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LITIGANT AND ATTORNEY ATTITUDES TOWARD COURT-ANNEXED ARBITRATION: AN EMPIRICAL STUDY*

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I. INTRODUCTION

Over the past several years the landscape of the American judicial system has undergone a perceptible change in response to increased popular and academic dissatisfaction¹ with the magnitude, cost and delay associated with litigating routine² civil cases. A number of different innovations, aimed at making the resolution of ordi-

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1. "Dissatisfaction with the trial courts appears well justified. In some of our major metropolitan areas, where most litigation is pending, a civil case frequently takes five years or more to get to a jury trial. In only a few courts do cases move routinely to trial within a year." ABA Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay: Final Report* 7 (1984). See also Trotter & Cooper, *State Trial Court Delay: Efforts at Reform*, 31 AM. U.L. REV. 213 (1983); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 35 F.R.D. 273 (1964); Janofsky, *Reducing Court Costs and Delay: An Overview*, 16 U. MICH. J.L. REF. 467 (1983); Connolly & Smith, *The Litigant's Perspective on Delay: Waiting for the Dough*, 8 JUST. SYS. J. 271, 285 (1983).

2. A recent study found that the median stakes for civil cases in federal court are \$15,000. D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT II 53-56 (1983). See also Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 73, 84-85 (1983).

nary civil cases less complex, time-consuming, and costly, are responsible for this change.

Court-annexed arbitration³ is one innovation that has achieved recent popularity⁴ as a method for the reduction of litigation cost and delay. The increased interest in court-annexed arbitration flows from two unrelated, but complementary, responses to the problems of delay and cost. These responses are represented by the efforts of court administrators to streamline the litigation process and the efforts of those who question the appropriateness of traditional litigation processes for the resolution of every type of case. The fundamental premise of court-annexed arbitration accepts the adversary process as a means of resolving disputes, but attempts to simplify and expedite the process without changing or challenging its essential character.

The principal aims of case management systems are to reduce case backlogs and expedite the processing of cases on the docket without adding judicial personnel—in other words, efficiency. Drawing upon the common wisdom that inertia is a powerful force and that individuals often will not act on a given problem until forced to do so by the pendency of an approaching deadline, case management

3. The name "court-annexed arbitration" is misleading because it suggests that the process is similar to traditional consensual arbitration. It is not similar; court-annexed arbitration is much closer to adjudication than to traditional arbitration.

Unlike commercial arbitration, court-annexed arbitration is mandatory, and cases which fit the jurisdictional requirements of a court-annexed arbitration program are referred to arbitration regardless of the wishes of the parties. The arbitrators in court-annexed arbitration programs are often selected by a third party, usually an employee of the court, rather than the parties themselves. Moreover, the hearings in cases subject to court-annexed arbitration are open to the public, unlike the generally private hearings in traditional arbitration. The greatest difference between the two is that in court-annexed arbitration the arbitrator's award is not binding on the parties. *See generally* Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537, 537-38 (1983). *See also*, Simoni, *Court-Annexed Arbitration in Oregon: One Step Forward and Two Steps Back*, 22 WILLAMETTE L. REV. 237 (1986) [hereinafter Simoni].

4. Pennsylvania became the first state to adopt court-annexed arbitration. The history of Pennsylvania's court-annexed arbitration legislation is described in Doty, *Philadelphia's Compulsory Arbitration Program*, 29 VILL. L. REV. 1449, 1449-53 (1984).

The states with court-annexed arbitration programs authorized by statute or court rule are: Alaska, ALASKA STAT. § 09.43.190 (1983); Arizona, ARIZ. REV. STAT. ANN. § 12-133 (Supp. 1987); California, CAL. CIV. PROC. CODE §§ 1141.10-1141.32 (Deering Supp. 1988); Connecticut, CONN. GEN. STAT. ANN. §§ 52-549n-aa (West Supp. 1988); Delaware, DEL. SUPER. CT. CIV. R. § 16(c) (Supp. 1986); Hawaii, HAW. REV. STAT. § 601 (Supp. 1987); Illinois, ILL. ANN. STAT. ch. 110, §§ 2-1001A-1006A (Smith-Hurd Supp. 1987); Minnesota, MINN. STAT. ANN. § 484.73 (West Supp. 1988); Nevada, NEV. REV. STAT. §§ 38.215-38.255 (1987); New Jersey, N.J. STAT. ANN. §§ 39:6a-24 -39:6a-25 (West Supp. 1987); New York, N.Y. CIV. PRAC. L. & R. § 3405 (McKinney Supp. 1988); North Carolina, N.C. GEN. STAT. § 7A-37 (1986); Oregon, OR. REV. STAT. § 33.360 (Supp. 1987); Pennsylvania, 42 PA. CONS. STAT. ANN. §§ 7361, 7362 (Purdon 1987); Washington, WASH. REV. CODE ANN. §§ 7.06.010-7.06.910 (West Supp. 1987).

theory stresses the development and implementation of strong, centrally controlled case management systems. These systems are characterized by the short-scheduling of events in the case as well as the imposition of judicial deadlines to which attorneys and court personnel must adhere.⁶ The presence of these deadlines forces attorneys to give early and continuing attention to cases, and prevents attorneys from placing certain cases on a lower level of priority, where they may languish from inattention.

The second impetus for court-annexed arbitration derives from the work of those who seek the related goals of developing and implementing "appropriate"⁶ dispute resolution techniques, and of reducing litigation cost and delay.⁷ These dual goals⁸ have been viewed

5. Smith & Connolly, *Achieving and Maintaining Currency: A First-year Examination of Vermont's Trial Court Program*, in A.B.A. ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY: PROJECT REPORTS AND RESEARCH FINDINGS* 42, 43 (1984) [hereinafter *PROJECT REPORTS*]; T. CHURCH, JR., A. CARLSON, J. LEE & T. TAN, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978); L. SIPES, A. CARLSON, T. TAN, A. AIKEN & R. PAGE, *MANAGING TO REDUCE DELAY* (1980).

The case management style of court administrators differs dramatically in its control over the criminal docket and over the civil docket. Court administrators traditionally exercise considerable control over the pace of criminal trials, monitoring the cases at each step in the judicial process. *PROJECT REPORTS*, *supra* note 5, at 39. In contrast, court administrators tend to leave concerns involving the pace of civil litigation to attorneys. *PROJECT REPORTS*, *supra* note 5, at 39.

A number of innovative case management systems demonstrate that the pace of civil litigation can be increased through a strong centralized system. A case management program implemented in two Kentucky circuit courts succeeded in reducing the average length of medium sized civil cases from sixteen to five months. Connolly & Planet, *Controlling the Caseflow—Kentucky Style*, 21 *JUDGES' J.*, Fall, 1982, at 8, 54. The hallmarks of the Kentucky case management program are judicial control of the progress of a case, short scheduling of events, a reasonable accommodation of the attorneys' needs, and a policy of firm trial dates and limited continuances. *Id.* at 56-57. Successful court-annexed arbitration programs use similar case management techniques. See generally Simoni, *supra* note 3, at 243 n.27. See also Friesen, *Cures for Court Congestion*, *JUDGES' J.*, Winter, 1982, at 7.

