbitration hearings under the present rules? The hearings are, as envisioned, relatively brief and informal. Our observations of hearings revealed considerable variation in the "style" of arbitration. The responses of arbitrators to our questionnaires showed that occasionally, but not always, arbitrators suggested that parties settle the case.

6. What are the opinions and attitudes of counsel in cases subject to the arbitration rules toward their district's rule in general and toward the effects of the rule in their own case in particular? Counsel generally favor the rules, but not overwhelmingly so. Their opinions about the effects of the rule on their own cases vary depending upon when and how the cases terminated. Counsel in cases terminated before a hearing or by arbitration award thought that the rule saved them and their clients' time (and, we would infer, money), and believed that the rule had resulted in more rapid termination of their cases. Counsel in cases terminated after demand for trial de novo more often saw the rule as leading to greater expenditure of their own and their clients' time, but they did not generally believe that the rule delayed termination of the cases. Opinions of the fairness of the final outcome were as high for cases terminated by arbitration award as for cases terminated by settlement or trial.

7. What problems have the pilot courts encountered in administering their arbitration programs? In the District of Connecticut and the Eastern District of Pennsylvania, where the courts assume responsibility for the scheduling of hearings, this scheduling consumes substantial time. In the Northern District of California, the scheduling of the hearing is left to the arbitrators. None of the pilot courts have experienced major problems in finding arbitrators or in other facets of administering the rules.

Arbitration as an Aid to Prehearing Settlement

The results of the evaluation show that the arbitration rules can expedite case dispositions and reveal that this is due not to the termination of cases by arbitration award but, rather, to terminations before arbitration hearings. The increase in terminations coincides with the time at which most arbitration hearings have been held, that is, between seven and twelve months after filing. A likely explanation for these findings is that counsel in arbitration-eligible cases, prompted by efforts of the clerk's office to schedule a hearing, turn their attention to the case and initiate negotiations. Because a thorough examination of the strengths and weaknesses of the case is necessary to prepare for the arbitration hearing, and because a settlement at this point would avoid the expenditure of time and effort that would be required if the hearing were held, termination of the case by settlement occurs earlier than it would absent the arbitration rule.

Although the above explanation is admittedly speculative, it does fit the evidence from the termination data in Connecticut and Eastern Pennsylvania, and it is in accord with the finding that counsel in cases that terminated prior to arbitration believed their case had terminated more rapidly because of the rule. This explanation is also in accord with the belief of many judges that termination by settlement becomes more likely just before trial begins, that settlement "on the courthouse steps" is common. It appears that the arbitration hearing can similarly prompt settlement by providing a deadline and an incentive for negotiation. If our interpretation is correct, it implies that an arbitration hearing is an event that, simply by being scheduled, can induce negotiation and disposition of a case. It is important to note that using arbitration hearings, rather than trials, to achieve this effect has some benefits. Arbitration hearings can be regularly scheduled earlier in the life of cases than trials; their informality and the absence of judge participation means that settlement just before arbitration is probably less inconvenient and less costly than settlement just before trial; and the provision of the right to trial de novo provides a means by which cases not amenable to settlement can have time for proper preparation for trial after it is apparent that adjudicated resolution is required.

This explanation suggests that the effect of the arbitration rules on terminations could be further increased if the arbitration timetables were followed more strictly. If, as posited

above, it is the firm scheduling of a hearing, as much as the holding of a hearing, that is important in expediting case termination, it is reasonable to suppose that closer adherence to the timetables and the granting of fewer continuances would speed up terminations even further. If arbitration hearings could be scheduled in most cases at the seventh-month point originally envisioned by the rules, there is every reason to expect that more cases would benefit from this accelerated-settlement phenomenon. As we noted above, scheduling hearings is difficult, and more timely scheduling probably requires a strong commitment by the court to achieving that end and an understanding by the bar that counsel and their clients reap the benefits of early scheduling of hearings.

It is noteworthy in this context that few counsel in cases terminated prior to arbitration thought the rules produced an overly hasty settlement. If the timetables were followed more strictly, it would be important to watch for any indication that cases were being forced to a hearing too rapidly, but there is no suggestion in the present data that earlier scheduling would produce this problem. If there is concern that closer adherence to the timetables specified in the rules will result in too rapid scheduling of hearings, it might be worthwhile to phase in progressively more strict limits on extension of the timetable, in much the same fashion that time limits on criminal case events have been phased in under the Speedy Trial Act of 1974.[19] A

19. 18 U.S.C. §§ 3161-3174.

close monitoring of the pace of terminations and of counsel attitudes during such a program of phased tightening of scheduling limits would permit an informed decision to be made about the optimum timing of arbitration hearings.

This explanation for the effects of court-annexed arbitration must, however, be reconciled with the finding of no discernible effect on the pace of termination in the Northern District of California.[20] If the rule was indeed ineffective in promoting faster terminations in this district, that result can be explained in two ways. The overall termination rates for both past and present cases in Northern California are quite high relative to the termination rates observed in the other two districts. It may be that the standard practices of the court and bar in Northern California, even without arbitration, produce very prompt dispositions; so prompt, in fact, that it may not be reasonable to expect any program to result in much increase. The second explanation is that arbitration hearings may not be scheduled soon enough to provide a helpful deadline for many cases. The arbitration rule in the Northern District of California requires the arbitrators to grant a continuance "for not more than 100 days" at the request of either party. If this provision is interpreted to allow multiple continuances, or other continuances

20. The absence of a discernible effect in Northern California might simply be the result of the heavy "dilution" of arbitration cases in our before-after comparison in that district. The rule might have actually expedited settlements, but not to an extent sufficient to be seen in the present sample available for comparison.

at the discretion of the arbitrators, or if there is substantial delay in referral of cases to the arbitrators, it is possible that the potential benefits of a rapid timetable are lost. We have no certainty that any of these conditions exist, but we do know that at least two of the hearings in Northern California were not held until eighteen months after filing, and we understand that the scheduling of hearings is often difficult, and sometimes doubly so, when a new date must be set after an obligatory continuance voids the original hearing date.

We cannot verify that either or both of these explanations apply to the situation in the Northern District of California. If the former account of the absence of an influence on prompt dispositions is accepted, it suggests that the benefits of arbitration in this district, if there are any, do not lie in expediting litigation. If the latter, delayed-hearing, explanation is correct, it suggests that the arbitration timetable might be specified more explicitly and enforced more rigorously for an additional test period in order to see whether Northern California will obtain the demonstrable benefits found in the other two test districts.

We have not found that the faster pace of termination observed in Connecticut and in Eastern Pennsylvania is limited to any particular type of case. It appears that arbitration has benefited the types of cases now subject to the rules in these pilot courts. Only by testing the effects of the rules on other types of cases can information be obtained concerning whether it

is possible to extend the faster termination pace to a larger percentage of the courts' civil case load. If the present results are judged sufficiently favorable to justify expansion of court-annexed arbitration programs, we suggest that consideration be given to the possibility of including other types of cases. Because the major benefits of arbitration have been seen in its role in encouraging settlement, prime candidates for additional case types would be those that now show substantial rates of settlement and that are thought to have potential for earlier or more pervasive disposition by settlement.

Arbitration as an Aid to Posthearing Settlement

Although the clearest effect of the arbitration rules is expediting dispositions prior to arbitration, we are also, of course, concerned about the influence on cases that are in fact arbitrated. As noted earlier, our ability to interpret the evaluation results for those cases is limited because of the small number of cases that have reached this point in the procedure.

One of the most striking findings of the evaluation is the high proportion of arbitration awards that have been voided by demands for trial de novo. Accounts of the experience of state and local courts with court-annexed arbitration had led to an expectation, before the pilot programs were instituted, that only about 10 or 15 percent of the arbitration awards would be rejected. Obviously the federal experience is quite different, but in retrospect the high rates of de novo demand are not so sur-

prising. The present programs have monetary ceilings much higher than those in state or local courts, and they provide either no penalty or very mild penalties against parties who demand trial de novo and fail to obtain a better result at trial. Hence, when compared with the possibly substantial amounts in controversy, neither the costs of the hearing itself nor the potential costs of rejecting the arbitration award seems sufficiently large to be major considerations in the decision to demand trial de novo.

As established in the three pilot districts, arbitration appears to function not only as an alternative form of trial but also, and perhaps most important, as a mechanism to promote settlements. The arbitration award may well be viewed by counsel as a type of settlement offer, and it should be neither surprising nor disturbing that the awards are rejected quite frequently. A demand for trial de novo by no means demonstrates either that the arbitration procedure was ineffective or that the case is destined for trial. In fact, counsel in cases for which trial de novo has been demanded do not generally condemn the hearing as a failure. Moreover, as we noted earlier, we can estimate that at least 46 percent of the de novo demand cases will settle prior to trial--that percentage has already settled. Unfortunately, the data are insufficient to determine whether arbitration hearings--as distinguished from the arbitration rules--are productive in the sense that they either expedite or increase the incidence of settlements.

