Judicial Arbitration in California

The First Year

Deborah R. Hensler, Albert J. Lipson, Elizabeth S. Rolph

Rand

THE INSTITUTE FOR CIVIL JUSTICE
This research is supported by The Institute for Civil Justice.

The Rand Publications Series: The Report is the principal publication documenting and transmitting the Institute's major research findings and final research results. The Note reports other outputs of Institute research for general distribution. Publications of The Rand Corporation do not necessarily reflect the opinions or policies of Rand's and the Institute's research sponsors.

Published by The Rand Corporation
Judicial Arbitration in California

The First Year

Deborah R. Hensler, Albert J. Lipson, Elizabeth S. Rolph

1981

THE INSTITUTE FOR CIVIL JUSTICE
The Institute for Civil Justice

The Institute for Civil Justice, established within The Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.

Rand is a private, non-profit institution, incorporated in 1948, which engages in nonpartisan research and analysis on problems of national security and the public welfare.

The Institute examines the policies that shape the civil justice system, the behavior of the people who participate in it, the operation of its institutions, and its effects on the nation's social and economic systems. Its work describes and assesses the current civil justice system; analyzes how this system has changed over time and may change in the future; evaluates recent and pending reforms in it; and carries out experiments and demonstrations. The Institute builds on a long tradition of Rand research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

The Institute widely disseminates the results of its work to state and federal officials, legislators, and judges, to the business, consumer affairs, labor, legal, and research communities, and to the general public.
Board of Overseers

CHAUNCEY J. MEDBERRY, III
Chairman
Chairman of the Executive Committee. Bank of America

KENNETH J. ARROW. The Joan Kemery
Professor of Economics and Professor of Operations
Research, Stanford University

WILLIAM O. BAILEY, President, Atlas Life and
Casualty Company

IRVING A. BLUESTONE, Professor of Labor
Studies, Wayne State University; retired Vice
President, United Auto Workers

ARCHIE R. BOE, Chairman and Chief Executive
Officer, Allstate Insurance Company

GUIDO CALABRESI, Sterling Professor of Law,
Yale Law School

RICHARD P. COOLEY, Chairman of the Board and
Chief Executive Officer, Wells Fargo Bank and
Wells Fargo Company

THOMAS R. DONAHUE, Secretary-Treasurer,
 AFL-CIO

W. RICHARD GOODWIN, President and Chief Execu-
tive, Huntington Capital Corporation

SHIRLEY M. HUFSTEDLER, Attorney,
Boarding, Hufstedler & Remick; former U.S.
Circuit Judge, former Secretary, U.S. Department of
Education

EDWARD H. LEVI, Graws A. Lloyd Distinguished
Service Professor, School of Law, University of
Chicago; former Attorney General of the United
States

LAURENCE E. LYNN, JR., Professor of Public
Policy, John F. Kennedy School of Government,
Harvard University

EDWARD J. NOHA, Chairman and Chief Executive
Officer, CNA Insurance Companies

WILLIAM B. SCHWARTZ, Vancorin Bank Univer-
sity Professor and Professor of Medicine, Tulia-
University

ELEANOR B. SHELDON, former President, Social
Science Research Council

GUSTAVE H. SHUBERT, Senior Vice President,
The Rand Corporation; Director, The Institute for
Civil Justice

JUSTIN A. STANLEY, Partner, Mayer, Brown &
Pitel; former President, American Bar Association

WARD WAGNER, JR., Partner, Cone, Owen,
Wagner, Nagari, Johnson, Hasquet & Riss; former
President, The Association of Trial Lawyers of
America

ROBERT W. WILCOX, President, Property-Casualty
Insurance Council

SANDBERG L. WILLET, Executive Vice President,
National Consumers League

MARGARET BUSH WILSON, Partner, Wilson,
Sweisg and McCullum, Chairman of the NAACP
National Board of Directors

PAUL S. WISE, President, Alliance of American
Insurers

CHARLES J. ZWICK, President and Chief Executive
Officer, Southeast Banking Corporation; former
Chairman of the U.S. Bureau of the Budget

HONORARY MEMBERS

SAMUEL R. PIERCE, JR., Secretary, U.S.
Department of Housing and Urban Development

DONALD H. RUMSFELD, President and Chief
Executive Officer, G. D. Searle & Company
Foreword

Observers of our court system have frequently wondered whether a civil trial—often preceded by years of pretrial maneuvers and delay—is the best way that society can find to resolve a dispute involving only a few thousand dollars. Bar associations, legislatures, judges, attorneys for litigants, and citizen groups have deplored the delays and questioned the overhead costs incurred by using the courts for this purpose, and have long sought a better way. The search for alternatives has become more intense in recent years as civil filings have multiplied.

One of the more popular legislative responses to demands for reform has been to require that smaller cases be assigned to court-administered arbitration, or "judicial arbitration," as it is called in California. The arbitration is not performed by a judge, but the court decides whether a case is to be arbitrated, appoints an arbitrator, and monitors the arbitration process. Unlike classic commercial arbitration, the outcome is not binding on the parties, who retain their rights to press the issue to trial. Penalties are often imposed, however, on a party who seeks a trial and then fails to receive a more favorable verdict than the arbitrator's award.

Supporters of judicial arbitration believe that diversion of small cases into the streamlined arbitration process will reduce court congestion, cut costs to both litigants and the public, and speed the resolution of disputes without diminishing the quality of the justice meted out.

This report summarizes the results of the first year of operation of one of the largest experiments with judicial arbitration yet undertaken. Since July 1979, California law has required that civil damage suits filed in the larger counties in the state be reviewed by a judge and assigned to judicial arbitration if, in the judge's opinion, the action involves $15,000 or less. The statute that installed judicial arbitration, which included a five-year "sunset" provision, was supported by the California State Bar Association and numerous other groups. It followed upon a more modest statewide experiment in which arbitration was ordered upon petition of the plaintiff if the case involved no more
than $7500; the mandatory format, extended to a flow of civil damage filings that was surpassing 100,000 per year at the time, was a far more ambitious application of the technique.

The end of the first year of the program presented an unusually promising analytic opportunity for The Institute for Civil Justice. Knowledgeable observers of the civil justice system urged us to examine various alternatives to judicial dispute resolution that were being proposed. Prominent among these was judicial arbitration, which was first adopted by the Philadelphia courts in the early 1950s and has now been adopted by all or parts of nine states. Here was a chance to catch a large-scale experiment at an early stage in its history. Not only could its progress be observed, but the data that the California Legislature will need for ultimately assessing its merits could be identified early. Perhaps most important, useful data and analyses could be made available to decision makers in other states that are considering adoption of some form of judicial arbitration. For all of these reasons, we embarked upon an examination of the experience under the new law.

This report is the product of that examination. It presents the first-year answers to the questions posed by the objectives of the enabling statute: Does judicial arbitration reduce court congestion or backlogs or both? Does it speed dispute resolution? Does it cut costs, and, if so, by how much and to whom? Do participants generally perceive the results as equitable, or do they see systematic biases in arbitrators' decisions? Do they like arbitration, or would they prefer a return to more traditional procedures? These are the central issues that the authors address.

Many students of the civil justice system will be surprised by the report's substantive conclusions; as the authors point out, however, some findings may well be artifacts of a difficult start-up period in which the courts were allowed to implement the program in a variety of ways. Particularly disquieting is the conclusion that the California Judicial Council, which is charged with the responsibility for evaluating the program, lacks the resources to do so. We have called this issue to the attention of the appropriate California authorities; we hope our research will assist them in developing a design for the long-term evaluation of the program.

Meanwhile, the findings that can be derived from the first year's experience should be of urgent interest not only to California but to every citizen who shares a concern for improving the quality and cutting the cost of the civil justice system.

Gustave H. Shubert
Director
The Institute for Civil Justice
Executive Summary

BACKGROUND

During the last decade, the volume of civil litigation has increased sharply in many metropolitan trial courts. Between 1967 and 1979, in the California superior court system, the number of personal injury and property damage suits doubled and the number of other civil money suits multiplied by a factor of more than two and one-half. Many other state court systems experienced similar increases.

Across the nation, courts have struggled to combat the resulting congestion on the civil trial calendar with a variety of procedures for expediting cases. Among these, judicial arbitration (also known as court-annexed, mandatory, or compulsory arbitration) is widely viewed as one of the most promising. First introduced in Philadelphia in the early 1950s, it has since been adopted by nine states\(^1\) and has been the subject of experimentation in the federal district courts as well. Although these programs differ in many ways, their common intent is to divert smaller cases from the civil trial calendar by substituting adjudication by volunteer arbitrators for the traditional judge and jury trial. Unlike the classical form of arbitration, judicial arbitration is compulsory but its results are not binding.

In 1978 the California State Legislature adopted a judicial arbitration program that is one of the largest and most ambitious in the nation. Under the rules of the program, the court orders all civil damage suits\(^2\) valued at $15,000 or less to be heard by a single randomly selected attorney (or retired judge) who has volunteered to serve as an arbitrator. In addition, any plaintiff who agrees to a ceiling of $15,000 on the arbitration award may elect to submit his or her case to arbitration, without the consent of the defendant. Both parties may also

---


\(^2\)Suits for monetary compensation for personal injury, property damage, or other loss incurred as a result of another's unlawful act, breach of contract, or negligence.
stipulate to arbitration of any case, regardless of its monetary value. The rules provide for completing the arbitration process within 3 months of a case's assignment to the program. The arbitrators are directed to conduct the hearing as informally as possible, with relaxed rules of evidence. The arbitrator's award has the same force and effect as a court judgment, but it may be appealed by either party. The case may then be tried "de novo," that is, as if arbitration had not occurred. If the party that requested trial does not better his position, however, he may be penalized by having to pay the arbitrator's fee and specific court costs.

The judicial arbitration program was sponsored by the administration of Governor Edmund G. Brown, Jr., and supported by judges, attorneys, legislators, and representatives of interest groups who shared a concern about the burdens imposed on the courts and the public by the rapidly increasing rate of civil litigation. By adopting the program, the legislature hoped to reduce court congestion, stabilize rising court costs, reduce the elapsed time to disposition for smaller civil suits, and reduce other burdens on litigants. The legislature hoped to reduce the judicial workload by diverting smaller cases from trial, and substituting volunteer arbitrator time for the judicial time that would otherwise be necessary to dispose of these cases. They expected this to free judges to devote their time to the backlog of larger cases. Thus, arbitrators and judges would work together to reduce congestion. Over the long run, the legislators also hoped to stabilize court costs, because fewer new judgeships would have to be added to cope with the increasing rate of litigation. The legislators also hoped to benefit litigants in smaller civil suits by providing a "fast track" to judgment, and by establishing an informal hearing process that would be less costly, less time-consuming and, perhaps, more understandable to the average citizen, than the traditional trial process. Finally, the legislators believed that these procedural improvements could be made without jeopardizing either plaintiffs' or defendants' chances of receiving a fair hearing and just resolution of their cases. Although there was a consensus among the participants in the legislative process that the mandatory program was desirable, there was considerable dispute over its specific features, and the program that emerged was the result of a number of compromises among the parties.

The California program became effective July 1, 1979; consequently, it has not been functioning long enough to yield definitive

---

3The rules provide that "no reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings." Cal. Rules of Ct. 1616.
results about its effectiveness in meeting the legislators’ objectives. During its first year, many courts experienced start-up problems that were not resolved until well into the year. Procedures for implementing the program changed during the year as courts modified or adopted new policies. In addition, the response of attorneys and litigants to the program, expressed in their willingness to volunteer for arbitration and in their demand for de novo trials after arbitration, continues to evolve as they gain more experience with it.

Nevertheless, it is useful to examine the experience of the program to date. The likelihood of its meeting its goals can be tentatively assessed through a review of its record in diverting cases, reducing judicial workload, recruiting arbitrators, speeding case disposition, and cutting costs. In addition, examining program performance during its first year, when procedures for implementing it differed considerably across courts, offers an important opportunity for studying the relationship between the different ways in which courts have decided to implement arbitration, and its potential for success. Finally, California’s program has a sunset provision requiring that the legislature evaluate its costs and benefits in 1984, before deciding whether to continue it. An early assessment of the program may contribute to that evaluation by identifying the data it will require and problems that may impede data collection.

With these concerns in mind, The Institute for Civil Justice decided in early 1980 to undertake a study of the first year of the California judicial arbitration program. This report presents the results of our exploratory analysis of the program’s effects on the courts and on litigants. We began by identifying the objectives of the program’s supporters. We first studied the program’s legislative history and interviewed 20 of the principal participants in the legislative process, including state legislators and legislative, executive, and judicial agency staff. Then, using data collected by the Judicial Council of California, the local courts, and the State Controller’s office, we constructed various measures of program outcomes and compared them with those expected by the program’s designers. Finally, we examined the relationship between these outcomes and implementation decisions made by the local courts. We derived our information about these decisions from interviews with 34 court officials and practitioners in 6 of the 13 jurisdictions initially required to adopt the program. The jurisdictions

---

4The Judicial Council of California reports regularly on the operations of courts, makes recommendations to the governor and the legislature, and adopts rules for court administration, practice, and procedure. It is headed by the Chief Justice.

5The statute requires all superior courts with 10 or more judges to adopt the program. At the time of its passage, there were 12 such courts: Alameda, Contra Costa, Fresno, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco,
selected for more intensive study were the superior courts of Alameda, Los Angeles, Orange, San Bernardino, San Francisco, and Santa Clara Counties, which together account for more than half of the civil court workload of the state's superior court system.

OVERVIEW OF PROGRAM PERFORMANCE

During its first year of operations, about 24,000 smaller-value cases were diverted to the judicial arbitration program in the 13 courts that were required to adopt it. This is about twice the number of cases diverted to California's previous, entirely voluntary, program during its entire three-year history.

The new program seems to be acceptable to most attorneys. About half of the cases assigned to arbitration arrived there voluntarily, either by plaintiff's election or by stipulation of both parties. The courts have had almost no trouble recruiting an adequate supply of attorney-arbitrators to deal with the caseload. And although the rate of requests for de novo trial averaged about 40 percent over the year, few of these cases are likely to be pursued to trial.

The legislators thus appear to have scored a victory in extending the scope of the program. Our analysis suggests, however, that diverting 24,000 smaller-value cases from the civil trial calendar will relieve congestion in the large superior courts only mildly, because they are still far outnumbered by the rest of the cases in the civil workload. In addition, the potential effect of the program on court costs is highly uncertain.

The program appears to offer some important benefits for litigants with smaller civil suits. Those who volunteer for arbitration enter a faster track to adjudication than would otherwise be available to them. Under certain conditions, court-ordered arbitration can also speed resolution of smaller cases. Arbitration should save time and out-of-pocket expenses for some litigants. The available evidence suggests that attorneys and litigants believe that the arbitration process is fair and does not hurt their chances of obtaining equitable resolution of their cases.

Reducing Court Congestion

Many supporters of the program hoped that it would sharply reduce court congestion. It appears that they should temper these hopes somewhat.
Under the current program rules, civil damage suits are the only type of cases that are eligible for arbitration. In the superior courts that were required to adopt mandatory arbitration, we estimate that about 58 percent of all civil damage suits that came up for court review during the program’s first year were diverted to arbitration. That percentage sounds large but damage suits do not dominate the civil caseload, which also comprises large numbers of family law cases, civil petitions, and probate and guardianship cases. We estimate that the total arbitration caseload—comprising only smaller-value civil damage suits—was only about one-fifth the size of the total pending civil caseload in the 13 largest courts.

Only a small fraction of all suits require jury trial. Contrary to conventional wisdom, however, we found that smaller-value suits account for a significant proportion of all civil damage cases that do reach jury verdict. By diverting about 24,000 smaller-value suits to arbitration annually, we estimate the courts might save from 200 to 400 civil jury trials per year—a savings of about 10 to 20 percent in the 13 largest courts.

We do not expect that reduction to result in a proportionate reduction in the total judicial workload, however, because less than half of a judge’s time is spent in jury trials, and because the arbitration program itself requires some judicial attention. The judicial time saved will depend on how much time smaller-value cases required in the past, the rate of trial de novo for cases arbitrated under the new program, and the length of these trials, all of which are currently unknown. Under our most optimistic set of assumptions, we estimate that the 13 courts could save as many as 26 judge-years annually, a reduction of 5 percent in the total number of judge-years they expended in the year before the program began. This estimate assumes that the de novo trial rate will be 1 percent (of all cases assigned to arbitration) and that the trials will last an average of 3 days. Under our most pessimistic assumptions, we estimate that the courts might experience a small increase in judicial time spent on smaller cases, equivalent to 3 judge-years. This estimate assumes a 3 percent de novo trial rate and a trial length of 5 days. It also assumes that, prior to arbitration, smaller-value cases required substantially less time for disposition than the average case.

The way in which local courts implement the program will also affect its ability to reduce judicial workload. For example, court policies regarding the imposition of monetary sanctions, authorized by the statute to discourage frivolous de novo trials, may affect the rate of such trials. We found little evidence that the courts regularly impose these sanctions. In addition, some courts assign all arbitration cases to settle-
ment conferences before permitting them to proceed to arbitration hearings. Unless these conferences are conducted by attorneys sitting as judges pro tem, they increase the judicial workload. During the program’s first year, this policy did not yield measurable increases in pre-arbitration settlement rates. Finally, the timing of assignment of cases to arbitration may affect the program’s potential for reducing workload. Proponents of early assignment believe it maximizes such potential by removing cases from the trial calendar before they can begin to consume court resources. Proponents of late assignment believe that it provides maximum opportunity for the parties to settle their cases out of court, reserving the expenditure of judicial time for those cases that actually require it. The available data do not permit an empirical assessment of the comparative validity of these assertions.

The program’s potential could be increased somewhat by raising the dollar limit for eligibility for its mandatory and elective components, thereby increasing the size of the arbitration caseload. But because there are no data on the composition of the civil caseload by dollar value, there is no way to predict how different monetary limits would affect the arbitration caseload. In addition, any consideration of increasing the scope of the program must not lose sight of fact that it depends on volunteers. Although the courts have had no trouble recruiting arbitrators to date, it is possible that larger caseloads would exhaust the supply.

Stabilizing Court Costs

During its first year, in the 11 large superior courts that reported detailed expense data, the arbitration program cost about $1.8 million to operate. Arbitrators’ fees accounted for about 60 percent of this total. Many cases that were assigned to the program in the first year, however, had not completed the process by the end of the year: Some were still awaiting selection of an arbitrator, and some were awaiting an arbitration hearing or award. We estimate that the total cost of program operations for all cases assigned to arbitration during the first year in the 13 large Superior courts will eventually reach about $3.4 million. We expect that the average cost per diverted case, including cases that are settled before arbitration, will be about $140.

Whether this represents a net savings or net cost to the taxpayers depends on the how much it costs to process the same kind of cases

---

*Because Fresno’s program did not become operational until the latter part of the year, we did not include its expenses in our analysis. Ventura, whose claims for reimbursement had previously been rejected by the State Controller’s office, did not submit detailed expense data.*
without arbitration, and that cost is unknown. To arrive at an approximation, we used statewide estimates of judicial costs and a complex set of assumptions about the time required to process smaller cases. We thereby estimated that, under various assumptions, the program could save as much as $4 million annually, could break even, or could result in a $4 million increase in court costs. Without additional data, it is impossible to say where within this range the final outcome will lie. Our most optimistic estimate of savings assumes a 1 percent trial de novo rate and 3 day trials. Our most pessimistic estimate assumes a 3 percent trial de novo rate and 5 day trials; it also assumes that, prior to arbitration, smaller-value cases required substantially less judicial time for disposition than the average case.

Even under the most optimistic assumptions, neither practitioners nor court analysts expect the arbitration program to reduce the cost of operating the courts in the short run, because the courts will expend any savings in judicial and other court time on reducing court backlogs and keeping up with continually rising caseloads. In the long run, however, if arbitration reduces the judicial workload somewhat, the rate of increase in the number of authorized judgeships could slow, resulting in net savings for taxpayers.

The likelihood of future savings due to arbitration partly depends on how the program evolves over the next few years. Savings will be less likely if the proportion of cases diverted to arbitration decreases—as it could, in time, if the legislature does not increase the monetary limit of the program to keep up with inflation. Savings will also be less likely if the cost of processing arbitration cases increases at a faster rate than the cost of processing other cases. This could occur if arbitrator fees increased substantially, or if time-consuming pre-arbitration settlement conferences are instituted widely.

Whether or not the arbitration program reduces court costs over the long run, it may reallocate some of these costs from the local jurisdictions to the state. By law, the state must reimburse the counties for any “net costs” the program imposes on them. As a practical matter, the state currently reimburses the counties for all costs incurred by the arbitration program. Counties are therefore spared any additional expense to process cases diverted to arbitration. In addition to paying for judges’ time, the state now pays for administrative time devoted to these cases; however, the state is currently attempting to develop a formula for calculating the net savings that the counties may be accruing due to arbitration, and hopes eventually to recoup any excessive payments it may have made to them.
Reducing Time to Disposition

Arbitration’s effectiveness in reducing the time to disposition for small cases appears to depend on whether litigants volunteer or are ordered to arbitration, how the program is implemented locally, and the degree of congestion on the local trial calendar.

In all courts, arbitration offers a “fast track” to parties who volunteer for the program. In the six courts we studied closely, according to court administrators’ estimates, it takes an average of only 7 months to reach an arbitration award when the litigant volunteers for it soon after the suit is joined.

Litigants whose cases are ordered to arbitration do not fare as well. Across the six courts, it takes an average of 22 months for these cases to reach arbitration award. In four of the six courts, it could even take slightly longer for a case to reach an arbitration award than to reach jury trial.

The elapsed time for a court-ordered case to reach an arbitration award depends primarily on when it is assigned to the program and how crowded the court calendar is. Congested courts that assign cases early in the pretrial process reap the greatest time savings. Congested courts that assign cases late in the pretrial process obviously cannot affect the time to disposition for arbitrated cases—except perhaps to extend it. In courts with uncongested calendars, statutory constraints on when a case is to be assigned to arbitration can worsen matters to the point that it takes longer to arbitrate a case than to try it.

Courts can speed disposition of both court-ordered and voluntary cases by expediting the selection of arbitrators, by monitoring the progress of cases, and by adopting strict limits on arbitration continuances. Such practices will increase the amount of time required to administer the program, however.

Reducing Other Burdens on Litigants

It is uncertain whether arbitration provides other benefits to litigants of smaller-value suits. We interviewed a small number of attorneys, who affirm that it costs less to adjudicate cases through arbitration than it does to try them. Arbitration eliminates expert and other witness fees and certain court costs, and reduces the amount of attorney time required to present the case. But what share of these savings is passed on to litigants, whether there are other reductions in litigants’ transaction costs, and whether arbitration costs litigants more or less than settlement without arbitration, are unanswered questions. We found no evidence that arbitration is affecting the contingent fee structure.
The attorneys we interviewed generally believe the arbitration process is fair, but we do not know whether litigants share this view and whether they perceive other benefits from the program, nor do we know whether arbitration will maintain or improve the equity of case outcomes.

The rate of requests for de novo trials, while somewhat higher than anticipated, should not be interpreted as indicating concern about outcomes. Not many attorneys or litigants are determined to proceed to trial. Rather, attorneys appear to be filing such requests to keep their options open and to lay the foundation for post-arbitration settlement negotiations. Plaintiffs and defendants are equally likely to request trial de novo, suggesting that there is no general tendency for either side to believe that arbitration hurts its chances for obtaining a fair resolution of their cases.

Finally, some plaintiffs' attorneys told us that arbitration enables them to take on more smaller-value civil cases and obtain fairer (and larger) settlements for their clients than they could formerly. Conversely, some defense attorneys told us that arbitration improves the prospects for settling cases earlier and at a lower dollar value. Clearly, the effects of arbitration on the settlement process require further study.

THE FUTURE OF ARBITRATION

Unless the legislature decides to extend it, the mandatory judicial arbitration program will expire in 1985. The legislature's decision will depend largely on the satisfaction of the courts, attorneys, and litigants with the program, but the phenomenon of political inertia may prolong its existence. As long as a program does not cause problems for key constituencies, it may be extended indefinitely, even if it is only marginally successful in meeting its original objectives.

Most of the court officials we interviewed do not think arbitration will materially affect their workload. Faced with rising caseloads and legislative resistance to adding new judgeships, however, they seem willing to experiment with arbitration because it generally does not impose new costs or new administrative burdens on them, and because they are free to incorporate the program into their existing procedures pretty much in whatever way they choose. Some courts also see the program as an opportunity to bring about change. These courts view arbitration as an additional tool for managing the court process.

Attorneys' reactions to judicial arbitration are more complex than those of the courts. The program could affect the way attorneys handle
their cases, their financial rewards, and the outcomes of their cases. Moreover, it touches on two of the most sensitive issues regarding the American judicial system, due process and the citizen’s right to a jury trial, about which many trial attorneys have strong philosophical convictions. Like court officials, attorneys will probably accept the program if it makes their job easier and if it does not harm them or their clients. But their reactions to arbitration will be colored by their beliefs about its larger effects on the system of justice.

All else being equal, plaintiffs’ attorneys working on a contingent fee basis should prosper in a situation where such cases are processed expeditiously, with minimal expenses, because they will be able to handle more cases and earn greater financial rewards. Defense attorneys probably do not gain financially from such programs because they are paid on an hourly basis; but as long as they are involved in a substantial number of larger cases, they should not suffer from a program that expedites resolution of smaller-value cases.

Plaintiffs’ attorneys are concerned, nevertheless, that arbitration may be construed as a first step in narrowing the purview of the jury trial process; and both the plaintiffs’ and defense bars are concerned that substituting arbitration for jury trial may bias a preponderance of case outcomes toward one side or the other. To satisfy the bar, the program must prove that it can maintain the same pattern of outcomes as prevailed before arbitration.

Litigants have a clear interest in the expeditious and economical resolution of cases. If arbitration can reduce the time and cost of resolving small cases, it should make it easier for plaintiffs to find attorneys to take their cases, shorten their period of uncertainty about the case outcome, and alleviate financial hardship. Defendants may find it more difficult to settle claims without litigation, but they too should benefit by reducing their costs for cases that are litigated.

In sum, judicial arbitration may be a uniquely appealing program. Although it does not appear to have major promise as the solution to court congestion and rising court costs, it seems to have made friends for other reasons, and perhaps more important, it seems to have made no enemies.

FUTURE RESEARCH

In the course of our analysis we identified several areas where more data must be collected for a thorough assessment of the arbitration program. Some of these data relate to the program itself, some to the court process more generally, and some to attorneys and litigants.
Reports of program activities should indicate what proportion of the arbitration cases are personal injury suits and what proportion are other civil complaints. Arbitration administrators should report the average interval between the time a case is placed on the arbitration hearing list and the time it is removed from the list, either by administrative dismissal, by settlement, or by filing of the arbitration award. Courts should also record the number of arbitrated cases that are subsequently tried de novo, rather than simply reporting the rate of requests for such trials. Information should also be collected on the allocation of judicial time to different activities for different types of cases, the costs of judicial and nonjudicial personnel, the effects of arbitration on the settlement process, and its effects on litigants' costs and their satisfaction with the process. The additional court data might be obtained through review of local court records and interviews with judges and court managers in a small number of courts. Surveys of attorneys and litigants would probably be required to obtain additional information about the effect of the program on the settlement process, litigation costs, and satisfaction.

Collecting these data will be costly. Although the legislature has directed the Judicial Council (with the assistance of the Auditor General) to conduct an analysis of the costs and benefits of mandatory arbitration, to date it has not appropriated funds to conduct such an analysis. It is therefore not clear how much money the legislature is willing to invest in assessing the program.

Our exploratory analysis demonstrates the problems that evaluators will encounter if they attempt to assess the program's effects without additional research data collection. We believe that a thorough assessment will be well worth the time and money, in view of the generally positive response to the program and its clear potential for reducing time to disposition for those who volunteer to arbitrate. Clearing away the uncertainty surrounding the program's effects on court workload, costs, and the outcomes of cases, will benefit all parties concerned, from the legislature and courts down to the ordinary citizen.
Acknowledgments

The research described here would not have been possible without the cooperation of the staffs of the Judicial Council of California, the state controller's office, the legislature and the local courts. We particularly want to thank Alexander Yakutis and Joe Doyle of the Judicial Council; the judges and court management staffs in Alameda, Los Angeles, Orange, San Bernardino, San Francisco, and Santa Clara; and the attorneys in these jurisdictions. All of these people took time away from their busy schedules to patiently and thoughtfully answer our many questions; many also reviewed earlier drafts of this report.

We would also like to thank our Rand colleagues for their contributions to this study. William Felstiner and Warren Walker, who served as technical reviewers, offered particularly helpful suggestions for presentation of the study results. Stephen Carroll provided useful counsel through many stages of the research and writing. Thanks also are due to Will Harriss for his skillful editing, and to Johnne Campbell and Diane Reingold and her staff for their preparation of the manuscript.
Contents

FOREWORD ........................................... v
EXECUTIVE SUMMARY ............................. vii
ACKNOWLEDGMENTS ............................... xix

Section
I. INTRODUCTION .................................. 1

II. DEVELOPMENT AND DESIGN OF THE JUDICIAL
    ARBITRATION PROGRAM ......................... 4
    Historical Background ........................ 4
    Early Arbitration Programs ................... 9
    The 1978 Mandatory Arbitration Law ........ 11

III. THE EFFECTS OF ARBITRATION ON COURT
    CONGESTION ................................... 24
    Proportion of the Caseload Diverted to Arbitration .. 25
    Reduction in Court Workload Due to Arbitration ... 29
    The Supply of Arbitrators ...................... 48
    Summary ....................................... 51

IV. THE EFFECTS OF ARBITRATION ON COURT
    COSTS ........................................... 53
    The Cost of the Arbitration Program .......... 54
    Potential Cost Effect of Arbitration .......... 62
    Effect of Arbitration on Court Costs .......... 68

V. THE EFFECTS OF ARBITRATION ON LITIGANTS .... 70
    The Effect of Arbitration on Time to Disposition .. 70
    The Effect of Arbitration on Litigants' Costs .... 81
    Arbitration and Equity ....................... 84
    Does Arbitration Benefit Litigants? ............ 90
VI. CONCLUSIONS ......................................................... 92
    Effects of Arbitration During Its First Year .......... 92
    The Future of Arbitration ............................... 97
    Further Research ....................................... 99

Appendix
A. Chronology of Important Events Preceding Consideration
    of Mandatory Arbitration in California ............. 103
B. Chronology of Important Events in the Legislative History
    of the California Mandatory Arbitration Law ....... 105
C. Kerry Memorandum on SB 1362 .......................... 108
D. Judicial Arbitration Statute ........................... 112
I. INTRODUCTION

During the last decade, the rate of civil litigation has increased sharply in many metropolitan trial courts. Across the nation, courts have struggled to combat the resulting congestion with a variety of procedures for expediting civil cases. Some procedures are directed toward streamlining the pretrial process, while others attempt to divert certain classes of cases from trial. Among the latter, judicial arbitration is widely viewed as having the most promise for reducing congestion and speeding litigation while maintaining or improving the equity of case outcomes.