For an additional study documenting similar results in courts with strong case management programs, see Connolly & Smith, *supra* note 1, at 274-82 (a survey of litigation delay patterns in the Vermont Superior Court).

6. The phrase "appropriate" dispute resolution technique is not self-defining. An "appropriate" dispute resolution technique is one that is responsive to the needs of litigants and adapted to the particularities of the dispute. Examples of efforts to introduce the use of "appropriate" dispute resolution techniques can be found in the use of mediation in child custody disputes. See *infra* note 8, at 903-04.

7. See Alfini, *Alternative Dispute Resolution and the Courts: An Introduction*, 69 *JUDICATURE* 252 (1986) [hereinafter Alfini].

8. Other alternative dispute resolution "methods include mediation, negotiation, mini-trials, summary jury trials, consensual arbitration, and final offer arbitration." They represent true "alternatives" to the litigation paradigm in that they stand in place of litigation. These alternatives are beyond the scope of this article. Walker, *Court-Annexed Arbitration Comes to*

by some as a major judicial reform⁹ and by others as a means to save litigants time and money while delivering higher quality justice.¹⁰ While not a true "alternative" dispute resolution mechanism, court-annexed arbitration can reduce litigation cost and delay for the ordinary civil lawsuit and provide litigants with an "appropriate" dispute resolution mechanism.

Court-annexed arbitration programs seek to achieve several related goals: (1) reduced congestion of civil dockets with a corresponding decrease in associated court costs; (2) reduced time necessary to dispose of cases and their concomitant costs; and (3) improved court access to litigants.¹¹ The effectiveness of court-annexed arbitration programs in meeting these goals has not yet been measured comprehensively.¹² However, the data that exist indicate that the effectiveness of court-annexed arbitration depends in large part on the quality of two ingredients critical to each program: the structure and process of each program as defined by the enabling legislation and other applicable rules, and the behavior of participating arbitrators, attorneys, and litigants.¹³

II. COURT-ANNEXED ARBITRATION PROGRAMS

Although the details of court-annexed arbitration programs vary, most successful programs share certain structural and operational similarities.¹⁴ First, the programs divert certain classes of cases¹⁵ to mandatory non-binding arbitration as a precondition to trial. Second, the cases are heard by an arbitrator, oftentimes an attorney selected by the parties or by court personnel, rather than a judge. Third, the programs set strict time lines for the arbitration hearing. Fourth, the programs give the arbitrators many of the same powers exercised by judges: the arbitrator conducts the hearing, rules on evidentiary matters, and issues a decision and award that becomes

North Carolina and the Nation, 21 WAKE FOREST L. REV. 901, 903 (1986).

9. Alfini, *supra* note 7, at 252.

10. Hensler, *What We Know and Don't Know About Court Administered Arbitration*, 69 JUDICATURE 270 (1986).

11. *Id.* at 272.

12. *Id.*

13. Walker, *supra* note 8, at 942-43; *See also* Hensler, *supra* note 10, at 272-76.

14. For a parallel discussion of the similarities among court-annexed arbitration, see Simoni, *supra* note 3, at 247-48.

15. Generally, the only cases assigned to arbitration are those in which the only relief sought is money damages or those domestic relations cases in which the only issue in dispute is the division or distribution of property between the parties. *See, e.g.*, OR. REV. STAT. § 33.360 (1987). *See* Simoni, *supra* note 3, at 248 n.43.

the judgment of the court if none of the parties request a trial de novo. Fifth, the programs provide parties dissatisfied with the arbitration award the right to a trial de novo before a judge. If a trial is held, the matter proceeds as if there had been neither an arbitration hearing nor an arbitration award.¹⁶ Finally, arbitration programs attempt to reduce the number of frivolous appeals by establishing disincentives for parties who appeal the arbitration award.¹⁷ The disincentives may be in the form of filing fees required to perfect the appeal as well as monetary penalties if the party appealing the award does not improve her position at the subsequent trial de novo.¹⁸ Under certain circumstances, a portion of the non-appealing party's attorney fees¹⁹ may be imposed upon the appealing party if the latter does not improve her position at the trial de novo.

A. *Effect of Court-Annexed Arbitration on Litigation Delay*²⁰

Successful court-annexed arbitration programs can reduce litigation delay for the cases referred to arbitration as well as for the cases that are not subject to arbitration. Because arbitration provides a simplified adjudicative forum, cases subject to court-annexed arbitration are generally resolved sooner than they would have been had they not been submitted to arbitration. Many arbitration programs divert cases to the arbitration track at an early point in a case's life and provide for shortened periods of discovery,²¹ a limitation on

16. Oregon's arbitration statute provides that the parties can "appeal" the arbitrator's decision by requesting a trial *de novo*. OR. REV. STAT. § 33.400(2)(a) (1987). The word "appeal" is misleading because the trial court is not asked to review the decision of the arbitrator and correct it for error. In fact, although the trial court will generally know that there has been an arbitration hearing and an award, the court will not know what the award was nor which party sought trial *de novo*. MULTNOMAH COUNTY ARBITRATION RULE 14.25. See Simoni, *supra* note 3, at 248 n.46.

17. OR. REV. STAT. § 33.400 (1987). For a parallel discussion of the disincentives to frivolous appeals in the arbitration setting, see Simoni, *supra* note 3, at 248-49.

18. OR. REV. STAT. § 33.400(2)(c) & (d) (1987).

19. Shuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Detroit's Mediation Program*, 8 JUST. SYS. J. 307, 316-17 (1983) [hereinafter Shuart]. Although its proponents describe Detroit's program as a "mediation" program, it more closely resembles court-annexed arbitration programs.

20. For a parallel discussion of the effects on litigation delay imposed by arbitration, see Simoni, *supra* note 3, at 249-52.

21. Not all arbitration programs refer cases to arbitration as soon as all of the parties have appeared. Michigan's Wayne County program does not refer cases to a hearing until discovery has been completed. The hearing does not take place until the 27th month after the complaint has been filed. Discovery is completed by the time of the hearing. Shuart, *supra* note 19, at 310-11 n.5.

some types of discovery,²² and an expedited hearing process.²³ The "fast-tracking"²⁴ of the arbitration cases reduces the possibility of excessive delay.