Our observation of arbitration hearings and communication

with participants raise questions about the role of arbitrators in the hearings. We should emphasize that here we speak from a purely theoretical or analytical position. Although the evaluation raises the issues discussed below, the nature of the pilot programs and the time frame of this evaluation preclude any attempt here to resolve those issues.

In view of the possibility that arbitration hearings can affect cases in which trial de novo is demanded but in which negotiations continue, what should the role of the arbitrators be? Or, more specifically, how can the arbitrators best assure that their services will facilitate a prompt, inexpensive, and fair disposition of the case? To be sure, it was not contemplated that the arbitrators should simply plead with counsel to reach a settlement and thus spare them the trouble of conducting a hearing. The intent is that the arbitrators should hear the evidence and arguments in the case, much as a judge or jury would in a trial, and offer their informed and presumably sound judgment on the merits. We saw hearings conducted with an efficiency and fair-mindedness of which any judge or jury would be rightly proud. But might the arbitrators do more, offer the litigants more than a verdict, even a verdict of high quality? We observed more than one hearing in which the arbitrators did offer more: some frank comments on the strengths and weaknesses of the case, which seemed to us to enhance the possibility that the parties might reach a compromise settlement even if they rejected the award.

We illustrate by an example one way that such advice might be given. In one hearing, the arbitrators discussed the case in some detail with counsel (and in the presence of parties) after closing arguments. The arbitrators agreed that plaintiff's case had clearly established defendant's liability for certain obvious injuries and thus for modest damages (about $500) related to medical expenses and loss of wages incurred the day of the accident. With respect to an allegation of continuing pain and impairment resulting from the injury, however, the arbitrators thought the evidence was very weak that these were caused by the injury, although allowing that, if they were, the damages would amount to about $30,000. Subsequently, the arbitrators filed an award for plaintiff in the amount of $500, and plaintiff demanded trial de novo. It seems to us that plaintiff was quite rational in rejecting the award and that the arbitrators' detailed comments might nevertheless have provided a basis for settlement. The defendant was obviously willing to settle for $500, and plaintiff obviously hoped to obtain much more. If plaintiff saw any realistic possibility that a judge or jury might find in his favor on the allegation of continuing pain and impairment, he would have sound reason (economically, at least) to demand trial de novo. And if defendant saw such a possibility, he would have good reason to offer something more than $500 in settlement.

Of course, advice helpful to posthearing settlement in a case such as the one described above need not take exactly the form it did in this hearing. The arbitrators might have included

their comments on the case as an addendum to the written statement of their award. Whatever the medium used to communicate such advice, in cases of this sort the likelihood of rejection of the award renders valuable any comments that the arbitrators might have; they are, after all, practicing attorneys with an understanding of the mechanics of negotiation and with a unique combination of impartiality and knowledge about the case. So we suggest that if it were made clear that the arbitrators' role includes not only that of judge or jury, but also that of advisor in evaluating the case and predicting the range of judgments that might be rendered by the judge or jury, they might thereby enhance the prospects that their services will facilitate compromise and settlement.

The credibility of advice from the arbitrators, whether in the form of the arbitration award or supplementary comments, will be enhanced to the extent that they are viewed as knowledgeable and capable with respect to both the law in the case and the conduct of the hearing. We therefore recommend that, insofar as is feasible, arbitrators be selected with a view to their experience with cases similar to that which they are to hear, and perhaps in a manner that affords counsel greater knowledge of the available arbitrators' backgrounds and encourages greater participation by counsel in the selection process. We suggest also that the arbitrators themselves might enhance their credibility by such methods as convening a brief session "in chambers" with counsel, immediately prior to the hearing, to review basic procedure, thus

avoiding any appearance of confusion during the hearing.

The Dual Function of Arbitration

Our analysis to this point has mirrored our earlier comments about the two potential functions of court-annexed arbitration: that the programs might serve to terminate cases by offering helpful advice on the probable verdict at trial and on the strengths and weaknesses of the case, and that they might also expedite settlement by providing a timetable and an incentive for prehearing settlement. Our observation of arbitration hearings and the comments of counsel have suggested some means for enhancing the case-mediation function, but the limited time frame of the evaluation precluded the accumulation of data on whether the present programs in fact promote posthearing settlement. Our analysis of case termination data has shown that two of the three pilot courts have realized, at least to some extent, the settlement-deadline function, and we have suggested that prehearing settlement might be further promoted by following more strictly the timetables provided by the rules. But as we consider additional recommendations for improvement of the arbitration programs, we find that the two functions sometimes lead to conflicting proposals.

Consider, for example, the question of whether the present use of three-arbitrator panels should be retained. The rationale for having three arbitrators was that such panels would have greater expertise and credibility than would a single arbitrator. This expertise and credibility serves the function of providing

information and advice to counsel that may increase the likelihood of posthearing settlement or acceptance of arbitration awards. But the difficulty of scheduling hearings that must be fitted to the schedules of at least five attorneys may well be one reason for the observed departures from the desired timetables for holding the hearing, and this delay of the hearing works against the potential of the rules for providing a deadline that promotes prehearing settlement. It may be that modification of the rules to specify single-arbitrator hearings would benefit the timely scheduling of hearings, and, hence, would enhance the positive effect observed on the pace of prehearing settlement, but this benefit might be purchased only at the cost of some diminution of the potential of the programs to terminate short of trial those cases that do reach a hearing.

Similar conflicts arise with respect to possible changes in other aspects of arbitration hearing procedure. For example, our observation of some hearings, which seemed to us too unstructured to be of much benefit in generating a good view of the strengths and weaknesses of the case, might prompt courts to consider greater specification of hearing procedure. If this were undertaken only to a modest extent it would not be of any harm, we believe, to either potential function of arbitration. But if greater specification of hearing procedure were carried to the point of mandating substantially greater formality, it might serve one function at the cost of the other. Greater formality in hearing the case might well lead to a desire on the part of

counsel for more time for preparation, and, although this might lead to more credible awards and advice from the hearing (thus improving the case-mediation function), such delay might diminish the benefits (from the settlement-deadline function) that are gained from the timetables now specified in the rules.

Because of the limited time frame of this evaluation, we have little hard data on the effects of the rules on promoting posthearing settlement, and we are unable to offer any guidance in weighing the net result of changes that seem likely to benefit one function of arbitration at the cost of the other. We nevertheless raise the issue of sometimes conflicting functions of court-annexed arbitration because we believe that alteration of the present rules should be based on consideration of its likely effects on both functions. We suggest that future experimentation with court-annexed arbitration, if any is undertaken, should reflect this basic complexity in its potential effects, by examining a variety of rules, which give emphasis to one function or the other, in order to provide a strong basis for the design of optimally effective procedures.

Limitations of the Evaluation

The limited time frame of the evaluation makes it impossible to draw any conclusions concerning the effect of the rules on the percentage of arbitration cases that reach trial. In order to gather information about whether court-annexed arbitration leads to fewer trials, it would be necessary to conduct tests over a much longer period of time (five years is a rough estimate),

preferably with the type of strong comparison design now in place in Connecticut. Any effect of the rules on trials, although important, would be relatively subtle; one could only expect a change of a few percent in the disposition of cases subject to the rule (for example, from 10 percent trials to 8 percent trials). Thus, it would be difficult to draw definite conclusions from comparison with past cases, even in pilot programs of substantially greater duration than those under evaluation here. Because any evaluation that sought to determine the effect of arbitration on the incidence of trials would be looking for a change in the method of disposition of probably less than 10 percent of the cases subject to the rule and because the cases in question would be among the longest-lived cases in the program, the evaluation would have to be long-term and as sensitive as possible. We certainly do not deny the importance of gathering information on effects on trials: this is a matter of utmost importance in determining the courts' stake in arbitration rules. But we must point out that gathering such information is an endeavor requiring great investments of time and effort and demanding sophisticated research designs.

Turning from the objective consequences of the rules to their effects on the attitudes and opinions of those involved in the cases we have studied, we see no substantial negative consequences. The majority of counsel in cases subject to the rule hold favorable opinions of court-annexed arbitration. The requirements of the rule were not seen as particularly burdensome;

in fact, they were seen as beneficial by counsel whose cases terminated before the hearing or by arbitration award. Even counsel in cases that terminated after demand for trial de novo, who believed that the rule resulted in greater expenditure of time and effort than they would otherwise have expended on the case, were not particularly negative in their overall assessment of the rules. We see no evidence that attorneys involved in cases subject to the rules viewed the arbitration procedure as detracting from the justice of the outcome.