First introduced in Philadelphia in the early 1950s, judicial arbitration (also known as court-annexed or compulsory arbitration) has since been adopted by nine states\(^1\) and has been the subject of experimentation in the federal district courts as well. Although these programs differ in many ways, their common intent is to substitute adjudication by volunteer arbitrators for the traditional judge and jury trial. Unlike the classical form of arbitration, judicial arbitration is compulsory but its results are not binding.

In 1978 the California State Legislature turned to judicial arbitration as a means of coping with steadily increasing civil caseloads. Under the rules of the program, the court orders all civil damage suits\(^2\) involving amounts of $15,000 or less to be heard by a randomly selected attorney or retired judge who has volunteered to serve as an arbitrator. California's program is one of the largest and most ambitious in the nation, and not surprisingly, practitioners in other states are eager to see if it "works."

The program has not yet been functioning long enough to yield definitive results. As with most programs of this magnitude, its first year has been one of modification and fine tuning of the original design. But although it is not possible as yet to assess the long-term costs and benefits of judicial arbitration, much can be learned from this early experience. Every program, no matter how detailed its original provisions, undergoes further development and modification during its implementation phase. The decisions made during that phase may determine the program's future success or failure; but because these


\(^2\)Suits for monetary compensation for personal injury, property damage, or other loss incurred as a result of another's unlawful act, breach of contract, or negligence.
decisions often go unrecorded, both analysts and officials contemplating similar programs are left to wonder what decisions were critical to its success or where some aspect of the program went wrong.

With these concerns in mind, The Institute for Civil Justice decided in early 1980 to undertake a study of the critical implementation phase of the California judicial arbitration program. This report presents our results; it is an exploratory analysis of the program’s effects on the courts and on litigants during its first operational year.

We began the study by identifying the primary objectives of the program’s supporters. We first analyzed the program’s legislative history and interviewed the principal participants in the legislative process. Then, using data made available by the Judicial Council of California, the local courts, and the state controller’s office, we constructed various measures of program outcomes and compared these outcomes with those expected by the program’s designers. In the course of our analysis, we discovered that several measures of performance and cost that are critical to a systematic quantitative analysis of the effects of arbitration were unavailable and difficult to construct. Our conclusions thus underscore the need for further research on the program. This need is all the more pressing in view of a “sunset” provision in the authorizing legislation that requires the legislature to review the costs and benefits of the program in 1984 and determine whether or not to extend it.

Our analysis paid particular attention to the influence of important implementation decisions made by the local courts. Our information about these decisions is based on interviews with officials in 6 of the 12 courts initially required to adopt the program. The courts selected for more intensive study were the superior courts of Alameda, Los Angeles, Orange, San Bernardino, San Francisco, and Santa Clara Counties. Together, these courts account for more than half of the civil court workload of the state’s superior court system. In each court we interviewed the judge responsible for directing the arbitration program, the court executive officer or his deputy or both, the arbitration administrator, and one or more attorneys who were familiar with the program. In two courts we also interviewed the presiding judge.\(^5\)

\(^3\) Altogether, we interviewed 30 people regarding the legislative history of the program, including state legislators, their staff, staff members of the Governor’s office, the Department of Finance, and the Judicial Council, judges, attorneys, and representatives of the various groups that participated in the legislative debate.

\(^4\) The Judicial Council of California reports regularly on the operations of courts, makes recommendations to the governor and the legislature, and adopts rules for court administration, practice, and procedure. It is headed by the Chief Justice.

\(^5\) In all we interviewed 34 people in this phase of the research. In many cases, we followed up our initial interviews with additional telephone conversations and correspondence.
Section II of the report describes the historical background of the adoption of mandatory arbitration in California, and the evolution of the program's design. Sections III through V present the results of our exploratory analysis of the program's effects. Section III examines arbitration's potential for reducing court workload. Section IV analyzes the costs of operating the program during the first year, and presents an approach to estimating the program's potential effect on court costs. Section V discusses the effects of arbitration on litigants, focusing on time to disposition, costs of litigation, and equity. Section VI summarizes our findings and discusses how certain groups are likely to respond to the program in the future. The section concludes with a discussion of the research that will be needed for a comprehensive analysis of the costs and benefits of the judicial arbitration program.
II. DEVELOPMENT AND DESIGN OF THE JUDICIAL ARBITRATION PROGRAM

The judicial arbitration program was adopted by the California State Legislature after several years of experimentation and consideration of alternative designs. This section describes the events leading up to the introduction of the mandatory arbitration bill in 1978, and the legislative debate over the bill. We identify the primary objectives of the program's supporters and the key issues that had to be resolved in its design. The section concludes with a description of the provisions of the arbitration program.

HISTORICAL BACKGROUND

During the decade preceding the bill's introduction, the California state courts experienced a steady increase in caseloads. Figure 2.1 illustrates some of the major trends in the superior courts during the period from fiscal year 1968 to fiscal year 1979, using a change index that resembles the Consumer Price Index. In this case, the number of filings in the base year, FY 1968, is set to 100, and increases and decreases are computed in relation to this base. Figure 2.1 shows that total filings increased more than 50 percent during this time, from about 468,000 in FY 1968 to 740,542 in FY 1979. Civil filings, which rose steadily throughout the decade (from about 319,000 to 551,142), constituted the greatest part of this increase; criminal filings, which rose sharply at the beginning of the decade, had leveled out by FY 1979 to about 54,000.

The increase in filings was much greater for some types of civil cases than for others. Figure 2.2 illustrates trends during the decade for different categories of civil cases. Filings in a few categories, such as probate and eminent domain cases, remained steady or even decreased, but they rose sharply in most categories, notably in personal injury and property damage suits, other civil complaints, and civil petitions. At the end of the decade, personal injury and property

\[1\]

\[1\] "Other civil complaints" include all civil actions other than probate, divorce, eminent domain, and personal injury and property damage suits seeking either monetary damages or other nonmonetary relief. "Other civil petitions" include adoption and change of name actions, petitions to establish the fact of life or death, various writs, and other special proceedings.
Fig. 2.1—Change in number of superior court filings, Fiscal Years 1968-1979
(number of filings in FY 1968 = 100)
Fig. 2.2—Change in number of superior court civil filings, Fiscal Years 1968-1979
(number of filings in FY 1968 = 100)
damage filings totalled almost 93,000, about twice what they had been at the beginning of the decade. Other civil complaints totalled more than 99,000, a level two and one-half times that of FY 1968. Increases in these categories were particularly significant because such cases require, on the average, more time for disposition than any other type of civil case.

As more cases crowded onto the civil calendar, court officials, legislators, and attorneys worried more than ever about the consequences of "court congestion." Practitioners were particularly alarmed by the lengthening time-gap between the point at which attorneys declared a civil case ready for trial and the point at which the court was ready to try it. In 11 of the 20 largest Superior Courts in 1968, the median interval between these points was one year or less. In the remaining courts the median interval was about one and one-half years. By 1979, only 4 of these same courts reported median intervals of one year or less, and only 11 reported intervals of one and one-half years or less. In 4 courts the interval was more than two years and in 2 courts it was three years or more. As the interval steadily lengthened, the term "backlog" was added to the rhetoric of court analysts and reformers, to denote the inventory of cases awaiting court attention.

The legislature and the courts attempted to cope with the situation in various ways. One obvious response was to authorize additional judgeships. As illustrated in Fig. 2.3, the number of authorized judgeships increased about 40 percent during the 1970s. Nevertheless, the number of civil active cases per judgeship continued to climb, from a low of 140 at the beginning of the decade to a high of 259 at its end. The courts also instituted procedural changes to deal with congested civil calendars. Calendar management reforms (e.g., strict trial scheduling, limits on continuances, and mandatory pretrial settlement conferences) were introduced to expedite case dispositions and remove "deadwood" from the active case file. Perhaps as a result of more intensive court efforts to facilitate pretrial settlements, the number of personal injury cases going to jury trial decreased substantially. The number of other civil cases and criminal cases going to jury trial, however, continued to rise, albeit sporadically.

---

2This means that half of the cases tried at this time had been declared ready for trial sometime within the previous 12 months; the remainder had been declared ready more than 12 months previously. Readers should note, however, that most civil cases never reach trial because they are settled by the parties. Courts do not report the average elapsed time to disposition for these cases.

3See Judicial Council of California, Annual Report, 1980, p. 84.

4"Civil active cases" include all civil cases in which a memorandum, called the "at issue" memorandum, has been filed notifying the court that the case is ready to have a trial date assigned.
Fig. 2.3—Change in number of superior court judgeships, civil active cases per judgeship and dispositions requiring juries, Fiscal Years 1968-1979
(number of each in FY 1968 = 100)
EARLY ARBITRATION PROGRAMS

The use of judicial or court-annexed arbitration to combat congestion and delay has a long history in California. (For a chronology of events leading to the 1978 Mandatory Arbitration Law, see App. A.) Proposals to establish a mandatory arbitration program were first made in the early 1960s; their proponents believed it would reduce court congestion, delay, and costs by diverting smaller cases from trial. They were influenced in their thinking by the success of the Philadelphia arbitration program, which had been introduced in the late 1950s. Because a substantial portion of California trial court costs are borne by county government, county boards of supervisors had a particular interest in the promising Philadelphia program.

Initially, the California Judicial Council, which is the constitutional body that oversees the state judiciary, opposed the program. The council believed that arbitration is simply another form of pretrial conference with no advantages over other techniques already in use to process small cases efficiently: settlement conferences, use of referees, and assignment of commissioners as judges. They also believed that arbitration intrudes into the courts' traditional domain by creating "substitute judges" who dispense "second-class justice."5

Despite that opposition, the Los Angeles bar created a voluntary binding arbitration program in the early 1970s that quickly spread to San Francisco and other large trial court jurisdictions. The voluntary program was a response by lawyers, who, concerned that the growing crush of civil litigation would lead to the demise of civil juries, hoped to divert smaller cases from the court and thus preserve the jury system for higher-valued cases. Our interviews with participants in the design of the voluntary program also suggest that dissatisfaction with the decisions of pro tem judges also helped generate support for voluntary arbitration, which permitted participation of the litigants' attorneys in the selection of arbitrators.

Although few cases were processed through the voluntary program, it seems to have persuaded skeptics that trial attorneys sitting as arbitrators could hand down equitable decisions. A number of parties were "keeping book" on the arbitration program in Los Angeles at the time. Their tabulations focused on comparing arbitration awards by plaintiff and defense attorney- arbitrators, and generally found no evidence that attorneys favored their "own side" in making awards.

Increased legislative interest prompted a 1972 Judicial Council contract study recommending mandatory arbitration for smaller personal injury cases in larger superior courts. The study found arbitration

plans in other states and the voluntary attorney-sponsored plans in California to be both workable and acceptable to attorneys, judges, and insurance companies.  

Following the study's completion, a bill permitting the California Judicial Council to set up a uniform statewide arbitration system in the superior courts was passed by the legislature in 1974, with the support of the Judicial Council and the California Trial Lawyers Association. It was vetoed by then-Governor Reagan. Although concerns about rising rates of litigation and the success of the attorney-sponsored program had apparently led the state bench to favor arbitration, the 1974 bill called for the state to pick up the cost of administration, including the arbitrators' fees, and because of this the California State Finance Department recommended that Governor Reagan veto the bill. More specifically, the department objected to a situation in which the counties, which bear the lion's share of trial court costs, would reap the primary financial benefits of smaller trial caseloads while the state picked up the arbitration cost tab. They feared this would be a first step toward state funding of local trial courts, which they opposed on cost grounds. There was also opposition to the broad discretion given the Judicial Council to design how the program would operate.

In 1975, after a change in administrations, a bill similar to the one previously vetoed was signed by Governor Brown, and a statewide arbitration program was finally authorized. Governor Brown approved the bill over the objection of the Finance Department, accepting Judicial Council arguments that the program would have a "significant" effect on court backlogs while providing an equitable and less expensive means of resolving disputes. Although the bill delegated broad administrative power to the Judicial Council, the Governor was informed of the primary features of proposed implementing rules before he approved the measure.

Under rules promulgated by the Judicial Council, arbitration was required in superior courts with ten or more judges and made optional in other superior courts. Under this program, not only could parties stipulate to arbitration by mutual agreement (as under the voluntary attorneys' plan), but plaintiffs could also elect arbitration for cases valued up to $7500; in other words, they could force the defendants into arbitration as long as the plaintiffs were willing to accept a ceiling on the award. To obtain support for the legislation from the organized bar, however, and to ensure that the program would withstand

---


7"Stipulate" is a legal term referring to the making of an agreement by opposing attorneys that regulates a particular aspect or aspects of a legal proceeding.
constitutional challenge, both parties were given the right to reject the arbitrator's award and request that the case be tried. This right to a "trial de novo" was established regardless of whether arbitration was elected or stipulated. This was a significant change from the earlier attorney-sponsored voluntary arbitration program. Under that program, parties volunteering for arbitration also agreed to accept the award as binding. Under the new legislatively authorized program it was necessary to preserve the right to trial de novo because, in instances of plaintiffs electing arbitration, both parties had not waived their rights to trial.

The court administered the new program but could not order cases to arbitration except on motion of the plaintiff. The state paid the arbitrators' fees and the costs of program administration. About 4500 cases per year were set for arbitration during the three years the program was in effect. About half of these were actually heard by an arbitrator; the rest were settled out of court. As with the earlier voluntary program, the tabulation of awards suggests that attorney arbitrators were able to make equitable decisions. Acceptance of this program by the bench and the bar paved the way for instituting mandatory arbitration.

THE 1978 MANDATORY ARBITRATION LAW

In 1977 the issue of court-ordered arbitration was raised anew by Governor Brown's staff when the Governor was presented with legislation to establish 54 new judgeships. The Governor vetoed that legislation, and his legal affairs staff began drafting a program to establish a broader, court-ordered arbitration program, which they saw as an alternative and preferable approach to coping with rising court caseloads. After a year of debate, negotiation, and compromise over the provisions of the proposed program, a mandatory arbitration bill was signed into law by Governor Brown in the fall of 1978. (See App. B for a chronology of events in the legislative history of the mandatory arbitration law.)

By 1978, there was a definite constituency favoring a statewide mandatory arbitration program. Governor Brown's administration, unwilling to continue the previous policy of increasing judgeships to deal with increasing caseloads, supported arbitration as an alternative that

---

*A de novo trial is a trial in which a case is heard afresh as if it had not been heard before and as if no previous decision had been rendered. In the context of arbitration, it is a trial in which neither the fact that a case has been arbitrated, the substance of the arbitration hearing, nor the arbitrator's decision may be offered in evidence.*
would also benefit litigants. His staff believed that arbitration would demystify the litigation process for the average citizen and reduce his dependence on lawyers. In the face of Brown’s resistance to adding judgeships, the judiciary and the state bar supported mandatory arbitration as a means of coping with court congestion. Also, many judges and trial attorneys representing both plaintiffs and defense supported the program as a way of diverting smaller cases from trial, thereby reducing the elapsed time to trial for larger cases. County governments supported arbitration as a way to reduce their court operating costs as long as the state would pick up the administrative costs, including arbitrators’ fees.

In June 1978, Proposition 13 was passed by California voters. After the election, Governor Brown and the Legislature were preoccupied with finding ways to offset the impact of massive property tax reductions. In this context, mandatory arbitration was viewed as a modest effort to both offset county costs and improve judicial efficiency.

The Objectives of Mandatory Arbitration

Various individuals and groups had their own reasons for supporting the mandatory arbitration law, but the law embodied several general objectives envisioned by its proponents.

First, it was designed to reduce congestion and backlogs in the large superior courts. By diverting smaller cases from trial, and substituting volunteer arbitrator time for the judicial time that would otherwise be required, arbitration would reduce the judicial workload. Judges would then be able to turn their attention to larger cases. Thus, arbitrators and judges would work together to reduce backlogs.

Second, the reduction in judicial workload would reduce court costs. Proponents contended that it is inappropriate to use an elaborate and costly court process to resolve civil disputes involving modest sums. Some estimated that the simplified arbitration procedure would cost only $100 per case.

Third, proponents believed arbitration would be more expeditious, less costly, and more satisfying to litigants: The expedited arbitration process would reduce time to disposition, and the streamlined adjudicative procedure, with relaxed rules of evidence, would reduce litigation costs. Proponents further believed that the average citizen finds the adversarial trial process incomprehensible, and that the process deprives him of the opportunity to participate. The use of less formal, more easily understood, procedures would increase citizen satisfaction with the dispute resolution process. Finally, proponents contended that mandatory arbitration would maintain equity. Experience in Phila-
delphia and in the voluntary arbitration program in California indicated that the outcomes of the arbitration process would probably mirror those of the trial process. Some believed arbitration might even produce fairer results because of greater direct involvement of the parties.

The law's proponents also put hope in mandatory arbitration as a way to preserve the jury system. As mentioned above, many lawyers believed that some steps had to be taken to handle civil actions more expeditiously or pressures would build to eliminate civil juries altogether. Furthermore, a successful arbitration program might improve public attitudes toward the judicial system.

Participants in the Legislative Debate

The Governor's office initially drafted the arbitration legislation. It was a key element in the Administration's program to relieve court congestion. Senator Jerry Smith introduced the bill as SB 1362, with the claim that it would "modernize the courts and bring welcome relief to bewildered litigants." He and his staff were major participants with the Governor's office in developing the details of the legislation, in cooperation with interest groups representing the bench and the bar. After questions were raised by members of the Senate Judiciary Committee about how the program would be implemented, a group of prominent judges and lawyers was convened to help work out the details of the bill and provide supporting testimony.

Representatives of the state bar, the California Judges Association, the California Trial Lawyers Association (CTLA), and the defense bar participated in various negotiating sessions to work out the details of implementation. The Judicial Council took no position on the merits of the bill, but its staff provided technical assistance in estimating effects and costs throughout the negotiations. The Finance Department and the County Supervisors Association of California (CSAC) were also interested in cost and implementation issues. Two Poverty lawyer groups—California Rural Legal Assistance (CRLA) and the Western Center on Law and Poverty—initially opposed certain provisions that they believed would discriminate against poor litigants. Participants in the design of the mandatory arbitration law served not only as representatives of organized interests but also as knowledgeable legal experts contributing to the design of a workable and acceptable program. (See discussion below for positions of various groups on particular issues.)

Insurance interests participated only peripherally in the negotiations, although some interviewees suggested that insurance industry viewpoints were at least partly represented by the defense bar. Some insurers were initially skeptical about arbitration, believing that awards might be biased in favor of plaintiffs and that arbitration might simply add a costly step to the judicial process. Nevertheless, insurance interests took no formal position against the arbitration bill apparently having been convinced that the experimental program might reduce their costs.

Although no major organized opposition arose, some observers doubted that arbitration would significantly reduce court congestion, believing that small arbitrated cases are the ones that most often settle anyway. Others suggested that reforms such as calendar management, combined with an aggressive settlement program or no-fault insurance, would do more to reduce court backlogs.

**Key Issues**

Although there was a consensus among key participants in the legislative debate that expansion of the arbitration program was desirable, there was considerable dispute over the specific features of the arbitration statute. The key issues were the following:

- What cases should be ordered to arbitration?
- In which jurisdictions should court-ordered arbitration be required?
- How and when should a court order a case to arbitration?
- What sanctions would be necessary to discourage post-arbitration trials?
- How would arbitration affect court costs?
- Who would pay program administrative costs?
- Should arbitrators be paid?
- How would arbitrators be selected?
- What would be the Judicial Council’s role in program design and implementation?

Disagreements over the operational details of the program were resolved, not surprisingly, in a number of compromises that our research suggests will strongly influence its effectiveness. We describe below how each issue was resolved.

**Which Cases?** There were two major aspects to the question of which cases should be handled by mandatory arbitration. First, there was debate over what case-value would dictate court-ordered arbitration. Second, there was uncertainty about whether the programs should
apply only to personal injury litigation or should include other civil actions. The determination of these limits was important because they would affect not only the size and complexity of the arbitration caseload, but also the response of attorneys to the arbitration system.

In early drafts of the proposed legislation, the monetary limit for mandatory arbitration ranged from $10,000 to $25,000. The Judicial Council recommended $15,000, the limit instituted in 1974 by the Los Angeles Attorneys' Special Arbitration Plan. Although no statistics were available on the distribution of the civil caseload by dollar value, the Citizens Commission on Tort Reform estimated that a large volume of tort cases would fall under $10,000.10 Although some of the parties were willing to accept a higher level, a $15,000 limit was finally adopted because of concern that a higher limit might divert more cases in Los Angeles than could be handled with the number of qualified arbitrators available. Early drafts of the legislation limited court-ordered arbitration to personal injury disputes, the largest volume of civil cases anticipated for inclusion in the program. Other civil damage suits were later included on the grounds that they too were amenable to arbitration.

Which Courts? There was little controversy about requiring larger superior courts (courts with ten or more judges) to establish mandatory arbitration, because it was believed that these were the most congested courts, as measured by the number of cases awaiting trial and the average elapsed time to trial.11 These courts also had experience with the previous voluntary program. The major controversy arose when the legislation was amended by the Assembly Judiciary Committee, over the objection of the author (Senator Smith) and the Governor's office, to require larger municipal courts to establish mandatory arbitration. The amendment was requested by Assemblyman Chel, author of legislation (AB 2192) increasing the limit of municipal court jurisdiction from $5,000 to $15,000. Chel argued that arbitration should be applied to large municipal courts because of their expanded caseload, which he believed would now include many smaller-value civil cases diverted from the superior courts. The amendment was vigorously opposed by almost all the affected courts, by the California Judges Association, and by the Judicial Council.

---

10They estimated that 78 percent of tort awards between 1970 and 1976 were under $15,000.

11Interestingly, data compiled by Senator Smith's office indicated great variability in elapsed time from "at issue" to trial among the larger counties. The median time ranged from 7 months in Santa Clara and San Mateo to 29 months in San Bernardino. According to Judicial Council data other smaller counties (Sonoma, San Joaquin, Marin, Ventura) had longer waiting time to trial than several of the larger counties.
Judges opposing mandatory arbitration in the large municipal courts argued that the nine affected courts had no congestion or backlog on the civil calendar. They cited examples of 45-day waits for trial in Los Angeles, and 30 and 60 days in San Francisco and San Diego, respectively. They also questioned whether arbitration in these courts would save judicial time, since almost all civil cases were non-jury, taking no more than two hours. They further argued that arbitration would increase court costs, since added staff would have to be hired to administer a new program.

There appeared to be a consensus among supporters of the arbitration program that attorneys would continue to file smaller civil cases in superior courts. Moreover, they believed that mandatory municipal court arbitration was premature because of uncertainty about arbitrator supply and the actual effects of raising municipal court jurisdictional limits. In the final bill, municipal court adoption of mandatory arbitration was left optional.

**How and When Would a Court Order Arbitration?** The question of how a case should be assigned to arbitration is actually a question of who should do the assigning. Permitting a judge to do so based on his determination of case value was initially opposed by trial lawyers, who objected to having the court rather than the plaintiff limit case value. The trial lawyers eventually accepted court determination of case value, however, in exchange for an agreement that arbitration awards could exceed $15,000, and other compromises.

One of the most controversial aspects of the mandatory arbitration bill was the determination of when the court would value a case, thereby diverting it to arbitration.

Should arbitration be ordered early in the process (close to the filing of an at-issue memorandum) or at a later time (close to trial)? The California Trial Lawyers Association was the leading proponent of later arbitration. The CTLA supported determination of case value by the judge at a settlement conference held 30 days before trial. At this point, all discovery (i.e., development and exchange of information about the case) would be complete. The CTLA argued that earlier referral to arbitration was both impractical and undesirable because neither the plaintiff nor the defense would yet have enough information to value a case properly, especially if a personal injury that might take time to develop and stabilize were involved.

Representatives of the state bar, in partial agreement with the CTLA, urged a "go slow" approach. They favored starting the program with later mandatory case assignment, and then gradually shortening the time to permit expansion of the program, believing this approach would help assure the attorney support essential to the program's success. One of their fundamental reservations about early referral was
that it could be abused by a few aggressive judges who might send cases
to arbitration prematurely, so as to clean up a backlog. They also
believed early referral might take too much judicial time, offsetting any
potential arbitration savings, while late referral would take little judi-
cial time. It might also encourage attorneys to elect arbitration early
to save the time and expense of arbitration close to trial.

Proponents of earlier arbitration included the Governor’s office,
some judges, some local bar associations, and some individual attor-
neys. They argued that most cases could be valued equitably early in
the process, and that waiting until the discovery process was complete
would not produce significant savings for either courts or litigants. The
parties would already have burdened the court process and incurred the
expense of discovery and pretrial preparation. Indeed, ordering cases to
arbitration at later times might set arbitration hearings at dates later
than those previously set for trial, thus adding to court delay and
litigants’ expense. They disputed the idea that early arbitration would
alienate lawyers, arguing that plaintiffs’ lawyers and litigants would
save time and expense, and would therefore support the arbitration
program.

After examining varying local pretrial, trial-setting, and settle-
ment procedures as well as varying degrees of congestion in different
courts, the negotiators agreed on a flexible approach to the question of
when mandatory arbitration should take place. During final negotia-
tions they considered a number of proposals for setting boundaries on
the time period during which referral to arbitration could take place.
Proposals ranged from one that would permit the court to value a case
as soon as practical after the filing of the at-issue memorandum (this
being favored by the Brown Administration) to one setting the date as
late as 14 months after the at-issue memorandum (this being favored
by the CTLA). The final compromise provided that the case value be
determined by the court at a conference occurring no sooner than 9
months after at-issue and no later than 90 days before trial.

What Sanctions To Discourage Trial De Novo? There was gen-
eral agreement that the arbitration bill would have to include disincentives to discourage parties dissatisfied with the arbitration award from
indiscriminately rejecting it and exercising their right to request a trial
de novo. Otherwise, some feared that arbitration might become no more
than a pretrial dress rehearsal in which evidence would be exposed. It
might also encourage inadequate preparation. No sanction, however,
could be so severe that it abridged the constitutional right to a jury
trial.

The Governor’s office favored penalties for rejecting the award and
requesting trial, including payment of attorneys’ fees by a party that
requested a trial but failed to improve its position at the subsequent
trial. This position was supported by the California Association of Insurance Companies. The state bar suggested several options, including the posting of a bond to cover legal and trial costs, and payment by the party that improved its position of both a percentage of the verdict and a portion of attorneys' fees.

The CTLA at first opposed any sanctions, but later softened its position. They vigorously opposed sanctions involving payment of attorneys' fees, however, arguing that such sanctions might raise constitutional issues.

Poverty lawyers argued successfully for the removal of a provision in an early version of the bill that required the party electing a trial to pay arbitration costs (including the arbitrator's fee) regardless of the trial outcome. They did so in the belief that this sanction would discourage the poor from seeking a trial. They failed to gain approval, however, of a provision to eliminate imposition of costs and fees for indigents proceeding in forma pauperis who failed to better their position after electing a trial. This provision was opposed by other negotiators on the grounds that it would give an unfair advantage to poor litigants receiving awards, who, in the absence of monetary sanction, might be encouraged to seek a trial de novo frivolously, regardless of the merit of the claim. Opponents argued that existing language was sufficient to protect the poor against economic hardship. The CRLA, and later the Western Center, withdrew their opposition to the bill after a compromise eliminated any cost penalty for merely requesting a trial, and assured that even if an indigent failed to better the arbitration award at a subsequent trial de novo, he would not have to pay costs exceeding the amount of the original award.

As adopted, the legislation provides that any party may freely request a trial de novo, but if the trial judgment is not more favorable to the requesting party, he must pay the arbitrator's fees to the county as well as specified trial costs to the other party—the usual statutory costs and certain expert witness fees incurred after the trial request. The legislation states that the court may choose not to impose these costs if it finds that they would constitute a substantial "economic hardship." When the party electing a trial has proceeded in forma pauperis, costs can be imposed only as an offset to an award. No sanction is applied if the award is over $15,000.

**How Would Arbitration Affect Court Costs?** One of Senator Smith's major contentions was that mandatory arbitration would save judicial costs by reducing court workload and avoiding the future addition of judgeships. The Judicial Council and the Department of Finance were uncertain about actual cost-effects and refused to project any "cost
savings" from reduced workload. They did not believe any judge would be fired or courtroom closed because of passage of this bill.\textsuperscript{12}

The Council and the Department of Finance faced many problems in estimating the cost implications of mandatory arbitration. They were unable to project the number of cases that would be arbitrated, the added judicial time that might be required to value cases, the number of trial de novo requests, or the number of actual trials. They did not know how many courts would voluntarily adopt the program or the effect of proposed legislation increasing municipal court jurisdiction to $15,000. It was also hard to predict how many arbitrators might waive their fees. Finally, it was hazardous to project long-term savings, since some negotiators believed the lower litigation costs of arbitration might stimulate increased case filings. The Judicial Council, calculating savings on the assumption of either a 20 percent or 40 percent reduction in large superior court civil trials, concluded that savings would be about $3 million, equivalent to the cost of 10 or 11 judgeships. (See App. C for details.)

Agreement was reached on fiscal estimates only after independent cost-estimating and subsequent lobbying by Smith's staff. These estimates acknowledged cost savings or, as it came to be known, "cost avoidance," would probably result from reductions in the number of additional judicial positions required to keep up with increasing caseloads.

Because the bill was part of the Governor's program and was supported by his legal affairs secretary, there were pressures on the Judicial Council and the Department of Finance to develop cost estimates that were favorable to, or at least did not impede, its passage. The Judicial Council and the Department of Finance pointed out in their fiscal analyses that the $3 million cost avoidance "would probably" equal or exceed the estimated additional cost of administering the program (estimated to be in the neighborhood of $2.5 million a year for 40,000 cases).

Who Would Pay Program Administrative Costs? The issue of who would pay administrative costs was especially important to the counties. At one point, the legislation prompted opposition from county representatives when it proposed that counties pay arbitrators' costs, whereas the state had reimbursed counties for those costs under the previous voluntary program. The counties dropped their opposition when the bill was amended to specify that the state would pay added county administrative costs; however, the State Controller's reim-

\textsuperscript{12}The Judicial Council was also concerned that the existence of the mandatory arbitration program might be used as an argument against providing additional judgeships that might be needed in the future because of heavier workloads.
bursements to the counties are offset by any local cost avoidance due to reduced need for added superior court judgeships.

**Should Arbitrators Be Paid?** The most controversial matter affecting arbitrators was whether they should be paid for their services. Governor Brown believed strongly that attorneys should voluntarily serve as arbitrators as a community service; he even threatened to veto the bill if it had no provision for service *pro bono publico*.

Some attorney negotiators shared his belief, but opposed a legal requirement for volunteer service. The CTLA said they would aggressively oppose the bill if it did not provide for compensation to arbitrators. Most negotiators, not wanting to provoke attorney opposition or discourage lawyers from serving as arbitrators, favored some arbitrator compensation. The state bar recommended a fee of $100 to $150 per day and $200 per night, suggesting that a number of attorneys would, in fact, serve free and that local bar associations could encourage such *pro bono* service.