The expedited discovery and hearing procedures encourage earlier settlements in cases likely to settle because the attorneys must prepare and evaluate their cases sooner than would have been necessary had the case remained on the litigation track.²⁵ If the parties do not settle, but proceed to the arbitration hearing and accept the arbitrator's award, the case is still resolved sooner than it would have had it gone to trial, because arbitration hearings are generally convened more quickly than a trial. Even if the parties reject the arbitration award and request a trial *de novo*, the arbitration award may stimulate settlement before trial because it provides the parties with a neutral evaluation of the value of their case.²⁶

Court-annexed arbitration programs can also benefit cases outside the arbitration programs. Because court-annexed arbitration diverts certain types of cases from the litigation track,²⁷ the total

22. See, e.g., MULTNOMAH COUNTY ARBITRATION RULE 14.14 (the arbitrator has the power to restrict discovery).

23. Although the restrictions on discovery and the expedited hearing process may raise concerns about the quality of justice dispensed by court-annexed arbitration programs, one should keep in mind that court-annexed arbitration is intended to handle the relatively routine case that does not present either legally or factually complex matters for decision. Our survey of attorneys found that discovery is not extensive in the large majority of cases subject to arbitration. See *infra* text accompanying notes 120-22.

24. The "fast-tracking" aspect of court-annexed arbitration is a direct descendent of the various types of strong case-management programs that are enjoying an increasing popularity with court administrators. See *supra* note 5.

25. [T]he predominance of settlement as a means of case disposition does not mean that settlement occurs shortly after filing; many cases last for a year or more before they are settled. It is reasonable to suppose that many settlements occur when, and only when, the attorneys in the case find it necessary to turn their attention to the case, prepare the evidence, and assess the case's strengths, weaknesses, and net monetary value. Trial is rarely an economically desirable method of case disposition, because it normally results in greater expense for all involved than would a settlement. . . . A prompt time schedule for the arbitration hearing provides a motivation for counsel to prepare their cases promptly, and the expense of attorney time spent in the arbitration hearing may motivate settlement in advance of the hearing.

E.A. LIND & J.E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 9-10 (rev. ed. 1983) [hereinafter LIND & SHAPARD].

26. If the parties do not settle before trial *de novo*, they will not have been delayed in getting to trial. Most arbitration programs specify that cases returning to litigation for a trial *de novo*, retain their original position on the civil trial docket. See, e.g., MULTNOMAH COUNTY ARBITRATION RULE 14.27. The practice in Lane County is to set a trial date at the same time a case is transferred to arbitration. Conversation with Norman Meyer, Lane County Trial Court Administrator. See Simoni, *supra* note 3, at 250 n.56.

27. The number of cases referred to arbitration will depend upon the jurisdictional

number of cases on the civil docket decreases. The cases remaining on the docket become part of a shorter queue of cases and there is a reduction in case backlog, although the number of court personnel has not increased. The beneficial effect of court-annexed arbitration is inversely related to the number of cases originally submitted to arbitration which return to the litigation track after the arbitration award is rejected. If a large percentage of the arbitration cases routinely accept the arbitration award and do not return to the litigation track, case backlog will be significantly reduced.

B. *Court-Annexed Arbitration in Oregon*

In 1983, the Oregon Commission on the Judicial Branch proposed a series of legislative bills designed to reduce excessive litigation delay and cost.²⁸ One of the bills authorized district and circuit courts to create and implement court-annexed arbitration programs.²⁹ The Commission stated that of the several litigation delay proposals it introduced, it believed "the one which may affect the greatest number of cases and provide the greatest savings is the authorization of local arbitration programs for ordinary civil cases."³⁰ The Oregon Legislature subsequently passed the legislation³¹ authorizing court-annexed arbitration in district and circuit courts. The statute set the jurisdictional ceiling for civil cases subject to arbitration at \$15,000 in circuit court and \$3,000 in district court and authorized arbitration for certain types of domestic relations cases.³² In 1987, the Legislature increased the jurisdictional level for arbitration

threshold and ceiling of the arbitration program. A program with a low jurisdictional ceiling will divert a smaller percentage of cases to arbitration than will a program with a higher jurisdictional ceiling. The jurisdictional ceilings for most arbitration programs range from \$15,000 to \$40,000. A number of federal district courts have \$100,000 jurisdictional ceilings. P. EBNER & D. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE 8-10 (1985). Michigan's Wayne County, program is unique because it has a \$10,000 jurisdictional floor, but no jurisdictional ceiling. Shuart, *supra* note 19, at 310 n.5. See Simoni, *supra* note 3, at 249 n.50.

28. For the legislative background of Oregon's adoption of a court-annexed arbitration program, see Simoni, *supra* note 3, at 252-59.

29. 1982 REPORT OF THE OREGON COMMISSION ON THE JUDICIAL BRANCH 5-51 (1983) [hereinafter 1982 REPORT]. Oregon's first court-annexed arbitration program was a pilot program adopted by local rule in Multnomah County Circuit Court in 1982. See *Multnomah County's Pilot Arbitration Program—A Model for the State of Oregon*, OR. ST. BAR BULL. 30 (Jan. 1985). For a more complete discussion of the legislative background of Oregon's court-annexed arbitration program, see Simoni, *supra* note 3.

30. 1982 REPORT, *supra* note 29, at 8.

31. H.B. 2369, 62 Leg., 1983 Or. Laws 1262.

32. OR. REV. STAT. § 33.360(1) (1985).

in circuit court to \$25,000 and \$10,000 in district court.³³ The jurisdictional requirements relating to domestic relations cases remained unchanged.

Two characteristics mark Oregon's arbitration statute.³⁴ First, the statute is permissive rather than mandatory. It authorizes judicial districts to adopt court-annexed arbitration programs, but does not require them to do so.³⁵ Second, the statute establishes only the broad outline for court-annexed arbitration programs. It delegates responsibility for the development of operational rules to the judicial districts adopting such arbitration programs.³⁶ The statute gives the courts a great deal of latitude in developing their rules: the arbitration rules need only be consistent with the enabling legislation³⁷ and receive approval from the Chief Justice.³⁸

The statute establishes jurisdictional limits for arbitration:³⁹ it provides that participating courts shall refer to arbitration those civil cases in which the only relief claimed "is recovery of money or damages, and no party asserts a claim for money or general and special damages"⁴⁰ greater than \$10,000 in district court or \$25,000 in circuit court,⁴¹ and those domestic relations cases in which "the only contested issue is the division or other disposition of property between the parties."⁴² The statute also permits litigants to opt into

33. H.B. 2091, 64 Leg., 1987 Or. Laws 198, increased the jurisdictional ceiling for court-annexed arbitration in circuit court from \$15,000 to \$25,000. H.B. 2092, 64 Leg., 1987 Or. Laws 192, increased the jurisdictional ceiling for court-annexed arbitration in district court from \$3,000 to \$10,000. The bills passed both houses of the Oregon Legislature without a dissenting vote.

34. For a complete discussion of Oregon's arbitration provisions, see Simoni, *supra* note 3, at 259-77.

35. OR. REV. STAT. § 33.350(1)(a) & (b) (1987).

36. *Id.* § 33.350(2).