Our original intention to obtain the reactions of litigants to the procedures and outcomes they experienced was not realized for a number of reasons. It would be most desirable to have additional information on how these "ultimate consumers" of the courts' services view the mechanism intended to benefit them. Because the clearest effects of the arbitration rules to date suggest that the rules may benefit litigants, by resolving their disputes more rapidly, it is especially unfortunate that no data are available on how they viewed their experience. Future tests of court-annexed arbitration, if any are undertaken, should employ strong designs and seek alternative ways of reaching litigants in order to evaluate not only the objective consequences of arbitration, but also its effects on perceptions of justice held by persons whose cases are subject to such programs.

Conclusions and Recommendations

The results of this evaluation might best be summarized as suggesting that federal court-annexed arbitration offers some

benefits. It is clear that in two of the three pilot districts the arbitration rules have expedited the disposition of cases, and it is quite possible that this can also be achieved in the third district by assuring that arbitration hearings are held more promptly. But the effects, though clear, appear to be rather modest: our best estimate of the average time savings is two to four months. Counsel judge the rules favorably, both with regard to their general merit and with regard to their perceived consequences in particular cases. But again, counsels' endorsement is mild, not enthusiastic. The evaluation has revealed no substantial negative consequences of the rules, although there are obvious costs in the form of increased manpower needs for the clerk of court and time expended on the part of arbitrators. Perhaps most crucial, however, the results of the evaluation are unavoidably incomplete. We cannot determine whether the rules will produce a decrease or avoid an increase in the incidence of trials. Either result would have consequences for the workload of judges and thus would be important for its influence not only on the expense of litigation in arbitration cases but also for the judicial resources available for cases not subject to arbitration. And although the judgments of counsel suggest that arbitration decreases expense in some cases and increases it in others, we do not have sufficient information to determine whether, on balance, the effect is an increase or decrease in expense.

It is not clear that the results of this evaluation are suf-

ficient to support a decision to establish court-annexed arbitration on a permanent basis in United States district courts; there are too many important questions that remain unanswered. We do not suggest that to continue or expand this type of arbitration would be clearly wrong, only that it is not clear whether the total effects of an arbitration rule are positive or negative in value. We are confident in asserting that the rules in the pilot districts show genuine promise, and that it would not be unwarranted to continue them on an experimental basis, with certain possible modifications in approach. We are doubtful, however, that the questions about federal court-annexed arbitration that remain unanswered are likely to be answered merely by continuing the present evaluation effort in any of the three pilot districts. The evaluation in the District of Connecticut, although rigorous in its structure, involves too few cases to provide information about such empirically precise inquiries as whether arbitration reduces the incidence of trials. And although the evaluations in Eastern Pennsylvania and Northern California involve large numbers of cases, they are too weak in design to detect the small, but important, differences required to answer the questions still remaining.

We offer the following recommendations:

With respect to operation of arbitration in the three pilot districts, we recommend that:

1. Emphasis be given to scheduling of early hearing dates in order to enhance their "deadline" value for negotiation and case preparation.

2. Arbitrators be encouraged to provide counsel a basis for negotiation and settlement that is not limited to a simple statement of award, in order to increase the likelihood that the hearing will promote posthearing settlement and avoid trial.

3. Efforts should be made to select arbitrators with consideration of their experience relevant to the case to be arbitrated and in a manner that encourages participation by the parties in the selection process.

With respect to further evaluation of the effectiveness of federal court-annexed arbitration, we recommend any new experimental project include the following features:

1. The evaluation should employ exemption of cases for purposes of statistical comparison, on a genuinely random basis, in order to assure that a reliable comparison can be made between identical groups of cases, one subject to arbitration and the other not.

2. The experiment should be conducted in courts that have a relatively large volume of arbitration-eligible cases, in order to provide adequate numbers of cases for precise comparisons, and should be continued for sufficient time (four to five years) to allow adequate collection of information on the ultimate disposition of cases in which trial de novo is demanded.

3. The evaluation should have active support from the court, in order to facilitate access to information about the costs of litigation and the satisfaction of litigants.

4. The experiment should test different arbitration rules, where consideration of the likely consequences of the settlement-deadline and case-mediation functions lead to different specifications, in order to permit evaluation of the relative merits of programs constructed on different rationales of arbitration.

5. The experiment should involve a wider variety of case types than do the present pilot programs, in order to generate information on the advantages and disadvantages of arbitration for various classes of cases.

APPENDIX A:

TEXTS OF LOCAL RULES FOR ARBITRATION

Precedin a

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RULE 28 - ARBITRATION

Sec. 1. Scope and Effectiveness of Rule.

This Rule governs the mandatory referral of certain actions to non-binding arbitration. It shall become effective on April 1, 1978, and shall apply to actions thereafter filed which fall within the scope of this Rule. Its purpose is to provide an incentive for the speedy, fair, and economical resolution of controversies involving moderate amounts by informal procedures while preserving the right of a conventional trial.

Sec. 2. Certification of Arbitrators.

(a) Certification. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this Rule.

(b) Eligibility. An individual may be certified to serve as an arbitrator if:

(1) the person has been for at least five years a member of the Bar of the highest court of any State or the District of Columbia; and

(2) the person is either a member of the Bar of the United States District Court for the District of Connecticut or a member of the faculty of an accredited law school within Connecticut; and

(3) the person is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

(c) Oath or Affirmation. Each arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator.

(d) Maintenance of List. A list of all persons certified as arbitrators shall be maintained in the office of the clerk.

(e) Supplementing List. The list may be supplemented from applications submitted to the Chief Judge by or on behalf of attorneys willing to serve and eligible under Sec. 2(b).

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(f) Selection by Agreement. The parties may by mutual agreement designate arbitrators who are neither lawyers nor certified under this Rule.

Sec. 3. Compensation and Expenses of Arbitrators.

Except as provided under Sec. 7(1), arbitrators selected under this Rule shall serve without compensation.

Sec. 4. Categories of Cases to be Referred.

The Court shall refer to arbitration any civil action filed on or after April 1, 1978, if

(a) the United States is a party, and;

(1) the relief sought consists only of money damages not in excess of $100,000, exclusive of interest and costs; and

(2) the action is brought pursuant to the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671 et seq.);

(b) the United States is not a party, the plaintiff is not incarcerated, and:

(1) the relief sought includes a claim for money damages not in excess of $100,000, exclusive of interest and costs; and

(2) the action is for breach of contract or for personal injury or property damage, and jurisdiction is based on diversity of citizenship (28 U.S.C. § 1332); or

(3) the action is for police misconduct, and jurisdiction is based on 28 U.S.C. § 1343; or

(c) the parties consent to arbitration.

Sec. 5. Referral to Arbitration.

(a) Prompt Notification. If an action is to be referred to arbitration under this Rule, the clerk shall so notify the parties following defendant's appearance.

(b) Pre-Arbitration Timetable. With respect to actions subject to arbitration pursuant to this Rule, the following pre-arbitration timetable shall apply:

(1) a motion for judgment on the pleadings, summary judgment, or similar relief may be filed within twenty days of the filing of the answer;

(2) within thirty days after the defendant's appearance, the magistrate shall hold a status conference to supervise discovery, narrow issues, determine the number of arbitrators when disputed (see Sec. 5(c)), and determine any application pursuant to Sec. 6(a) and any claim that the case is not subject to arbitration under Sec. 4;

(3) discovery may be conducted until ninety days after the filing of the answer, or the ruling of the Court on any motion filed under Sec. 5(b)(1), whichever is later;

(4) whether or not the aforesaid motion has been previously filed, such motion may be filed within ten days after expiration of the discovery period.

A party does not waive the right to make any motion or conduct any discovery permitted by the Federal Rules of Civil Procedure (including further depositions of witnesses previously deposed or questioned at the arbitration hearing) by failing to move or discover within the above time periods, and any such motion or discovery may be initiated or renewed after arbitration if a trial de novo is timely sought.

(c) Number of Arbitrators. The number of arbitrators shall be one, if all parties agree; or three, if all parties agree; or, in the event of disagreement, the choice of one or three shall be made by the magistrate at the status conference (see Sec. 5(b)(2)) with due regard for the likelihood that use of three arbitrators will significantly enhance the prospects for acceptance of the arbitrators' decision.

(d) Appointment of Arbitrators. If the magistrate has not done so at the status conference, the clerk shall, during the ninety-day discovery period, submit to each party an identical list of names of persons chosen from the list of persons certified as arbitrators under this Rule. Each party shall have seven days from the status conference or the mailing date in which to cross off any names to which the party objects, number the remaining names indicating the order of preference, and return the list to the clerk. The parties may agree to an arbitrator or arbitrators who are not named on the list, provided the parties promptly notify the clerk within the aforementioned seven-day period. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the clerk shall invite the acceptance of the arbitrators to serve and ascertain available hearing dates. The Chief Judge may authorize the clerk to appoint a fourth arbitrator as an alternative to serve in the event one of

the arbitrators becomes unavailable. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Court shall have the power to make the appointment from other persons certified as arbitrators under this Rule.

(e) Disqualification. Any arbitrator shall be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and shall disqualify himself in any action in which the arbitrator would be required to do so under 28 U.S.C. § 455 if that person were a justice, judge, magistrate or referee in bankruptcy.