The CTLA membership voted against any government requirement for *pro bono* services. In their view, any mandate or legal exhortation that lawyers provide free services was philosophically and economically unsound as well as discriminatory. They opposed the idea that lawyers should serve for nothing while their clients, witnesses, and other parties received monetary rewards. They argued that lawyers would be providing some free service anyway, since the $150 per day compensation would not even cover their overhead costs.

Senator Smith believed lawyer compensation was not a major issue. He accepted an amendment that provided for arbitrator compensation but permitted the voluntary waiver of it. The Governor’s office, with the support of the state bar, later lobbied for a strong statement of intent exhorting attorneys to provide free arbitration services. The CTLA strongly opposed this language, but eventually accepted it reluctantly.

As adopted, the legislation provides for minimum compensation of $150 a day, and states that lawyer arbitrators “are urged to volunteer their services without compensation whenever possible.”

**How Would Arbitrators Be Selected?** The issue of arbitrator selection entails several questions. How many arbitrators should there be? How much legal experience should be required? Should specialized legal experience be required in specific cases? During what hours should arbitration hearings take place?

As initially introduced, the legislation permitted arbitrators to sit individually or in panels of three, as in Pennsylvania. Although some favored the three-member panel for higher-valued cases because it

---

13 Under the Los Angeles Attorneys’ Special Arbitration Plan (LASAP), selection as an arbitrator was an honor conferring status upon those selected by their peers.

14 Cal. Stats. (1978), Ch. 743, Sec. 114.10(b)(3).
would provide more balance, it was eliminated as more costly and cumbersome than a single arbitrator.

The initial legislation also required attorney arbitrators to have been members of the bar for at least five years, based on the belief that less experience might produce inconsistent results and provoke dissatisfaction with the program. The five-year requirement was finally eliminated, however, so that the availability of arbitrators could be maintained. Determination of arbitrator qualifications was left to the Judicial Council and local courts.

The next issue was whether there should be requirements for specialized experience. Representatives of insurance companies were concerned that requiring extensive experience in particular fields of litigation, such as personal injury, would result in an oversupply of arbitrators who were plaintiffs’ attorneys and would therefore produce higher plaintiffs’ awards. Similarly, attorneys expert in business litigation suggested that it would be necessary to set up special arbitration panels with expertise in handling this type of litigation. But the negotiators apparently believed that the selection process would assure fairness. As adopted, the legislation declares legislative intent that arbitrators have experience "with cases of the type under dispute."15

Scheduling of arbitration hearings was also a matter of concern. Statutory language arguing that arbitration hearings should be held during nonjudicial hours whenever possible was opposed by some who believed this might inconvenience witnesses and attorneys. The provision was retained, however, primarily to encourage maximum use of existing court facilities for arbitrations.

The final legislation provides that arbitrators shall be either members of the bar, retired judges, unpaid sitting judges, or non-attorneys stipulated by the parties. They are to sit individually, during nonjudicial hours whenever possible, and should have experience with the type of case under dispute. The state bar is to develop rules for their selection, to be approved by the Judicial Council after consulting with arbitration committees set up under previous law or with county bar associations.

What Role for the Judicial Council? In its initial form, the arbitration bill would have given broad power to the Judicial Council to determine how the arbitration plan would be implemented. The council would have determined whether to pay arbitrators and how much, and what their qualifications, powers, and procedures should be. The Judicial Council itself favored legislative determination of many of these questions, and key members of the Senate Judiciary Committee concurred, believing that if this was to be a mandatory program, major policies should be explicitly determined by the legislature.

15Ibid.
As finally adopted, the law leaves rulemaking power with the Judicial Council, but provides policy guidance on (1) the selection and payment of arbitrators, (2) how and when a case is referred to mandatory arbitration, and (3) trial de novo sanctions.

Summary of the Law

The various compromises on the issues discussed above resulted in legislation containing the following major provisions.

The arbitration law provides three methods for referring a case to arbitration: (1) by stipulation of the parties; (2) by plaintiff’s election; and (3) by order of the court. Court-ordered arbitration is required in superior courts with 10 or more judges for certain actions where the amount in controversy does not exceed $15,000. It may be adopted in other superior courts or in municipal courts by local rule.

Arbitration by plaintiff’s election is limited to awards not exceeding $15,000. No award limit is established on arbitration by stipulation. Both these arbitration reference methods are in effect in all California courts.

Mandatory arbitration applies to civil suits for monetary compensation. Certain types of cases, such as family law proceedings and small claims, are explicitly exempt from arbitration. A case is referred to mandatory arbitration when the court determines that the amount in controversy does not exceed $15,000. This may occur at any conference held not before 9 months after the action has been placed on the civil active list, and not later than 90 days before trial at which the parties are present or represented. Arbitration awards may exceed $15,000.

The arbitration hearing date is set no later than 60 days after a case is assigned to an arbitrator. The hearing takes place in facilities provided by the court or selected by the arbitrator. It is conducted as a civil nonjury trial, except that written reports and records and statements of witnesses may be introduced into evidence in lieu of testimony. No hearing record is permitted.

Any member of the state bar and any active or retired judge may serve as an arbitrator. A nonlawyer may serve upon stipulation of the parties and approval of the court. Arbitrators are selected at random by the arbitration administrator and are subject to rejection or disqualification under special conditions. The arbitrator’s award is entered as a judgment. Arbitrators are paid $150 per day, or more if the

---

16Cal. Stats. (1978), Ch. 743, and California Rules of Court 1600-1617. The complete statute is presented in App. D.
affected local governments so determine. They may waive their fee and are urged to volunteer their services whenever possible.

Any party may request a trial de novo within 20 days after the award is filed. The case is then restored to the civil active list in the same position it would have had if there had been no arbitration, and the case is tried as if no arbitration had occurred. If the judgment is not more favorable than the arbitration award, the party requesting the trial must pay the arbitrator’s fee, plus statutory costs and expert witness fees incurred after the request for trial de novo is filed. The costs may not be imposed if the court determines they will create an economic hardship. If the trial applicant proceeds in forma pauperis, costs are imposed only as an offset to the judgment. No sanction may be imposed if the trial judgment exceeds $15,000.

The arbitration program administrator is selected by the presiding judge. In superior courts with 10 or more judges, an administrative committee with specified membership is to be set up to supervise the program. The committee determines the size and composition of arbitration panels. Every court must have a personal injury panel, and may have others determined necessary by the presiding judge.

The Judicial Council adopts rules for arbitration practice and is required to report on the effectiveness of the program to the Governor and the legislature on or before January 1, 1984. The program “sunsets” on January 1, 1985 unless continued by the legislature.

The legislature declared its intent that counties be reimbursed for the costs of the arbitration process, but reimbursements are to be offset by savings resulting from any reduced need for additional judgeships.
III. THE EFFECTS OF ARBITRATION ON COURT CONGESTION

A primary objective of the arbitration program is to reduce congestion in the civil courts by reducing the inventory of cases awaiting trial. Using recent data on court workload, statistical reports of the program's performance during its first year, and information obtained during our interviews with court officials and practitioners in six courts required to adopt mandatory arbitration, we assess in this section the likelihood that the program can achieve this objective.

The expectation that congestion will ease hinges on three assumptions:

1. A significant fraction of the caseload will be diverted to arbitration;
2. The amount of judicial time allocated to these cases before, during, and after arbitration will be less than the amount of time they would otherwise have required for their disposition; and
3. The supply of arbitrators will be adequate to dispose of all diverted cases, thereby precluding the development of backlogs in the arbitration program itself.

If all three assumptions prove to be true, court congestion should be reduced. It may not be possible to observe the results, however, simply by examining changes in the number of civil cases awaiting trial.\(^1\) For example, if there is an increase in the litigation rate that offsets any decrease in the caseload due to arbitration, the backlog could remain constant or even grow. Conversely, shrinkage in the backlog could be mistakenly credited to arbitration, whereas the actual causes might be a decreased rate of litigation, an increase in the number of judges, or more efficient management of court resources—changes that might occur entirely independently of arbitration.

\(^1\)In the California courts, cases are considered to be "awaiting trial" when attorneys have filed a memorandum indicating that the case is ready for trial. In fact, most of these cases are never tried. The memorandum serves to indicate that the case is being actively pursued by the parties, and the court assumes that it will be tried (and therefore will require future allocation of judicial resources) until it learns otherwise from the parties. As a result, the pending caseload includes a mix of cases, most of which will be settled by the parties without trial, but some of which will require substantial intervention by the court in responding to pretrial motions, settlement conferences, or trial.
It is difficult, then, to decipher the effects of arbitration by examining changes in court backlogs. Another problem is that the current backlog in any court reflects conditions that have prevailed in that court for several years; any change directly attributable to arbitration is therefore unlikely to appear until the program has been in operation for a few years. Nevertheless, all interested parties are naturally curious to know the size of the backlog after one year of program operation; their curiosity will not be satisfied, however, until the Judicial Council publishes pending caseload data for Fiscal Year 1980.

In view of these problems, we adopted an analytic approach for assessing the effects of the arbitration program that does not depend on measuring its direct effect on court backlogs. Instead, we examined arbitration's potential for satisfying each of the critical assumptions upon which success hinges. We also considered how that potential is affected, for better or for worse, by the legislature's key decisions in designing the program and the local courts' key decisions in implementing it.

PROPORTION OF THE CASELOAD DIVERTED TO ARBITRATION

To reduce court congestion, arbitration must "capture" a sizeable portion of the court's caseload. Despite its popularity, the earlier voluntary arbitration program was never able to draw more than a few thousand cases per year. The legislators hoped to increase that number by adding the mandatory component and by increasing the limit for plaintiff's election to $15,000.

Table 3.1 shows that more than 24,000 cases were diverted to arbitration in the first program year in the 13 superior courts with 10 or more judges. This is about twice the number of cases diverted to the previous voluntary arbitration program during its entire three-year history. The increased number of arbitration cases in courts other than Los Angeles is primarily due to the program's mandatory component, but the number of litigants volunteering for arbitration also seems to have increased considerably across the courts. In Los Angeles, for reasons discussed in Sec. V, voluntary cases outnumbered court-ordered cases by a ratio of two to one.

---

2According to Judicial Council statistics, an additional 1208 cases were diverted to arbitration in the smaller superior courts that adopted mandatory arbitration although they were not required to do so, and another 1492 cases were diverted to the program in the municipal courts that did so. In 28 of these courts, some cases were ordered to arbitration. For a summary of the earlier voluntary arbitration program experience, see Annual Report of the Judicial Council of California, 1980, p. 47.
### Table 3.1

**NUMBER OF CASES DIVERTED TO ARBITRATION, FISCAL YEAR 1980**

<table>
<thead>
<tr>
<th>Court</th>
<th>Cases Placed on Arbitration Hearing List</th>
<th>Rate of Court-Ordered Arbitration (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>By Stipulation</td>
<td>By Election of Plaintiff</td>
</tr>
<tr>
<td>Alameda</td>
<td>33</td>
<td>451</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>21</td>
<td>174</td>
</tr>
<tr>
<td>Fresnob</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>485</td>
<td>6,956</td>
</tr>
<tr>
<td>Orange</td>
<td>935</td>
<td>542</td>
</tr>
<tr>
<td>Riverside</td>
<td>18</td>
<td>94</td>
</tr>
<tr>
<td>Sacramento</td>
<td>127</td>
<td>259</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>39</td>
<td>156</td>
</tr>
<tr>
<td>San Diego</td>
<td>91</td>
<td>459</td>
</tr>
<tr>
<td>San Francisco</td>
<td>25</td>
<td>311</td>
</tr>
<tr>
<td>San Mateo</td>
<td>48</td>
<td>40</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>56</td>
<td>139</td>
</tr>
<tr>
<td>Ventura</td>
<td>15</td>
<td>66</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,904</strong></td>
<td><strong>9,947</strong></td>
</tr>
</tbody>
</table>

**SOURCE:** Judicial Council of California, unpublished preliminary report.

**NOTE:** Includes courts with 10 or more judges.

- **Includes a small number of municipal court cases in most jurisdictions.**
- **Fresno's program did not start until the end of the first program year.**

The number of cases that can be diverted to arbitration in any court is limited by the number of smaller value civil damage suits (i.e., suits for monetary compensation) that are filed in that court, since, with the exception of the stipulation provision, the arbitration statute applies only to these cases. The proportion of the caseload accounted for by smaller-value civil damage suits is believed to vary considerably across the courts; if so, the program's potential for reducing congestion may also vary. Unfortunately, courts do not tabulate the distribution of their civil caseloads by dollar value.3

Among all cases considered for diversion to the arbitration program in each court during its first year, the percentage actually diverted should roughly correspond to the court's civil damage caseload that involves amounts of $15,000 or less.4 Although the courts are not

---
3 In California, plaintiffs are not allowed to set a total dollar value on their suits in their complaints. Prior to the establishment of mandatory arbitration, courts had no reason for keeping track of the dollar value of the suits they disposed of.

4 For several reasons, we would not expect these percentages to be identical. First, the percentage assigned during the first year may have been inflated by litigants who delayed pursuing their suits until the inception of the program, in order to benefit from its provisions. Second, the rate of assignment may have been affected by differences in court policies or individual judges' predispositions toward the program.
required to report such diversion rates, our examination of local court records and discussions with court officials enabled us to estimate rates for the six courts we studied intensively.

Table 3.2 presents these estimated rates. Column (1) of the table lists the estimated numbers of cases considered for diversion to the program, including cases reviewed for mandatory arbitration and all cases that volunteered for arbitration.\(^5\) Column (2) tabulates the number of cases diverted to the program. The last column shows computed diversion rates, which range from a low of 40 percent in San Bernardino County to a high of 64 percent in Alameda and Los Angeles Counties. The overall diversion rate for all six courts is 58 percent.

### Table 3.2

**Rates of Diversion to Arbitration, Fiscal Year 1980**

<table>
<thead>
<tr>
<th>Court</th>
<th>Number of Cases Considered for Assignment(^a)</th>
<th>Number of Cases Assigned to Arbitration(^b)</th>
<th>Diversion Rate(^c) (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alameda</td>
<td>2,458</td>
<td>1,583</td>
<td>64</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>17,624</td>
<td>11,245</td>
<td>64</td>
</tr>
<tr>
<td>Orange</td>
<td>1,768</td>
<td>3,811</td>
<td>49</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>842</td>
<td>336</td>
<td>40</td>
</tr>
<tr>
<td>San Francisco</td>
<td>2,492</td>
<td>1,092</td>
<td>44</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>2,974</td>
<td>1,883</td>
<td>63</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>34,158</strong></td>
<td><strong>19,950</strong></td>
<td><strong>58</strong></td>
</tr>
</tbody>
</table>

\(^a\)Estimated from local court calendar reports. Includes all civil damage suits considered by the court for assignment to arbitration and all cases that elected or stipulated to arbitration.

\(^b\)Judicial Council of California, unpublished report.

\(^c\)Column (2) divided by Column (1).

\(^5\)The courts review all suits for monetary compensation that do not volunteer for the program to determine whether they involve amounts of $15,000 or less. Cases that volunteer for arbitration do not have their monetary value assessed by the court. However, they must be included in the total of cases considered for assignment to compute an accurate diversion rate.
It is not possible to say whether these cases constitute a significant fraction of the court's total civil caseload, because of the way in which court caseload statistics are monitored and reported.\textsuperscript{6} Because the number of pending civil cases is the best available indicator of the magnitude of the total civil caseload in each court, we used it as a basis for estimating the relative size of the arbitration caseload. Since data for Fiscal Year 1980 are not yet available, and since pending caseloads vary considerably from year to year, we used an average of the pending civil caseloads for the three years before the inception of mandatory arbitration to compute these estimates for each court. Table 3.3 shows the results of our computations. The relative size of the arbitration caseload in the superior courts with 10 or more judges, compared with the average pending civil caseload in these courts in recent years, is 22 percent. That figure varies considerably from court to court, however, from lows of less than 20 percent in Fresno, Los Angeles, San Bernardino, and San Diego Counties, to highs of more than 40 percent in San Mateo and Santa Clara Counties.\textsuperscript{7}

The reader may find it puzzling that an arbitration diversion rate as high as 58 percent can result in a caseload that is only about one-fifth the size of the court's total civil caseload. This apparent discrepancy is explained by the fact that, altogether, civil damage suits constitute only about one-third of the court's total civil caseload.\textsuperscript{8} Because the arbitration program is limited to civil damage suits, it cannot capture a very large proportion of the court's total civil caseload. Considering, however, that less than 60 percent of the civil damage suits reviewed by the court during the first program year were diverted to arbitration, by our estimation it appears that the program could capture a somewhat higher percentage of the civil caseload if the dollar limit were raised.

\textsuperscript{6}For each year, the courts report the number of cases filed, the number of cases disposed by the court, and the number of pending cases. For various reasons, none of these numbers is exactly appropriate as a denominator for computing the percentage that is of interest. The number of cases filed includes many suits that will be dropped or dismissed before the issues in the case are developed and the "at issue" memorandum indicating trial-readiness is filed. Since most of these cases require little or no court processing time, total filings may give an inflated picture of the size of the caseload that actually requires court effort. The number of cases disposed by the court in any year and the size of the pending caseload at the end of the year reflect not only the size of the caseload requiring court attention but also judicial productivity rates for that year, and the rate of filings and judicial productivity in previous years.

\textsuperscript{7}The low percentage for Fresno is at least partly due to its late program start-up.

\textsuperscript{8}In Fiscal Year 1979, civil damage filings constituted one-third of all civil filings. (\textit{Annual Report} of the Judicial Council of California, 1980, p. 71.) Since data on civil active cases are not reported separately by type of case, we cannot compute a similar percentage that applies only to civil active cases.
Table 3.3

RELATIVE SIZE OF ARBITRATION CASELOAD
COMPARSED WITH AVERAGE PENDING CIVIL
CASELOAD, FISCAL YEARS 1977-1979

<table>
<thead>
<tr>
<th>Court</th>
<th>Fiscal 1980 Arbitration Caseload</th>
<th>Average Pending Civil Caseload</th>
<th>Relative Size of Arbitration Caseload (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alameda</td>
<td>1,583</td>
<td>5,130</td>
<td>31</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>556</td>
<td>2,643</td>
<td>21</td>
</tr>
<tr>
<td>Fresno (^b)</td>
<td>51</td>
<td>1,627</td>
<td>3</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>11,245</td>
<td>63,254</td>
<td>18</td>
</tr>
<tr>
<td>Orange</td>
<td>3,811</td>
<td>10,678</td>
<td>36</td>
</tr>
<tr>
<td>Riverside</td>
<td>515</td>
<td>2,277</td>
<td>23</td>
</tr>
<tr>
<td>Sacramento</td>
<td>1,141</td>
<td>2,981</td>
<td>38</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>336</td>
<td>2,823</td>
<td>12</td>
</tr>
<tr>
<td>San Diego</td>
<td>1,110</td>
<td>7,307</td>
<td>15</td>
</tr>
<tr>
<td>San Francisco</td>
<td>1,092</td>
<td>4,584</td>
<td>24</td>
</tr>
<tr>
<td>San Mateo</td>
<td>558</td>
<td>1,283</td>
<td>43</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>1,883</td>
<td>3,084</td>
<td>61</td>
</tr>
<tr>
<td>Ventura</td>
<td>348</td>
<td>1,454</td>
<td>24</td>
</tr>
<tr>
<td>Total</td>
<td>24,229</td>
<td>109,125</td>
<td>22</td>
</tr>
</tbody>
</table>


NOTE: Data apply to superior courts with 10 or more judges.

\(^a\)Calculated by summing the number of civil active cases pending at the close of fiscal years 1977-1979, and dividing by 3.

\(^b\)Fresno's program did not start until the end of the first program year.

REDUCTION IN COURT WORKLOAD DUE TO ARBITRATION

Whether arbitration can reduce court congestion if it continues to operate at its first-year level of about 24,000 cases also depends on the reduction in court workload due to their diversion. To measure this reduction, we need to know how much judicial time these cases would have required in the absence of arbitration, and how much time they now require prior to, during, and after arbitration. The difference between these two amounts represents the net reduction in workload due to arbitration.\(^9\) Estimating this difference is made difficult by the

\(^9\)In addition to judges, other court personnel at both the management and support level are involved in the disposition of suits. Because judicial time is the most expensive
absence of reliable and comprehensive measures of the burden that is placed on the court by different types of cases (independent of arbitration), and the absence of statistics on the composition of the arbitration caseload and court time required to process cases after arbitration. Below we discuss these problems and our approach to dealing with them.

Methodological Approach and Problems

We encountered a number of difficulties in attempting to estimate the amount of judicial time that cases diverted to arbitration would have required if the program did not exist. The first of these concerns the choice of a measure of court workload. Although there is no agreement about how to measure trial court workloads, the two measures that have received the most attention from policymakers concerned about court congestion are the annual number of jury trials required to resolve cases, and the average amount of judicial time required to dispose of cases.

It is widely believed that judges spend most of their time at trial. Since the number of jury trials held annually in each superior court is regularly reported by the Judicial Council, it is the most easily observed indicator of court workload. But a Judicial Council study of the allocation of superior court judge time, conducted in 1976 found that only 16 percent of all judicial time is spent on jury trials. Most suits that are filed in court are dropped or settled by the litigants and therefore never require trial. Judicial time may be required, however, to rule on legal motions related to these cases, to shepherd them through the pretrial process, and to assist the litigants in settling them. To reflect the amount of time required to dispose of different types of cases, the Judicial Council reports "case weights" that indicate the average number of minutes that judges spend processing cases, including jury and bench trial and nontrial time. These weights are used in assessing the courts' needs for additional judgeships to keep up with rising caseloads. But the studies that provide the basis for

\footnote{An additional 14 percent is spent on bench trials. See Administrative Office of the Courts, 1977, Weighted Caseload Study, California Superior Courts, September-December 1976. A more recent study, conducted in the autumn of 1979, has not yet been released.}
computing these weights (termed "weighted caseload" studies) are conducted infrequently. The weights currently in use are based on studies conducted in 1976. Thus each of these two commonly used measures provides a different perspective on court workload and each is deficient in some regard. Rather than choose between them, we used both in our analysis of workload reduction. While this approach requires us to present separate results, based on the different measures, the congruence of these results increases our confidence in our conclusions.

Both jury trial data and weighted caseload data are reported separately for different types of cases. We can therefore select the statistics that apply to the two types of civil damage suits that are eligible for arbitration: personal-injury/property-damage suits, and other civil cases involving monetary compensation. Neither jury statistics nor weighted caseload data, however, differentiate suits by the amount of money in controversy. Because arbitration applies only to smaller-value civil suits, we need to make certain assumptions when using these data to estimate the net reduction in court workload due to the program. The complications that this introduces into our analysis are different for the two measures of workload and are therefore detailed later, in our separate discussions of the results using these measures.

The separate reporting of jury trial data and weighted caseload data for personal-injury/property-damage cases and other civil damage suits, while helpful to some parts of the analysis, introduces an additional complication. Because arbitration caseload data do not separate the two types of cases, we need to make an assumption about the composition of the arbitration caseload in order to use the different sets of statistics in the same analysis. For the six courts we studied intensively, court officials' estimates of the contribution of personal injury suits to the arbitration caseload varied between 70 and 90 percent. We therefore assumed an average of 80 percent.

We encountered another set of problems in estimating the amount of judicial time that is required to process smaller-value civil suits before, during, and after arbitration. Before a case can be ordered to arbitration, according to Judicial Council rules, a judge must review it to determine the dollar amount that is in controversy.\(^{11}\) No court systematically records the amount of judicial time expended per case on this activity. The judges we interviewed reported that valuing and assigning cases requires about two minutes per case when performed

\(^{11}\)The judge is instructed by law not to make any determination of liability but to assess the value of the case as if the defendant were fully liable. Thus, the judge would not assign a case involving damages of more than $15,000 to arbitration, even if there is little likelihood that the defendant will be held substantially liable. Cal. Stat. (1978), Ch. 743, Sec. 1141.16(b).
in a pretrial scheduling conference. We adopted this as our estimate of judicial time required to process mandatory arbitration cases before assignment. (Cases that volunteer for arbitration by election or stipulation omit this step.)

Some courts eliminate the expenditure of judicial time at this step by substituting administrative personnel. Other courts increase pre-arbitration expenditure of judicial time by requiring settlement conferences. Later in this section we comment on the effect of these local court decisions on workload reduction due to arbitration.

By statute and rule, judges are not involved in the actual arbitration process. After a case is assigned to an arbitrator, judicial time is required only if litigants reject the arbitrator's award by requesting trial de novo, and the case goes on to trial. Although the Judicial Council requires courts to report the numbers of litigants requesting trial de novo, courts are not required to record the number of cases that actually reach trial. Because the return of arbitrated cases to the trial calendar could cancel or sharply diminish any workload reduction due to arbitration that has been experienced up until that point, the rate of trial after arbitration is critical for workload analysis. Below, we describe what we learned about this rate, and the assumptions we adopted for our analysis.

**Trial De Novo**

On average, in 38 percent of arbitration cases litigants exercised their right to request trial de novo in the program's first year, with the figure ranging from a low of 20 percent in San Bernardino County to a high of 60 percent in Santa Clara County. (See Table 3.4.)

*De novo* requests do not mean that cases will be tried, however, or even that litigants seriously intend to pursue cases as far as trial. The statute requires filing requests for *de novo* trials within 20 days of the issuance of the arbitrator's award. Since there is no penalty for filing a request, many attorneys do so routinely to keep their options open and to improve their post-award position if they intend to negotiate further. In fact, as attorneys have become more familiar with the arbitration program, the trial *de novo* request rate seems to be increasing.

Despite the many *de novo* requests, most court officials we interviewed believe that only one to two percent of all cases diverted to arbitration will ever be tried. Only further experience will reveal whether that estimate is correct.

---

12Both plaintiff and defendant are free to reject the arbitrator's award, whether the case has been arbitrated by court order, by plaintiff's election, or by stipulation of both parties. Cal. Stats. (1978), Ch. 743, Sec. 1141.20.
<table>
<thead>
<tr>
<th>Court</th>
<th>Total Number of Arbitration Awards</th>
<th>Total Number of Requests for Trial de Novo</th>
<th>Rate of Request (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alameda</td>
<td>645</td>
<td>201</td>
<td>31</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>174</td>
<td>72</td>
<td>41</td>
</tr>
<tr>
<td>Fresno</td>
<td>2</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>2525</td>
<td>866</td>
<td>34</td>
</tr>
<tr>
<td>Orange</td>
<td>970</td>
<td>306</td>
<td>31</td>
</tr>
<tr>
<td>Riverside</td>
<td>156</td>
<td>69</td>
<td>44</td>
</tr>
<tr>
<td>Sacramento</td>
<td>345</td>
<td>147</td>
<td>43</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>135</td>
<td>27</td>
<td>20</td>
</tr>
<tr>
<td>San Diego</td>
<td>241</td>
<td>86</td>
<td>36</td>
</tr>
<tr>
<td>San Francisco</td>
<td>496</td>
<td>180</td>
<td>36</td>
</tr>
<tr>
<td>San Mateo</td>
<td>373</td>
<td>181</td>
<td>48</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>849</td>
<td>513</td>
<td>60</td>
</tr>
<tr>
<td>Ventura</td>
<td>134</td>
<td>59</td>
<td>44</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7045</strong></td>
<td><strong>2707</strong></td>
<td><strong>38</strong></td>
</tr>
</tbody>
</table>

**SOURCE:** Judicial Council, unpublished preliminary report.

**NOTE:** Data apply to superior courts with ten or more judges.

One of the courts we studied intensively, Santa Clara, has been monitoring the disposition of cases following arbitration. This court had a mandatory arbitration program in place (under local rule) before the adoption of the statewide program, and has an uncongested court calendar that permits cases to go to trial soon after de novo requests are made. Their experience during FY 1980 thus provides an interesting indicator of patterns of case disposition after arbitration.

Figure 3.1 shows the disposition of all Santa Clara cases for which arbitration awards were filed during FY 1980. Although litigants rejected arbitrators’ awards in 60 percent of these cases, almost half of the trial de novo requests had been dropped by the end of the year, and most of the remaining number were still pending disposition. Only 2 percent of the cases (20 suits) for which awards had been filed were actually tried. However, this represented 3 percent of the 611 arbitrated cases that had reached final disposition.

We do not know whether the cases pending at the end of the year have had a similar rate of trial, nor do we know how typical the Santa Clara experience is. As indicated in Table 3.1, Santa Clara had the highest rate of court-ordered arbitration among the 13 largest courts.
It also has one of the most uncongested calendars. These factors might combine to produce a higher than average trial rate; but it is also possible that other courts, for reasons particular to them, might experience higher rates than Santa Clara.

Not all cases diverted to arbitration eventually reach an arbitration hearing. Some cases are dropped or dismissed by the court for administrative reasons and others are settled by the parties without a hearing. During the first program year, according to Judicial Council reports, 58 percent of all cases that were removed from the arbitration hearing list in the large superior courts reached hearings that resulted in awards; the remaining 42 percent were dropped or settled without a hearing. If 3 percent of all cases that reached arbitration hearings in these courts eventually resulted in trial, the trial rate for all cases diverted to arbitration during the year would be roughly 2 percent.
(.03 \times .58). Based on these data and our discussions with court officials, we assumed a 2 percent rate of jury trial for cases diverted to arbitration in our workload reduction analysis.\textsuperscript{13} However, we tested our findings to determine their sensitivity to alternate assumptions of 1 and 3 percent rates.

Our discussion of trial \textit{de novo} rates completes the identification of methodological problems encountered in the workload analysis. The remainder of this section describes the results of our analysis, focusing first on the number of jury trials, and then on the amount of judicial time that could potentially be saved through arbitration.

\section*{Reduction in Jury Trials Due to Arbitration}

To estimate the reduction in jury trials due to arbitration, we needed to estimate before-and-after percentages of smaller-value civil damage suits going to trial. In the the year before arbitration began, according to Judicial Council reports, jury trial was required for about 3 percent of the personal injury suits and 1.6 percent of other civil complaints that were finally disposed.\textsuperscript{14} But these rates do not differentiate between smaller- and greater-value suits. Because many court observers believe that there is a substantial difference in trial rate by value of the suit, we did not want to simply apply the Judicial Council statistics to determine the expected trial rate for the smaller-value civil damage suits without an arbitration program. Instead, we chose to estimate this rate using a combination of data obtained from the Judicial Council reports, from local court records, and from \textit{Jury Verdicts Weekly}, a report of jury trial outcomes published regularly by a private firm.

Our calculation of the pre-arbitration expected trial rate for smaller-value cases required that we know three other proportions: the proportion of all civil damage suits that are tried, the proportion of all civil damage suits that are smaller-valued (i.e., involve amounts of $15,000 or less), and the proportion of all civil damage suits reaching trial verdict that are smaller-valued. We had to perform this calculation separately for personal injury suits and other civil complaints.