37. *Id.*

38. *Id.*

39. The arbitration statute permits parties who assert "a claim for money or general and special damages in an amount exceeding \$25,000" to waive the amount in excess of \$25,000 and have the claim assigned to arbitration. *Id.* § 33.380. The decision to waive the amount in excess of \$25,000 and proceed to arbitration is the sole decision of the party asserting the claim. In such cases, the waiver of the amount in excess of the \$25,000 jurisdictional limit is for purposes of the arbitration hearing only; if the party waiving the amount in excess of the \$25,000 is dissatisfied with the arbitrator's decision and award, that party may assert the entire original claim in a trial *de novo*. *Id.*

40. *Id.* § 33.360(1)(a).

41. The statutory limits are "exclusive of attorney's fees, costs and disbursements and interest on judgment." *Id.*

The Commentary to the proposed legislation states that punitive damages are not to be considered in determining the amount of damages sought. 1982 REPORT, *supra* note 29, at 8.

42. OR. REV. STAT. § 33.360(1)(b) (1987). Despite the mandatory language that courts with arbitration programs "shall" refer eligible domestic relations cases to arbitration, the

arbitration even though their cases may not meet the statute's jurisdictional requirements. Conversely, the statute also permits presiding judges of participating courts to exempt qualifying cases from arbitration if good cause exists to do so.⁴³

The fundamental structural guidelines of the arbitration programs are also set by statute. The statute provides that cases will be heard by one arbitrator,⁴⁴ and places responsibility for compensating this individual with the parties to the dispute.⁴⁵ The compensation requirement ensures that the arbitration program is directly funded by the parties who use it. The compensation costs will not increase the total cost of litigation if, as anticipated, arbitration expedites the process and reduces other costs associated with litigation.⁴⁶

The arbitrators' powers are largely defined by statute. The statute gives the arbitrators the authority to conduct a hearing and make a "decision and award"⁴⁷ that becomes the judgment of the court if not appealed within 20 days after the date the decision and award are filed by the arbitrator.⁴⁸

The statute permits parties against whom "relief is granted by the [arbitrator's] decision and award or a party whose claim for relief was greater than the relief granted"⁴⁹ to file a written notice of appeal and a request for a trial de novo.⁵⁰ Although the statute guar-

Linn-Benton program exempts domestic relations cases from arbitration.

43. *Id.* § 33.360(2). The flexibility inherent in this rule is necessary if court-annexed arbitration is to meet its goal of expediting cases without diminishing either the apparent or actual justice provided. Although the ordinary civil case is neither factually nor legally difficult, see *infra* notes 111-12 and accompanying text, a case involving small stakes can raise significant legal and policy questions. Such a case is inappropriate for arbitration because of the likelihood that the parties will appeal the arbitration award and request a trial de novo. If it is apparent that a case will be tried irrespective of the presence of mandatory arbitration, the case should be exempted from the arbitration process. See Simoni, *supra* note 3, at 260 n.109.

44. Although the statute does not expressly state that a single arbitrator is to be used, it consistently uses the single form of the word "arbitrator." See, e.g., OR. REV. STAT. § 33.390(1) (1987): "At least five days before the date set for an arbitration hearing, the *arbitrator* shall notify the clerk of the court of the time and place of the hearing." (emphasis added).

45. *Id.* § 33.390(3).

46. See *infra* notes 123-38 and accompanying text.

47. OR. REV. STAT. § 33.400(1) (1987).

48. *Id.* § 33.400(3). The specific limitations on the arbitrators' powers are described by local arbitration rule.

49. *Id.* § 33.400(3).

50. The Oregon Constitution guarantees litigants the right to jury trial in civil actions. Article I, section 17 provides that "[i]n all civil cases the right of Trial by Jury shall remain inviolate." OR. CONST. art. I, § 17. This provision is limited by art. VII, section 3, which provides that "[i]n all actions at law, where the value in controversy shall exceed \$200, the right of trial by jury shall be preserved." *Id.* § 3.

For a parallel discussion of the appeal provisions, see Simoni, *supra* note 3, at 263-64.

antees the parties' right to a trial de novo, it establishes two distinct sets of financial disincentives regarding the right to appeal.⁵¹ First, the party filing a notice of appeal and request for a trial de novo must deposit \$150 with the clerk of the court.⁵² The deposit is refunded if the party filing the notice of appeal improves her position in the subsequent trial de novo;⁵³ it is forfeited if she does not improve her position in the trial de novo.⁵⁴ The second financial disincentive can be more onerous. The statute bars a party who files the notice of appeal and fails to improve her position in the subsequent trial de novo from recovering either an award of attorney's fees or costs and disbursements to which she would otherwise be entitled.⁵⁵ Moreover, the statute makes this person liable for the costs and disbursements incurred by the opposing party in the trial de novo.⁵⁶

III. PURPOSE AND METHODOLOGY OF THE EMPIRICAL SURVEY

A. *Purpose of the Survey*

We conducted a survey to assess the attitudes of litigants and attorneys in cases subject to court-annexed arbitration. Specifically, we sought to determine whether the participant's evaluations of court-annexed arbitration validated the theoretical assumptions that underlie court-annexed arbitration.⁵⁷

Critics of court-annexed arbitration have sometimes argued that the process establishes a system of second class justice for subject

51. The reasons for the disincentives are obvious: court-ordered arbitration will succeed in reducing backlog and delay only if a substantial proportion of the cases diverted to arbitration do not return to litigation. If a substantial proportion of the cases diverted to arbitration return to the litigation track, court-ordered arbitration will have done nothing to decrease litigation delay. In fact, diverting cases to arbitration may succeed only in increasing litigation delay and cost by inserting an additional procedural obstacle that the parties must surmount before proceeding to trial. See Simoni, *supra* note 3, at 263-64 n.128.

52. OR. REV. STAT. § 33.400(2)(c) (1987).

53. *Id.*

54. *Id.*

55. *Id.* § 33.400(2)(d). A party who prevails in the arbitration hearing is entitled to costs and disbursements under OR. R. CIV. PRO. § 68(B) (1987). If the prevailing party files a notice of appeal and a request for a trial de novo, and receives a judgment equal to or less than the award she received from the arbitrator, the party has failed to improve her position at the trial *de novo* and forfeits the right to costs and disbursements under OR. R. CIV. PRO. § 68(B) (1987) even though she remains the prevailing party.

56. *Id.* § 33.400(2)(d).

57. Although neither the arbitration statute nor the arbitration rules explicitly state as much, the purpose of the arbitration process is to produce a result that approximates what a litigant could reasonably expect to receive at trial. This conclusion is implied in the arbitration statute's grant of the automatic right to request a trial *de novo* for any reason. *Id.* § 33.400(2)(a).

cases.⁵⁸ This criticism is directed both at the quality of the decisions reached by arbitrators and at the possible reduction in procedural protections available to the litigants in such an expedited and informal hearing process. Closely tied to this criticism is the concern that any potential savings in time and expense realized by court-annexed arbitration in theory will be illusory if the litigants routinely reject the arbitration award and proceed to trial *de novo* because they are dissatisfied with their awards.