Sec. 6. Removal of Cases Referred to Arbitration.

(a) Complex Cases. If at any time it appears that a case referred to arbitration is of such complexity that the arbitration hearing cannot be concluded within two days, any party may apply to the magistrate to have the case removed from the coverage of this Rule. The magistrate may remove the case from arbitration if he determines that the arbitration hearing is both unlikely to be concluded within two days and unlikely to provide an opportunity that will significantly enhance the prospects for settlement. If the magistrate removes the case from arbitration, the case will resume its status before the trial judge to whom it is assigned.

(b) Statistical Comparisons. The Chief Judge may remove from arbitration any case or class of cases for the purpose of obtaining comparative statistical data regarding the effect of this Rule.

Sec. 7. Arbitration Hearing.

(a) Time, Date, and Place. The arbitration hearing shall commence within sixty days after expiration of the discovery period specified in Sec. 5(b)(3) or ruling on any motion filed under Sec. 5(b)(4), whichever is later. The clerk shall set the time and date of each hearing and shall mail to each party and to the arbitrators notice thereof at least fifteen days in advance. Hearings will normally be held at the appropriate United States Courthouse. Any request to postpone the hearing must be presented to the magistrate and may be granted only for extraordinarily good cause such as illness or unforeseen conflicting court dates.

(b) Default for Failure to Attend. If a plaintiff fails, without good cause, to attend the arbitration hearing, the Court may, after notice and hearing, enter judgment dismissing the complaint. If a defendant fails, without good

cause, to attend the arbitration hearing, the Court may, after notice and hearing, order that judgment enter for the plaintiff pursuant to the requirements of Fed. R. Civ. P. 55(b). For any non-attendance, the Court may award the attending party reasonable expenses.

(c) Stenographic Record. Any party desiring the attendance of a stenographer shall make the necessary arrangements. The cost of the stenographer's attendance fee, stenographic record, if any is made, and all transcripts thereof, shall be pro-rated equally among all parties ordering copies unless they shall otherwise agree and shall be paid for by the responsible parties directly to the reporting agency.

(d) Interpreter. Any party desiring the services of an interpreter shall make the necessary arrangements and assume the costs of such services.

(e) Attendance. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrators to determine the propriety of the attendance of any other person.

(f) Testimony Under Oath or Affirmation. All witnesses shall testify under oath or affirmation administered by any duly qualified person. Interpreters shall take the same oath used in the District Courts.

(g) Conduct of Hearing. When three arbitrators conduct a hearing, they shall select one member of the panel to preside, but all evidentiary and procedural decisions shall be made by at least two of the arbitrators. A hearing shall be opened by the recording of the place, time and date of the hearing, the presence of the arbitrators and parties, and counsel, and by receipt by the arbitrators of the pleadings and any statement narrowing issues that may have been prepared by the magistrate (see Sec. 5(b)(2)). The arbitrators may, at the beginning of the hearing, ask for statements clarifying the issues involved. The plaintiff shall then present the claim and proofs and witnesses, who shall submit to questions or other examination. The defendant shall then present the defense and proofs and witnesses, who shall submit to questions or other examination. The arbitrators may in their discretion vary this procedure.

(h) Exhibits. The parties may introduce photocopies of exhibits if the originals are available for inspection at the hearing. The presiding arbitrator shall place all exhibits in the custody of the clerk at the conclusion of the hearing.

(i) Subpoenas. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule.

(j) Evidence. The arbitrators shall be the judge of the relevancy and materiality of the evidence offered and conformity to the Federal Rules of Evidence shall not be necessary. The arbitrators may use the Federal Rules of Evidence as guides in determining the admissibility of evidence. All evidence shall be taken in the presence of all of the arbitrators and all of the parties or their counsel, except where any of the parties is absent in default or has waived his right to be present.

(k) Conclusion of Hearing. To close the hearings, the arbitrators shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrators shall declare the hearings closed (see Sec. 7(l)). Counsel may make oral argument, but filing of briefs will ordinarily not be permitted. If the arbitrators decide to accept briefs, such briefs must be simultaneously filed within fourteen days.

(l) Hearings Beyond Two Days. If an arbitration hearing is not concluded within two days, the hearing will terminate, no arbitration award will be made, and the case will resume its status before the trial judge to whom it is assigned, provided however that the parties may by agreement proceed with the arbitration hearing beyond two days, in which event they will share the cost of a $250 per diem fee for each arbitrator for the third and any successive days of hearing. Such consent to an extended arbitration hearing, if given, is not a waiver of the right to trial de novo. An extended arbitration hearing may be terminated before all parties rest either by mutual agreement of the parties or by a decision of the arbitrators that continuation of the hearing is inappropriate; in either event no arbitration award will be made. A party proceeding in forma pauperis will be relieved of the obligation to share the per diem cost, in which event the cost will be proportionately reduced.

Sec. 8. Relief From Time Limits.

Relief from any time limits specified in this Rule may not be accomplished by stipulation between the parties, but may be granted only by the magistrate and only for extraordinarily good cause.

Sec. 9. Arbitration Award and Judgment.

(a) Issuance of Award. The arbitrators shall issue their award within thirty days of the date of the closing of the hearing or receipt of briefs, whichever is later.

(b) Award Procedure. The award shall be issued on forms approved by the Court and signed by at least a majority of the arbitrators. The award shall dispose of all of the monetary claims presented to the arbitrators. The arbitrators are not required or expected to issue any opinion explaining the award. The arbitration award shall be filed by the arbitrators with the clerk.

(c) Judgment Upon Award. Copies of the award shall be mailed by the clerk to counsel. THE AWARD SHALL BE ENTERED AS THE JUDGMENT OF THE COURT AFTER THE TIME FOR REQUESTING A TRIAL DE NOVO PURSUANT TO SEC. 10 OF THIS RULE HAS EXPIRED, UNLESS A PARTY DEMANDS A TRIAL DE NOVO BEFORE THE COURT PURSUANT TO SEC. 10. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect, as a judgment of the Court in a civil action.

Sec. 10. Trial de novo.

(a) Twenty-day limit. Within twenty days after the filing of the arbitration award with the Court, any party may demand a trial de novo in the District Court.

(b) Return to Court Calendar. Upon such a demand for a trial de novo, the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, and any right to trial by jury that a party would otherwise have shall be preserved inviolate.

(c) Evidence From Arbitration Hearing. At the trial de novo, the Court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, unless the parties otherwise agree, except that testimony given at an arbitration hearing, if transcribed and filed, may be used for the same purposes as any deposition under the Federal Rules of Civil Procedure.

(d) Binding Arbitration by Agreement. The parties to any case subject to referral under this Rule may, by mutual agreement, waive the right to trial de novo before or after the arbitration hearing and agree to be bound by the arbitration award.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LOCAL CIVIL RULE 49 (Amended July 31, 1979)

ARBITRATION

Sec. 1. Certification of Arbitrators.

(a) The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

(b) An individual may be certified to serve as arbitrator if: (1) he has been for at least five years a member of the Bar of the highest court of a State or the District of Columbia, (2) he is admitted to practice before this court, and (3) he is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

(c) Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28, U.S.C. § 456 before serving as an arbitrator.

(d) A list of all persons certified as arbitrators shall be maintained in the office of the clerk.

Sec. 2. Compensation and Expenses of Arbitrators.

~~The chairman of the arbitration panel shall be compensated at seventy dollars for each case in which he serves as chairman; the other two arbitrators on the panel shall each receive forty dollars for each case in which they serve.~~ The arbitrators shall be compensated $75.00 for each case in which a hearing is held. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. ~~In the event~~ Whenever the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated ~~seventy dollars~~ $75.00 for each case in which ~~he serves as a single arbitrator~~ he holds a hearing. The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

Sec. 3. Jurisdiction and Powers of Arbitrators.

The court shall refer to arbitration any civil action in which the complaint was filed after February 1, 1978, provided:

1. The United States is a party, and:

   (A) the action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

   (B) the action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. § 270(b)), the United States has no monetary interest in the claim, and the relief sought:

      (i) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

      (ii) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; or

2. the United States is not a party, and:

   (A) the parties consent to arbitration, the relief sought consists only of money damages, and the parties agree to pay a reasonable fee to the arbitrators; or

   (B)(i) the relief sought:

      (a) consists only of money damages not in excess of $50,000 exclusive of interest and costs; or

      (b) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; and

   (ii) jurisdiction is based in whole or in part on:

      (a) Title 28, U.S.C. § 1331 and the action is brought pursuant to Section 20 of the Act of March 4, 1915, as amended (Title 46, U.S.C. § 688);

      (b) Title 28, U.S.C. §§ 1331 or 1332 and the action is based on a negotiable instrument or a contract; or

(c) Title 28, U.S.C. §§ 1332 or 1333 and the action is for personal injury or property damage.