As mentioned above, the Judicial Council found that 3 percent of all personal injury suits disposed of in FY 1979 were tried by juries. We

\begin{footnotes}
\textsuperscript{13}We assumed that all \textit{de novo} trials involve juries, although a few bench trials probably occur.
\textsuperscript{14}See \textit{Annual Report} of the Judicial Council of California, 1980, p. 75. The figures reported are for trials that progressed to the point where both parties had offered evidence. Trials were begun and broken off prior to presentation of evidence by both sides for a larger number of cases.
\end{footnotes}
used the percentage of personal injury suits diverted to arbitration in FY 1980, among all cases considered for diversion, as our indicator of the proportion of personal injury suits that are smaller-valued. In the three courts for which we were able to obtain this statistic, the average proportion of smaller personal injury suits was 47 percent.\textsuperscript{16} From \textit{Jury Verdict Weekly} we obtained data on the distribution of jury awards by dollar amount, for all personal injury cases tried in the 13 largest superior courts in FY 1979, the year before mandatory arbitration became effective. Table 3.5 presents these data. Across all courts, we found that 48 percent of the jury awards reported were for amounts of $15,000 or less. Assuming that cases won by the defense have a similar distribution of dollar value, it would appear that almost half of all personal injury cases tried to verdict in FY 1979 were smaller-value cases.\textsuperscript{16}

We examined the above results by county and compared them with those reported by the Judicial Council. The thoroughness of reporting varied considerably among courts. Overall, \textit{Jury Verdicts Weekly} reported about 85 percent of the total verdicts reported by the Judicial Council.\textsuperscript{17} We suspect that reporting errors are distributed randomly, however; if there were any bias in the reporting, we would expect it to result in overreporting of large verdicts, since these are generally of most interest to practitioners. If this were the case, the data in Table 3.5 would underestimate the proportion of smaller-value jury cases.

The finding that almost half the personal injury cases tried in FY 1979 were smaller-value cases contradicts conventional wisdom, which we believe is based on two factors. First, noting that only a small fraction of smaller-value cases are tried, many observers assume that few of the cases tried involve small dollar amounts.\textsuperscript{16} In fact, if a large proportion of all cases are smaller value, even a very low trial rate among these cases may represent a substantial fraction of the total trial

\textsuperscript{16}For Alameda, San Francisco, and Santa Clara Counties the estimated proportions were 46 percent, 50 percent, and 46 percent, respectively.

\textsuperscript{17}The relationship between direction of verdict and dollar value of the case is unknown. There are theoretical reasons for believing that the dollar value of cases resulting in plaintiff and defendant verdict does not differ significantly. However, for certain types of cases, such as medical malpractice suits, there is some empirical evidence that larger value claims are more likely to result in verdicts for the defendant.

\textsuperscript{16}There are probably several causes of the apparent under- and overreporting for some jurisdictions: (1) We used the Index to the report, rather than the biweekly reports, to perform these calculations. The summary information that appears in the Index may be less accurate than the data reported in the reports themselves; (2) sometimes it was difficult to determine whether the same cases were reported in the Index several times; and (3) the service depends on reports from individuals located in each jurisdiction, so the quality of these reports may vary.

\textsuperscript{16}For an example of a classic analysis of delay that is based on this assumption, see M. Rosenberg and M. Sovern, "Delay and the Dynamics of Personal Injury Litigation," \textit{59 Colum. L. Rev.} 1115, 1959, pp. 1153-55.
Table 3.5

DISTRIBUTION OF PERSONAL INJURY VERDICTS BY AMOUNT, FISCAL YEAR 1979

<table>
<thead>
<tr>
<th>Court</th>
<th>Verdicts for Defendant</th>
<th>Verdicts for Plaintiff</th>
<th>Estimated Percentage of Verdicts</th>
<th>Number of Verdicts Reported in Index</th>
<th>Number of Verdicts Reported in Annual Report</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Defendant</td>
<td>≤$15,000</td>
<td>&gt;$15,000</td>
<td>≤$15,000</td>
<td></td>
</tr>
<tr>
<td>Alameda</td>
<td>41</td>
<td>28</td>
<td>28</td>
<td>50</td>
<td>97</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>16</td>
<td>6</td>
<td>11</td>
<td>35</td>
<td>33</td>
</tr>
<tr>
<td>Fresno</td>
<td>4</td>
<td>5</td>
<td>5</td>
<td>50</td>
<td>14</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>236</td>
<td>120</td>
<td>147</td>
<td>45</td>
<td>503</td>
</tr>
<tr>
<td>Orange</td>
<td>42</td>
<td>16</td>
<td>25</td>
<td>39</td>
<td>83</td>
</tr>
<tr>
<td>Riverside</td>
<td>8</td>
<td>8</td>
<td>8</td>
<td>50</td>
<td>24</td>
</tr>
<tr>
<td>Sacramento</td>
<td>46</td>
<td>28</td>
<td>23</td>
<td>55</td>
<td>97</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>15</td>
<td>3</td>
<td>6</td>
<td>33</td>
<td>24</td>
</tr>
<tr>
<td>San Diego</td>
<td>62</td>
<td>29</td>
<td>25</td>
<td>54</td>
<td>116</td>
</tr>
<tr>
<td>San Francisco</td>
<td>56</td>
<td>35</td>
<td>40</td>
<td>47</td>
<td>113</td>
</tr>
<tr>
<td>San Mateo</td>
<td>24</td>
<td>26</td>
<td>18</td>
<td>59</td>
<td>68</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>18</td>
<td>17</td>
<td>23</td>
<td>43</td>
<td>58</td>
</tr>
<tr>
<td>Ventura</td>
<td>10</td>
<td>7</td>
<td>8</td>
<td>47</td>
<td>25</td>
</tr>
<tr>
<td>Total</td>
<td>578</td>
<td>328</td>
<td>357</td>
<td>48</td>
<td>1255</td>
</tr>
</tbody>
</table>


NOTE: Data apply to superior courts with 10 or more judges.
verdicts. Second, suits for large amounts of money, which frequently involve death or serious personal injury and sometimes break new legal ground, attract more attention than routine suits for smaller amounts of money that ordinarily involve less serious injuries. We suspect that this results in an exaggerated perception of the proportion of larger suits.

Using the proportion of personal injury cases tried by juries (3 percent), the proportion of personal injury cases that involve amounts of $15,000 or less (47 percent), and the proportion of jury verdicts in personal injury cases that involve those amounts (48 percent), we arrived at 3 percent as the expected jury trial rate for smaller-value personal injury cases before arbitration. We conclude, therefore, that the rate of jury trial for smaller-value personal injury suits before arbitration was the same as the rate for the average case.¹⁹

Because we were not able to obtain local court record data or comprehensive *Jury Verdict Weekly* data for other civil damage suits, we could not perform similar calculations to estimate the jury trial rate for smaller-value civil complaints other than personal injury suits. However, based on our finding regarding personal injury suits, we decided to assume that the jury trial rate for smaller-value civil complaints is the same as the average rate for these suits, about 2 percent.

To compute the net reduction in jury trials that could be expected due to arbitration, we applied the estimated pre-arbitration trial rates and the estimated rate of *de novo* trials discussed earlier to the arbitration caseload. (These calculations also reflect our assumption, discussed earlier, that personal injury suits account for 80 percent of the arbitration caseload.) Table 3.6 presents our findings. Before the establishment of mandatory arbitration, we would have expected a caseload of 24,229 cases to result in 678 jury trials. With the arbitration program in place we would expect 485 trials, for a net savings of 193 trials. This number is highly sensitive to the assumed rate of trial *de novo*. At a 1 percent rate, 436 trials would be saved, more than twice as many with a 2 percent rate. There would be no savings at all if the rate were 3 percent, the same as the pre-arbitration rate.

It is for policymakers to decide how many trials need to be saved for the arbitration program to be deemed valuable. We note, however, that in FY 1979 a savings of 193 trials would have reduced the number of civil jury trials held in superior courts with 10 or more judges by about 9 percent. A savings of 436 trials would have reduced this total by about 20 percent. If we consider personal injury trials alone, the

¹⁹We multiply .03 by .48 to derive the product .014, which is the percent of jury-tried, smaller-value personal injury cases. We divide this product by .47, the percent of all personal injury cases that are small, to obtain a trial rate of .029.
Table 3.6

ESTIMATED REDUCTION IN NUMBER OF JURY TRIALS
DUE TO ARBITRATION

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Cases&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Estimated Rate of Jury Trials</th>
<th>Expected Number of Jury Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before arbitration</td>
<td>24,229</td>
<td>Personal injury 3%</td>
<td>678&lt;sup&gt;c&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other civil complaints 2%</td>
<td></td>
</tr>
<tr>
<td>After arbitration</td>
<td>24,229</td>
<td>2%</td>
<td>485&lt;sup&gt;d&lt;/sup&gt;</td>
</tr>
<tr>
<td>Net reduction</td>
<td>24,229</td>
<td>~1%</td>
<td>193</td>
</tr>
</tbody>
</table>

NOTE: Data apply to superior courts with 10 or more judges.
<sup>a</sup>Judicial Council of California, unpublished report.
<sup>b</sup>See text for the derivation of this estimate.
<sup>c</sup>0.03 x .80(24,229) + .02 x .20(24,229).
<sup>d</sup>0.02 x 24,229.

...savings appear somewhat greater. With a 2 percent trial de novo rate, the total number of personal injury jury trials would be reduced by about 13 percent; with a 1 percent trial rate, the total would be reduced by as much as 30 percent.<sup>20</sup>

Amount of Judicial Time Saved Due to Arbitration

To estimate how much judicial time arbitration might save, we needed estimates of the amount of judicial time spent on smaller-value civil damage suits before the program began, and the amount now spent on such suits before, during, and after arbitration. According to weight ed caseload studies conducted by the Judicial Council across the state superior court system, judges formerly spent an average of 81 minutes disposing of each personal injury suit filed and 131 minutes for other civil complaints. These are generally referred to as "case filing weights."<sup>21</sup>

<sup>20</sup>In FY 1979 there were 2217 dispositions of civil cases by jury trial in the 13 largest superior courts. Of these, 1429 involved personal injury suits. See Judicial Council of California, Annual Report, 1980, p. 154.
<sup>21</sup>To reflect the court workload imposed by different types of cases, the Judicial Council has developed a set of empirically derived weights for each case category. The weight for each category indicates the average amount of judicial time (in minutes) required to dispose of a case in that category. Readers who are surprised by the size of these weights should note that they reflect both the negligible amount of judicial time...
These weights do not differentiate between smaller- and larger-value suits. We wanted our analysis to reflect the widespread assumption that smaller-value suits are less time-consuming than others, but we were unable to obtain any information on time-differences. In addition, our analysis of jury trial data had suggested to us that, despite the conventional wisdom, there might be little difference in average judicial time expenditure by dollar value, at least in the monetary range of interest. We therefore decided to perform two separate calculations of the expected expenditure of judicial time for smaller value suits before arbitration. The first is based on the assumption that smaller-value cases require the same amount of time as the statistically "average" case, and the second on the assumption that judges need spend only half as much time on smaller cases. Our calculations also required us to introduce an assumption about the composition of the arbitration caseload. As indicated earlier, we assume that personal injury suits account for 80 percent of this caseload. Applying these several assumptions to the published weights, we estimate that before the mandatory arbitration program began, judges might have spent as much as 91 minutes, or as little as 45 minutes, on each civil damage case involving an amount of $15,000 or less filed in the superior court.22

Estimating the amount of judicial time required to process the arbitration caseload is more complex. As discussed earlier, we assume that judges spend about 2 minutes per case to determine whether it should be ordered to arbitration. We assume further that judges spend no additional time during the arbitration process. In other words, most of the judicial time required for these cases is now expended after arbitration. To calculate this time requires us to introduce assumptions not only about the de novo trial rate but also about the length of such trials. We were unable to obtain any statistics about the number of days required to try smaller-value civil cases; officials' estimates range from 3 to 5 days.23 The Judicial Council's weighted caseload studies suggest

spent on the bulk of filings that require little court attention, and the extremely large amount of judicial time spent on cases that are tried. Differences in weights reflect differences in out-of-court settlement rates, in court time expended in the prettrial process, and in trial rates for different types of cases. The weights are developed and updated periodically by monitoring judicial time expended during several months in a sample of superior courts. They are reported separately for Los Angeles and rest of the state. Our analysis uses the state-excluding-Los Angeles weights. Other calculations not presented here indicate that applying different weights for Los Angeles and the other courts has little effect on the findings. The current approved weights were derived from a study conducted in 1976. For a description of study methodology, see Administrative Office of the Courts, 1977, Weighted Caseload Study: California Superior Courts, September-December 1976.

22We multiply 81 minutes by .80 and 131 minutes by .20 and sum the products to arrive at the first estimate of 91 minutes. The second estimate is simply half this amount.

23Officials in Los Angeles said that the average length of trial might now be as much
that, on average, a "trial day" requires 6 hours or 360 minutes of judicial time. To try a case after arbitration might therefore involve as little as 18 hours (1080 minutes) or as much as 30 hours (1800 minutes).

Rather than computing a single estimate of the annual savings of judicial time that might be expected as a result of diverting approximately 24,000 cases to arbitration, we decided to calculate a set of estimates, based on the different assumptions outlined above. Our estimates are presented in Figs. 3.2 and 3.3. For ease of interpretation, we have converted the hours saved to judge-years.\textsuperscript{24} The estimates in 3.2 are based on the assumption that, before the arbitration program began, smaller-value cases required the same amount of judicial time as the statistically average case. The estimates in 3.3 are based on the assumption that smaller-value cases then required half as much judge time as the average case. Both figures assume an arbitration caseload of 24,229 cases and both show the effects of different assumptions about the de novo trial rate and the length of trial.

Our highest estimate of savings, shown in Fig. 3.2, is 26 judge-years (32,391 hours).\textsuperscript{25} Arbitration could achieve that if smaller-value civil cases formerly required an average of 91 minutes for disposition, and if, under arbitration, the trial de novo rate were only 1 percent and the average length of such trials were three days. The savings would be 18 to 23 judge-years under a 2 percent trial de novo rate, and 12 to 19 judge-years under a 3 percent rate.\textsuperscript{26}

The estimates in Fig. 3.3 are less optimistic. The savings are less—

\textsuperscript{24}The weighted caseload studies also provide a basis for estimating the amount of judicial time available in a calendar year for case-related activities. According to the 1976 study, in courts with 11 or more judges this amounts to 74,000 minutes or 1233 hours per judge annually.

\textsuperscript{25}Some readers may be surprised that as the assumed length of trials increases, judicial time savings due to arbitration decrease rather than increase. This seemingly paradoxical result is explained by the fact that we are varying the assumption about the length of trial after arbitration, while holding constant, with each figure, the assumed amount of judicial time formerly devoted to smaller civil cases. We do not know what combination of trial rate, trial length, and other factors explains the Judicial Council's estimate of 91 minutes per case. If we did, we might be able to choose the most realistic set of estimates from among those shown in the figures.
no more than 11 judge-years—because the figure assumes that smaller cases were less time consuming before arbitration. Arbitration could even increase the expenditure of judicial time by about 3 years (3638 hours) if the trial de novo rate were as high as 3 percent and the average length of such trials were five days.

Figures 3.2 and 3.3 demonstrate that the savings critically depend on how much judicial time was expended on trying cases formerly and after arbitration. The values of both of these critical variables are currently unknown.
Fig. 3.3—Estimated number of judge-years saved annually due to arbitration, if pre-arbitration judicial time expenditure for small cases was half the average amount (assumes arbitration caseload = 24,229 cases)

Are annual savings of 3 to 26 judge-years significant? Again, this is for policymakers to decide. We note, however, that during the year before the establishment of mandatory arbitration, approximately 530 judge-years were expended in the superior courts with 10 or more judges.27 A savings of 26 judge-years would be a 5 percent reduction.

The apparent discrepancy between the previously estimated 10 to 20 percent reduction in the number of civil trials annually, and the 5 percent or less reduction in the number of judicial positions, is explained by the fact that civil jury trials account for only a small fraction of judicial time expended.28

Effects of Local Court Implementation Decisions on Workload Reduction

Although the formal requirements for administering the arbitration program were set forth in the authorizing legislation, in this area as in others local courts exercise substantial discretion in implementing state court rules. Our interviews suggest that the workload reduction due to arbitration will depend a great deal on local implementation decisions, four of which may be critical.

First, the reduction in any court depends heavily on the rate of de novo trials. Legislators clearly had that fact in mind as they debated proposed sanctions against such trials. Under the final legislation, a litigant who requests a trial but does not receive a verdict more favorable than the arbitrator’s award, must pay the arbitrator’s fee and certain court costs.

We do not believe that statutory penalties directly affected the rate of trial during the arbitration program’s first year, since to the best of our knowledge most courts did not apply them. None of the six courts we studied intensively had done so. Several court administrators mentioned procedural problems that penalties entail. In one court, we were told that there might be logistical difficulties in transmitting, from the arbitration administrator’s office to the appropriate judicial department, the arbitration records a judge would need in deciding whether to impose penalties. In another court, the judge who supervised the arbitration program seemed to be unaware of the penalty provision. In a third, a judge indicated that the proper format had not yet been worked out for a judicial order requiring the appealing party to reimburse county government for the arbitration costs. In one court, the administrators we interviewed suggested that the costs of collecting penalty payments might exceed the payments themselves.

On the other hand, the threat of sanctions may have deterred some litigants. It clearly did not prevent requests for de novo trials, but there is reason to believe that most litigants did not seriously intend to press

28Judicial time-savings due to arbitration cannot be directly translated into cost savings because the program imposes a set of new expenses on the court. To calculate net cost savings, we need to take these expenses into account. Sec. V presents the results of our attempt to do so.
forward to trial—possibly, in part, for fear of sanctions. If courts do not systematically impose sanctions when they are appropriate, however, and the fact becomes widely known, they will lose much of their potential for discouraging frivolous trials.

Second, some courts have decided to require that all litigants whose cases are assigned to arbitration appear at a settlement conference prior to arbitration. Of the six courts we studied intensively, we found two, Alameda and San Francisco, that require or "strongly recommend" pre-arbitration settlement conferences. These courts gave several reasons for this policy. In both courts, administrators fear that unless there is a substantial settlement rate, the arbitration caseload will grow too large to be heard by the available supply of arbitrators. One court also believes that such conferences speed the disposition of cases and therefore benefit the litigants. The other court believes that conferences "clear out" the arbitration calendar, thus preventing the waste of having an assigned arbitrator prepare for a case only to discover at the last moment that the litigants have settled privately. (Other courts that have not adopted pre-arbitration settlement conferences also mentioned this problem. They agree that last-minute settlements damage arbitrators' morale, and over the long run may even erode their willingness to serve, but most courts choose to deal with the problem by urging litigants to provide timely notice of settlements to arbitrators.)

Courts' beliefs about the likelihood of out-of-court settlement are clearly borne out by the first year's experience with the program. Table 3.7 shows that the rate of pre-arbitration settlement among cases that had completed the arbitration process by the end of the year was 38 percent; in Alameda and San Francisco, the two courts that require settlement conferences, the rates were not significantly higher.29

Mandatory pre-arbitration settlement conferences could substantially reduce the judicial time savings otherwise possible through arbitration. Although the figure varies considerably, our interviews with court officials suggest that settlement conferences require an average of about 30 minutes of judicial time per case. Mandatory conferences, then, may add as many as 500 judicial hours, or 40 percent of a judge-year, to the time required to administer arbitration for every 1000 cases assigned to the program.30 The fact that Alameda's and San Francisco's settlement rates are not much better than the rates in courts that do

29In Alameda, cases that settle prior to arbitration may never be assigned to the arbitration hearing list. The settlement statistics for that court may therefore underestimate the true pre-arbitration settlement rate.
30Judicial time required for settlement conferences may be reduced or eliminated if these conferences are held by volunteer attorneys sitting as judges pro tem. In San Francisco about half the pre-arbitration settlement conferences were conducted in this fashion.
### Table 3.7

**Pre-Arbitration Settlement Patterns, Fiscal Year 1980**

<table>
<thead>
<tr>
<th>Court</th>
<th>Cases Removed from Arbitration Hearing List&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Settlement Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>By Settlement Before an Arbitrator’s Award</td>
<td></td>
</tr>
<tr>
<td></td>
<td>By Arbitrator’s Award</td>
<td></td>
</tr>
<tr>
<td></td>
<td>For Administrative Reasons</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>Alameda</td>
<td>329</td>
<td>1,030</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>111</td>
<td>297</td>
</tr>
<tr>
<td>Fresno&lt;sup&gt;b&lt;/sup&gt;</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>1,935</td>
<td>4,576</td>
</tr>
<tr>
<td>Orange</td>
<td>579</td>
<td>1,809</td>
</tr>
<tr>
<td>Riverside</td>
<td>117</td>
<td>294</td>
</tr>
<tr>
<td>Sacramento</td>
<td>269</td>
<td>655</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>57</td>
<td>220</td>
</tr>
<tr>
<td>San Diego</td>
<td>225</td>
<td>472</td>
</tr>
<tr>
<td>San Francisco</td>
<td>385</td>
<td>917</td>
</tr>
<tr>
<td>San Mateo</td>
<td>198</td>
<td>584</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>390</td>
<td>1,311</td>
</tr>
<tr>
<td>Ventura</td>
<td>97</td>
<td>246</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4,696</strong></td>
<td><strong>12,218</strong></td>
</tr>
</tbody>
</table>


NOTE: Data apply to superior courts with 10 or more judges.

<sup>a</sup>These cases have completed the arbitration process. However, some may return to the main pre-trial process. A small number of municipal court cases are included in most jurisdictions.

<sup>b</sup>Fresno’s program did not start until the end of the first program year.

—

not require settlement conferences suggests that this investment may not be worthwhile.

Third, all courts must decide when cases will be valued and assigned to arbitration. The authorizing legislation sets broad guidelines for the court’s decision on this point, stating that cases must be valued “no sooner than nine months after the case has been placed on the civil active list and no later than 90 days before trial, whichever occurs first.”<sup>31</sup> Despite the final phrase, everyone we interviewed, including those who participated in the legislative debate and those involved in implementing the statute, interprets this provision as permitting local courts to schedule the assignment conference at any time between 9 months after the “at issue” memorandum is filed and 90 days before trial.

---

<sup>31</sup>Cal. Stats. (1978), Ch. 743, Sec. 1141.16 (a).
Two of the courts we studied intensively, Los Angeles and San Bernardino, decided to value and assign cases at the mandatory settlement conference held shortly before trial. The impact of this decision on time savings is difficult to estimate. On the one hand, these courts do not expend any additional time valuing and assigning cases, and the number of cases they consider for assignment to the program is probably substantially smaller than the number they would consider if assignment took place earlier in the pretrial process. On the other hand, all cases that litigants are unable to settle on their own, whether or not they are appropriate for arbitration, must be considered by a judge at a settlement conference. While it is possible that a judge would spend no more time on these cases at settlement conferences than he would otherwise have spent valuing them, court officials in Los Angeles say that judges attempt to settle cases before ordering them to arbitration, which suggests that judges spend considerably more time on these cases than valuing them would require. Because we lack statistics on settlement rates prior to mandatory settlement conferences and on the amount of time such conferences consume, we cannot assess whether the practice of assigning cases at pretrial conferences increases or reduces judicial time savings due to arbitration.32

Finally, the court must decide who will value the case and assign it to arbitration. The statute requires that "the court" do so when appropriate. Most courts have assigned these tasks to a judge, but two of the six courts we studied intensively—Alameda and San Francisco—have, to some degree, delegated valuing to arbitration administrators or commissioners, and allow their decisions to be appealed to a judge.33 Although only a small fraction of judicial time is saved by delegating the valuing task to other court personnel (about 3 percent of a judge-year for every 1000 cases ordered to arbitration), this may be a good strategy for courts that have until now rejected early assignment of cases on the grounds that doing so would require an inordinate amount of judicial time.

Our analysis suggests that the contribution of arbitration to judicial workload reduction may be quite modest. This may lead some court observers to propose an increase in the scope of the program, either to include larger-value cases or other types of suits. Any proposals to expand the program, however, will have to consider the supply of volunteer arbitrators.

32The practice of late assignment of cases to arbitration also affects time to disposition. This is discussed in Sec. V.
33In San Francisco, cases are first screened by a court commissioner, but formal assignment to arbitration takes place at a conference with a judge.
THE SUPPLY OF ARBITRATORS

An adequate supply of arbitrators is clearly critical to the success of the program. If the supply is inadequate, backlogs on the trial calendar will simply be replaced by backlogs on the arbitration calendar.

One of the issues legislators wrestled with during the debate over mandatory arbitration was the extent to which attorneys' willingness to serve as arbitrators might be linked to the level of compensation. Some proponents of the program believed that arbitrators should serve pro bono, with no monetary compensation. Others argued that at least a modest fee should be offered to ensure an adequate supply of arbitrators. The final language of the statute provided for payment of $150 per day, but urged arbitrators to waive this fee whenever possible.34

Development of criteria for selecting arbitrators and screening volunteers was delegated to local court committees. These committees are reported to have taken their task seriously because they believed that attorney acceptance of the program would depend on the quality of the arbitrators.

Most committee members we interviewed believe they have been able to recruit an adequate number of qualified volunteers, but some were concerned about their ability to fill slots left vacant by attrition. Most members are of the opinion that arbitrators will be unwilling to hear more than the current average of 3 to 5 cases a year.

Some courts adopted special rules or procedures, particularly because of concerns over the supply of arbitrators. As mentioned above, Alameda and San Francisco instituted pre-arbitration settlement conferences partly because of concerns that the arbitration caseload would otherwise be too large to process.

Another court, Orange, requested and received permission from the Orange County Board of Supervisors to compensate arbitrators at the (presumably higher) rate of $150 per case, instead of $150 per day. Most court officials told us, however, that attorneys' incentives for volunteering are nonmonetary: They enjoy the quasi-judicial experience, believe it increases their professional status, and are motivated by a sense of "public duty."

Judicial Council rules require a multistep process for selecting arbitrators to hear particular cases. The arbitration administrator must randomly select three candidate arbitrators from the panel or pool of attorneys who have been approved by the committee in charge of the program in each court.35 A list of these names is then sent to the

34Cal. Stats. (1978), Ch. 743, Sec. 1141.10(b)(3).
35More precisely, the rules provide for selecting one more candidate arbitrator than there are "sides" in a case. For a typical case with two sides, the number selected is three; for a case with three sides, the number is four, and so forth. Cal. Rules of Court, Rule 1605 (a)(2).
litigants' attorneys, each of whom may "strike" or veto one name. After receiving the attorneys' responses, if each side has exercised its right to strike a name, the arbitration administrator assigns the remaining person as arbitrator. If more than one name remains on the list, the administrator selects one of these at random.

Regardless of whether they had enough arbitrators, some court officials were concerned that allowing litigants to "strike" names of candidate arbitrators would eventually produce a "shadow" panel of preferred arbitrators who would be chosen time after time. In that event, the effective size of the arbitrator panel would be much smaller than the official list of names.

We found that most administrators have precluded such a situation, however, by adopting simple procedures for rotating the selection of candidate arbitrators. Once an arbitrator has been assigned a small number of cases, his or her name is temporarily removed from the list. Litigants are therefore not continually presented with the same set of candidate arbitrators from which to choose.

Some courts have adopted another procedure to control the selection of arbitrators. In Orange and Los Angeles, litigants must explicitly inform the court within 10 days of being notified that their case has been sent to arbitration that they wish to exercise their right to strike candidate names. If they do not do so, they are considered to have waived their veto rights.

Several court officials said they are encouraging judges nearing retirement age to consider establishing arbitration "practices." They believe that many litigants would be happy to stipulate to the assignment of these judges to their cases. In Orange County, where litigants have been encouraged to stipulate to a mutually acceptable arbitrator rather than go through the random selection process, at least one such arbitration practice already exists.

If the supply of arbitrators was adequate during the first year of mandatory arbitration, most cases directed to the program should have been assigned to an arbitrator by the end of the year—and they were, as Table 3.8 shows. An average of 67 percent of the arbitration caseload had been assigned to arbitrators by the end of the year; in most courts, the figure was at least 80 percent.

In courts with lower assignment rates, particularly Los Angeles, there was some concern about the backlog. Some observers feared that it indicated an inadequate supply of arbitrators. The court officials and attorneys we interviewed, however, said that the long queue of cases awaiting assignment could be attributed to a late start in organizing the arbitration office, and a shortage of clerical workers in this office.
<table>
<thead>
<tr>
<th>Court</th>
<th>Number of Cases Placed on Arbitration Hearing List</th>
<th>Number of Cases Assigned to Arbitrators</th>
<th>Assignment Rate (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>By Stipulation</td>
<td>By Random Selection</td>
</tr>
<tr>
<td>Alameda</td>
<td>1583</td>
<td>14</td>
<td>1121</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>556</td>
<td>5</td>
<td>507</td>
</tr>
<tr>
<td>Fresno*</td>
<td>51</td>
<td>10</td>
<td>32</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>11,245</td>
<td>233</td>
<td>5008</td>
</tr>
<tr>
<td>Orange</td>
<td>3811</td>
<td>1393</td>
<td>1634</td>
</tr>
<tr>
<td>Riverside</td>
<td>515</td>
<td>29</td>
<td>392</td>
</tr>
<tr>
<td>Sacramento</td>
<td>1141</td>
<td>6</td>
<td>1027</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>336</td>
<td>6</td>
<td>283</td>
</tr>
<tr>
<td>San Diego</td>
<td>1110</td>
<td>164</td>
<td>926</td>
</tr>
<tr>
<td>San Francisco</td>
<td>1092</td>
<td>29</td>
<td>849</td>
</tr>
<tr>
<td>San Mateo</td>
<td>558</td>
<td>15</td>
<td>473</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>1883</td>
<td>18</td>
<td>1729</td>
</tr>
<tr>
<td>Ventura</td>
<td>348</td>
<td>18</td>
<td>304</td>
</tr>
<tr>
<td>Total</td>
<td>24,229</td>
<td>1940</td>
<td>14,288</td>
</tr>
</tbody>
</table>

SOURCE: Judicial Council, unpublished report.
NOTE: Data apply to superior courts with 10 or more judges.
\*Fresno’s program did not start until the end of the first program year.
By the end of the year Los Angeles had added clerical staff to speed case processing.

We conclude that the supply of arbitrators appears to be adequate in the short run for processing annual arbitration caseloads of at least 24,000, but the long-term prospects are uncertain. Administrators believe that arbitrators will be unwilling to handle more than 3 to 5 cases a year and that the pool of qualified candidates is limited. Supply problems could develop in the future, then, if the number of cases diverted to arbitration steadily rose, or if current arbitrators tired of serving and withdrew.

SUMMARY

Supporters of California’s mandatory judicial arbitration program hoped that it would sharply reduce court congestion. Our exploratory analysis of the performance of the program during its first year suggests that these hopes should be tempered somewhat.