The results of our survey indicate that a large majority of participants believe court-annexed arbitration produces acceptable awards, and that it reduces the time and cost of case disposition for the bulk of cases subject to the arbitration rule. A large majority of the litigants said court-annexed arbitration was a good way to resolve cases similar to theirs and that their arbitration awards were fair. More than 60% of the litigants said they saved time by hearing their cases before an arbitrator, and nearly 45% said they paid a smaller sum in attorney's fees because their cases were subject to court-annexed arbitration.⁵⁹ Only a few litigants questioned the legitimacy of a process that requires their case to be heard first by an arbitrator rather than by a judge.⁶⁰ The results of the survey also indicate that attorneys involved in court-annexed arbitration are satisfied with the process. Eighty percent of the attorneys thought that arbitration was an efficient way to resolve their cases and 86% thought the process was a fair way to resolve their cases. Most attorneys indicated that their arbitrators understood the procedural, factual, and legal issues in their cases. Three-quarters of the attorneys said the results they received from the arbitration hearing were similar to what they had expected to receive at trial. Attorneys in cases which were referred to court-annexed arbitration, but which were settled before a hearing, also expressed their satisfaction with court-annexed arbitration, and also indicated that the arbitration process contributed to the early resolution of their cases.

B. Methodology

We surveyed litigants⁶¹ and attorneys from cases subject to arbi-

58. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Cf. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

59. See *infra* notes 123-38 and accompanying text for a fuller discussion of the survey results on time and attorney's fees.

60. See *infra* notes 80-81 and accompanying text.

61. The authors obtained the names of the litigants from court records. Because the records did not always contain the litigants' addresses or telephone numbers, this information

tration in three Oregon arbitration programs: the Lane, Linn-Benton, and Multnomah County arbitration programs.⁶² We attempted to survey⁶³ litigants in every case⁶⁴ for which there had been a hearing and award in the Lane and Linn-Benton programs.⁶⁵ Because of the large number of cases involved in Multnomah County, we did not attempt to survey each of these cases in that jurisdiction. Instead, we randomly selected plaintiffs from 15% of the cases in which there had been both a hearing and an award, and we made a separate, random selection of defendants from an additional 15% of these cases.⁶⁶

was solicited from the attorneys of record. Letters seeking the addresses and telephone numbers of clients to 410 attorneys were mailed.

A large percentage of the attorneys responded, although a number refused to provide the information without their clients' prior approval. A somewhat smaller number of attorneys refused to provide the information under any circumstances. Several attorneys were of the opinion that they would violate the attorney-client privilege by divulging their clients' addresses and telephone numbers. Some of the information the attorneys provided was no longer current, thus only about two-thirds of the parties for whom the attorneys provided information. The results are reported below:

Table 1

Case Type/ Category	Letters sent	Responses received	Surveys completed
Lane County	80	56	25
Linn-Benton	85	49	24
Multnomah	245	109	107
Totals	410	214	156

62. The litigants were selected only from cases in which there had been both an arbitration hearing and an award. Litigants from cases subject to arbitration that had terminated without an arbitration hearing were not surveyed because they would be less reliable informants about the effect that court-annexed arbitration had on their cases.

63. The litigants were surveyed by telephone, using law students as questioners. The surveys required between fifteen minutes and one-half hour to complete, depending upon the amount detail the litigants provided to the open-ended questions.

64. An attempt was made to survey both a plaintiff and a defendant from every case from the Lane and Linn-Benton programs with a hearing and award. In cases in which there was more than one plaintiff or defendant, only one of the multiple parties was randomly selected to survey. Within this constraint, an attempt was made to survey at least two parties from each of the Lane and Linn-Benton cases that met the criteria.

65. All cases from the Lane and Linn-Benton arbitration programs from the dates the programs began and April 1, 1986 were surveyed. The Lane County program began in May, 1985; the Linn-Benton program began October, 1984.

66. The participants were selected from Multnomah County arbitration cases that terminated between January 1, 1985 and December 31, 1985. We sought to ensure that the sample of Multnomah County litigants was representative by controlling the selections by case type.

We did not attempt to match plaintiffs and defendants from the same cases because we

We surveyed two groups of attorneys. One group consisted of attorneys in cases that were referred to court-annexed arbitration and in which an arbitration hearing was held. We sought to survey attorneys from each case referred to arbitration in the Lane and Linn-Benton programs.⁶⁷ Because of the large number of cases which had gone to hearings in Multnomah County, we randomly selected the plaintiffs' attorneys from 15% of the cases that had gone to hearings and also made a separate random selection of defendant's attorneys from 15% of the cases that had gone to hearings.⁶⁸

The second group of attorneys were involved in cases that were referred to court-annexed arbitration, but which had been settled before a hearing was held. We surveyed this group of attorneys separately to determine whether they believed that arbitration contributed to the settlement of their cases. We followed the methodology outlined in the preceding paragraph in selecting these attorneys.

1. *Litigants and Their Cases*

Of the 156 litigants surveyed,⁶⁹ 107 were involved in the Multnomah County program, twenty-five in the Lane County program, and twenty-four in the Linn-Benton arbitration program. Our sample was balanced between plaintiffs (51%) and defendants (49%). Eighteen litigants (11.6%) had more than one of their cases referred

were interested in the litigants' evaluation of their arbitration experience, not in obtaining comparative responses.

67. The survey was conducted by mail. A survey was mailed to one plaintiff's attorney and one defendant's attorney in each case that went to an arbitration hearing during the study period. If case information reflected that more than one attorney represented either plaintiffs or defendants in a given case, only one of these attorneys was randomly surveyed.

68. The random selections were controlled by case type to ensure a representative cross-section of cases. No effort was made to match the attorneys that we surveyed and the cases in which they were involved with the litigants or arbitrators that we surveyed. This practice parallels the procedure we followed in surveying litigants from the Multnomah County cases we surveyed. *See supra* note 66.

69. The sample suffered from a dual level of non-response. Some attorneys failed to provide addresses, thereby excluding their clients from the sample. In addition, some respondents refused to participate in the survey. However, on all available measures the sample appears to be non-biased and representative of the litigant population. This suggests that the non-response was probably random and should not effect our ability to generalize to the litigant population. Confidence intervals for the data range from $\pm .05$ to $\pm .07$ (90% confidence level). For instance, with our data on the litigants opinion of the fairness of the award, we can say with 90% certainty that the true percent of litigants in the population who feel that the award was fair is found somewhere between 56.6% and 68.6% (62.6%, $\pm 6\%$). Yet, even the low end of the interval would support our conclusion that a good majority of litigants find the process fair. Although this is a broader confidence interval than we would have liked, in most instances it does not effect our overall conclusions.

to arbitration.⁷⁰ Sixty-six (44%) said they had prior experience with court trials as parties in other cases. Twenty-five (16%) said they had prior experience with court trials in a capacity other than as a party. The remaining sixty-five (40%) said they had no prior experience with court trials.