Sec. 4. Referral to Arbitration.

(a)(1) ~~Actions subject to arbitration pursuant to this rule shall automatically be referred to arbitration by the judge to whom the case has been assigned (acting through the courtroom deputy clerk) as soon as possible after a twenty-day period from the filing of the answer.~~ Actions subject to arbitration pursuant to this rule shall be referred to arbitration by an order of the judge to whom the case is assigned after a 20 day period from the filing of the answer. The court's order shall set forth the date, time and place of the arbitration hearing and shall designate the arbitrators. In the event that a third party is brought into the action, this ~~twenty-day~~ 20 day period shall commence to run from the date of the filing of an answer by the third party. In the event that a party has commenced discovery within the ~~twenty-day~~ 20 day period, and the court is so notified, the case shall not be referred to arbitration until discovery has been completed or upon expiration of ~~one hundred twenty~~ 120 days from the filing of the answer, whichever occurs earlier. In the event that a party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the case shall not be referred to arbitration until the court has ruled on the motion, but the filing of such a motion after referral shall not stay the arbitration unless the judge so orders.

(2) For the sole purpose of making the determination as to whether the damages are in excess of $50,000, exclusive of interest and costs, as provided in Sections 3(1)(B)(i), 3(1)(B)(ii), 3(2)(B)(i)(a) and 3(2)(B)(i)(b), damages shall be presumed in all cases to be less than $50,000, exclusive of interest and costs, unless counsel of record for the plaintiff at the time of filing the complaint or counsel of record for defendant at the time of filing an answer containing a counterclaim, files with the court a document signed by said counsel which certifies to the best of his knowledge and belief that the damages recoverable exceed the sum of $50,000, exclusive of interest and costs. The court may disregard such certification and require arbitration if satisfied that recoverable damages do not exceed $50,000.

(b) The arbitration shall be conducted before a panel of three arbitrators, one of whom shall be designated as chairman of the panel, unless the parties agree to have it conducted by a single arbitrator. The parties may by agreement select any person or persons to conduct the arbitration. If, within seven days after the action has been referred to arbitration, the parties have not notified the Clerk of the

Court that they have made such a selection, the arbitrator or arbitrators shall be chosen by the Clerk by a process of random selection from among the persons certified as arbitrators by the court.

(c) A person selected to be an arbitrator shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. § 144 and shall disqualify himself in any action in which he would be required under Title 28, U.S.C. § 455 to disqualify himself if he were a justice, judge, magistrate or referee in bankruptcy.

Sec. 5. Arbitration Hearing.

~~(a) The arbitration hearing shall commence not later than thirty days after the action is referred to arbitration and shall be concluded promptly.~~

(a) The deputy clerk for arbitration shall telephone the arbitrators and the attorneys for the parties in an effort to ascertain an agreeable time and date for the arbitration hearing and he shall recommend such time and date to the judge for inclusion in the order.

~~(b) The chairman of the arbitration panel shall set the time, date and place of hearing, and shall give notice of the hearing date to the parties at least fifteen days prior to the date set for the arbitration hearing.~~

(b) The arbitration hearing shall take place in accordance with the date, time and place set forth in the order of the court. The arbitrators are, however, authorized to change the date and time of the arbitration hearing provided the hearing is commenced within 30 days of the filing of the order. Continuances beyond this 30 day period must be approved by the judge to whom the case has been assigned. The arbitration hearing shall be concluded promptly.

(c) The deputy clerk for arbitration shall give notice of the hearing to all parties at least 15 days prior to the date set for the hearing.

(d) The arbitration may proceed in the absence of any party who, after due notice, fails to be present, but an award of damages shall not be based solely upon the absence of a party.

(e) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter. Testimony at an arbitration hearing shall be under oath or affirmation.

~~(e) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence in an arbitration hearing, but strict adherence is not required. Relevance and efficiency shall be the primary considerations.~~

(f) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. The panel may receive into evidence, without formal proof, bills, hospital records, medical reports, police reports, weather reports and other similar type exhibits, provided all adverse parties have received, at least five (5) days prior to hearing, written notice together with a copy of the exhibits.

(g) A party may have a recording and transcript made of the arbitration hearing at his expense. ~~If a party has a transcript or a tape recording made, he shall furnish a copy of the transcript or tape recording without charge to any other party, unless the parties otherwise agree.~~

Sec. 6. Arbitration Award and Judgment.

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial de novo pursuant to Section 7 has expired, unless a party demands a trial de novo before the court pursuant to that section. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

Sec. 7. Trial De Novo.

(a) Within twenty days after the filing of the arbitration award with the court, any party may demand a trial de novo in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties.

(b) Upon a demand for a trial de novo, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial de novo the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial de novo.

(d) If the party who demanded a trial de novo fails to obtain a judgment in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the amount of the arbitration fees. ~~and, if he is a defendant, he shall pay to the plaintiff interest on the arbitration award from the time it was filed, at the current legal rate of interest.~~

TEMPORARY LOCAL RULES OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

CHAPTER V--ARBITRATION

RULE 500
MANDATORY ARBITRATION

500-1. Scope and Effectiveness of Rule.

This Rule governs the mandatory referral of certain actions to arbitration. It shall become effective on April 1, 1978, and shall apply to actions thereafter filed which fall within the scope of this Rule. ~~This Rule shall terminate on March 31, 1979, on which date the procedures authorized hereunder shall cease the absence of further order of the court.~~ Its purpose while in effect is to provide an incentive for the speedy, fair and economical resolution of controversies involving moderate amounts by informal procedures while preserving the right to a conventional trial.

500-2. Actions Subject to This Rule.

(a) Categories of Actions. All civil actions falling within any of the following categories shall be subject to this Rule, except as otherwise provided:

(i) Actions in which the United States is not a party which--

(A) Seek relief limited to money damages not exceeding $100,000, exclusive of interest and costs, and in which any claim for non-monetary relief is determined by the assigned judge to be insubstantial; and

(B) Are founded on diversity of citizenship (28 U.S.C. § 1332), federal question (28 U.S.C. § 1331) or admiralty or maritime jurisdiction (28 U.S.C. § 1333) and arise under a contract or written instrument, or out of personal injury or property damage.

(ii) Actions in which the United States is a party which--

(A) Seek relief limited to money damages not exceeding $100,000, exclusive of interest and costs, and which

arise under the Federal Tort Claims Act or the Longshoremen's and Harbor Workers Act (33 U.S.C. § 901 et seq.), or

(B) Arise under the Miller Act (40 U.S.C. § 270b), with the United States having no monetary interest in the claim, and seek relief limited to money damages not exceeding $100,000, exclusive of interest and costs, and in which any claim for non-monetary relief is determined by the assigned judge to be insubstantial.

(b) Non-Monetary Relief Claim. Actions which are subject to this Rule except that they include a claim for non-monetary relief shall be referred to the assigned judge immediately after the filing of a responsive pleading for determination whether for purposes of this Rule that claim is insubstantial. That determination may be made, in the judge's discretion, ex parte or following consultation with the parties.

(c) Determination of Monetary Claims. At any time prior to the pretrial conference in any action otherwise subject to this Rule, the assigned judge may determine, on motion of any party or sua sponte, that for purposes of this Rule no genuine claim for damages in excess of $100,000 exists and that the action is subject to this Rule. The determination shall be made at any hearing or conference at which the parties are represented, without necessity, however, for a formal motion, memoranda or affidavits. In the event of such a determination, the action shall be referred to arbitration as herein provided.

500-3. Referral to Arbitration.

(a) Time for Referral. Every action subject to this Rule shall be referred to arbitration by the clerk in accordance with the procedures under this Rule twenty days after the filing of the last responsive pleading, except as otherwise provided. If any party notices a motion to dismiss or for summary judgment or similar relief prior to the expiration of the twenty-day period, the motion shall be heard by the assigned judge and further proceedings under this Rule deferred pending decision on the motion. If the action is not dismissed or otherwise terminated as the result of the decision on the motion, it shall be referred to arbitration twenty days after the filing of the decision.

(b) Authority of Assigned Judge. Notwithstanding any provision of this Rule, every action subject to this Rule shall be assigned to a judge upon filing in the normal course in accordance with the court's assignment plan, and the assigned judge shall have authority, in his discretion, to conduct

status and settlement conferences, hear motions and in all other respects supervise the action in accordance with these Rules notwithstanding its referral to arbitration.

(c) Relief From Referral. At any time prior to the expiration of the twenty-day period following the filing of the last responsive pleading, any party may notice a motion for relief from the operation of this Rule. Such motion shall conform to Rule 220 and shall be supported by a memorandum and, if appropriate, declarations showing good cause. The assigned judge may, in his discretion, exempt an action from application of this Rule where a party has demonstrated the existence of significant and complex questions of law or fact or other grounds for finding good cause.

500-4. Selection and Compensation of Arbitrators.