Adding a mandatory component to the previous voluntary program significantly increased the number of civil damage cases diverted to arbitration—to as much as 58 percent in the superior courts that were required to adopt the new program. The total arbitration caseload in the first program year, however, was only about one-fifth the size of the total pending civil caseload in these courts.

By annually diverting approximately 24,000 smaller-value civil damage suits to arbitration, the courts might save several hundred civil jury trials per year—a reduction of about 10 to 20 percent. Operating at this level, the courts might save as much as 26 judge-years annually (a reduction of 5 percent in the total number of judge-years expended in the 13 largest superior courts in the year before the program began), or might actually experience a small increase in the expenditure of judicial time. Actual savings in judicial time will depend on the amount of time expended on smaller value civil cases before the establishment of the mandatory arbitration program, the rate of trial de novo for cases arbitrated under the new program, and the number of days required to try these cases. The true values of these factors are currently unknown.

The program’s potential for reducing congestion could be strengthened somewhat by raising the dollar limit for eligibility for its mandatory and elected components, thereby increasing the size of the arbitration caseload. We cannot predict quantitative results, however, because there are no data on the composition of the civil caseload by dollar value. In addition, proponents of enlarging the program must keep in mind that it depends on volunteers. Our research indicates that
the supply of arbitrators is adequate to process annual caseloads of approximately 24,000. Whether larger caseloads would exhaust the supply is unknown.

The way in which local courts choose to implement the program will strongly affect its ability to reduce congestion. Court policies regarding the imposition of monetary sanctions to deter frivolous de novo trials may reduce the rate of such trials. We found little evidence that the courts systematically impose these sanctions. In addition, some courts assign all arbitration cases to settlement conferences before permitting them to proceed to arbitration hearings. Unless attorneys, sitting as judges pro tem, preside over these conferences, they increase the judicial workload. During the program's first year, conferences seemed to do little to increase pre-arbitration settlement rates. Finally, the timing of assignment of cases to arbitration may affect the program's potential for reducing workload. Proponents of early assignment argue that it removes cases from the trial calendar before they can begin to draw upon court resources. Proponents of late assignment believe that it provides maximum opportunity for the parties to settle their cases without court intervention, reserving the expenditure of judicial time for those cases that actually require it. The available data do not permit an empirical assessment of the comparative validity of these assertions.
IV. THE EFFECTS OF ARBITRATION ON COURT COSTS

Supporters of judicial arbitration believed that it would not substantially increase the cost of operating the courts and might, over the long run, save taxpayers money. Administrative expenses were expected to be modest. During the legislative debate, supporters estimated that the average administrative cost, not including arbitrators' fees, would be about $25 for each case.\(^1\) Most arbitration programs set arbitrators' fees at a low level. In some, arbitrators serve with no compensation; in others the fee is $50 to $75 per case. Under the California rules, arbitrators are permitted to charge $150 per day ($150 per case in Orange County). Since arbitrating a case should generally require no more than one day, fees were expected to be no higher than $150 per case. Program supporters hoped that the average might be even lower.

If arbitration succeeds in diverting many of the smaller civil cases from the judicial workload, the courts should be able to handle rising civil caseloads without a proportionate increase in the number of judgeships. During the legislative debate over California's program, some supporters predicted that avoiding new judgeships would result in savings amounting to $3.6 million annually. These savings would result from streamlining civil case-processing, and substituting the attorneys' labor (compensated at a lower than market rate) for costly judicial time.

The arbitration statute requires the Judicial Council, in consultation with the State Department of Finance and the auditor general, to report on the net costs or savings due to arbitration in its final evaluation of the program. Plans for this analysis have not yet been developed. Aggregate information about the program's first year costs is available, but a comprehensive assessment of the net costs or savings must await a detailed analysis of the effects of arbitration on the court's workload. (Section III discussed the obstacles that hamper such an analysis.)

This section presents the results of our exploratory analysis of the effects of arbitration on costs in the larger superior courts. We begin with an examination of available data on the costs of program operation during the first year. Next we describe our analysis of the potential cost

\(^1\)Memorandum from Ed Kerry, Special Assistant to the Administrative Director of the Courts, to State Senator Jerry Smith, April 17, 1978. The memorandum is reproduced in its entirety in App. C.
effect of arbitration, which is based on the court workload analysis reported in Sec. III. Finally, we discuss some of the factors that may determine whether any potential savings due to arbitration will eventually be translated into real tax savings.

THE COST OF THE ARBITRATION PROGRAM

The arbitration statute requires that the state reimburse program expenses incurred by superior courts with 10 or more judges. Each of the counties in which these courts are located may file for reimbursement of all administrative expenses related to the program and all arbitrator fees. (Judicial time spent on arbitration is not reimbursed, since most of a judge's salary is already paid by the state.) The courts therefore have an incentive to monitor, and promptly report, nonjudicial administrative expenses due to arbitration and payments of arbitrators' fees. These reports provide a good basis for analyzing the cost of arbitration, but to interpret them properly we need to take into account information about the progress of the arbitration program in these courts during the first year.

Table 4.1 shows expenditures for the first year of program operations, as reported to the state controller by the 11 largest courts required to adopt the program. These costs should not include start-up expenses, which were supposedly incurred in the previous fiscal year and which were claimed for reimbursement separately. In some courts where the program got off to a slow start, however, the first year's operational expenses no doubt include start-up expenditures as well. The 11 courts claimed a total of about $1.8 million for reimbursement in Fiscal Year 1980. Of this, about $1.1 million, or 59 percent, was claimed for payment of arbitrators' fees.

---

2There may also be an incentive for counties to attribute as much of their court costs as possible to arbitration.
3One other court, Fresno, was included in the original set of courts required to adopt the program, but its program did not get under way until very late in the first program year. The Ventura Superior Court, which had only nine judgeships at the time the arbitration statute was passed, gained two additional authorized positions in January 1980, and has also adopted mandatory arbitration. However, the state controller rejected Ventura's claim for reimbursement of program start-up funds and its current reimbursement status is uncertain. A special bill passed after the arbitration statute authorized Sonoma to adopt a mandatory arbitration program and provided for state reimbursement of its costs. The program was established for a three-year period (September 1978 to September 1981). Because of the special character of the program's inception in each of these courts, they are not included in our cost analysis.
Table 4.1

ARBITRATION COSTS CLAIMED FOR REIMBURSEMENT BY THE 11 LARGEST SUPERIOR COURTS, FISCAL YEAR 1980

<table>
<thead>
<tr>
<th>Administration</th>
<th>Contra Costa</th>
<th>Los Angeles</th>
<th>Orange</th>
<th>Riverside</th>
<th>Sacramento</th>
<th>San Bernardino</th>
<th>San Diego</th>
<th>San Francisco</th>
<th>San Mateo</th>
<th>Santa Clara</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Superior Court</td>
<td>36,427</td>
<td>18,926</td>
<td>144,281</td>
<td>105,372</td>
<td>8,857</td>
<td>20,413</td>
<td>16,868</td>
<td>80,496</td>
<td>35,369</td>
<td>40,464</td>
<td>NA</td>
</tr>
<tr>
<td>Services + supplies ($)</td>
<td>3,012</td>
<td>2,399</td>
<td>9,547</td>
<td>5,007</td>
<td>563</td>
<td>1,142</td>
<td>2,877</td>
<td>2,746</td>
<td>NA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indirect expenses ($)</td>
<td>1,920</td>
<td>9,179</td>
<td>58,916</td>
<td>34,026</td>
<td>11,286</td>
<td>8,434</td>
<td>6,242</td>
<td>10,184</td>
<td>NA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subtotal ($)</td>
<td>41,359</td>
<td>30,504</td>
<td>212,744</td>
<td>144,405</td>
<td>9,420</td>
<td>31,699</td>
<td>26,302</td>
<td>87,880</td>
<td>48,490</td>
<td>43,210</td>
<td>NA</td>
</tr>
<tr>
<td>County Clerk</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>4,846</td>
<td>-</td>
<td>36,463</td>
<td>7,657</td>
<td>-</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>Subtotal ($)</td>
<td>41,359</td>
<td>30,504</td>
<td>212,744</td>
<td>144,405</td>
<td>9,420</td>
<td>36,545</td>
<td>25,302</td>
<td>124,343</td>
<td>56,087</td>
<td>43,210</td>
<td>752,150</td>
</tr>
<tr>
<td>Total ($)</td>
<td>1,583</td>
<td>556</td>
<td>11,245</td>
<td>3,811</td>
<td>515</td>
<td>1,141</td>
<td>336</td>
<td>1,110</td>
<td>1,092</td>
<td>558</td>
<td>1,883</td>
</tr>
<tr>
<td>Number of cases diverted</td>
<td>1,135</td>
<td>512</td>
<td>5,241</td>
<td>3,027</td>
<td>421</td>
<td>1,033</td>
<td>289</td>
<td>1,093</td>
<td>878</td>
<td>488</td>
<td>1,747</td>
</tr>
<tr>
<td>Average cost per processed case ($)</td>
<td>36</td>
<td>60</td>
<td>41</td>
<td>48</td>
<td>48</td>
<td>27</td>
<td>126</td>
<td>23</td>
<td>142</td>
<td>115</td>
<td>25</td>
</tr>
<tr>
<td>Arbitrator fees</td>
<td>101,037</td>
<td>33,822</td>
<td>370,100</td>
<td>148,635</td>
<td>26,348</td>
<td>63,075</td>
<td>22,350</td>
<td>69,450</td>
<td>55,134</td>
<td>65,815</td>
<td>114,659</td>
</tr>
<tr>
<td>Number of cases arbitrated</td>
<td>645</td>
<td>174</td>
<td>2,525</td>
<td>970</td>
<td>156</td>
<td>345</td>
<td>135</td>
<td>241</td>
<td>496</td>
<td>373</td>
<td>849</td>
</tr>
<tr>
<td>Average fee per arbitrated case ($)</td>
<td>157</td>
<td>194</td>
<td>147</td>
<td>153</td>
<td>169</td>
<td>183</td>
<td>288</td>
<td>111</td>
<td>176</td>
<td>135</td>
<td>155</td>
</tr>
<tr>
<td>Total cost claimed for reimbursement ($)</td>
<td>142,396</td>
<td>64,326</td>
<td>582,844</td>
<td>293,040</td>
<td>35,768</td>
<td>91,306</td>
<td>58,895</td>
<td>94,752</td>
<td>179,477</td>
<td>121,902</td>
<td>157,869</td>
</tr>
</tbody>
</table>

SOURCE: California State Controller's Office and Judicial Council of California. The cost data have not yet been audited. The controller's audit may disallow some of the costs claimed.

NOTE: The data apply to superior courts with 10 or more judges.

**a**Total number of cases placed on the arbitration list during FY 1980; includes mandatory, elected, and stipulated cases.

**b**Total number of cases assigned to an arbitrator.

**c**Total number of cases in which an award was made.
Administrative Expenditures

The courts claimed about $752,000 in administrative expenditures, excluding arbitrators' fees. This sum includes salaries and benefits for the arbitration administrator and support staff, supplies and other expenses, overhead, and salaries and expenses of the county clerk's office (claimed by 3 courts). A typical program employed a full-time junior-level manager as arbitration administrator and one clerical assistant. Some courts, however, allocated higher-level employees to manage the program, and courts with larger programs employed more clerical assistants.

Administrative expenses varied considerably, from a high of about $213,000 in Los Angeles to a low of about $25,000 in San Diego. Expenses are higher, of course, in courts with larger arbitration caseloads, but expenses also vary with the rate at which cases were processed during the first year, and with policy decisions regarding the management structure for the program.

The main activity of the arbitration administrator and his or her staff is assigning arbitrators to cases. The rules usually make this a multistep process involving several interactions with attorneys for both sides and with the arbitrator who is eventually selected. The number of cases assigned to arbitrators during the first year is therefore a reasonably good indicator of the number of cases processed by the arbitration office.4

In total, these 11 courts processed only two-thirds of their arbitration caseload (see Table 3.7). The figures in Table 4.1 therefore do not represent the full administrative expense of processing all cases initiated in one year. Most courts processed 80 to 90 percent of their caseloads, however, so their administrative expenses for the year would have been only slightly higher if they had processed all cases.5 But Los Angeles processed somewhat less than half of its caseload; its costs would probably have been much higher if the arbitration office had been able to keep up with its caseload.6

By taking the rate of processing into account, we can compute an average administrative cost to process each case diverted to arbitration, which should be a reliable indicator of future expenses. Table 4.1 shows

4Some administrators also spend time monitoring the progress of cases through arbitration, but others believe that such monitoring would thwart the purpose of the program. These differences in policy may also contribute to variations in administrative expenditures.
5A few courts had mandatory arbitration by local rule prior to the establishment of the statewide program. These courts were organized and staffed and had tested procedures before the formal starting date of the state program.
6By the end of the first program year, the Los Angeles arbitration office had increased its clerical staff to handle the caseload.
that the average administrative cost of processing a case in FY 1980 was $47. This is almost twice the cost originally estimated by program supporters.

That figure varied from a low of $22 in Riverside to a high of $142 in San Francisco, apparently reflecting differences in management structure and allocation of tasks between court and county clerk offices. For example, San Francisco assigned a court commissioner to the position of arbitration administrator. A more senior official than is typically assigned to the position, his salary contributes to the high figure for San Francisco. The commissioner screens all civil damage suits, assigns those that involve dollar amounts that are substantially higher than $15,000 to a regular trial-setting conference, and sends the rest to judicial conference for formal assignment to arbitration. The effect of this procedure on the judicial workload is uncertain, but any resultant savings would not be reflected in the expenditure data, because judicial time is not reimbursable.

Average processing costs were also higher where certain administrative tasks were apparently allocated to the county clerk’s office (San Bernardino, San Francisco, and San Mateo).

Arbitrators’ Fees

Arbitrators’ fees submitted for reimbursement amounted to about $1.1 million (see Table 4.1). The average fee for cases in which arbitration awards were made was $155. This may disappoint some program supporters who hoped that a substantial number of attorneys would waive their fees.

The proportion of disposed cases requiring arbitration may surprise some observers. Program planners expected that only 25 percent of all cases diverted to arbitration would ever reach the award stage; they expected the rest to be dropped or settled out of court. Preliminary estimates of annual arbitrator fee payments were based on this 25 percent figure (see App. C). A superficial review of arbitration program statistics may lead observers to conclude that the 25 percent expectation was nearly correct: During the first program year, of the 24,229 cases diverted to arbitration, only 29 percent (7045) reached the award stage. Only half of the caseload (12,218 cases) had completed the arbitration process by the end of the year, however. Consequently, if we consider cases completed instead of cases diverted, the 7045 cases that resulted in arbitration awards constituted 58 percent of the completed cases. We believe that this percentage is a more reliable indicator of the proportion of the total arbitration caseload that will reach the award stage (and hence result in requests for arbitrator compensation) than
the smaller percentage based on incomplete data. If we are correct, the annual cost for arbitrators could be twice the amount originally anticipated.

The average arbitration fee varied considerably among courts, from a low of $111 per arbitrated case in San Francisco to a high of $288 in San Diego. Some of this variation may be due to differences in court policy regarding the fee claims. It is widely believed that most arbitrators are charging on a per case, rather than a per day, basis. Some courts monitor fee claims more closely than others do, which may result in lower fees per case. Courts may also differ in the times at which fee claims are submitted and paid. Because arbitrators do not always file their fee requests immediately upon completing arbitration, Table 4.1 may not include some requests that should have appeared on the first-year ledger. For courts in which that happens, Table 4.1 would show a lower than average fee per case. Finally, in all courts, a substantial number of cases assigned to arbitrators are settled by the parties before an arbitration hearing is held. Some of these cases consume none of an arbitrator’s time, but in others, arbitrators spend time conferring with the attorneys, scheduling a hearing, and the like, before the settlement is reached. Some arbitrators request compensation for this time. Differences in out-of-court settlement rates and in arbitrators requests for compensation may also affect average fees per case.

The Cost of Judicial Time

Because there is no reimbursement for judicial time spent on arbitration, courts do not report this time to the Controller and they have little incentive to monitor it. The amount of such time appears to vary considerably among the courts.

In three of the six courts we studied, a single judge was responsible for assigning cases to arbitration. In one of these three, and in one other court, a single judge was responsible for pre-arbitration settlement conferences. But in all four of these courts, the "arbitration judge" also handled cases that were not eligible for arbitration, either scheduling them for settlement conferences or trials, or attempting to negotiate settlements. In the remaining two courts, cases were assigned to arbitration at pretrial settlement conferences that were conducted by many different judges, who also handled cases not eligible for arbitration.

Such complexity makes it difficult to estimate the amount of judicial time devoted exclusively to arbitration. The highest estimate we received was about 25 percent of the judge’s time, but later conversations with court officials suggested that this figure reflected start-up costs, and that the program required less judicial time once it settled into a routine.
Judges who assign cases to arbitration at scheduling conferences estimated that on the average each case requires only one or two minutes. Judges who conduct settlement conferences said that the time required for a case varies considerably, but that if they could not settle a case expeditiously they sent it on to arbitration. We suspect that it is uncommon for judges to spend more than 30 minutes attempting to settle such cases.

The judges we interviewed seemed to regard arbitration activity as something that they "fit into" the rest of their schedule regardless of how much time it absorbs. There is thus a tendency among court officials to treat judicial time spent on the program as cost-free. However, unless a court has designed program procedures to exclude judges from the process entirely, they must spend at least a few minutes on each case they order to arbitration. Although the cost of judicial time is not included in Table 4.1, it should be considered in estimating the actual costs of operating the program.

Total Estimated Costs

For the reasons described above, we do not believe that the total claims for reimbursement shown in Table 4.1 represent the total amount that will be incurred for disposing of all cases initiated in the large courts during the first program year. Two courts' expenses (Fresno and Ventura) were not included in that table. Reported administrative expenses do not include the costs of processing cases that were diverted to the program but not yet assigned to an arbitrator at the end of the year. Reported payments to arbitrators do not include the cost of arbitrating cases that were diverted to the program but had not reached an award by the year's end. Finally, because it is not reimbursable, the cost of judicial time spent on the program is not reported at all.

What is the total cost of program operations for cases initiated during the first year likely to be? Table 4.2 presents our estimate of the total cost for cases initiated in the 13 courts with 10 or more judges. The total estimate has three components: administrative expenses for processing all cases diverted to the program, arbitrator fees for all cases that will eventually reach arbitration hearings, and judicial time for valuing all cases ordered to arbitration. Based on the assumptions and calculations described below, our estimated total is about $3.4 million. The average cost for cases that reach arbitration award should be $210. The average cost for all cases diverted to the program, including those that settle before arbitration and those that drop out for other reasons,
Table 4.2

Estimates of Total Costs of Arbitration, for Cases Initiated During the First Program Year: Superior Courts with 10 or More Judges

<table>
<thead>
<tr>
<th>Item</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative expense to process cases:</td>
<td></td>
</tr>
<tr>
<td>$47 x 23,018&lt;sup&gt;a&lt;/sup&gt;</td>
<td>$1,081,846</td>
</tr>
<tr>
<td>Arbitrator fees: $155 x 14,053&lt;sup&gt;b&lt;/sup&gt;</td>
<td>2,178,215</td>
</tr>
<tr>
<td>Judicial time: $7.74 x 12,378&lt;sup&gt;c&lt;/sup&gt;</td>
<td>95,806</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$3,355,867</strong></td>
</tr>
</tbody>
</table>

Average cost per diverted case:

Total ÷ 24,229<sup>d</sup> = $138

Average cost per arbitrated case:

$47 + $155 + $7.74 = $210

Sources: Authors' estimates, based on claims for reimbursement submitted to the State Controller's Office, and unpublished Judicial Council reports of program performance. See text for explanation of derivation of estimates.

<sup>a</sup>Number of cases processed (estimated).
<sup>b</sup>Number of cases arbitrated (estimated).
<sup>c</sup>Number of cases ordered to arbitration.
<sup>d</sup>Number of cases diverted.

should be $138. This is about twice the per case cost estimated by Judicial Council staff during the legislature debate. (See App. C.)

Other court analysts may disagree with our estimates because they would make other judgments about the proportion of cases that will require processing, the proportion that will require arbitration, and other factors that are used in arriving at the estimates. But if analysts attempt to project future costs of arbitration based solely on the claims for reimbursement, without taking into account the progress of the program to date, they may seriously underestimate the amount necessary to support program continuation.

Estimating Procedure

Our estimate of the total administrative cost of processing cases is $1,081,846. We arrived at this estimate by multiplying the average administrative cost per processed case shown in Table 4.1—$47—by the
23,018 cases from the first year's caseload that we expect to be assigned to arbitrators. Although many cases diverted to arbitration settle before an arbitration hearing, most of these settlements occur after an arbitrator has been assigned to a case. Some cases do, however, drop off the arbitration list for administrative reasons. We estimate that in the 13 courts, 23,018 cases (or 95 percent of all cases diverted) will be assigned to arbitrators. This allows for 5 percent of cases being dropped for administrative reasons.\(^7\)

Our estimated total cost for arbitrator fees is $2,178,215, arrived at by multiplying the average fee per arbitrated case shown in Table 4.1—$155—by the 14,053 cases from the first year's caseload that we expect to reach an arbitration award. These cases compose 58 percent of the 24,229 cases diverted to the program in these courts.\(^8\)

Our estimated cost for judicial time is $95,806, arrived at by multiplying the number of cases placed on the arbitration list by court order in these 13 courts during the first year of the program, 12,378, by the cost of two minutes of judicial time per case. Despite the tendency of judges to treat the program as cost-free, we think it is reasonable to assume that judges spend an average of at least two minutes on each case they order to arbitration. This is the same amount of time per case that judges report spending at scheduling and status conferences.\(^9\)

The estimated cost of judicial time, $7.74 for 2 minutes, is based on Judicial Council estimates of the average cost of judicial positions statewide and the average number of minutes available in a judge-year for case-related activities.\(^10\)

---

\(^7\)Of the total number of cases removed from the arbitration list during the first year, about 4 percent were dropped or dismissed for administrative reasons.

\(^8\)We expect that cases that remained on the arbitration list at the end of the first program year will have about the same rate of pre-arbitration settlement and dismissal, 42 percent, as cases that were removed from the list. This expectation is based on the belief that most of the cases remaining on the list—roughly half of all cases diverted—were not a peculiar subset of all cases, but rather were simply those that had been diverted to the program toward the end of the year.

\(^9\)This estimate is too high for courts where judges spend no time on arbitration, either at the assignment stage or in pre-arbitration settlement conferences. It is too low for courts where judges spend much more time trying to settle arbitration cases prior to hearings. However, we think two minutes per mandatory case (or about one minute per diverted case) is more likely an underestimate than an overestimate of the average amount of judicial time spent on the arbitration program.

\(^10\)The Judicial Council estimates that the average cost of a judicial position in FY 1980 was $286,263. The figure is computed by estimating the total costs of the superior courts in the state and dividing by the total number of judicial positions. The cost per position includes judicial salary and retirement benefits, salaries of court reporters and bailiffs, salaries of other court and county clerk employees, services and supplies, and other indirect costs. It does not include costs that are associated exclusively with the criminal justice system, such as those for the district attorneys’ and public defenders' offices. (This information was provided by Daniel Clark, Judicial Impact Analyst, California Judicial Council.) The official Judicial Council estimate of the total amount of time that a superior
POTENTIAL COST EFFECT OF ARBITRATION

Although some supporters of arbitration expect it to yield long-term savings, there is no agreement on how to estimate the program's effects on costs. To do so accurately we need to answer two questions:

1. What does it cost to process a given number of cases that are diverted to the arbitration program, including cases tried de novo?
2. How much would it have cost to process these cases in the absence of arbitration?

The difference between the two answers yields the net savings (or net cost) due to arbitration. We term this difference the potential cost effect because it is an amount that the courts could realize, theoretically, under certain conditions.¹¹ For example, the courts might elect to use any time or money savings to process other civil cases, or to speed up the entire pretrial process. In this case, citizens might not observe any dollar savings due to arbitration, but might notice improvements in other aspects of the court process.

Neither of the two critical questions listed above can be answered with a high degree of certainty, but we were able to estimate the upper and lower bounds of the potential cost effect by making a number of assumptions and performing several sets of calculations.

To estimate the operational component of the program's cost, we used the amount of $138 per diverted case derived in Table 4.2.¹² To estimate the cost of de novo trials, we had to introduce assumptions regarding not only the de novo trial rate and the length of trial, but also the cost of a trial day. Rather than select a single de novo trial rate and a single number of trial days for our analysis, we performed a number of calculations using different assumptions. We used the same set of assumptions that we used in Sec. III for the workload reduction

court judge has available to spend on case-related activities during a single year is 74,000 minutes. Therefore, the average burdened cost of a minute of case-related judicial time is $3.87 ($286,263/74,000). Burdened costs provide a more accurate estimate of court costs than do judicial salary and fringe expenses alone.

¹¹Our definition of the potential cost effect per case can be represented by the following equation:

\[ E = C - (A + Q) \]

where \( E \) = potential per case cost effect attributable to arbitration; \( C \) = estimated per case cost of processing without arbitration; \( A \) = estimated per case cost of arbitration program operations; and \( Q \) = estimated per case cost of cases that reappear on the trial calendar and continue on to settlement conference and trial.

¹²We did not perform any sensitivity analyses regarding this figure because we believe it is as accurate an indicator of true program costs as will be available and we could find no empirical basis for varying it.
analysis: 1, 2, and 3 percent de novo trial rates, and 3, 4, and 5 day trials. To estimate the cost of a trial day we assumed that each such day requires six hours (360 minutes) of judicial time,\(^{13}\) at a cost of $3.87 per minute, for a total of $1393 per day. We also calculated different estimates of the cost of disposing of smaller-value civil damage cases before the establishment of mandatory arbitration, based on two different assumptions about the amount of judicial time required for disposition. For these calculations, we used the same two per-case estimates of judicial time used in the workload reduction analysis: 91 minutes and 45 minutes. These estimates are based on the alternate assumptions (1) that smaller-value cases formerly required the same amount of judicial time for disposition as the "average" case (91 minutes), and (2) that they formerly required half as much time (45 minutes). The cost of processing these cases before arbitration under these two different assumptions would have been $352 (91 \times $3.87) and $174 (45 \times $3.87), respectively.

Figures 4.1 and 4.2 show the upper and lower bounds of arbitration's potential cost effect. (These figures correspond to Figs. 3.2 and 3.3, but because the operational costs of arbitration are included in the calculations illustrated here, the estimates in Figs. 4.1 and 4.2 cannot be derived directly from those in the earlier figures.)

Our highest estimate of potential cost savings, shown in Fig. 4.1, is $172 per case.\(^{14}\) Not surprisingly, the savings drop almost to zero with a 3 percent de novo rate (about the same as before arbitration) and 5-day trials.

Figure 4.2 shows that there might be no cost savings if smaller-value cases formerly required only 45 minutes to process. According to our estimates, cost savings would then accrue only if the trial de novo rate were less than 1 percent. With higher rates and longer trials, costs increase steadily to a high of $173. With a 3 percent trial de novo rate and a 5-day trial length, the program would double the former per case processing costs.\(^{15}\)

\(^{13}\)California Judicial Council, Weighted Caseload Study.

\(^{14}\)The estimating procedure is as follows: At 91 minutes per case and $3.87 per minute, the total cost to process a case before arbitration would have been $352. With arbitration, if one percent of the cases are tried for 3 days apiece, at a cost of $1393 per day, the average per case cost of trial will be $42 (.01 \times 3 \times $1393). The cost of arbitrating the average case will equal $138 (the average arbitration program cost per diverted case) + $42, for a total of $180. The difference between $352 and $180 is $172. All of the values Figs. 4.1 and 4.2 were obtained using this computational procedure. The differences between the figures result solely from using different estimates of the per case cost of processing smaller-value civil cases before arbitration. The differences between the curves in each figure result from differences in the cost of trying cases under the different assumptions.

\(^{15}\)At 45 minutes per case and $3.87 per minute, the cost of processing a smaller-value case before arbitration would have been $174. According to our calculations, with a 3 percent de novo rate and 5-day trials, the cost of processing a case would be $347 ($138 arbitration program costs plus $209 to try a case).
Fig. 4.1—Potential cost effect per case, due to arbitration, if pre-arbitration judicial time expenditure for small cases was "average"
Fig. 4.2—Potential cost effect per case due to arbitration, if pre-arbitration judicial time expenditure for small cases was half the average amount.
It is readily seen from Figs. 4.1 and 4.2 that the potential cost effect critically depends on the *de novo* trial rate and the average length of trial.

Our estimates are also highly sensitive to several assumptions underlying our estimated $138 per case arbitration program operating cost. The most critical of these are the assumption that 58 percent of the cases diverted to the program will eventually be heard by an arbitrator, and the assumption that little judicial time is allocated to administering the program. If a smaller fraction of the arbitration caseload eventually reaches arbitration, a smaller amount will be expended for arbitrator fees. The cost per case of arbitration will then be lower, and the savings higher. Costs will rise and savings drop if substantial judicial time is allocated to administering the program—for example, by requiring settlement conferences for all or most of the cases diverted to the program.

It is not easy to assess the cost-effectiveness of pre-arbitration settlement conferences. We estimate that the cost of arbitrating a case, including processing expenses ($47) and arbitrator fees ($155) but not including judicial time, is $202. This is the average amount that can be saved if a case is settled prior to assignment to an arbitrator. It is equivalent to the cost of 52 minutes of judicial time, at the rate of $3.87 per minute. Since judges probably spend less time than that in attempting to settle a case prior to arbitration, one might conclude that substituting a judicial settlement conference for an arbitration hearing is cost-effective. That conclusion is doubtful. Arbitration program statistics show that, among all of the large superior courts, about 38 percent of the cases disposed of through arbitration during the first year were settled prior to an arbitration hearing. Many of them were settled in courts that do not require pre-arbitration hearings; in other words, the litigants settled them privately without judicial intervention.

To assess the cost-effectiveness of pre-arbitration settlement conferences, it is therefore necessary to weigh the cost of judicial time spent attempting to settle all or most diverted cases against the savings that accrue from *increasing the settlement rate above what it would have been without this investment of judicial time*. Among the six courts that we studied intensively, one of the courts requiring pre-arbitration settlement conferences, Alameda, had a lower than average pre-arbitration settlement rate and one, San Francisco, had a rate that was somewhat higher than average. In the former it appears that the settlement program was not cost-effective. In the latter, we estimate that it could

---

16Alameda's reported pre-arbitration settlement rate may not include some cases that were settled at the judicial conference. If Alameda achieved a much higher settlement rate than reported, we might draw a different conclusion.
have been cost-effective only if, on average, about two minutes per case were spent attempting to bring about settlements.\footnote{We estimate that by increasing the pre-arbitration settlement rate by 4 percent over the average settlement rate, San Francisco may have settled 37 more cases. At a cost of $202 per case, this would result in $7474 potential savings due to avoiding arbitrating these cases. At $3.87 per judicial minutes, this is equivalent to the cost of 1931 minutes. If these minutes were allocated equally across the 917 cases disposed in San Francisco, this would permit an expenditure of roughly 2 minutes per case at settlement conferences.} These results suggest that the justification for pre-arbitration settlement conferences must be based on their benefits for litigants—for example, speeding disposition or reducing litigation expenses—rather than their benefits for the court.