The distribution of cases by case type in the litigant survey was consistent with the distribution of cases by case type in the general population of all cases subject to arbitration during the time period of the study.⁷¹ The largest percentage of cases were those involving contracts, while the smallest percentage were domestic relations cases. The distribution of cases in the litigant survey did contain a slightly larger percentage of contract cases and a slightly lower percentage of domestic relations cases than were in our empirical survey. The differences were not sufficient to affect the validity of the

70. The number of responses may not total 156 in every instance because not all respondents answered every question.

71. Case Type Distribution: Litigant Survey

Table 2

<u>Case Type</u>	<u>Number in Survey</u>	<u>Percent by Category</u>
Torts (non-auto)	32	20.5%
Torts (auto)	21	13.5%
Contract	84	53.8%
Domestic Relations	17	10.9%
Other	2	1.3%
Totals	156	100.0%

The distribution by case type of the 684 closed arbitration cases that terminated between January 1, 1985 and December 31, 1985 in Multnomah County was as follows:

Table 3

<u>Case Type</u>	<u>Number in Survey</u>	<u>Percent by Category</u>
Torts (non-auto)	123	18%
Torts (auto)	96	14%
Contract	342	50%
Domestic Relations	96	14%
Other	27	4%
Totals	684	100%

With one exception, which relates to a peculiarity of the Linn-Benton arbitration rules, the distribution of cases in the Lane and Linn-Benton programs was similar to the distribution of cases in Multnomah County. The Linn-Benton program does not transfer domestic relations cases to arbitration; therefore, the percentage of cases in each of the other four categories is slightly greater than the percentages reported above.

litigant survey.⁷²

Thirty-five litigants (23%) said the arbitration award was appealed from in their cases, and ten (6.3%) said a trial de novo took place. These percentages are somewhat lower than the percentages from the empirical survey,⁷³ and the percentages reported by the responding attorneys in our survey.⁷⁴ Of the thirty-four cases in which the award was appealed, the litigants we surveyed appealed the award in one-half of the cases.

2. *The Attorneys and Their Cases*

We received 154 surveys from attorneys who represented clients in cases in which an award was rendered.⁷⁵ Fifty-five percent of the surveyed cases were from Multnomah County, 24% from Linn-Benton, and 21.4% from Lane County. The attorneys were an experienced group of Oregon practitioners.⁷⁶ One-third had been in prac-

72. The consistency among the litigant survey, the attorney survey, and the empirical survey on crucial descriptive information strongly supports the conclusion that our samples are representative of the population and that any bias due to non-response is probably random and does not effect our ability to generalize from the samples. *See supra* note 69.

73. The percentage of both the cases in which the award was appealed and which proceeded to trial de novo are somewhat lower than the percentages for the same events that we found in our survey of 1,484 closed cases subject to arbitration during the period of our study. Those figures are reported below.

Table 4

<u>Category</u>	<u>Number</u>	<u>Percentage</u>
Cases transferred to Abitration	1,484	(100%)
Cases to Hearing (with award)	744	(50%)
Cases Appealing Award (as a percentage of cases with an award)	209	(28%)
Cases to Trial		
As a percent of all cases transferred to arbitration	66	(4.4%)
As a percent of all cases with an award	66	(8.9%)
As a percent of all cases appealing award	66	(31.6%)

74. *See infra* note 78 and accompanying text.

75. We had initially planned to use a mail survey for both litigants and attorneys. However, since the response rate of litigants to a pilot study was disappointing, we chose to conduct a telephone survey of litigants. Therefore, when we compare the results of the litigant survey with the attorney surveys, it should be kept in mind that the difference in methodologies may have some hidden effect on such a comparison. The comparisons we make, however, are few, and are primarily concerned with descriptive information. Nevertheless, the comparisons produce a surprisingly high degree of agreement among the surveys. This indicates that the slight difference in data gathering methodology is likely not a serious problem.

76. The distribution of lawyer respondents in our survey by number of years in practice and by number of lawyers in office is similar to the distribution found among 2,815 private

tice for between eleven and twenty years, a third for between six and ten years, and one-fifth⁷⁷ for five years or less. Fifty-seven percent of the respondents indicated they had substantial trial experience, while 37% stated they had some trial experience. Seventy-nine percent of the respondents had represented clients in other cases that had been referred to court-annexed arbitration and 87.5% percent of this group had been involved in at least one other case which had gone to an arbitration hearing.⁷⁸ Thirty-nine percent of the respondents had served as an arbitrator in at least one arbitration proceeding.

Eighty-four surveys were received from attorneys who represented plaintiffs, and sixty-nine from attorneys who represented defendants.⁷⁹ Forty-seven attorneys reported that the arbitration award was appealed in their case. In twenty-three of those cases the attor-

practitioners responding to a survey conducted by the Committee on Economics of the Oregon State Bar. See *The State Bar Economic Survey; Earnings and Overhead in 1985*, THE PROFITABLE LAW. (Oregon State Bar, Spring 1987).

77. A third of the respondents who indicated how their practice was organized were sole practitioners. An equal percentage were in firms of not more than five attorneys and 21% were in firms of 6 to 15 attorneys.

78. Each questionnaire sent to an attorney identified a particular case in which the attorney had represented a client. It asked the attorney to answer the questionnaire with reference to that particular case. We asked the attorney to identify the nature of the case.

The distribution of cases by case type was as follows:

Table 5

Case Type by Category	Number of Cases	
	by Category	Percent of Cases
Torts (non-auto)	19	11.3%
Torts (auto)	33	19.6%
Contract	60	35.7%
Real Property	5	3.0%
Domestic Relations	20	11.9%
Other	31	18.5%
Totals	168*	100.0%

* The total number of responses exceeds the number of respondents because of answers indicating more than one type of claim in the same case.

Although the distribution of case types differs somewhat from that found in our empirical study of all cases going to court-annexed arbitration, the differences do not undermine our ability to make comparisons. See *supra* note 72 and accompanying text. The attorney survey sample has a higher proportion of cases identified as "other" and a smaller proportion of contract and tort/non-auto than the empirical study of all cases. This results in part, we believe, from the attorneys' greater tendency to classify claims as "other." For example, several attorneys classified fraud claims as "other" while we classified such claims as tort/non-auto in the empirical study.