(a) Selection of Arbitrators. The office of the clerk shall maintain a roster of arbitrators who shall hear and determine actions under this Rule. Arbitrators shall be selected from time to time by the court from applications submitted by or on behalf of attorneys willing to serve. Any attorney who has been admitted to practice in California for not less than five years and is a member of the bar of this court shall be eligible for selection by the court. Each person shall upon selection take the oath or affirmation prescribed in 28 U.S.C. § 453.

(b) Selection of Panel. Whenever an action is referred to arbitration pursuant to this Rule, the clerk shall forthwith furnish to each party a list of ten arbitrators whose names shall have been drawn at random from the roster of arbitrators maintained in the clerk's office. The parties shall then confer for the purpose of selecting a panel of three arbitrators in the following manner:

(i) Each side shall be entitled to strike two names from the list, plaintiff(s) to strike the first name, defendant(s) the next, then plaintiff(s) and then defendant(s);

(ii) The parties shall then select the panel from the remaining six names by alternating selecting one name, defendant(s) to make the first choice, plaintiff(s) the next, and continuing in this fashion;

(iii) At the conclusion of this process, the parties shall list the six names in the order selected and submit them to the clerk within ten days of receipt by them of the original list of ten names. In the event the parties fail to submit such a list within the time provided, the clerk

shall make the selection of arbitrators at random from the original list of ten names;

(iv) The clerk shall promptly notify the three persons whose names appear as the first three choices of the parties of their selection, or, if no choices have been made, the persons he has selected. If any person so selected is unable or unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to constitute a panel of three arbitrators from the six selections, the process of selection under this Rule shall begin anew. When three of the selected arbitrators have agreed to serve, the clerk shall promptly send written notice of the membership of the panel to each arbitrator and to the parties.

(c) Disqualification. No person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist.

(d) Withdrawal by Arbitrator. Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his name removed or, if selected to serve on a panel, decline to serve but remain on the roster. After a person has served as an arbitrator in an action, he shall not serve again for at least six months.

(e) Compensation and Reimbursement. Arbitrators shall be paid seventy-five dollars for each day, or portion of a day, of hearing in which they participate. At the time when the arbitrators file their decision, each shall submit a voucher in form prescribed by the clerk for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing.

500-5. Hearings.

(a) Hearing Date. The arbitrators constituting the panel shall set a date for hearing not less than twenty nor more than forty days after notice from the clerk of the membership of the panel pursuant to Rule 500-4(b)(iv). Upon stipulation of the parties or written request of any party, the arbitrators shall continue the hearing date for not more than 100 days, during which time the parties may conduct discovery. Notice of the hearing date and of any continued hearing date shall be given by the arbitrators to the clerk who shall give written notice to the parties.

(b) Default of Party. Subject to the provisions of subparagraph (a) above, the hearing shall proceed on the noticed date. Absence of a party shall not be a ground for continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrators.

(c) Conduct of Hearing. The arbitrators are authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses except as herein provided. In receiving evidence, the arbitrators shall be guided by the Federal Rules of Evidence, but they shall not thereby be precluded from receiving evidence which they consider to be relevant and trustworthy and which is not privileged. A party desiring to offer a document otherwise subject to hearsay objections at the hearing may serve a copy on the adverse party not less than ten days in advance of the hearing indicating his intention to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, any hearsay objection to the document shall be deemed waived. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil Procedure.

(d) Transcript or Recording. A party may cause a transcript or recording to be made of the proceedings at its expense but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. In the absence of agreement of the parties and except as provided in Rule 500-7(b) relating to impeachment, no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial of the action.

(e) Place of Hearing. Hearings shall be held at any location within the Northern District of California designated by the arbitrators. Hearings may be held in any courtroom or other room in any federal courthouse or office building made available to the arbitrators by the clerk's office. When no such room is available, the hearing shall be held at any other suitable location selected by the arbitrators. In making the selection, the arbitrators shall consider the convenience of the panel, the parties and the witnesses.

(f) Time of Hearing. Unless the parties agree otherwise, hearings shall be held during normal business hours.

(g) Optional Waiver of Trial De Novo; Voluntary Arbitration. At any time prior to the commencement of the hearing, the parties may by written stipulation approved by order of the assigned judge waive the right to a trial de novo following

the award and proceed as in voluntary arbitration. In the event of such a stipulation, the provisions of state and federal law governing review of awards rendered in voluntary arbitration shall govern.

(h) Authority of Arbitrators. The arbitrators constituting the panel shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before them. Any two members of the panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.

(i) Ex Parte Communication. There shall be no ex parte communication between an arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

500-6. Award and Judgment.

(a) Filing of Award. The arbitrators shall file their award with the clerk's office promptly following the close of the hearing and in any event not more than ten days following the close of the hearing. The clerk shall serve copies on the parties.

(b) Form of Award. The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief if any awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by at least two members of the panel. No member shall participate in the award without having attended the hearing.

(c) Entry of Judgment on Award. Promptly upon the filing of the award with the clerk, the clerk shall enter judgment thereon in accordance with Rule 58, Federal Rules of Civil Procedure. Unless either party files a demand for a trial de novo within thirty days of the entry of judgment, the judgment shall have the same force or effect as any judgment of the court in a civil action, except that no appeal shall lie from such a judgment (any notice of appeal shall be treated as a demand for a trial de novo).

500-7. Trial De Novo.

(a) Time for Demand. If either party files and serves a written demand for a trial de novo within thirty days of entry of judgment on the award, that judgment shall immediately be vacated by the clerk and the action shall proceed in the normal manner before the assigned judge.

(b) Limitation on Evidence. At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, except that statements made by a witness at the arbitration hearing may be used for impeachment only.

(c) Costs. If the party who has requested the trial de novo fails to obtain judgment in an amount which, exclusive of interest and costs, is more favorable to that party, costs within the meaning of Rule 265-1 may be assessed against that party.

RULE 505
VOLUNTARY ARBITRATION

Notwithstanding the provisions of Rule 500, the parties to any action or proceeding may stipulate to its referral to arbitration upon such terms as they may agree to, subject to approval by order of the assigned judge. In the case of such referral, the provisions of state and federal law governing voluntary arbitration shall control.

APPENDIX B:

QUESTIONNAIRES USED IN THE EVALUATION

COUNSEL QUESTIONNAIRE

(Not used for counsel in Connecticut comparison cases.)

Please answer the questionnaire with reference to the following case:

CASE:
Ddocket NUMBER:

Code _____

1. At the present time, what is your general opinion of the arbitration rule? (Please circle the number which best represents your answer.)

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

2. Prior to your experience in the case noted on the attached sheet, what experience had you had as counsel in controversies subject to arbitration? (Please check the answers which best describe your experience; check as many answers as apply.)

____Experience with cases processed under this rule.
____Experience with cases processed under other mandatory, nonbinding arbitration rules.
____Experience with conventional binding arbitration.
____Experience with arbitration in other contexts.
____No previous experience with arbitration.

3. Have you ever served as an arbitrator?

____Yes ____No

If you answered yes, please indicate the nature of the arbitration(s).

____Arbitration under this rule.
____Arbitration under another mandatory, nonbinding arbitration rule.
____Conventional binding arbitration.
____Other. (Please specify)_____

4. Given your present benefit of hindsight in the case noted on the attached sheet, would you have preferred that the case be processed under the arbitration rule or not? (Please circle the number which best represents your answer.)

5	4	3	2	1
PREFER RULE VERY MUCH	PREFER RULE SOMEWHAT	NO PREFERENCE	PREFER NO RULE SOMEWHAT	PREFER NO RULE VERY MUCH

5. Do you feel that this case required more or less of your own time and effort than it would have if there had been no arbitration rule?

5	4	3	2	1
MUCH MORE	SOMEWHAT MORE	ABOUT THE SAME	SOMEWHAT LESS	MUCH LESS

6. Do you feel that this case required more or less of your client's time and effort than it would have if there had been no arbitration rule?

5	4	3	2	1
MUCH MORE	SOMEWHAT MORE	ABOUT THE SAME	SOMEWHAT LESS	MUCH LESS

7. Compared to what you would have expected of this case if it had not been subject to the arbitration rule, do you feel that the arbitration rule resulted in a more or less rapid resolution of this case?

5	4	3	2	1
MUCH MORE RAPID	SOMEWHAT MORE RAPID	ABOUT THE SAME	SOMEWHAT LESS RAPID	MUCH LESS RAPID

(The following question was included only on questionnaires sent to attorneys in cases that were settled prior to an arbitration hearing.)

8. We seek here your views on the role, if any, that the arbitration rule had in the termination of this case. Please read all the options listed below, then check any that reflect your views.