The bounds on potential cost effect shown in Figs. 4.1 and 4.2 apply to a statistically average court. The estimates are derived using state-wide averages for case processing time and court costs, and average arbitration costs for the 11 largest superior courts that reported detailed expenditure data to the State Controller.

Of course, each superior court in the state differs substantially from the statistically average court. For a particular court, the time required to dispose of cases with and without arbitration, and the cost of operating the court, may be lower or higher than the average and this will cause the potential cost savings of arbitration to go up or down. For example, a court with average arbitration costs, but below-average pre-arbitration costs, might experience either smaller savings or higher costs than indicated in the figures as might a court with above-average arbitration costs but average pre-arbitration costs. But a court with below-average arbitration costs and above-average pre-arbitration costs might have larger savings or less of a cost increase than shown in the figures.

To summarize, the estimates shown in Figs. 4.1 and 4.2 suggest the likely upper and lower bounds of the potential cost effect of arbitration. They indicate that the program may provide a means of saving a moderate amount of money per case, it may simply break even, or it may result in a moderate increase in the cost of processing cases. Where, within this range, the final outcome will lie cannot be determined without more complete data on the contribution of smaller-value cases to court workload. Further, these estimates apply to a statistically average court. An individual court's savings will depend on its program operating costs and the previous cost of processing smaller-value cases.
EFFECT OF ARBITRATION ON COURT COSTS

Using the calculations described above, we estimate that if the arbitration program continues to operate at an annual level of about 24,000 cases, it could save the superior court system as much as $4 million, it could simply break even, or it could add about $4 million to the cost of the system. In Sec. III we estimated that the arbitration program might save as much as 26 judge-years annually or cause an annual increase of about 3 judge-years. But in calculating cost savings, we have deducted operating costs from the savings due to this reduction in judicial time. Taking these operational expenses into account, the net effect of the program on court costs, under our more optimistic assumptions, is the equivalent of saving 14 judge-years; under our more pessimistic assumptions, it is the equivalent of adding 14 judge-years.

Even under the more optimistic assumptions, however, neither practitioners nor court analysts would expect the arbitration program to reduce the costs of operating the courts in the short run, because whatever judicial and other court time is saved will be spent attempting to reduce court backlogs and keep up with continually rising caseloads. Over the long term, if the rate of increase in the number of authorized judgeships slows, there could be net savings for taxpayers.

The likelihood of future savings due to arbitration depends on the program's evolution over the next few years. Savings will be less likely if the proportion of cases diverted to arbitration decreases—as it will, over time, if the legislature does not increase the monetary limit of the program to keep up with inflation. Savings will also be less likely if the cost of processing arbitration increases faster than the cost of processing other cases. This could occur if arbitrator fees increased substantially, either because of a change in the fee schedule or because the amount of time required to arbitrate a case increased. The cost of processing a case could also rise if time-consuming pre-arbitration settlement conferences became common practice.

The most striking conclusion from this analysis is the enormous uncertainty about the effect of arbitration on court costs. It is impossible to estimate that effect accurately because of the lack of data on the contribution of smaller-value cases to court workload, and on the rate and lengths of de novo trials following arbitration, and also because of

---

18 At a maximum rate of $172 saved per case, the program would save $4.128 million annually. At a maximum rate of $173 increased cost per case, the program would add $4.152 million annually to the cost of the system.

19 The difference of 12 judgeships (between 26 and 14) may surprise some readers, but it is easily explained: With an annual caseload of 24,229, at a rate of $138 per diverted case, the arbitration program would cost $3,343,602. At $286,263 per judgeship this is equivalent to the cost of 11.6 judgeships.
the lack of disaggregated statistics on the cost of court operations. Although we can estimate the upper and lower bounds of that effect and identify factors that influence it, we cannot offer a certain basis for choosing among alternative estimates. That impasse is unlikely to disappear unless a much greater effort is made to collect and analyze court cost data.
V. THE EFFECTS OF ARBITRATION ON LITIGANTS

Proponents of arbitration hoped that it would not only benefit the courts but also would ease the burden of the court process on litigants—a burden that some believe is so great that it effectively denies many people access to justice. The burden consists mainly of costs and the law's delay.

By diverting smaller-value civil cases from the main pretrial stream to a more informal and streamlined adjudication process, proponents expected arbitration to shorten the time required to resolve these cases, and also to reduce the time that larger cases spend "waiting in line" for trial. By substituting a brief hearing with relaxed rules of evidence for the traditional trial process, proponents expected arbitration to reduce out-of-pocket costs to litigants. Because hearings can take place outside of court and outside of normal business hours, they expected that many litigants would also incur lower transaction costs—time away from work, transportation, and the like. Moreover, because the hearing is more informal than a trial, they believed it might impose less emotional strain on litigants.

Proponents expected arbitration to yield those benefits while still treating all parties fairly. The process itself could not discriminate among litigants, nor could arbitration systematically bias outcomes of cases either by favoring one side of a case over another or by producing larger or smaller settlements or awards. Otherwise, the program would lay itself open to attack as "inequitable."

This section describes the effects of arbitration during its first year on time to disposition, costs to litigants, and case outcomes.

THE EFFECT OF ARBITRATION ON TIME TO DISPOSITION

Proponents of mandatory arbitration believe that congestion on the civil trial calendar creates a fundamental injustice: inordinate delay in getting a fair hearing. As the legislature found, in the intent section of the arbitration statute, "... [The] delays and expenses [of litigating a small case today] deny parties their right to a timely resolution of
minor civil disputes." To reduce delay, the arbitration program must not only divert enough cases to allow the courts to deal with the remainder expeditiously; it must also deal with its own cases expeditiously.

This section presents comparative estimates of time it takes to dispose of cases that are arbitrated and cases that go to trial. The time that an arbitrated case requires appears to depend on three factors. First, the legislation and the Judicial Council rules establishing the program set forth certain requirements that affect disposition time. Second, the litigant himself can hasten or prolong the process through his options of volunteering or stipulating to arbitration at an early date, and of requesting a trial de novo. Third, individual courts have chosen to implement the program in a variety of ways that greatly influenced disposition time.

Statutory Requirements Governing Arbitration

The statute enacting the mandatory program establishes specific time limits for ordering cases to arbitration and for requesting a trial de novo.2 Our interviews suggest that these limits are often transgressed, but they nevertheless represent targets the courts may hope to achieve with more experience.

In California, after a plaintiff files his complaint, the courts pay little attention to the case until the plaintiff has filed his "at issue" memorandum. Any intervening delay, broadly speaking, is viewed as the litigant's responsibility. Delay between filing the memorandum and the trial is the court's responsibility.3 The rules governing the processing of arbitration cases therefore focus on this latter period.

Once a plaintiff has filed his memorandum, he may volunteer for arbitration (thereby agreeing that his award cannot exceed $15,000). The case is then placed immediately on the arbitration hearing list to await assignment of an arbitrator. Alternatively, plaintiff and defendant can stipulate for arbitration, with no limit on the award, and the case is then placed immediately on the hearing list. If the litigants do not opt for arbitration immediately, they may stipulate to be placed on the list at any time up to 30 days before their scheduled trial; or the plaintiff may volunteer for the program at such later date as the indi-

---

1Cal. Stats. (1978), Ch. 743, Sec. 1141.10(a).
2Otherwise, the statute orders the Judicial Council to establish rules governing how local courts carry out the program.
3This assessment is somewhat oversimplified. Especially in congested courts, litigants often file their memoranda well before they are ready for trial simply "to get a place in line." Then if their case is called, they must get continuances.
vidual court allows. In practice, most litigants who volunteer or stipulate to the program do so early.

The arbitration statute requires that courts subject to mandatory arbitration value their civil damage suits and place the smaller-value cases on the arbitration hearing list "not sooner than nine months after the memorandum has been filed, but not later than 90 days before the case is scheduled for trial or whichever is first." This provision offers the individual courts considerable latitude in deciding how quickly to start a case on its way to arbitration.

The law probably gives the individual courts such discretion for two reasons. First, there is major disagreement among the large courts about when cases ought to be diverted. Some believe that early diversion forces attorneys to look at cases and settle early, thereby lessening court and litigant costs. Others believe that cases necessarily mature slowly, and that late diversion allows settlement to take place, thereby greatly reducing the number of cases a court must handle. Second, this provision accommodates litigants in both congested and uncongested courts. A litigant does not necessarily know, before his case is valued by the court, whether he will be ordered to arbitration. In a congested court, where he may file his memorandum well before his case is ready "to get a place in line" for a trial date assignment, the "no sooner than nine months" provision protects him from being sent immediately to arbitration when he is still unprepared. The "no later than 90 days" provision ensures that in an uncongested court the case will be assigned early. Moreover, since the statute requires that an arbitration award be made within approximately 90 days of when a case is placed on the hearing list, the 90-day provision also guarantees that it will take no longer for a case to reach arbitration than to reach trial.

Once a case has been placed on the arbitration hearing list, Judicial Council rules set forth a detailed timetable for pushing it to disposition. The arbitration administrator must send a list of candidate arbitrators to the litigants' attorneys within 15 days of case assignment. The parties must strike names they object to and return the list within 10 days. The arbitrator is then to be appointed, and he must schedule the arbitration hearing 35 to 60 days from the time of his appointment. Parties may stipulate to a continuance with permission of the arbitrator. Once the arbitrator hears the case, he must file the award within 10 days (20 if he deems the case "very complex"). And finally, if either party wants to file a request for trial de novo, he must do so within 20 days of when the award is filed. In the absence of continuances, and assuming that the hearing takes one day, it should take a case between 91 and 116 days to reach final disposition once it has been assigned to arbitration. Moreover, it should take no more than 15 months (116 working days plus 9 months) from the time a plaintiff files his memo-
random for a case to reach resolution. If a litigant elects or stipulates to arbitration, his case should be immediately assigned to the arbitration hearing list and be resolved in the 91 to 116 days. The reality is far from the ideal; arbitrated cases seem to be taking anywhere from 4 to 41 months to reach disposition. The question is why.

Election and Stipulation

Although the Judicial Council carefully monitors the time to disposition for cases going through the court to trial, no one monitors the time to disposition for arbitrated cases. Because we lacked the time and resources to review a statistical sample of arbitrated cases, it was necessary that we construct a set of estimates. Our estimates of the time it takes to dispose of arbitrated cases are based on reports by court and arbitration administrators of the typical time it takes a case to move from one step in the arbitration process to the next. The estimates are therefore not averages in a statistical sense, nor do they offer any indication of how many cases might be faster or slower than average. We believe our estimates to be credible and useful for our purposes, however. A formal evaluation of the program would, of course, require more accurate disposition data.

There is a further problem with using “time to disposition” as a yardstick for evaluating the arbitration program. This measure applies only to cases that reach a verdict or award. It says nothing about the time to disposition for cases that settle or the proportion of cases in each track that settle. Therefore it can say nothing about the average time to disposition for all arbitration or trial-bound cases. If, for instance, a smaller proportion of the arbitration caseload than of the trial-bound caseload is settling out of courts, that could further decrease any average time-savings that arbitration might confer. Because we have no data on settlement, we are forced to compare trial and award disposition times.

Table 5.1 compares the time to disposition for jury trial cases, cases ordered to arbitration, and cases that elect arbitration. This table dramatically illustrates some unexpected relationships. Perhaps most striking is the fact that cases ordered to arbitration do not seem to reach a final award appreciably faster than they would have reached a jury trial. The average time to disposition in the six courts we examined closely is about 22 months for both tracks. Only one court, Orange, has achieved a significant reduction in the time to disposition for cases ordered to arbitration. In four courts, such cases actually take longer on average. This comparison suggests that arbitration may not be restoring to litigants “their right to a timely resolution of minor civil disputes,” as the legislature intended the program should.
Table 5.1

**COMPARISON OF CASE DISPOSITION TIME:**

**TRIAL VS. ARBITRATION**

<table>
<thead>
<tr>
<th>Court</th>
<th>Typical Case Disposition Time (in months) from &quot;At Issue&quot; to:</th>
<th>Arbitration Award</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Jury Trial</td>
<td>Court-Ordered</td>
</tr>
<tr>
<td>Alamed</td>
<td>15</td>
<td>14.5</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>38</td>
<td>41</td>
</tr>
<tr>
<td>Orange</td>
<td>30</td>
<td>18</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>30</td>
<td>30.5+</td>
</tr>
<tr>
<td>San Francisco</td>
<td>16.5</td>
<td>18</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>6.5</td>
<td>9.5</td>
</tr>
<tr>
<td>Average</td>
<td>23</td>
<td>22</td>
</tr>
</tbody>
</table>

**SOURCE:** Court administrators’ estimates.

Table 5.1 also shows, however, that litigants who stipulate to or elect arbitration benefit greatly from the program. On the average, the time required to dispose of an elected case is seven months, about 16 months less than a court-ordered or jury case. In no court does it take longer to dispose of elected cases than to go to jury trial, and in all but one there is a very substantial reduction in time. Not surprisingly, the rate at which litigants choose arbitration is significantly higher in those courts with the longest time to disposition for court-ordered arbitration cases. It is also significantly lower (only 10 percent) in Santa Clara, where litigants can get a trial within six to seven months of filing their memoranda (see Table 3.1).4

On the basis of this evidence, one might conclude that the old “voluntary program” was as effective as the present mandatory program in offering litigants of small cases a fast track; that does not appear to be true, however. Almost three times as many litigants stipulated to or volunteered for arbitration in the first year of the mandatory program as in an average year under the voluntary program, which

---

4In Los Angeles 66 percent of those cases placed on the arbitration hearing list have elected or stipulated to do so. In San Bernardino 58 percent fall into this category. In Orange, where the time to disposition for court-ordered cases is considerably less than in Los Angeles or San Bernardino, the proportion electing or stipulating is also less: 47 percent. The percentage for the other three courts ranges from 10 to 31 percent.
suggests that litigants find it easier to volunteer for arbitration in the context of a mandatory program. There are several plausible reasons for this phenomenon. First, the statute has raised the cap on the amount the litigant who volunteers for arbitration can recover, from $7,500 to $15,000. Second, the mandatory program forces more attorneys to get first-hand experience with arbitration; once they learn the mechanics and find themselves satisfied with the results, they may be more willing to return as volunteers. And third, since litigants of smaller-value cases now know they will be ordered to arbitration eventually, even those who would prefer a court trial may volunteer early to save time.

Finally, Table 5.1 shows that time to disposition for arbitrated cases varies from court to court. These differences are large and clearly depend on local practices.

**Superior Court Implementation Practices**

Although the law and Judicial Council rules are quite specific in the implementation guidelines they give the superior courts, much is still left to local discretion. We found that the program differs considerably from court to court, and that local practices frequently depart from state requirements. Local decisions that seem to have the strongest effect on the time required to dispose of an arbitration case include (1) when to assign a case to the arbitration hearing list, (2) when to assign an arbitrator to a case, (3) how to assign an arbitrator, and (4) what continuance policy to adopt. To understand how policies on these issues affect time to disposition, it is useful to examine the arbitration process in its component pieces.

There are six fundamental steps in the arbitration process, as shown in Fig. 5.1. Also shown are the court administrators' estimates of how much time it takes a typical court-ordered case to move from one step to the next. An examination of Fig. 5.1 reveals why litigants who elect or stipulate to arbitration reach an award so much faster than those who are ordered to arbitration. Once he has filed a memorandum, the litigant spends most of his time awaiting assignment to the hearing list. If he elects or stipulates, he generally does so when he files the memorandum and is assigned immediately to the arbitration hearing list.

The assignment policies in the Los Angeles and San Francisco superior courts slightly lessen the advantage of electing or stipulating. In Los Angeles, there is congestion at the point where arbitrators are assigned to cases. Because court-ordered cases have already waited several years for adjudication, the arbitration administrator gives
them priority when assigning arbitrators. Under this policy, court-ordered cases wait an average of two months for an assignment, while voluntary cases wait about 11 months. However, since litigants are not ordered to arbitration until about 36 months after their memoranda are filed, those volunteering for arbitration still enjoy a 27-month advantage.

In San Francisco, the court does not assign litigants electing arbitration to the hearing list for one to three months after they volunteer. The court has adopted this policy to encourage litigants willing to accept a $15,000 ceiling on their awards to file in the municipal rather than the superior court.

It is difficult to say whether or not the litigant who elects or stipulates saves the full time he otherwise would have spent waiting for assignment to the list. In all the congested courts we visited, attorneys habitually filed their memoranda soon after they filed their complaints and well before their cases were ready to be heard, simply to reserve a place in the line. When one court reduced its backlog and sent litigants to arbitration or settlement conferences within a few months of filing, attorneys were caught unprepared. After considerable complaining, the attorneys learned to file their memoranda when they had prepared their cases. This history of attorney flexibility in filing the memoranda suggests that it may not be entirely appropriate to regard the interval between filing the memorandum and assignment as court delay. It might well be that if courts managed to shorten that interval, attorneys would simply delay filing their memorandums by that same.
amount; if they did, the time from complaint to disposition would remain the same.

Our interviews with attorneys suggest, however, that they are unlikely to do that. They report that small cases rarely take more than six months to a year to mature, and that although they would certainly want to guarantee themselves that amount of time, they would not unduly delay filing their memoranda.

Because the interval from memorandum to assignment to arbitration so dominates the process, court policies determining when the assignment should be made powerfully influence the disposition time of a case ordered to arbitration. As Fig. 5.1 indicates, that time is longest in the Los Angeles and San Bernardino courts. Both these courts have decided to value cases and assign them to arbitration at their regular mandatory settlement conferences, generally held about one month before the trial date (not withstanding the statutory requirement that they be assigned “no later than 90 days before the trial”). Ordering cases to arbitration so late in the process necessarily means that it takes them longer to go through the arbitration process and reach an award than it would have taken them to reach a jury trial. These courts argue that they do not have the resources to “pick a case up an extra time” for valuing and assignment. They also reiterate the argument that with late assignment most cases have already been settled and need not be processed. Thus, the arbitration caseload will be smaller and not as likely to tax their ability to find arbitrators and assign cases. In their view, arbitration can reduce court workload only with their late assignment policy. Several of the courts we visited were clearly convinced that they must choose between speeding the assignment of arbitrated cases and reducing their own workloads to speed processing of cases still in the courts. Los Angeles and San Bernardino chose the latter.

At the opposite extreme, Orange County has managed to arbitrate cases in substantially less time than it takes to try cases. Members of that court argue their success depends on their decision to “pick up cases an extra time” and to do so early. They call all cases for a very brief (1 to 2 minutes per case) status conference relatively soon (for a congested court) after the memoranda are filed. Small cases are valued and diverted at this point. Court officials contend that this conference not only weeds out those cases going to arbitration at an early date, but it also forces attorneys to attend to their cases, thereby promoting early

---

5Arbitration lengthens the time to disposition in only one other court, Santa Clara. There the court is so free of congestion that it takes longer to put a case through the arbitration process according to the rules than to get it through a mandatory settlement conference and into a courtroom.
settlement as well. They describe the status conference as the linchpin in their program to speed the handling of both large and small cases. Unfortunately, we have no settlement rate profiles for the two courts, so we are unable to compare the validity of the assumptions underlying Los Angeles and Orange Counties' policy choices.

The remaining three courts we visited make no special effort to assign arbitration cases early, and their time to award for court-ordered arbitration cases more or less approximates the time to trial for large cases.

It is worth noting here that over the long run, time to disposition of trial-bound cases offers a poor benchmark for evaluating the arbitration program. In our study, we compared the time it took to dispose of arbitrated cases with the time it took to dispose of jury-bound cases in the first year of the program. Mandatory arbitration has not operated long enough to shorten the time it takes to dispose of trial-bound cases in congested courts. If it reduces court congestion, in the longer run, however, trial-bound civil damage cases may be processed much more rapidly. Since the time from the filing of the memorandum to the trial-setting conference or the mandatory settlement conference is the only long leg of the journey, any meaningful acceleration in processing would have to shorten that leg and therefore also shorten the processing of court-ordered arbitration cases. In short, the program would be a success because it would have reduced the time to disposition for both trial-bound and arbitration-bound cases. A comparison of the times to disposition would be misleading, however, because both types of cases would continue to require roughly equal disposition time.

Courts do not have nearly as much opportunity to save time at subsequent steps in the arbitration process, because these steps are much shorter. Nevertheless, a number of courts have adopted special practices to speed those steps where possible.

Both Orange and Los Angeles Counties have adopted local rules governing the appointment of arbitrators. The Judicial Council rules require that court arbitration administrators offer a list of randomly-selected arbitrators to the litigants and that the litigants have the opportunity to strike a specified number from the list. As noted above, the rules also require that this process be completed within 25 days; however, some courts have not had the administrative and clerical resources available to assign cases according to the Judicial Council rules. As an alternative to finding more resources, Orange County and Los Angeles County have adopted local rules under which both parties are considered to have waived their right to veto candidate arbitrators unless one or both specifically requests this right within 10 days after a case is placed on the arbitration hearing list. If the litigant waives his right to veto, the arbitration administrator simply selects a single
arbitrator at random from the panel. (Any party may, according to the rules, exercise his right to challenge the arbitrator selected for cause.) This procedure may cut the time required to arbitrate a case by as much as a month. It also reduces the administrative and clerical support needed for this step.

In a further effort to reduce the time and support required to assign arbitrators, the status conference judge in Orange County encourages litigants to stipulate to arbitrators at the status conference. He suggests possible qualified candidates. Agreement is generally reached and the arbitrator is assigned at that time. This practice reduces assignment time to zero and cuts the program’s administrative costs (postage and clerical) substantially. Other courts have experimented with this practice, but unsuccessfully. One reports that legal firms in its area tend to send junior attorneys who are unwilling or unauthorized to stipulate to an arbitrator without consulting their offices.

Once an arbitrator has been appointed, Judicial Council rules require that a case be heard within 60 days, but they also permit continuances if both parties agree and the arbitrator agrees it is for “good cause.” Many courts report that these liberal rules have resulted in considerable unnecessary delay in disposing of cases. They note that given their collegial relationship, attorney-arbitrators are hard-put to deny even unwarranted continuances to fellow attorneys.

Courts differ enormously in their attitudes toward delay at this stage in the process. Orange County lies at one extreme. That court has no local rules governing continuances and consciously pursues a no-monitoring policy once an arbitrator is assigned to a case. Consequently, the time between assignment of the arbitrator and the hearing varies a great deal, depending on the arbitrator and his attitude toward continuances. Orange County has adopted its “hands off” policy on the argument that the arbitration program was meant to reduce court workload by getting cases out of the court. Monitoring cases and pressuring arbitrators imposes new work on the court. Administrators in Orange County, however, say that once they have controlled their court’s substantial backlog and have more time, they intend to begin monitoring arbitration cases to speed their disposition. Los Angeles and San Bernardino seem to follow Orange County’s example, although less explicitly. Again, the arbitration programs seem to put courts in a position of choosing between litigants of smaller-value cases (arbitrated cases) and large cases (those still in the court).

At the other extreme, Alameda and San Francisco have adopted local rules that provide for continuances of up to 30 days beyond the maximum under state rules. However, the rules prohibit granting continuances that permit the hearing to be held more than 90 days after
the arbitrator is appointed. Exceptions to the "90 day rule" may be granted only by a judge, upon show of good cause.

The sixth court, Santa Clara, has no formal limit on continuances, but the arbitration administrator exercises informal control by randomly checking with arbitrators on the progress of their cases. If an arbitrator is chronically late in hearing cases, he may be assigned fewer of them.

Arbitration and Time to Disposition

In light of the above examination of court practices, what now can we say about how expeditiously arbitration deals with its own cases? Clearly, the program as implemented by most courts offers the litigant who is ordered to arbitration little improvement over the normal court process. Since 52 percent of all arbitration cases are mandatory, we can fairly say that half the litigants in small cases are continuing to experience substantial court delay. On the other hand, the 48 percent who do elect or stipulate to arbitration reach disposition much faster than they could before.

The option to volunteer for arbitration gives a plaintiff with a small suit fundamental control over his destiny. Arbitration offers a reasonably fast route to dispute resolution if he is willing to put a $15,000 ceiling on the award. In the case of an accident victim who needs prompt restitution to buy a new car and pay his medical bills, he need no longer settle his case for a fraction of its value. He can elect arbitration.

Interestingly enough, the Judicial Council rules authorize any court to abandon the mandatory program if it believes that mandatory arbitration does not or cannot contribute to the faster disposition of its caseload. Yet even in those courts that process mandated cases more slowly than jury cases, no one has suggested discontinuing the program. These courts may believe that the time to disposition would be still longer without arbitration, or they may find the program useful for other reasons.

Our analysis highlights another very important aspect of the arbitration program: the degree to which local practices dictate program design and effects. Some courts have seized on the arbitration program as yet another weapon for their war against backlog and delay. These courts have devised supplementary rules and practices to further reduce the Judicial Council's conservative schedule. Other courts, often the most congested ones, view program requirements as "unworkable," "too costly," or "too time-consuming." They often have ignored the state rules with impunity and substituted their own practices.
THE EFFECT OF ARBITRATION ON LITIGANTS' COSTS

Litigants incur three types of costs: (1) out-of-pocket costs for attorneys' fees and other legal expenses; (2) the costs of their own time spent in discussions with the attorneys, participation in court-mandated conferences, and participation in trial; and (3) at least in some cases, emotional costs due to delay in resolving the case, uncertainty about its outcome, pressures of the adversary process, and, perhaps, the difficulty of comprehending the formal trial process. Many supporters of arbitration believed that the cost of litigating a case imposes an unfair burden on the litigants. They wanted to reduce these costs by substituting a brief, informal hearing with relaxed rules of evidence for the lengthier, formal trial conforming to traditional rules of evidence. Some arbitration proponents also hoped that over the long run the program might reduce litigants' dependence on their attorneys, and, perhaps, even permit some to pursue cases on their own.

Our exploratory study of judicial arbitration did not include interviews with litigants; however, we interviewed about a dozen attorneys in the six courts selected for intensive analysis. Our information about the effects of the program on the costs of litigation is limited to what we learned in these interviews.

Out-of-Pocket Costs

The expectation that litigants will save out-of-pocket costs is based on the assumption that arbitration is a substitute for trial. But as we discussed earlier, in most cases arbitration actually is a substitute for settlement. We found that most attorneys were unable (or unwilling) to talk about the costs of the settlement process and to compare them with the costs of arbitration. Because there has been little or no research on the pattern of investment of time and money by attorneys during the settlement process, it is impossible to determine the effect of arbitration on the cost of resolving cases that would not have gone to trial in any event, without directly studying the issue. Our interviews did give us some insights, however, into the kinds of savings that might be realized when cases are arbitrated rather than tried.

The attorneys agreed that it costs them less to arbitrate a case than to try it. They said that they spend far less time preparing for an arbitration hearing (including preparing witnesses) and participating in it than they would have spent on trial preparation and conduct. Some court officials and attorneys had mentioned to us that attorneys could subvert the legislators' intention to streamline the adjudicative pro-
cess, by elaborate preparations and lengthy presentations at arbitration hearings. The attorneys we interviewed thought that this approach to arbitration is rare. They reported that the hearings require only two to three hours on average.

Many attorneys had not yet considered what the total economic effect of these time savings might be. One plaintiffs' attorney said that with arbitration instead of jury trial he was able to save at least two weeks time. A defense attorney estimated that arbitrating a small case required only a third of the time he had to spend on a jury trial.

Attorneys unanimously reported substantial savings resulting from the elimination of witness fees under the relaxed rules of evidence that permit submission of written testimony. For the type of case targeted for arbitration, savings due to elimination of witness fees were estimated to range between $750 and $1000. The cost of expert medical testimony accounted for most of this amount, but attorneys noted that arbitration also eliminated standard witness fees and the cost of police testimony. In addition, attorneys noted that substituting arbitration for trial eliminates jury fees, estimated at $90 to $100 per day. In all, one attorney estimated that arbitration saves $1500 to $2000 in costs that would generally be required to try a small civil case.

These savings will not necessarily be passed on to all litigants. Because defense attorneys are paid on an hourly basis (plus costs), defendants should save money as a result of the shorter time their attorneys spend on cases and the elimination of witness fees and court costs. But time saved by plaintiffs' attorneys who are working on contingent fees can be translated into dollar savings for plaintiffs only if attorneys accept a lower percentage of the award than they would otherwise have required. The elimination of witness fees might or might not be reflected in lower out-of-pocket costs to plaintiffs, depending on the nature of the contingent fee agreement. We found no evidence that plaintiffs' attorneys were lowering their fees, but no firm conclusions can be drawn without further study of arbitration's effect on the contingent fee structure.

Finally, litigants plainly will save out-of-pocket expenses only if they avoid a trial de novo. The program has the effect of increasing non-contingent-fee clients' costs, at least somewhat, in the small fraction of cases tried after arbitration.

Transaction Costs

Most arbitration hearings are held in the arbitrator's office during normal business hours at the mutual convenience of the parties. Because hearings ordinarily last no more than three hours, attorneys
believe that litigants lose less time away from work than they would in a trial. Occasionally, too, the travel distance to the arbitrator’s office is shorter than it is to the courthouse.

In Los Angeles, hearings are frequently held in the courthouse during evening hours. In jurisdictions like Los Angeles, where the population is dispersed over a large geographic area, the office of a randomly selected arbitrator may be distant from other attorneys’ offices and the litigants’ homes or places of business. Under these conditions, scheduling hearings in a central location outside of normal business hours may be better for litigants.

The flexibility in scheduling hearings permitted by the arbitration rules should result in lower transaction costs for litigants. We do not know, however, to what extent the concerns of litigants are taken into account in scheduling the hearings, or whether attorneys tend to give first priority to reducing their own transaction costs. In any event, as in the case of out-of-pocket costs, the expectation that litigants will experience savings is based on the assumption that their cases would otherwise have gone to trial. Because most cases are settled out of court, many litigants spend no time at all in court-mandated conferences; presumably, then arbitration increases their transaction costs.

Other Costs

Because our research did not encompass interviews with litigants, we cannot say whether arbitration reduces emotional stress on them. Attorneys reported that their clients were generally content with the arbitration process, and that the process seemed to satisfy their need to have a “day in court.” A court administrator observed that arbitration offers the only opportunity for having an open hearing of their case to the majority of litigants who have little or no practical chance of having their cases tried. He believed that litigants prefer the arbitration process to the more traditional pretrial process, which includes a settlement conference that usually does not directly involve the litigant. But the issue of litigants’ satisfaction should properly be addressed through interviews with them.

We also spoke with attorneys about the prospects for arbitration reducing litigants’ dependence on their services. Not surprisingly, attorneys unanimously discounted this possibility. They agreed that some litigants might be able to handle an arbitration hearing on their own, but that legal knowledge is required in processing a case prior to arbitration—filing the suit, taking depositions, and the like. Consequently, arbitration could reduce dependence on attorneys only if it were conducted entirely outside of the court process.
ARBITRATION AND EQUITY

In designing the arbitration program, supporters were careful to specify features they believed were necessary to maintain equity. Drafters of the arbitration statute and rules wanted to assure attorneys and their clients that both the process and the outcomes of arbitration would be fair.