79. One survey did not indicate whether the attorney represented a plaintiff or a defendant.

ney's client appealed the case; in twenty-four, the other party appealed.⁸⁰

The second group consisted of 105 attorneys of record who were involved in cases transferred to arbitration in the Multnomah, Lane, and Linn-Benton arbitration programs, but which were settled before an arbitration hearing took place. Twenty-eight percent of the attorneys in this group said they had practiced law between six and ten years, while 40% had practiced law between eleven and twenty years. A large majority said they had substantial trial experience. The distribution of cases by type of case was similar to the distribution of cases by type of case in the general population of cases.⁸¹ Of these attorneys, thirty-two represented clients in cases subject to the Linn-Benton arbitration rules, thirty-six represented clients in cases in Lane County, and the balance represented clients in the Multnomah County arbitration program. The attorneys were evenly divided between those who represented a plaintiff/petitioner (49%) and those who represented a defendant/respondent (51%). Virtually all of the attorneys were in private practice.

IV. THE PARTICIPANTS' RESPONSES: LEGITIMACY, EFFICIENCY AND GENERAL EFFECTS OF COURT-ANNEXED ARBITRATION PROGRAMS

In this Part of the article we report the views expressed by the surveyed litigants and attorneys. The first section presents the respondents' perceptions of court-annexed arbitration as a "legitimate" procedure for dispute resolution. The second section reports the respondents' perceptions of the adequacy of court-annexed arbitration procedures for the "efficient" resolution of disputes. The third section reports the respondents' general evaluations of their arbitration experience.

A. *Legitimacy*

In order to survey the participants' attitudes toward the legitimacy of Oregon's court-annexed arbitration program, we questioned the participants in two areas. First, we asked whether the litigants found their particular arbitration awards acceptable. Second, we asked them whether they had confidence in the arbitration process

80. The appeal rate in the attorney survey is comparable to the appeal rate found for all cases sent to an arbitration hearing in the three counties during the time of the study. See *supra* note 73.

81. See *supra* notes 71 and 78.

itself—i.e., the procedures leading up to the award.

1. *Were Awards Acceptable to the Litigants?*

a. *Trial De Novo*

One measure indicating the acceptability of arbitration awards is the trial de novo rate in arbitration programs.⁸² However, while a high trial de novo rate suggests widespread dissatisfaction with the arbitration award, the opposite conclusion is not necessarily true. Parties may accept the arbitration award for reasons unrelated to their evaluation of the award's acceptability.⁸³

Our litigant survey found that in cases in which an arbitration award was rendered, the litigants accepted the award 77% of the time. Moreover, although the arbitration award was appealed in 23% of the cases surveyed, a trial de novo occurred in only 6.4% of the cases. While the 6.4% trial de novo figure is comparable to the percentage of cases proceeding to trial in the general population of cases, and hence may not appear to represent a significant savings in judicial time, it must be remembered that the 6.4% figure represents the percentage of cases for which an arbitration award was rendered which then proceeded to trial de novo. Because about one-half of the cases subject to arbitration terminate before a hearing and award, the trial rate for all cases subject to arbitration is less than 4%. This figure is lower than the trial rate for all cases in the general population.

Out of the 143 cases in the attorney survey for which the attorneys provided information, the parties accepted the award in approximately 70% of the cases. In an additional 17.5% of the cases, the case was appealed, but the case was settled before a trial de novo. A trial was held and a judgment entered by the court in 9.1% of the cases surveyed. These percentages are comparable to the respective percentages found in the population of all cases referred to arbitration for which an award was rendered during the period of our study.⁸⁴ Although this figure is higher than that reported by the litigants we surveyed, it is still lower than the trial rate of all civil and domestic relations cases.

82. The appeal rate is a misleading figure. Parties may appeal the arbitration award for any number of reasons, many of which are strategic. A high percentage of appeals does not necessarily indicate that an arbitration program is unsuccessful.

83. See *supra* text accompanying notes 85-87.

84. See *supra* note 73.

b. *Factors Leading to an Acceptance of the Arbitration Award*

Litigants may accept an arbitration award for reasons unrelated to their perception of the correctness of the award. An arbitration program that makes the appeal process unattractive by imposing large fees on parties seeking to appeal the award or threatening the imposition of large economic sanctions if the appeal is unsuccessful, can discourage meritorious awards⁸⁵ and keep the appeal rate artificially low. Therefore, in addition to the frequency with which the litigants accepted their arbitration awards, we also inquired into the factors that were responsible for this high rate of acceptance.

When we specifically asked the litigants what factor caused them to accept the arbitration award, more than 43% said they accepted the award because they were satisfied with it. A number of litigants said they accepted the award because of the prospect of incurring additional attorney's fees (26%), the time involved (10%), or because they did not expect to be able to improve their position at trial (8%). Only six litigants (4%) identified the \$150 appeals fee as the reason they did not appeal.

We received similar explanations from the attorneys representing those clients who accepted the arbitration award. The most frequently provided response was that their clients were satisfied with the outcome. Eighty-five⁸⁶ attorneys gave this response and seventy-seven indicated that it was the primary reason. Twenty-eight attorneys indicated that the prospect of additional attorney's fees was a factor in their clients' decisions not to appeal, and eighteen stated this was the primary reason. Eleven attorneys responded that their clients' primary reason for not appealing was their belief that they could not have won at trial. This was cited as an additional reason, although not the most important reason, by another five attorneys.

Only seven attorneys listed the \$150 appeal fee as the most important reason for their client's acceptance of the award. An additional ten attorneys believed it was a factor, although not the primary one. It appears from both the litigants' and the attorneys' responses that the \$150 fee, by itself, was not a major disincentive to appeal. The \$150 fee is not the only monetary disincentive to appeal,

85. Most arbitration programs do impose various types of financial disincentive on a party who appeals but fails to improve her position at trial. *See supra* notes 16-18 and accompanying text. The disincentives set out in the Oregon arbitration statute are relatively minor. *See supra* notes 50-56.

86. We report numbers rather than percents for this question because the attorneys were encouraged to select more than one response to this question.

however. Such factors as increased attorney fees and court costs also deter appeals.⁸⁷ Several of the attorneys' narrative comments indicated that they did not appeal because the increased costs of a trial would have been greater than any reasonably expected improvement over the arbitrator's award.

c. *The Litigants' Evaluation of the Arbitration Award*

We asked both the litigants and the attorneys to indicate the factors which lead the litigants to accept their arbitration awards. We questioned the litigants on the fairness of their particular award; the attorneys were asked whether they believed court-annexed arbitration was generally a fair way to resolve their clients' cases. We limited the litigants' question to the fairness of their award because we assumed that many of them did not have any prior experience against which to evaluate the overall fairness of the process. We asked the attorneys the more general question because it was assumed that they had greater experience with the litigation process.

We asked the litigants two specific questions about the award: whether they had held any expectations about the type of award they would receive,⁸⁸ and whether the award they did receive was the award they had expected.⁸⁹ We also asked the litigants whether they were satisfied with the award and whether they believed their award was fair. The questions were designed to elicit different assessments

87. See J. ADLER, D. HENSLER, & C. NELSON, *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 50-54 (1983).

88. Through these questions we correlated the litigants' evaluation of their awards with their pre-hearing expectations about the award. We asked the litigants two related questions.