____The relatively rapid discovery required by the arbitration timetable probably resulted in an earlier settlement than would have occurred in the absence of the arbitration rule.
____The early status conference with the magistrate probably led to an earlier settlement.
____The arbitration rule probably caused an overly hasty settlement of the case.
____The arbitration rule probably delayed settlement of this case.
____The arbitration rule had no effect on this litigation.
____Other. Please describe any other effects you think the rule may have had on this case:_____

(The following two questions were sent to attorneys in cases that were terminated by arbitration award.)

8. Below are several statements of possible reasons for your acceptance of the arbitration award. Please read all the options listed below, then check all that apply to this case.

____My client and I both viewed the award as generous to us.
____My client and I both viewed the award as reasonable.
____My client was unwilling to accept the delay that would have resulted if we had demanded a trial de novo.
____While I was of the opinion that we had a good chance of obtaining a better net result in settlement or trial, my client was unwilling to take the risk, and thus accepted the award with some reluctance.
____While I was of the opinion that we had a good chance of obtaining a better net result in settlement or trial, my client was satisfied with the award, and thus accepted the award.
____While the award was somewhat disappointing, I thought that the risks and expenses associated with further litigation were not justified. My client agreed, so the award was accepted.
____My client was inclined to demand trial de novo and seek a more favorable result in settlement or trial. I thought that unwise and convinced my client to accept the award.
____Other. Please explain:_____
_____
_____

9. Tc what extent did the arbitration hearing provide you with a good or poor opportunity to present all of the evidence and arguments favoring your side of the case?

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

(The following two questions were sent to attorneys in cases settled after an arbitration hearing.)

8. We seek your views on the role, if any, that the arbitration procedures had in the termination of this case. Please read all the options listed below, then check any that reflect your views.

____The relatively rapid discovery required by the arbitration timetable probably resulted in an earlier settlement than would have occurred in the absence of the arbitration rule.
____The arbitration rule probably delayed settlement of this case.
____The arbitration hearing was a useful disclosure of the strengths and weaknesses of the case, and as such was of significant assistance in reaching settlement.
____The arbitration hearing was an efficient method of discovery.
____The arbitration award was viewed as a reasonable valuation of the case, and became the focus around which a settlement was reached.
____The arbitration award or hearing led my opponent to an unrealistic view of the case, which probably made settlement more difficult to reach.
____The arbitration hearing was a needless exercise. It had no positive effect on this litigation.
____Other. Please describe any other effects you think the rule may have had on this case:_____
_____
_____

9. To what extent did the arbitration hearing provide you with a good or poor opportunity to present all of the evidence and arguments favoring your side of the case?

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

(The following two questions were sent to attorneys in cases terminated by trial.)

8. We are interested in the effects, if any, that you think the arbitration rule had on the termination of this case. Please read all of the options listed below, then check any that reflect your views.

____The arbitration hearing, by offering a good view of all sides of the case, probably resulted in a better presentation of the evidence and arguments at trial than might otherwise have occurred.
____I thought that the arbitration award was reasonable, and thus that it should have led to settlement, but my opponent apparently had an unrealistic view of the case which was not altered by the opinion of the arbitrator(s).
____The arbitration hearing probably resulted in an unnecessary trial by leading my opponent to an unrealistic view of the case.
____The arbitration hearing was an efficient method of discovery.
____The arbitration hearing was a needless exercise, since it was inevitable that this case would go to trial.
____Other. Please describe any other effects you think the rule may have had on this case:_____

_____

_____

9. To what extent did the arbitration <u>hearing</u> provide you with a good or poor opportunity to present all of the evidence and arguments favoring your side of the case?

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

(The following question was asked of all counsel.)

10. Overall, to what extent do you feel that the final outcome of the case is fair to all involved?

4	3	2	1
VERY FAIR	REASONABLY FAIR	SLIGHTLY UNFAIR	VERY UNFAIR

(The following question was asked only of counsel in Connecticut.)

11. Approximately how many billable attorney hours were expended on your client's case? (Please estimate the hours expended even if your fee arrangement was such that you did not actually bill on an hourly basis.)

_____hours

(The following question was asked only of counsel in cases that were terminated by settlement.)

12. Please indicate below the terms of the settlement or disposition in this case. (We realize the potential sensitivity of this information. Please be assured that our pledge of confidentiality is absolute, and that this information is a crucial element of the evaluation process.)

a. Plaintiff recovered $_____ from defendant.

b. Since it is not possible to frame a standard answer that covers all possible settlements, we ask your indulgence in explaining here the terms of the settlement if the fill-in answer above does not fit this case:

_____
_____
_____

(The following request was made only of counsel in Connecticut.)

We would like your assistance in one additional matter. As part of our evaluation we would like to provide litigants with an opportunity to express their perceptions of the litigation. We would appreciate it if you would provide us with the address of the party you represented in this case so that we can send that individual or corporation a brief questionnaire asking about reactions to the procedures and outcome of the case. To assure you that we do not intend to place a burden on your litigant, we attach a copy of this questionnaire for your inspection. The pledge of confidentiality that we have made concerning your responses applies also to the responses of litigants to their questionnaires. It is not necessary that you forward the litigant questionnaire to the party you represented; please simply indicate here the party's address:

Party's name:_____
Address:_____
_____
_____

THANK YOU VERY MUCH FOR YOUR COOPERATION

If you would like to be notified when we publish our evaluation of the arbitration rule, please check here:_____.

COUNSEL QUESTIONNAIRE

(Used for counsel in Connecticut comparison cases.)

Please answer the questionnaire with reference to the following case:

CASE:
DOCKET NUMBER:

Code _____

1. At the present time, what is your general opinion of the arbitration rule? (Please circle the number which best represents your answer.)

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

2. What previous experience have you had as counsel in controversies subject to arbitration? (Please check the answers which best describe your experience; check as many answers as apply.)

____Experience with cases processed under this rule.
____Experience with cases processed under other mandatory, nonbinding arbitration rules.
____Experience with conventional binding arbitration.
____Experience with arbitration in other contexts.
____No previous experience with arbitration.

3. Have you ever served as an arbitrator?

____Yes ____No

If you answered yes, please indicate the nature of the arbitration(s).

____Arbitration under this rule.
____Arbitration under another mandatory, nonbinding arbitration rule.
____Conventional binding arbitration.
____Other. (Please specify)_____
_____

4. Given your present benefit of hindsight in the case noted on the attached sheet, would you have preferred that the case be processed under the arbitration rule or not? (Please circle the number which best represents your answer.)

5	4	3	2	1
PREFER RULE VERY MUCH	PREFER RULE SOMEWHAT	NO PREFERENCE	PREFER NO RULE SOMEWHAT	PREFER NO RULE VERY MUCH

5. Overall, to what extent do you feel that the final outcome of the case is fair to all involved?

4	3	2	1
VERY FAIR	REASONABLY FAIR	SLIGHTLY UNFAIR	VERY UNFAIR

6. Approximately how many billable attorney hours were expended on your client's case? (Please estimate the hours expended even if your fee arrangement was such that you did not actually bill on an hourly basis.)

_____hours

(The following question was asked only of counsel in cases that were terminated by settlement.)

7. Please indicate below the terms of the settlement or disposition in this case. (We realize the potential sensitivity of this information. Please be assured that our pledge of confidentiality is absolute, and that this information is a crucial element of the evaluation process.)

a. Plaintiff recovered $_____ from defendant.

b. Since it is not possible to frame a standard answer that covers all possible settlements, we ask your indulgence in explaining here the terms of the settlement if the fill-in answer above does not fit this case:

_____
_____
_____

We would like your assistance in one additional matter. As part of our evaluation we would like to provide litigants with an opportunity to express their perceptions of the litigation. We would appreciate it if you would provide us with the address of the party you represented in this case so that we can send that individual or corporation a brief questionnaire asking about reactions to the procedures and outcome of the case. To assure you that we do not intend to place a burden on your litigant, we attach a copy of this questionnaire for your inspection. The pledge of confidentiality that we have made concerning your responses applies also to the responses of litigants to their questionnaires. It is not necessary that you forward the litigant questionnaire to the party you represented; please simply indicate here the party's address:

Party's name:_____
Address:_____
_____
_____

THANK YOU VERY MUCH FOR YOUR COOPERATION

If you would like to be notified when we publish our evaluation of the arbitration rule, please check here:_____.

ARBITRATOR QUESTIONNAIRE

Code _____

This short questionnaire is an element of the Federal Judicial Center's effort to evaluate the effects of the arbitration rule in effect in the United States District Court for the _____ District of _____. The questionnaire is being sent to all persons who serve as arbitrators under this rule. It serves to provide us with indications of the nature of the arbitration hearing and of the apparent "use" of the hearing by counsel. Your cooperation in completing and returning the questionnaire will be greatly appreciated.

Your answers will be kept in strict confidence, and will be revealed only in the form of aggregate statistics reflecting arbitrator perceptions of hearings they conduct. You are identified with this questionnaire by code number solely to enable us to track questionnaire responses.