Procedural Equity

Many of the arbitration program rules address concerns of procedural equity. For example, the rules explicitly provide for the involvement of local attorneys in administrating the arbitration program, including establishing criteria for selecting arbitrators. The rules recommend that the committee established to oversee the program include trial attorneys from both the plaintiffs’ and the defense bar. They also recommend that the committee attempt to recruit equal numbers of plaintiff and defense attorneys to serve as arbitrators. To minimize the possibility that the arbitrator assigned to hear a particular case will be biased for or against one of the parties, attorneys for each side are permitted to veto one of the candidate arbitrators, as well as to challenge the arbitrator selected for cause. The statute also forbids discovery after an arbitration hearing (for the purpose of trial de novo) except by permission of the court where the party has demonstrated good cause. This rule was intended to assuage the fears of attorneys that if arbitration were used as a discovery mechanism, it might give an unfair advantage to one of the parties.

Attorneys we interviewed in each of six courts perceive arbitration procedures as generally fair. Attorneys whose cases had been arbitrated thought that the arbitrators conducted the hearings competently and impartially. Although some attorneys expressed concern about arbitrators who attempted to settle cases by “splitting the difference” between the plaintiff’s demand and the defendant’s offer, rather than adjudicating the issues, those who had served as arbitrators denied adopting such an approach. They said they inquired about the possibility of settlement before beginning a hearing, and offered their assistance in settling the case if the parties so desired. Once the hearing began, however, they adhered strictly to an adjudicative role.

All of the attorney-arbitrators we interviewed expressed concern about attorneys who do not prepare adequately for the arbitration hearing. Some conceded that poor preparation is rare, but others claimed that it is the norm. However, no arbitrator suggested that inadequate preparation had unfairly affected the hearing of the issues.
Instead, they complained about having it left to them to draw out all of the issues and assure that both sides received a fair hearing. The extent of poor preparation, its effect on the hearing, and the effect of a more “inquisitorial” arbitrator role on case outcomes, merit further investigation.

None of the attorneys we interviewed believed that the key characteristic of the arbitration hearing—its relaxed rules of evidence, leading to general dependence on written testimony and lack of opportunity for cross-examination—had a negative effect on case outcomes. Instead, they viewed this streamlining of the adjudicative process as most appropriate for the smaller-value civil damage suits to which it is applied.

Some attorneys echoed the concern voiced in the legislative debate that arbitration might be used as a discovery mechanism, but they did not seem to know that discovery may not continue after arbitration except with the court’s permission. This issue apparently did not receive much attention because attorneys did not plan to pursue cases to trial.

Outcomes

Although perceptions about procedural equity are important, the crucial question for litigants and their attorneys regarding arbitration is, “How will it affect the outcome of my case(s)?” If either group believes that arbitration systematically puts them at a disadvantage they will reject the program.

Attorneys we interviewed thought that arbitrators do a good job of valuing cases. Some plaintiffs’ attorneys believed that arbitrators generally produce fairer decisions than a jury, because as attorneys they are able to separate the issues of liability and damages. These attorneys believed that when the case they are litigating involves clear liability but relatively small damages, an arbitrator is more likely than a jury to rule in the plaintiff’s favor.

The general perception that attorney-arbitrators do a good job of valuing cases is clearly critical to the success of the program. In fact, some experienced litigators (and judges) see arbitration chiefly as a mechanism for valuing the cases of younger, less experienced attorneys who have difficulty assessing case value on their own.\(^6\)

The clear agreement that the nature of arbitration’s effect on case outcomes is critical to the future of the program is not matched by

\(^6\)Generally, in evaluating cases which they themselves are not litigating, attorneys find it easier to reach consensus on the value of cases involving small damages than they do on cases involving larger damages. Thus, if the scope of the program were changed to include much larger cases, there might be more controversy over arbitrators’ decisions.
agreement on how to measure the equity of these outcomes. Some court officials and practitioners regard the rate of requests for trial de novo as a measure of the perceived equity of arbitration awards. They would be perturbed if the rate of such requests were high or if one side tended to make more requests than the other. We contended in Sec. III, however, that de novo request rates are not a reliable measure of perceived equity, because they are affected by several factors, including attorneys’ beliefs that they should keep their options open and their desire to use arbitration awards as a basis for further settlement negotiations. Furthermore, the pattern of trial de novo requests (whether requests are made by plaintiffs or defendants) could just as easily reflect differences in negotiation strategy as differences in perceived equity. Practitioners have nevertheless been reassured by data for the first year of program operation, shown in Table 5.2, indicating that plaintiffs and defendants are equally likely to request trial de novo.

A second approach to measuring equity that has been popular among practitioners focuses on the relationship between the arbitrator’s background (plaintiffs’ or defense practice) and the decision he or she hands down. Obviously it would be impossible to maintain equity

Table 5.2

<table>
<thead>
<tr>
<th>Court</th>
<th>Total Requests</th>
<th>Percent by Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alameda</td>
<td>201</td>
<td>53</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>72</td>
<td>51</td>
</tr>
<tr>
<td>Fresno</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>866</td>
<td>50</td>
</tr>
<tr>
<td>Orange</td>
<td>306</td>
<td>43</td>
</tr>
<tr>
<td>Riverside</td>
<td>69</td>
<td>36</td>
</tr>
<tr>
<td>Sacramento</td>
<td>147</td>
<td>50</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>27</td>
<td>59</td>
</tr>
<tr>
<td>San Diego</td>
<td>86</td>
<td>41</td>
</tr>
<tr>
<td>San Francisco</td>
<td>180</td>
<td>52</td>
</tr>
<tr>
<td>San Mateo</td>
<td>181</td>
<td>55</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>513</td>
<td>50</td>
</tr>
<tr>
<td>Ventura</td>
<td>59</td>
<td>61</td>
</tr>
<tr>
<td>Total</td>
<td>2707</td>
<td>50</td>
</tr>
</tbody>
</table>

SOURCE: Judicial Council of California, unpublished report.
if arbitrators consistently leaned in favor of one side. Fears on that score may be unwarranted, at least if past experience in Los Angeles is typical. Periodic tabulations of awards according to arbitrator background, published by the Los Angeles Attorneys' Special Arbitration Plan, demonstrated that awards under that program seemed not to be significantly affected by the orientation of the arbitrator's practice. Table 5.3 shows data tabulated in 1976, the last year of the attorneys' plan. Unfortunately, no court we studied has compiled similar tabulations for the new mandatory program.

Table 5.3

<table>
<thead>
<tr>
<th>Prevailing Party</th>
<th>Arbitrator's Background</th>
<th>All Arbitrators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Plaintiff Practice</td>
<td>Defense Practice</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>82%</td>
<td>75%</td>
</tr>
<tr>
<td>Defendant</td>
<td>18%</td>
<td>25%</td>
</tr>
<tr>
<td>Total number of awards</td>
<td>649</td>
<td>581</td>
</tr>
</tbody>
</table>

SOURCE: Los Angeles Superior Court, Civil Courts Coordinator.

NOTE: These cases were arbitrated under the Los Angeles Attorneys' Special Arbitration Plan.

A third measure of the equity of outcomes is the difference between arbitration awards and trial awards for similar suits. A Judicial Council study of arbitration under the attorney-sponsored voluntary program found little difference between the two kinds of awards. Because all smaller-value civil money suits are now assigned to arbitration, and those that are tried are a special subset of all arbitration cases, it is no longer possible to judge the equity of arbitration awards by comparing a sample of awards with a sample of jury verdicts in the same time period. It would be possible, however, to make such a comparison between arbitration's first year and the previous year, using jury verdict reports and arbitration records. When adjusted for the possible effects of inflation, the results would provide a useful measure of equity. We have not performed such an analysis for this study.

Another approach to comparing arbitration awards and trial verdicts is to examine the outcomes of trials *de novo*. Although these cases are surely not representative of all cases arbitrated (since insisting on trial is such a rare event), most previous attempts at comparative analysis have adopted this approach.\(^8\)

We found one court, Santa Clara, that had recorded data on awards and verdicts for all of the 20 arbitrated cases that were tried *de novo* during the first program year. As shown in Table 5.4, arbitrators had ruled in favor of plaintiffs in 17 of these cases, but 8 of the 20 trial verdicts (40 percent) favored the defendant. Moreover, 8 of the 12 trial verdicts favoring plaintiffs were for lesser amounts than had been awarded by the arbitrator. In comparison with arbitration, these verdicts also favored defendants. Thus, in 13 of the 20 cases (65 percent) the plaintiff's position was worsened by trial. These data suggest there may be a difference in the pattern of outcomes resulting from arbitration and trial for that small fraction of cases that are actually tried.

\[
\begin{array}{c|c|c}
\text{Prevailing Party} & \text{Arbitration Award} & \text{Trial Verdict} \\
\hline
\text{Plaintiff} & 17 & 12^{a} \\
\text{Defendant} & 3 & 8 \\
\text{Total} & 20 & 20 \\
\end{array}
\]

\*SOURCE: Santa Clara Superior Court Arbitration Office.

\*Of these 12, 8 were for lesser amounts than the original arbitration awards.

All of the above approaches to measuring the effects on arbitration on outcomes are seriously flawed, for they are all directed toward a comparison of arbitration awards and trial verdicts. Because most cases are settled out of court, the effects of arbitration on outcomes can only be fully realized by analyzing its effect on both settlements and awards. Because courts generally do not maintain records of settlement out-

\(^8\)See, for example, M. Rosenberg and M. Schubin, "Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania," 74 Harv. L. Rev. 446, 1961.
comes, such an analysis will require a systematic survey of attorneys involved in settled cases.

Our interviews with attorneys cannot substitute for such a survey, but they suggest the issues that need further research. Several plaintiffs' attorneys told us that the availability of arbitration affected their decisions on whether to accept new cases and whether to pursue them to settlement or to adjudication. Prior to adoption of the mandatory program, they reported, it was economically infeasible for them to litigate cases worth less than $10,000 to $15,000. When they accepted such cases, it was with the intention of achieving the best settlement they could. They could not afford to try these cases, and defendants' settlement offers reflected their understanding of this economic reality. With mandatory arbitration, however, it is certain that any small civil damage suit that is not settled will reach adjudication. Because plaintiffs' attorneys can afford to arbitrate these cases, their negotiation position has been strengthened. These attorneys reported that they are now able to obtain "fairer" (and larger) awards for their clients. If these experiences are representative, arbitration is indeed affecting the pattern of outcomes in smaller civil damage suits.

On the other hand, we were also told by defense attorneys that one of the problems they encounter in attempting to settle suits is that younger, inexperienced plaintiffs' attorneys tend to demand substantially more than their cases are worth. This makes it difficult to settle cases and increases the time and money spent on the settlement process. These costs may, in turn, result in defendants agreeing to settle cases for more than their "true value." By providing a neutral assessment of case value, arbitration may improve the prospects for settling these cases at a lower dollar value. If so, arbitration may be affecting outcomes in the opposite direction.

It will not be easy to analyze arbitration's effects on the settlement process—a fact driven home by the data in Table 5.5, which compare arbitration awards and amounts of post-arbitration settlements for a small sample of cases in Santa Clara. Table 5.5 indicates that the number of post-arbitration settlements that exceeded the arbitration award (22) is 50 percent higher than the number resulting in smaller payments (15). One factor in this imbalance is the small number of cases (4) in which the arbitrator found for the defendant, who nevertheless made a payment to the plaintiff in order to settle the case.

Table 5.5 also shows that most settlements differ significantly from the arbitrator's award. About half of the settlements that improved the defendant's position (7 cases) and almost three-quarters of the settlements that improved the plaintiff's position (16) involved changes of 25 percent or more. These changes did not involve much money, however, because the amount at issue in all of these cases was relatively small. The median dollar difference between arbitration awards and settle-
Table 5.5

COMPARISON OF ARBITRATION AWARDS AND SETTLEMENT AMOUNTS, SANTA CLARA, FISCAL YEAR 1980

<table>
<thead>
<tr>
<th>Percent Change from Award to Settlement</th>
<th>Defendant Position Improved (Settlement Award)</th>
<th>Plaintiff Position Improved (Settlement Award)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>10-24</td>
<td>6</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>25-49</td>
<td>3</td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>50 or more</td>
<td>4</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Arbitration award for defendant; settlement paid to plaintiff</td>
<td>—</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Total number of cases</td>
<td>15</td>
<td>22</td>
<td>37</td>
</tr>
</tbody>
</table>

SOURCE: Santa Clara Superior Court Arbitration Office.

An additional 2 cases had no change.

ment amounts was less than $2000, and 75 percent of the cases involved differences of less than $3000.

The data in Table 5.5 are intriguing, but difficult to interpret without further information on the facts of the cases, the situations of the litigants, and the perspectives of the attorneys. Clearly, it will not be sufficient simply to monitor settlement outcomes to measure arbitration's effects on the settlement process.

This discussion of equity leaves many questions unanswered. The attorneys we interviewed believe the process is fair, but we do not know what litigants think. One can surmise that many litigants find the outcomes of arbitration acceptable because defense and plaintiffs' attorneys are equally likely to request trial de novo, and because few cases proceed to trial. But available data do not allow us to assess whether arbitration produces changes in case outcomes. Such an assessment will require not only comparison of arbitrated and trial awards, but also an examination of the program's effect on the settlement process.

DOES ARBITRATION BENEFIT LITIGANTS?

The fragmentary information available tightly limits what we can say about the effects of arbitration on litigants. Of all the measures, our conclusions regarding time to disposition are perhaps the strongest. Our analysis shows that arbitration offers a decidedly faster avenue of dispute resolution to plaintiffs in congested courts who are willing to
put a $15,000 ceiling on their potential award by volunteering for the program.

On the other hand, litigants who are ordered to arbitration in most courts do not get hearings any faster than they would have gotten trials. This unexpectedly long time to disposition for court-ordered cases seems clearly linked to local courts’ implementation policies, particularly those determining when in the process a case will be valued and assigned to arbitration, and the continuance rules the court imposes on the arbitrators. Generally, policies that speed disposition of arbitration cases seem to require more court time to implement.

Our limited interviews suggest that it costs less to adjudicate cases through arbitration than to try them. It is unknown, however, how much of the savings is passed on to litigants, whether there are additional reductions in litigants’ transaction costs, and whether arbitration costs litigants more or less than settlement without arbitration. The broad subject of costs to litigants needs further study before conclusions can be drawn.

Our interviews also suggest that attorneys and their clients are generally satisfied with the fairness of the procedures and with outcomes, but not enough empirical data are available for a systematic assessment of the effects of arbitration on equity.
VI. CONCLUSIONS

For the judicial arbitration program to succeed in California, it must prove satisfactory over a sufficient period of time not only to the legislature but to the courts, to attorneys and to litigants. The latter three groups will judge arbitration by its performance in meeting their own needs, and their criteria may differ considerably from what the legislature intended when it enacted the program. Our exploratory analysis of judicial arbitration focused on its prospects for achieving the legislature's objectives. In this section we summarize our findings on the results of the program, discuss the relationship between the results and practitioners' reactions, and suggest what these reactions may imply for the program's future.

Inadequate data constrained our analysis at many points. It will be necessary to expand current data-collection efforts if the legislature is to be given a comprehensive assessment of the benefits and costs of arbitration upon which to base future decisions regarding the program. In the final part of this section we identify the data we think are critical to a cost-benefit analysis and discuss strategies for collecting them.

EFFECTS OF ARBITRATION DURING ITS FIRST YEAR

Because our analysis is based on a single year's experience, our findings are necessarily tentative. Many courts experienced start-up problems that were not resolved until well into the year. Procedures for implementing the program changed during the year as courts modified or adopted new policies. Finally, the response of attorneys and litigants to the program, expressed in their willingness to volunteer for arbitration as well as in their demand for de novo trials, continues to evolve as they gain more experience with it. The results of the first program year are only suggestive of future outcomes. Nonetheless, we think our analysis has uncovered some interesting and useful information that helps to identify areas where the program cannot be expected to be very productive and areas where it may be. Of particular interest are the four objectives the legislature hoped to achieve when it authorized mandatory arbitration:

- Reduce court congestion;
- Stabilize rising court costs;
- Reduce the time required to dispose of smaller-value cases; and
- Reduce other burdens on litigants.
Court Congestion

Many supporters of the program hoped that it would sharply reduce court congestion. It appears that they should temper these hopes somewhat. In its first year, the program captured about 24,000—58 percent—of the civil damage suits that came before the large superior courts. That percentage sounds large, but damage suits do not dominate the civil caseload, which also comprises large numbers of family law cases, civil petitions, and probate and guardianship cases. Because of data limitations, it is impossible for us to determine the exact fraction of the total civil caseload diverted to arbitration beyond saying that it is only about one-fifth the size of the total.

To determine how much diverting 24,000 smaller-value cases each year might reduce court workload, we first estimated the number of jury trials that might be saved with this diversion rate. In the 13 largest superior courts, in the year before arbitration began, 1429 personal injury cases—about 3 percent of all such suits disposed that year—were tried by juries. Contrary to the conventional wisdom we discovered that small suits composed a significant fraction of these cases. Using verdict summaries from Jury Verdict Weekly, we estimated that 48 percent of all personal injury cases reaching a jury verdict in FY 1979 had a value of $15,000 or less. Although we have no comparable data on other civil damage suits, there is no reason to assume that the relationship between monetary value and trial rate for these cases—which had a jury trial rate of about 2 percent before arbitration—should be different. If arbitration reduces the jury trial rate for smaller personal injury cases to 2 percent, we estimate that it could save the large courts close to 200 jury trials annually, approximately 10 percent of the total number of civil jury trials in those courts in FY 1979. If the de novo trial rate were only 1 percent for all civil damage suits, there could be about 400 fewer jury trials, a reduction of 20 percent in the total. If the rate were 3 percent, however, there would be no jury trials saved.

Using another approach to assessing arbitration's potential for reducing congestion, we next attempted to estimate its effect on judicial workload. This estimate proved to be very sensitive to our assumptions regarding the rate and length of de novo trials, the judicial time consumed by small civil damage suits before arbitration, and the judicial time required to implement the court’s arbitration program. Under the most optimistic set of assumptions, diverting 24,000 smaller-value cases to arbitration could save approximately 26 judge-years annually—5 percent of the judge-years used by the 13 largest courts in FY 1979.
Under the most pessimistic set of assumptions, the program might increase the workload of these courts by about 3 judge-years. While there is considerable divergence between the two estimates, even the most optimistic assumptions do not lead us to expect significant reductions in the judicial workload with arbitration. The promising reduction in jury trials does not result in an overall reduction in court workload of the same magnitude, because civil jury trials consume only a small fraction of a judge's time.

Much of arbitration's potential for reducing court workload depends on how the local courts implement the program. Court policies regarding the imposition of monetary sanctions against litigants who frivolously pursue de novo trials may well affect the de novo trial rate. None of the courts we studied was imposing the sanctions provided for in the statute. Courts that require that judges conduct settlement conferences for arbitration cases reduce the savings in judicial time made possible by arbitration. And court policies determining when cases should be assigned to arbitration probably affect workload reduction, although we do not know how. Some courts argue early assignment diverts small cases before they consume court resources. Others argue that late assignment allows most cases to settle, reserving the expenditure of judicial time for cases requiring it. We did not have the data to test the comparative value of these two policies.

The program's potential could be increased somewhat by raising its monetary ceiling. But because there are no data on the composition of the civil caseload by dollar value, there is no way to predict how different monetary limits would affect the size of the arbitration caseload. In addition, any consideration of increasing the scope of the program must not lose sight of the fact that it depends on volunteers. Although the courts have had no trouble recruiting arbitrators to date, it is possible that larger caseloads would exhaust the supply.

Court Costs

The effect of arbitration on court costs is highly uncertain. We estimate that the cost of administering the program for cases initiated in the larger superior courts during the first year, including arbitrators' fees and judicial time, will amount to more than $3 million. This is equivalent to a cost of $138 for each case.

Whether this represents a net savings or a net cost to the taxpayers depends on the cost of processing these cases without arbitration, which is unknown. Using statewide estimates of judicial costs and a complex set of assumptions about the time required to process smaller cases, we estimate that the program could save as much as $4 million annually,
could break even, or could result in a $4 million increase in court costs. Without additional data, it is impossible to say where within this range the final outcome will fall.

It is worth noting in conclusion that although measuring the program’s net cost-effect is important, it is also important to determine who saves and who pays what amount. The law provides that the state shall reimburse the counties for any "net costs" that arbitration imposes on them. As a practical matter, the state currently is reimbursing the counties for all costs incurred by the arbitration program. Thus, counties are spared any additional expense to process those cases diverted to arbitration; meanwhile, the state must pay not only for the judges who administer the program, but also the administrative costs. The state, however, is currently attempting to develop a formula for calculating the savings the counties may be accruing due to arbitration, and hopes eventually to recoup any excess payments it may have made to them.

Our findings regarding arbitration’s effects on the time required to dispose of small cases are more definitive. The evidence suggests that litigants benefit differentially under the mandatory program, depending on whether they volunteer for or are ordered to arbitration, how the program is implemented locally, and the status of the local calendar.

Arbitration offers a much faster avenue for resolving disputes than the normal trial process to parties who stipulate to arbitration and to plaintiffs who are willing to put a $15,000 ceiling on their award by volunteering for the program. In all of the courts we studied, according to court administrator’s estimates, it takes less time to dispose of those cases volunteering for arbitration than those going to trial. On average, in these courts, arbitrators were making awards to litigants who elected or stipulated in about 7 months, while it was taking about 23 months to get a jury verdict, a difference of 16 months.

During the program’s first year, litigants stipulating to or volunteering for arbitration accounted for 48 percent of the arbitration caseload. Not surprisingly, the volunteer rates were highest in the most congested courts, where litigants had to wait a long time for either a jury trial or for mandatory assignment to arbitration. It would appear that plaintiffs are having to choose between speedy resolution and having no ceiling placed on the arbitration award.

While voluntary cases seem to be getting a reasonably prompt hearing, the same is not true for litigants ordered to arbitration. In all but one court, cases ordered to arbitration are heard no faster than cases going to trial; and in four of the six courts we studied, it could take slightly longer for a case to get an arbitration award than a jury trial.

How successful a court is in reducing the time it takes to dispose of a court-ordered arbitration case seems to depend both on the conges-
tion in the local court and on implementation practices, namely, at what point in the process a court chooses to assign its cases to arbitration. Congested courts that assign cases early in the pretrial process reap the greatest time savings. Courts that assign cases to arbitration late in the pretrial process obviously cannot affect the time to disposition for arbitrated cases, except perhaps to extend it. And in congested courts, statutory constraints on when a case is to be assigned to arbitration can create a situation where it takes longer to reach arbitration than to reach jury trial.

Other local court implementation policies equally affect the ability of courts to dispose of voluntary and assigned arbitration cases. Of principal significance are courts' queueing policies for cases awaiting assignment of arbitrators and their monitoring and continuance policies for arbitration hearings.

Generally, we observed that policies that tend to speed the disposition of arbitration cases also appear to require more court time to implement. Thus, courts are frequently faced with having to choose between arbitration cases and trial-bound cases when allocating a very scarce resource.

Reducing Other Burdens on Litigants

The effects of arbitration on litigants of small-value suits are as yet unclear. Arbitration is obviously less expensive than a trial. It eliminates expert and other witness fees and certain court costs, and reduces the amount of attorney time required to dispose of cases. Some of these savings are probably passed on to litigants. There is also some evidence that plaintiffs with smaller-value claims are finding it easier to obtain legal assistance in pursuing these cases to adjudication.

Attorneys generally believe the arbitration process is fair, but whether litigants share this view and whether they perceive other benefits from the program are unknown. Whether arbitration will maintain or improve the equity of case outcomes is also unknown. The rate of requests for de novo trials, while somewhat higher than anticipated, should not be interpreted as an indication of concern about outcomes. Rather, attorneys appear to be filing such requests to keep their options open and to lay the foundation for post-arbitration settlement negotiations. The actual rate of trial de novo is unknown, but is believed to be small.

To summarize, we expect the program to be only mildly effective in relieving court congestion and stabilizing court costs, but it may offer some important benefits to attorneys and litigants. These benefits will play an important role in determining the program's future.
THE FUTURE OF ARBITRATION

Unless the legislature decides to extend it, the mandatory judicial arbitration program will expire in 1985. The legislature’s decision will depend to a large extent on the reactions of the courts, attorneys, and litigants to the program. It is also possible, however, that the phenomenon of political inertia may prolong the life of the program. Once such a program is adopted, and as long as it does not cause problems for key constituencies, it may be extended indefinitely even if it is only marginally successful in meeting its original objectives.

From the court’s perspective, arbitration will be viewed as successful if it reduces the workload of civil cases without imposing new burdens or constraints on court managers and judges. Attorneys will consider it successful if it reduces the time and expense of processing civil suits without producing major changes in the outcomes of the adjudicative process and without negatively affecting their own livelihood. Large institutional litigants, such as insurance companies, will view arbitration positively if it reduces their litigation costs without negatively affecting their case outcomes. Finally, the average citizen with a smaller-value suit will deem arbitration successful if it reduces the time he has to wait and the money he has to spend, without seeming to reduce the quality of justice he receives. Below we relate each of these perspectives to our tentative findings on program outcomes.

Court Reactions

Most of the court officials we interviewed do not think arbitration will materially affect their workload. Faced with rising caseloads and legislative resistance to adding new judgeships, however, they seem willing to experiment with new programs if those programs do not impose new costs or new administrative burdens.

Because the state pays the costs of the program, arbitration imposes no new costs on the courts. It may even reduce local costs slightly, since the trial court does not have to bear the costs of disposing of cases diverted to arbitration. Moreover, the program places little additional administrative or judicial burden on the trial court. And local judges and administrators are free to incorporate the program into their existing procedures pretty much how they choose.

Some officials also see the program as an opportunity to bring about change, as an additional tool for managing the court process. The need to value and assign cases provides them with a rationale for requiring early status conferences, perhaps encouraging more timely case preparation by attorneys and promoting earlier settlement. These activist
courts also believe that assigning cases to arbitration weeds out the suits that are least likely to require trial, thereby increasing the court manager's control over the calendar and the court's ability to set firm trial dates.

Attorney Reactions

Attorneys' reactions are more complex than those of the courts, because the program can affect the way they handle their cases, the outcomes of their cases, and their financial rewards. Moreover, it touches on two of the most sensitive issues regarding the American judicial system: due process and the individual's right to jury trial, about which many trial attorneys have strong philosophical convictions. Like court officials, attorneys will probably accept the program if it makes their job easier and does not harm them or their clients. But their reactions to arbitration will be colored by their beliefs about its larger effects on the system of justice.

Attorneys seem to respond positively to arbitration's streamlining of the adjudication process. They find the informality of the hearing and the relaxed rules of evidence appropriate to the types of cases assigned to arbitration. For inexperienced attorneys, arbitration also offers a way to obtain a reliable assessment of the case value from a competent neutral attorney.

All else being equal, plaintiffs' attorneys working on a contingent fee basis should prosper in a situation where such cases are processed expeditiously, with minimal expense, because they will be able to handle more cases and earn greater financial rewards. Defense attorneys probably do not gain financially from such programs because they are paid on an hourly basis. But as long as they have a substantial number of larger cases, defense attorneys should not suffer as a result of a program that expedites resolution of smaller-value cases.

Some attorneys are wary of arbitration, however, because of its potential for radically changing the adjudicative process. It troubles plaintiffs' attorneys in particular that arbitration may be construed as a first step in narrowing the purview of the jury trial process. Both the plaintiffs' and defense bars also seem concerned that substituting arbitration for jury trial may bias a preponderance of case outcomes to the advantage of one side. To satisfy the bar, arbitration must prove that it can maintain the same pattern of outcomes as prevailed before arbitration.
Litigant Reactions

Although we did not interview litigants, we can infer some of their attitudes toward arbitration from the outcomes we assessed. Litigants have a clear interest in expeditious and economical resolution of cases. If arbitration can reduce the time and cost of resolving small cases, it should make it easier for plaintiffs to find attorneys to take their cases, shorten their period of uncertainty about the case outcome, and alleviate financial hardship. Defendants might find it more difficult to settle claims without litigation, but they too should benefit by reducing their costs for cases that do result in lawsuits. Arbitration, then, seems to offer some reward to both sides.

In sum, judicial arbitration may be a uniquely appealing program. Although it does not appear to have major promise as the solution to court congestion, it seems to have made friends for other reasons and, perhaps more important, it seems to have made no enemies.

The legislature may decide to continue the program, but its future success is largely in the hands of the courts and the bar. Our study indicates that the critical outcomes of the program, including its effects on court workload, costs, and time to disposition, are highly dependent on the decisions of the trial courts. Attorneys will also affect program results through their participation in local court arbitration committees, as well as by their individual decisions as arbitrators and as counsel to litigants.

FURTHER RESEARCH

Our research identified several areas where additional data will be necessary for evaluating the arbitration program more accurately. Some of these data relate to the program itself, some relate to the court process more generally, and some to attorneys and litigants.

Arbitration Program Data

Our analysis of arbitration's effect on court workload and costs was limited by the lack of data on the composition of the arbitration caseload and on the number of de novo trials. In order to use the results of weighted caseload studies to estimate time saved by arbitration, we needed to know what proportion of the arbitration cases were personal injury suits and what proportion were other civil complaints. To estimate potential time and cost savings due to arbitration, we needed to know how many of the trial de novo requests actually resulted in trials.
In addition, to analyze the effects of arbitration on time to disposition, we would have liked to use estimates based on a sample of cases rather than averages estimated by court managers. Finally, except for a small sample of cases in one court, we could investigate neither the relationship between arbitration awards and trial verdicts nor the relationship between arbitration awards and settlements, because we lacked data on case outcomes.

Some of these data gaps could be filled by extending the regular arbitration program reporting system. The arbitration administrators already file monthly reports on the number of cases assigned to the program. It would be useful to ask them to distinguish between personal injury cases and other civil complaints. This would be worthwhile not merely because it would aid analysis, but because information on the use of arbitration for cases other than personal injury suits would be helpful in considering future changes in the program. Several courts have noted that a rising proportion of other civil complaint cases is being assigned to arbitration; if so, the trend is worth documenting.

We also believe that arbitration administrators should develop a system for identifying arbitrated cases that reach trial, and for documenting their arbitration awards and trial verdicts. Such systems will be necessary in any event if the courts are to carry out the appeal disincentive provisions of the arbitration statute. They can also be used to generate accurate de novo trial rates and to measure the relationship between arbitration awards and trial verdicts.