The questions below pertain to your service as arbitrator in an arbitration hearing for the following case:

Docket Number_____

Style:_____vs_____

1. Approximately how many hours of your time did your service as arbitrator consume:

In hearing? _____
Other time (include preparation, deliberation, writing, travel)? _____

2. If this had been a trial rather than an arbitration hearing, approximately how many hours do you think it would have consumed in trial? _____

3. To your recollection, approximately how many witnesses testified in person at the arbitration hearing? _____
For about how many witnesses was testimony received by other than in-person means (e.g., by deposition, affidavit, or stipulation to what the witness would say if called)? _____

The following questions relate to the individual counsel (or pro se parties) at the hearing. Please answer each question with respect to each attorney (or party). We have identified the parties we understand were involved in the case in the answer spaces below. If our identifications are incorrect, please correct them.

5. Please indicate whether each of the following individuals was present at the arbitration hearing:

Plaintiff: ___party present ___attorney present
Defendant: ___party present ___attorney present
Third-party defendant: ___party present ___attorney present

6. Did it appear to you that counsel for any of the following parties was motivated in the hearing by tactical considerations in anticipation of further litigation more than by a desire to resolve the dispute by arbitration?

Plaintiff: ____yes ____no
Defendant: ____yes ____no
Third-party Defendant: ____yes ____no

7. Was counsel for this party as well prepared and earnest in the presentation of the case as you would expect of an attorney at trial?

Plaintiff: ____yes ____no
Defendant: ____yes ____no
Third-party Defendant: ____yes ____no

8. To your knowledge did you or your fellow arbitrators suggest to the parties that they should negotiate a settlement of this case?

____yes ____no

Thank you for your time and attention in answering this questionnaire. Please return the questionnaire in the attached return envelope.

If you would like to receive a copy of the report of our evaluation of the arbitration rule, please check here:___

UPDATED ANALYSIS OF COURT-ANNEXED ARBITRATION
IN THREE FEDERAL DISTRICT COURTS

By John Shapard

February 1982

Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center 1981) was prepared on the basis of data available through early 1980 and consequently could not report conclusions regarding the incidence of trial de novo among arbitration cases. Data now available enable us to determine the percentage of arbitration cases actually reaching trial and to offer guarded conclusions regarding the effect of the arbitration programs in reducing the incidence of trial. The District of Connecticut's recent abolition of its arbitration program is also noteworthy in evaluating federal court-annexed arbitration.

Incidence of Trial De Novo

For the arbitration program in the Northern District of California, we evaluated the status of two overlapping groups of arbitration cases, as of November 1981: (1) those cases filed prior to January 1, 1980, and (2) those filed prior to June 1, 1980. The relevant statistics are as follows:

	Cases Filed Prior to	
	1/1/80	6/1/80
Number designated for arbitration	668	875
Number (and %) reaching hearing	138 (21)	179 (20)
Number (and %) demanding trial de novo	72 (11)	96 (11)
Number (and %) reaching trial de novo	15 (2.2)	16 (1.8)
Number (and %) still pending	10 (1.5)	33 (3.8)
Number (and %) that may go to trial (sum of 2 preceding lines)	25 (3.7)	49 (5.6)

The fact that some of these cases remain pending and may yet reach trial de novo makes it impossible to estimate precisely how many will ultimately go to trial. Nonetheless, we think it fair to assume that in this district, about 3 percent of arbitration cases ultimately go to trial (and, of course, that about 97 percent are disposed of short of trial). Of the 10 cases filed prior to January 1, 1980, that remain pending, only 5 have actually reached an arbitration hearing and been perpetuated by a demand for trial de novo. We think it doubtful that more than 20 (3 percent) of the 668 cases in this group will ever reach trial. For analogous reasons, we think it fair to assume that fewer than 30 (3.4 percent) of the 875 cases filed prior to June 1, 1980, will ever reach trial. We regard the 3 percent and 3.4 percent figures as upper estimates of the percentage of cases that will reach trial, which leads to the suggestion of 3 percent as a fair assumption regarding the rate of trial de novo in the Northern District of California.

For the Eastern District of Pennsylvania, we evaluated the court's report, as of November 30, 1981, of the status of arbitration cases filed in 1978 and 1979. The statistics available

do not permit presentation of the same breakdown as that shown for the Northern District of California. Similar statistics are as follows:

	Cases Filed in	
	1978	1979
Number designated for arbitration	778	943
Number (and %) referred to an arbitration panel	177 (23)	283 (30)
Number (and %) demanding trial de novo	58 (7)	180 (19)
Number (and %) reaching trial de novo	19 (2.4)	18 (1.9)
Number (and %) still pending	5 (0.6)	35 (3.7)
Number (and %) that may go to trial (sum of 2 preceding lines)	24 (3.1)	53 (5.6)

Only 4 of the 5 cases still pending from 1978, and 23 of the 35 pending from 1979, have reached an arbitration hearing and been perpetuated by a demand for trial de novo. Although the maximum possible trial rate for 1978 cases is only 3.1 percent, we question the reliability of this figure because these cases appear to be abnormally low in rate of demand for trial de novo (7 percent). The rate of 19 percent for trial de novo in 1979 cases appears to be more the norm (the rate for 1980 cases is at least 16 percent). For the 943 arbitration cases filed in 1979, we think a better estimate than that shown by the data presented is that not more than 41 (4.3 percent) will ultimately reach trial. By analogy to our discussion of statistics for the Northern District of California, we think it a fair assumption that the trial rate in Eastern Pennsylvania is somewhere between 3.5 and 4 percent.

We did not update our data for arbitration cases in the Dis-

trict of Connecticut, for two reasons: (1) the number of both arbitration and control cases in that district was too small to permit statistically reliable comparisons of trial rates, and (2) that district has abandoned its arbitration program.

Although it is valuable to understand how frequently arbitration cases reach trial, the more important question may be how much the arbitration plans in the Northern District of California and the Eastern District of Pennsylvania succeed in reducing the incidence of trials. Here, the crucial question is what the incidence of trial would be in the absence of the arbitration programs. Because of weaknesses in the structure of the evaluation design employed in these two districts (weaknesses that are thoroughly explained in the 1981 report), we have no data on any comparable group of cases that could yield a reliable comparison regarding trial rate.

Two other sources of information, however, provide useful hints about what the relevant "comparison" trial rate might be. First, taking into consideration the mix of contract and personal injury cases that account for the bulk of arbitration cases, one can infer from the Annual Reports of the Director of the Administrative Office that the trial rate for cases whose subject matter was appropriate to arbitration would ordinarily be between 10 and 12 percent. This includes all cases of the proper subject matter, without regard to the amount in controversy, whereas arbitration cases are limited to those on the lower end of the spectrum of amount in controversy (not more than $100,000 in Northern

California and not more than $50,000 in Eastern Pennsylvania. Second, there is reason to suppose that the incidence of trial is lower for cases with relatively small amounts in controversy than it is for cases in which quite large sums are in dispute. Evidence of this difference in trial rates can be found in data collected from Eastern Pennsylvania and several other metropolitan districts in the course of the Center's District Court Studies Project in 1975. There, the incidence of trial was about 7 percent for those cases that met both the subject-matter and amount-in-controversy requirements of the arbitration rules.

In interpreting this information, it is important to recognize that the incidence of trial has generally been decreasing over the last decade, and that there are problems in making comparisons between cases disposed of in 1975 and the arbitration cases we are concerned with, most of which were disposed of in 1979 and 1980. The rate of trial that might be inferred from the Annual Report of the Director for cases appropriate for arbitration in terms of subject matter in 1975 is about 15 percent, or twice the 7 percent rate for appropriate cases involving amounts in controversy of less than $50,000. For the years 1979 and 1980, however, the inference from the Annual Reports is a trial rate of about 11 percent, which implies that the trial rate for cases involving less than $50,000 was about 5.5 percent (i.e., one-half of 11 percent). This method of estimation is confounded in two ways, however. On one hand, $50,000 was more "real" dollars in 1975 than it was in 1980, suggesting that 5.5

percent might be a high estimate for the "comparison" trial rate (cases demanding $50,000 in 1980 being "smaller" than those demanding $50,000 in 1975). On the other hand, as was discussed in the 1981 report, "amount in controversy" is not a particularly meaningful or objective measure of the actual stakes in a civil suit, and its meaning has undoubtedly been affected by the arbitration rules themselves, which make "amount in controversy" a determinant of the procedures that will apply to the litigation.

Without repeating here the possible effects of the arbitration rules on counsel's statements of amount in controversy, we think it fair to assume that the trial rate for arbitration-appropriate cases could be as high as 6 or 7 percent in the absence of the arbitration rules (but it might not be much higher than the 3 percent we regard as a fair estimate of the rate achieved with an arbitration program). We find it very difficult to doubt that the rules cause some decrease in the incidence of trial, but would doubt that the arbitration programs established in Northern California and Eastern Pennsylvania reduce the incidence of trials by more than half.

END