It may be too burdensome to require arbitration administrators to report on time to disposition from the filing of the "at issue" memorandum to the arbitration award, settlement, or trial verdict; but they could report the average time interval between placing a case on the arbitration hearing list and filing the award, just as the courts currently record the time interval between "at issue" and trial in their monthly "calendar report" to the Judicial Council. These data would facilitate analysis of the effects of arbitration, and individual courts could use them to monitor the effects of different arbitrator assignment and continuance policies.

We believe it will be necessary to survey attorneys to collect additional data on time to disposition and case outcomes. Such surveys need not be carried out in all jurisdictions. It should be possible to develop a sufficient data base for further analysis by selecting a sample of cases in several courts that have adopted different approaches to arbitration, and then interviewing attorneys on both sides of these cases. We would suggest conducting such a survey in (1) a court that assigns cases to arbitration early in the pretrial stage; (2) a court that requires pre-arbitration settlement conferences; and (3) a court that assigns cases to arbitration at the pretrial conference.
Court Process Data

Arbitration program statistics are not sufficient to analyze the program's effects on court workload and costs. Our analysis was limited by the lack of data on several aspects of the court process, including the proportion of the caseload diverted to arbitration, the amount of judicial time that would have been required to process these cases if they had not been diverted, and the amount of judicial time spent administering the program.\(^1\)

Collection of additional court process data is complicated by the continuous nature of the pretrial process. Cases are constantly entering the system, flowing through various stages or "gates," and being disposed of either with or without court assistance. Data captured at a particular point in time frequently reflect neither the true status of the court's calendar nor the full effect of court efforts to resolve cases. Even data collected on an annual basis may be misleading, because they often reflect the processing of cases filed several years previously, when conditions in the court may have been quite different from what they are currently.

The complexity of this process makes it difficult to design simple standardized forms to collect the sorts of data required for research analysis. We think it would be more reasonable to ask a few courts to gather court process data that are not generally reported than to ask all courts to add to their regular reporting burden. A special study of several courts might include reviewing scheduling and settlement conference calendars to determine the proportion of cases assigned to arbitration and to measure the average time required to process a case through each stage. It might also require asking the courts to record, for a short period of time, the proportion of cases assigned to arbitration at a particular stage in the pretrial process. Additional interviews with judges and court managers might also reduce uncertainty about the amount of time required to dispose of smaller civil cases without arbitration.

Finally, our analysis of the effects of arbitration on court costs depended on claims for reimbursement of arbitration expenses and state-wide estimates of the cost of judicial positions. Additional analyses using county budget data and local court records to determine the cost of judicial and nonjudicial personnel and other court expenses will be necessary to reduce uncertainty about the cost effectiveness of the program.

---

\(^1\)We include the latter under court process data because the judicial administration of arbitration is generally not separated from the regular court process.
Data on Litigants

Some questions about the effects of arbitration can be answered only by attorneys and litigants. Attorneys can provide information about program effects on the amount of time they spend disposing of a case through arbitration and their out-of-pocket expenses. The estimates and assessments that we have reported, based on our interviews, should be confirmed or modified by surveying a larger number of attorneys. Such a survey should also include questions about program effects on the time required to settle cases and on settlement outcomes.

Information about litigants' satisfaction with the program—in particular, their views about the quality of justice it provides—should be gathered directly from a sample of litigants. Litigants should also be questioned about their out-of-pocket expenses for arbitrating cases, their time away from work, and other transaction costs.

Future Analysis

The research described above would be costly to carry out. Although the legislature has directed the Judicial Council (with the assistance of the Auditor General) to conduct an analysis of the costs and benefits of mandatory arbitration, to date it has not appropriated the necessary funds. It is therefore not clear how much money the legislature is willing to invest in assessing the program. Our exploratory analysis demonstrates the problems that evaluators will encounter if they attempt to assess the program's effects without additional data collection. We believe that a comprehensive analysis would be well worth the time and effort. Even though unanswered questions still abound, the program has already won a generally positive response from its participants and has proven its ability to speed the adjudication process for litigants who volunteer for arbitration. Further experience with the program, coupled with the analysis of fuller empirical data, will yield valuable information on workload reduction, costs, and the outcomes of cases. This information will benefit the legislature, the courts, attorneys and litigants, and the ordinary taxpayer.
Appendix A

CHRONOLOGY OF IMPORTANT EVENTS PRECEDING CONSIDERATION OF MANDATORY ARBITRATION IN CALIFORNIA

1952 The Pennsylvania legislature empowers courts of common pleas to set up compulsory arbitration to expedite small claims and relieve delay. Jurisdictional ceiling is $1000, but is later raised to $3000 and then to $10,000.

1955 Pennsylvania Supreme Court, in the case of Application of Smith (381 Pa. 223, 112 A 2d 625), upholds constitutionality of compulsory arbitration.

1956 The Massachusetts Auditor System, first authorized in 1817, is put to extensive use to cope with a rising volume of motor vehicle tort cases.

1962 Special Study Commission on Judicial Procedures set up by the Los Angeles County Board of Supervisors recommends legislation to permit the use of hearing boards composed of three volunteer lawyers to dispose of backlog in both superior and municipal courts. The program is patterned after the Pennsylvania arbitration program and the Massachusetts Auditor System.

1965 The California Judicial Council recommends that the legislature take no action to authorize the use of a lawyer-arbitrator plan as proposed by the Los Angeles County Study Commission.

1971 The Los Angeles Attorneys' Special Arbitration Plan (LASAP) is set up. It provides for a voluntary arbitration program by stipulation of the parties for personal injury cases. By agreement of the parties, there is no appeal except to a two-member grievance committee; arbitrators serve "pro bono"; and recovery is not to exceed $7,500 unless stipulated by the parties. Similar projects are later initiated in San Francisco, Alameda, and Orange Counties.

1972 Judicial Council contract study recommends mandatory arbitration.
1973  SB 1211 introduced by Senator George Moscone to implement Judicial Council recommendations. Referred to interim study by Senate Judiciary Committee.

1974  SB 1211 enacted to institute arbitration at plaintiff's election and by stipulation of the parties, but vetoed by Governor Reagan. LASAP program limit raised to $15,000.

1975  Statewide Uniform Arbitration Program is authorized by SB 983 (Moscone) and signed by Governor Brown, effective July 1, 1975.

Appendix B

CHRONOLOGY OF IMPORTANT EVENTS IN THE LEGISLATIVE HISTORY OF THE CALIFORNIA MANDATORY ARBITRATION LAW

1977

Aug.  Governor Brown vetoes legislation setting up 54 new judicial positions.

Sept.  California Citizens Commission on Tort Reform recommends extension of arbitration to $10,000 at plaintiff's demand and between $10,000 and $15,000 on stipulation of either party. Commission proposes that party requesting a trial but not improving his position pay court and legal costs.

Nov. 4  First tentative draft of mandatory arbitration bill prepared by Governor's Office.

1978

Jan. 12  Legislation introduced by Senator Smith (SB 1362).

Jan. 17  Governor's Legal Affairs Secretary J. Anthony Kline meets informally with Senate Judiciary Committee members; they raise questions about the bill.

Jan. 19  Kline suggests to Senator Smith that support group of prominent lawyers and judges be formed.

Jan. 24  California Trial Lawyers Association endorses concept of arbitration but opposes four major elements in proposed bill.

Jan. 28  California State Bar Association endorses bill on condition that it include specified changes.

Jan. 30  Meeting between representatives of attorney groups and legislative staff to consider amendments; state bar requests specified amendments.

Feb. 10  California State Bar Association proposes alternative sanc-
tions for trial de novo. Judicial Council takes no position on the basic principle of mandatory arbitration but opposes the bill unless amended to resolve several problems.

Feb. 23 California Rural Legal Assistance opposes bill.
March 1 SB 1362 amended in the Senate. Insurance Agents and Brokers Legislative Council endorses bill.
March 7 Meeting between attorney groups, Senator Smith, and legislative staff to discuss amendments.
March 13 Associated Builders and Contractors Association supports bill.
March 16 Amended in the Senate based on meeting of March 7.
March 20 California State Bar Association, and Associations of Defense Counsel of Southern California and of Northern California, endorse bill.
March 23 California Trial Lawyers Association endorses bill; Western Center on Law and Poverty opposes bill.
March 27 Meeting of interested parties (including Governor’s Office, legislative staff, Judicial Council, state bar, CTLA, defense council, California State Department of Finance, CRLA, Western Center on Law and Poverty, and California Taxpayers Association) supports bill.
March 28 Hearing of Senate Judiciary Committee; bill reported favorably. California Medical Association supports bill.
April 6 Amended in the Senate.
April 14 Judicial Council estimates fiscal impact.
April 17 Reported favorably by Senate Finance Committee.
April 26 Amended in the Senate.
May 11 Passes Senate 35 to 1.
May 16 Meeting of interested parties to consider and resolve remaining issues.
May 17 Governor Brown signs Chel bill raising municipal court jurisdiction to $15,000.
May 22 Amended in the Assembly; CRLA removes opposition.
June 1 California Assembly Judiciary Committee hearing.
June 6 Passage of Proposition 13.
June 13 Bill amended in the Assembly applying mandatory arbitration to larger municipal courts.
June 14 Judicial Council and California Judges Association oppose legislation unless mandatory application to large municipal courts is eliminated.
Aug. 7  County Supervisors Association of California supports bill.  
Aug. 22  Passes Assembly 75 to 0.  
Sept. 11  Signed by Governor Brown.  

1979

May 1  Governor signs cleanup legislation exempting class actions and courts participating in the economical litigation project from the law.  
Sept. 28  Governor signs legislation mandating arbitration in Sonoma County.
Appendix C

KERRY MEMORANDUM ON SB 1362

The following memorandum of 14 April 1978 was communicated by Ed Kerry, Special Assistant to Ralph T. Gampell, Administrative Director of the Courts, to California State Senator Jerry Smith.

TO: Senator Jerry Smith
FROM: Ed Kerry, Special Assistant to the Director
DATE: April 14, 1978
SUBJECT: SB 1362 (SMITH) MANDATORY ARBITRATION

This is a review of the potential fiscal impact of SB 1362 as it affects the 12 largest superior courts with 10 or more judges. The cost implications are set forth in three areas as follows:

1. Cost of administering the mandatory arbitration program in the 12 superior courts including payment to arbitrators,
2. Annual costs that may be avoided by postponing additional judicial positions during the course of the mandatory arbitration program, and
3. Costs to the Judicial Council to prepare rules and collect and process data necessary to evaluate the mandatory arbitration program.

I. Cost of Administration

The total cost of the mandatory arbitration program in the 12 superior courts with 10 or more judges is estimated at $2.5 million per year. Start up costs are estimated to require an additional $200,000. These costs are calculated as follows:

Administration costs in the 12 superior courts will approximate $1,000,000 annually for the first full year of program operation (1979-80). This is based on an average administrative cost of $25 per case with an estimated 40,000 cases submitted to arbitration annually in the 12 courts ($25 \times 40,000 = $1,000,000). Administrative start-up costs to be incurred in 1978-79 are estimated at 20% of the first full year costs, or $200,000 (20% \times $1,000,000 = $200,000).

The preliminary cost estimate of payments to arbitrators in the 12 courts is $1,500,000 per year commencing in 1979-80. This is based on an assumption that of the 40,000 cases submitted to arbitration, only 1 in 4 will actually reach arbitration. The other 75% will filter out
through settlement, dismissal, etc. A further assumption is that arbitrators will be compensated $150 per day and that the average case will be concluded in one day. Therefore, 40,000 cases × 25% = 10,000 cases arbitrated × $150/case = $1,500,00.

II. Cost Avoidance

Costs that may be avoided due to the mandatory arbitration program result from new judicial positions that may not be required in the 12 superior courts because of a decrease in judge time required to process the personal injury and other matters that will now be resolved through arbitration. There is no consensus on the reduced amount of judicial time that may result from arbitration. This analysis provides estimates of cost avoidance based on the following assumptions:

(a) First, we assume that 20% of personal injury and other civil complaint cases that now go to trial in the 12 largest superior courts will be arbitrated.1 Second, an equivalent of 83.9 judge years are required to process all personal injury and other civil complaint trials in the 12 courts. Third, over the past five years, the combined number of judges in the 12 largest superior courts has increased an average of 10.6 additional judicial positions annually.

Therefore, an equivalent of 16.8 judge years would be saved if 20% of the personal injury and other civil complaints that now go to trial are instead settled through arbitration (83.9 judge years × 20% = 16.8 judge years). This means that:

(1) The average of 10.6 additional judicial positions added each year might be avoided for a total cost avoidance each year of $2,979,819 ($281,115 × 10.6). The state cost avoidance is estimated at $98,000 per position, or $1,038,800. The county cost avoidance is estimated at $183,115 per position, or $1,941,019.

(2) That 6.2 current judges will be made available to reduce backlog at least for the first year. This assumes no immediate cost savings from this potential reduction.

(b) Under this hypothesis, it is assumed that 40% of personal injury and other civil complaint cases that now go to trial in the 12 largest superior courts will be arbitrated.2 With the other estimates above remaining constant, an equivalent of 33.6 judge years would be saved if 40% of the personal injury and other civil complaints that now go to trial are instead settled through arbitration (83.9 judge years × 40% = 33.6 judge years). This means that:

(1) The average of 10.6 additional judicial positions added each

---

1We are aware that a portion of the cases that go to arbitration will result in trial de novo's. The assumptions herein allow for that circumstance.

2We are aware that a portion of the cases that go to arbitration will result in trial de novo's. The assumptions herein allow for that circumstance.
year might be avoided for a total cost avoidance of $2,979,819 ($281,115 × 10.6). The state and local portion is the same as calculated above.

(2) That 23.0 current judges will be made available to reduce backlog at least for the first year. This assumes no immediate cost savings from this potential reduction.

III. Judicial Council Costs

SB 1362 imposes additional duties on the Judicial Council consisting of the following: 1) preparation of rules governing the practice and procedure for all actions submitted for arbitration under this bill, and 2) collection and processing of data from each superior and municipal court that will allow the Judicial Council to give to the Legislature a comprehensive review of the effectiveness of this measure and any recommendations for future action.

The cost to perform these two functions is estimated as follows:

(1) **Preparation of rules.** It is estimated that eight months will be required to develop the rules, utilizing one half-time attorney and one half-time secretary.

The cost of preparation of the rules would be a one time cost incurred in 1978-79 of $25,347. The data collection and processing costs of $24,950 would be continuing costs.

(2) **Data Collection and Processing Staff.**
**Staff**

<table>
<thead>
<tr>
<th>Position</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/2 Senior Attorney II</td>
<td>$1,215</td>
</tr>
<tr>
<td>1/2 Judicial Secretary II</td>
<td>$598</td>
</tr>
</tbody>
</table>

Benefits computed at 26.28%

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Staff</td>
<td>$1,813</td>
</tr>
</tbody>
</table>

(times 8 months)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Staff (times 8 months)</td>
<td>$2,289</td>
</tr>
</tbody>
</table>

$18,312

**Supplies and Operating Expense**

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office Space</td>
<td>$1,800</td>
</tr>
</tbody>
</table>

300 sq. ft. at $.75 = $225 x 8 mo.

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telephone</td>
<td>$800</td>
</tr>
</tbody>
</table>

2 at $50 = $100/mo. x 8

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Office Expense</td>
<td>$500</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Travel</td>
<td>$1,400</td>
</tr>
</tbody>
</table>

4 Advisory Committee Mtgs. at $350

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Supplies &amp; Operating Expense</td>
<td>$4,500</td>
</tr>
</tbody>
</table>

**Equipment**

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Desks, chairs, credenza, bookcase, file cabinet, typewriter, dictating machine</td>
<td>$2,535</td>
</tr>
</tbody>
</table>

**TOTAL COST OF RULES PREPARATION**

$23,347

**(2) Data Collection and Processing Staff**

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data Control Clerk (1/2)</td>
<td>$7,200</td>
</tr>
<tr>
<td>Data Entry: 20,000 documents at $.15</td>
<td>$3,000</td>
</tr>
<tr>
<td>Data Processing Charges at $750/mo.</td>
<td>$9,000</td>
</tr>
<tr>
<td>Printing and Miscellaneous</td>
<td>$750</td>
</tr>
<tr>
<td>One Time Programming Costs 200 hours at $25</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

**TOTAL COST OF DATA COLLECTION & PROCESSING**

$24,950

**TOTAL JUDICIAL COUNCIL COST**

$50,297
Appendix D

JUDICIAL ARBITRATION
STATUTE
[Cal. Stats. (1978), Ch. 743]

An act to repeal and add and repeal Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, relating to arbitration, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 1362, Smith. Arbitration.

Existing law provides for voluntary agreements between parties to arbitrate disputes and the judicial enforcement of such agreements and of any awards made pursuant to such agreements, but makes no provision for the mandatory submission of civil actions to arbitration.

This bill would provide for the mandatory submission of certain civil actions to arbitration. This bill would, among other things, do each of the following:

1. Require each superior court with 10 or more judges to submit to arbitration certain at-issue civil actions where the amount in controversy in the opinion of the court will not exceed $15,000 for each plaintiff.

2. Permit each superior court with less than 10 judges to provide by local rule for the mandatory submission of certain at-issue civil actions where the amount in controversy in the opinion of the court will not exceed $15,000 for each plaintiff and permit each municipal court district to provide by rule for the mandatory submission of certain at-issue civil actions pending in such district.

3. Require such superior courts referenced in (1) and (2) above, upon stipulation of the parties, to submit to arbitration certain at-issue civil actions regardless of the amount in controversy. In all other superior, municipal, and justice courts, the Judicial Council would be required to provide by rule for a uniform system of arbitration for specified causes.

4. Except as otherwise specified, make the bill applicable only to civil actions at law and inapplicable to civil actions which include prayers for equitable relief which are neither frivolous nor insubstantial.
(5) Require the Judicial Council to provide by rule for practice and procedure for all actions submitted to arbitration under the bill and for exceptions, for cause, to arbitration of civil actions and to provide for the compensation of arbitrators, and require the board of governors of the State Bar, as specified, to provide by rule for the method of selection of arbitrators; and require the Auditor General, in consultation with the Department of Finance the Judicial Council and local agencies, to estimate the potential costs or savings for the arbitration program if it is continued beyond the operative period of the bill.

(6) Provide that submission to arbitration does not toll the running of time periods governing the dismissal of actions for want of prosecution, except that submission to arbitration pursuant to a court order within 6 months of the expiration of the statutory period would toll the running of such period until the filing of an arbitration award.

(7) Require arbitrators to be retired judges or attorneys. Compensation of arbitrators would be $150 per day, unless waived, except county boards of supervisors would be authorized to set a higher rate. A judge may also serve as an arbitrator without compensation. A person not an attorney also may serve as an arbitrator upon the stipulation of all parties.

(8) Permit a party to arbitration to elect to have a de novo trial, by a court or a jury, as to both law and facts and would require such trial to be calendared insofar as possible so that the trial shall be given the same place on the active list it had prior to arbitration or shall receive civil priority on the next setting calendar. The bill would require a court to require the party making such election to pay to the county the compensation of the arbitrator; and to the other party, all costs, as specified, and reasonable expert witness fees, as specified, in the event that the judgment upon the trial de novo is not more favorable to the party electing the trial de novo than the arbitration award, except as otherwise specified.

(9) Prohibit discovery after an arbitration award except by leave of court upon a showing of good cause or except by stipulation.

(10) Provide that an award shall have the same force and effect as a judgment, if neither a request for a de novo trial is made nor the award is vacated, except that it is not subject to appeal and may not be attached or set aside except as provided by Judicial Council rule.

(11) Require the Judicial council to report to the Governor and the Legislature on or before January 1, 1984, as to the effectiveness of the bill, including recommendations for future action.

(12) Require counties to pay all administrative costs of arbitration, including compensation of arbitrators.
(13) Make related changes.

(14) Provide that the provisions of the bill shall become operative July 1, 1979, except that the Judicial Council would be required to adopt rules by March 31, 1979, and remain in effect only until January 1, 1985, and, as of such date would be repealed, unless a later enacted statute chaptered prior to January 1, 1985, deletes or extends such date.

(15) Require the Auditor General to conduct studies of the bill’s effect on superior court workloads and to report to the Legislature annually, commencing on October 31, 1980.

The bill also would appropriate $173,950 from the General Fund as follows: (a) $142,950 to the Controller for reimbursement to counties for costs incurred in fiscal year 1978-79; and (b) $31,000 to reimburse the Judicial Council for costs incurred in fiscal year 1978-79 in implementing the bill.

The bill also would declare the Legislature’s intent that additional costs incurred by counties in the 1979-80 fiscal year and subsequent years be reimbursed and would provide that funding for such costs can be provided through the regular budget process.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the code of Civil Procedure is repealed.

SECTION 2. Chapter 2.5 (commencing with Section 1141.10) is added to Title 3 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 2.5. JUDICIAL ARBITRATION

1141.10. (a) The Legislature finds and declares that litigation involving small civil claims has become so costly and complex as to make more difficult the efficient resolution of such civil claims that courts are unable to efficiently resolve the increased number of cases filed each year, and that the resulting delays and expenses deny parties their right to a timely resolution of minor civil disputes. The Legislature further finds and declares that arbitration has proven to be an efficient and equitable method for resolving small claims, and that courts should encourage or require the use of arbitration for such actions whenever possible.

(b) It is the intent of the Legislature that:

(1) Arbitration hearings held pursuant to this chapter shall provide parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes.

(2) Arbitration hearings shall be as informal and private as possible
and shall provide the parties themselves maximum opportunity to participate directly in the resolution of their disputes, and shall be held during nonjudicial hours whenever possible.

(3) Members of the State Bar selected to serve as arbitrators should have experience with cases of the type under dispute and are urged to volunteer their services without compensation whenever possible.

1141.11. (a) In each superior court with 10 or more judges, all at-issue civil actions pending on or filed after the operative date of this chapter shall be submitted to arbitration, by the presiding judge or the judge designated, under this chapter if the amount in controversy in the opinion of the court will not exceed fifteen thousand dollars ($15,000) for each plaintiff, which decision shall not be appealable.

(b) In each superior court with less than 10 judges, the court may provide by local rule, when it determines that it is in the best interests of justice, that all at-issue civil actions pending on or filed after the operative date of this chapter, shall be submitted to arbitration by the presiding judge or the judge designated under this chapter if the amount in controversy in the opinion of the court will not exceed fifteen thousand dollars ($15,000) for each plaintiff, which decision shall not be appealable.

(c) In each municipal court district, the municipal court district may provide by local rule, when it is determined to be in the best interests of justice, that all at-issue civil actions pending on or filed after the operative date of this chapter in such judicial district, shall be submitted to arbitration by the presiding judge or the judge designated under this chapter. The provisions of this section shall not apply to any action maintained pursuant to Section 1781 of the Civil Code or Section 116.2, 378, or 1161 of this code.

1141.12. (a) In each superior court in which arbitration may be had pursuant to subdivision (a) or (b) of Section 1141.11, upon stipulation of the parties, any at-issue civil actions shall be submitted to arbitration regardless of the amount in controversy.

(b) In all other superior, municipal, and justice courts, the Judicial Council shall provide by rule for a uniform system of arbitration of the following causes:

(i) Any cause upon stipulation of the parties, and

(ii) Upon filing of an election by the plaintiff, any cause in which the plaintiff agrees that the arbitration award shall not exceed the total sum of fifteen thousand dollars ($15,000).

1141.13. This chapter shall not apply to any civil action which includes a prayer for equitable relief, except that if the prayer for equitable relief is frivolous or insubstantial, this chapter shall be applicable.
1141.14. Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter.

1141.15. The Judicial Council rules shall provide exceptions for cause to arbitration pursuant to subdivision (a), (b), or (c) of Section 1141.11. In providing for such exceptions, the Judicial Council shall take into consideration whether the civil action might not be amenable to arbitration.

1141.16. (a) The determination of the amount in controversy, under subdivision (a) or (b) of Section 1141.11 and Section 1141.12, shall be made by the court and the case submitted to arbitration at any conference at which all parties are present or represented by counsel. Such conference shall be held no sooner than nine months after the case has been placed on the civil active list and no later than 90 days before trial, whichever occurs first. At that time the court shall make a determination whether any prayer for equitable relief is frivolous or insubstantial, which decision shall not be appealable. The date of such conference may be postponed upon motion of any party for good cause shown. No determination pursuant to this section shall be made if all defendants stipulate in writing that the amount in controversy exceeds fifteen thousand dollars ($15,000).

(b) The determination of the amount in controversy shall be without prejudice to any finding on the value of the case by an arbitrator or in a subsequent trial de novo. The determination shall be based on the total amount of damages, and the judge shall not consider questions of liability or comparative negligence or other defenses.

(c) The case shall be submitted to arbitration at an earlier time upon the written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing.

1141.17. Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in Section 583 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of an arbitration award.

1141.18. (a) Arbitrators shall be retired judges or members of the State Bar, and shall sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators upon the stipulation of all parties.
(b) The Judicial Council rules shall provide for the compensation, if any, of arbitrators, except that no compensation shall be paid prior to the filing of the award by the arbitrator, or prior to the settlement of the case by the parties. Compensation for arbitrators shall, unless waived in whole or in part, be one hundred fifty dollars ($150) per day, except that the board of supervisors of a county or a city and county may set a higher level of compensation for that county or city and county.

(c) The board of governors of the State Bar shall provide by rule for the method of selection of arbitrators after consulting with administrative committees established pursuant to Rule 1603 of the Judicial Arbitration Rules for Civil Cases and with county bar associations in counties where there are no administrative committees. These rules shall provide for specialized panels and shall become operative upon approval of the Judicial Council.

(d) Any party may request the disqualification of the arbitrator selected for his case on the grounds and by the procedures specified in Section 170 or Section 170.6 within five days of the naming of the arbitrator.

1141.19. Arbitrators approved pursuant to this chapter shall have the powers necessary to perform duties pursuant to this chapter as prescribed by the Judicial Council.

1141.20. An arbitration award shall be final if a request for a de novo trial is not filed within 20 days after the date the arbitrator files the award with the court. Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar.

1141.21. (a) If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(i) To the county, the compensation actually paid to the arbitrator.

(ii) To the other party or parties, all costs including, but not limited to, those specified in Sections 1032.5, 1032.6, 1032a, and 1032b, and the party electing the trial de novo shall not recover his costs.

(iii) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.
Such costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of election of the trial de novo.

(b) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under paragraphs (ii) and (iii) of subdivision (a) shall be imposed only as an offset against any damages awarded in favor of that party.

(c) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs under paragraph (i) of subdivision (a) shall be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under subdivision (b) has been deducted from the judgment.

1141.22. The Judicial Council rules shall specify the grounds upon which the arbitrator or the court, or both, may correct, modify or vacate an award.

1141.23. The arbitration award shall be in writing, signed by the arbitrator and filed in the court in which the action is pending. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and it may not be attacked or set aside except as provided by Section 1286.2 or Judicial Council rule.

1141.24. In cases ordered to arbitration pursuant to Section 1141.16(a), absent a stipulation to the contrary, no discovery shall be permissible after an arbitration award except by leave of court upon a showing of good cause.

1141.25. Any reference to the arbitration proceedings or arbitration award during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of Section 657.

1141.26. Nothing in this act shall prohibit an arbitration award in excess of fifteen thousand dollars ($15,000). No party electing a trial de novo after such award shall be subject to the provisions of Section 1141.21 if the judgment upon the trial de novo is in excess of fifteen thousand dollars ($15,000).

1141.27. This chapter shall apply to any civil action otherwise within the scope of this chapter in which a party to the action is a public agency or public entity.

1141.28. All administrative costs of arbitration, including compen-
sation of arbitrators, shall be paid for by the county in which the arbitration costs are incurred, except as otherwise provided in Section 1141.21.

1141.29. The Judicial Council shall, by rule, require each superior and municipal court subject to the provisions of this chapter to file with it such data as will enable it to provide, on or before January 1, 1984, a report to the Governor and the Legislature which shall serve as a comprehensive review of the effectiveness of this chapter, and which shall include recommendations for future action.

The Judicial Council, in consultation with the Department of Finance and the Auditor General, shall include in its study an estimate of the potential costs or savings, if any, should the program be continued beyond the life of the act.

1141.30. The provisions of this chapter shall not be construed in derogation of the provisions of Title 9 (commencing with Section 1280) of Part 3, and, to that extent, the provisions of this chapter and that title are mutually exclusive and independent of each other.

1141.31. The provisions of this chapter shall become operative July 1, 1979, except that the Judicial Council shall adopt the arbitration rules for practice and procedures on or before March 31, 1979.

1141.32. This chapter shall remain in effect only until January 1, 1985, and as of such date is repealed, unless a later enacted statute, which is chaptered before January 1, 1985, deletes or extends such date.

SEC.3. It is the intent of the Legislature that the additional costs incurred by counties in the 1979-80 fiscal year and subsequent years in administering the arbitration program required by this act be reimbursed to the extent that such costs are not offset by the avoidance of costs associated with the reduced need for additional superior court judgeships. Funding for such costs can be provided through the regular budget process. Claims for actual costs incurred in the 1979-80 fiscal year and subsequent fiscal years must be submitted to the State Controller pursuant to paragraph (2) of subdivision (d) of Section 2231 of the Revenue and Taxation Code. The Controller shall reduce such claims by the amount of any cost avoidance that is found to have occurred in each county in the report of the Auditor General pursuant to Section 4 of this act.

SEC.4. The Auditor General shall conduct studies of the effects of this act on superior court workload in each county affected by this act. The studies shall include but not be limited to, an analysis of the reduction in superior court workload, which resulted in a decreased need for additional superior court judgeships. The report shall also include a statement of the costs avoided in each affected county due to
the effect of this act. The results of these studies shall be reported annually to the Legislature and the State Controller beginning on October 31, 1980.

SEC. 5. The sum of one hundred seventy-three thousand nine hundred fifty dollars ($173,950) is hereby appropriated from the General Fund according to the following schedule.

(a) To the Judicial Council for implementing this act in Fiscal Year 1978-79 .............................. $31,000
(b) To the State Controller for allocation and disbursement to counties pursuant to Section 2231 of the Revenue and Taxation Code to reimburse counties for costs incurred by them in Fiscal Year 1978-79 pursuant to this act; provided, claims for direct and indirect costs hereunder shall be filed as prescribed by the State Controller ........................ $142,950

SEC. 6. Section 1 of this act shall become operative July 1, 1979.
Other ICJ Publications

R-2716-ICJ
The Law and
Economics of
Workers' Compensation
Policy Issues and Research Needs
L. Darling-Hammond and T. J. Kniesner
1980

R-2717-ICJ
Models of Legal
Decisionmaking
Research Designs and Methods
D. A. Waterman and Mark A. Peterson
1981

R-2732-ICJ
Court Efforts to Reduce
Pretrial Delay
A National Inventory
P. Ebener, with the assistance of J. Adler, M. Selvin, and M. Yesley
1981

A special bibliography (SB 1064) provides a list of other Rand publications in the civil justice area. To request the bibliography or to obtain more information about The Institute for Civil Justice, please write the Institute at this address: The Institute for Civil Justice, The Rand Corporation, 1700 Main Street, Santa Monica, California 90406, (213) 393-0411.