Question 3. "Before the arbitration hearing, what did you think your chances were of getting a decision that you would be satisfied with?" The response frequency for Question 3 is as follows:

Table 6

<u>Response</u>	<u>Number</u>	<u>Percentage</u>
Almost Certain	60	38.7%
Better than 50/50	36	23.2%
50/50	26	16.8%
Worse than 50/50	8	5.2%
Almost no change	9	5.8%
No expectation	16	10.3%
Total	155	100.0%

89. Question 4: "Was the arbitrator's decision the same as or different from the decision you expected?" The response frequency for Question 4 is as follows:

of the arbitration award. In asking the litigants whether they were satisfied with their award, we forced them to focus solely upon whether the award had met their expectations. By asking whether they believed their award was fair, we invited them to evaluate the outcomes of their cases in more than simple "win/loss" terms.

The litigants were nearly evenly divided between those satisfied and those dissatisfied with their awards. A slight majority (52%) said they were either "very satisfied" or "somewhat satisfied" with the arbitration award.⁹⁰ The balance said they were either "somewhat dissatisfied" or "very dissatisfied" with their award.⁹¹ Although only a slight majority of the litigants said they were satisfied with their award, nearly two-thirds (62%) said their award was either "very fair" or "somewhat fair."⁹²

The fact that two-thirds of the respondents believed the arbitration process produced a fair award, when many said they were dis-

Table 7

<u>Response</u>	<u>Number</u>	<u>Percentage</u>
Same as what I expected	62	40.0%
Different than what I expected	83	53.5%
No expectation	10	6.5%
Total	155	100.0%

90. Confidence interval ranges from 45% to 59% (90% confidence level).

91. The response frequency for Question 5 is as follows:

Table 8

<u>Response</u>	<u>Number</u>	<u>Percentage</u>
Very satisfied	56	36.1%
Somewhat satisfied	25	16.1%
Somewhat dissatisfied	25	16.1%
Very dissatisfied	49	31.6%
Total	155	99.9%

92. The response frequency for Question 6 is as follows:

Table 9

<u>Response</u>	<u>Number</u>	<u>Percentage</u>
Very fair	60	38.7%
Somewhat fair	37	23.9%
Somewhat unfair	25	16.1%
Very unfair	33	21.3%
Total	155	100.0%

appointed with their award, indicates that the litigants differentiated between their satisfaction with their award and their overall assessment of the fairness of their award.⁹³ The litigants' answers display an interesting dynamic which may say more about the inherent optimism of the human spirit than the litigation process. More than 61% of the litigants said that before the hearing, they believed they had a *better* than even chance of obtaining an award with which they would be satisfied, and of this 61%, the largest group (38.7%) was "almost certain" that it would be satisfied with the awards. The answers do not reveal why such a large percentage of the litigants believed they would be satisfied with their arbitration awards. One can only speculate that the litigants believed in the "correctness" of their position and assumed the arbitrator would be similarly convinced. Or, perhaps, their attorneys instilled a sense of confidence in the outcome that was not borne out by the award. In any event, while more than 61% said they had a better than even chance of receiving an award with which they would be satisfied, only 40% said the award they received was similar to the award they expected.

The receipt of an award that is lower than that anticipated by the litigant tended to affect the litigants' satisfaction with the award. The data indicate that there is a statistically significant relationship between the litigants' satisfaction with the arbitration award and the litigants expectations. The data also supports the conclusion that litigants have a general perception that the arbitration process is a fair way to resolve disputes, regardless of personal outcome. Some critics

93. ($\chi^2=71$, $df=6$, $p < .001$). Chi-square (χ^2) is an appropriate measure for comparing two variables when the data is expressed as a frequency or a percent. It examines the difference between observed frequencies and the frequencies expected if the two variables are unrelated to each other. A large difference between the observed frequencies and the expected frequencies would indicate that the two variables are in fact related to each other and that the answers of respondents to one question is linked to their answers to the other question. In this case, the high value of χ^2 is an indication that the respondents' satisfaction with the award is related to their judgement that the award was similar to or different from what they expected.

The first number $\chi^2=$ — refers to the chi-square value. A larger value generally means that our observed frequencies deviate significantly from what we would expect if no relationship existed between the two variables. The second number $df=$ — refers to the degree of freedom in the analysis. A larger degree of freedom indicates that both variables have a larger number of categories of response (e.g., strongly agree, agree, neutral, disagree, strongly disagree v. yes and no) and influences the ease with which statistical significance may be gained. (A larger degree of freedom will require a greater chi-square value to get the same level of significance). The third number, $p <$ —, refers to the probability of getting a chi-square value of this size and with this degree of freedom by chance when no real relationship exists between the two variables. For example, a value of $p < .001$ indicates that the probability of getting this result by chance when no real relationship exists is less than ($<$) one in one thousand.

of arbitration have contended that it produces a form of second class justice for the litigants.⁹⁴ Although this research was not designed to evaluate the quality of justice provided by the arbitration programs, it does demonstrate that litigants do not have any widespread perception that the process is unfair.⁹⁵

The results reported in the preceding paragraphs suggest two important conclusions: First, most litigants perceived the arbitration award and process as fair, even when they received an award with which they were not satisfied. The litigants' perceptions of fairness are a strong endorsement of the arbitration process. Second, disappointed expectations are, nonetheless, an important source of dissatisfaction with the award. Attorneys should be aware of their clients' attitudes and should play a role in encouraging and developing realistic expectations.

The litigants with prior litigation experience were more likely than were those without prior litigation experience to believe that their arbitration awards were fair. More than 69% of the litigants with prior litigation experience thought their awards were either very fair or somewhat fair, while less than 57% of the litigants without prior litigation experience believed their awards were fair.⁹⁶ Similarly, litigants with prior litigation experience were more likely to believe that their arbitrator accurately understood what happened in their case (80%), than were the other litigants (70.1%).⁹⁷

The attorneys also stated their general belief that the arbitration process is fair. More than 87% of the attorneys said the process proved to be fair in their cases. This finding tends to refute the criticism that the arbitration process results in second-class justice.⁹⁸ This level of support for the fairness of court-annexed arbitration is

94. See *supra* note 58.

95. The litigants were asked what expectations they had before the hearing that they would receive an arbitration award with which they would be satisfied, and whether the award was the same as or different from the award they had expected. No attempt was made to draw a correlation between a litigant's satisfaction with the award and the amount of money the litigant received or was required to pay.

96. ($\chi^2=3$, $df=1$, $p < .09$).

97. The litigants' prior litigation experience does not appear to influence their answers to the questions whether they believed they saved time or paid less in attorney's fees, or whether they were satisfied with their award. The distribution of litigants answering those questions is the same for those with or without prior litigation experience.

98. There was a substantial relationship between the attorneys' belief that the court-annexed arbitration process was a fair way to resolve their case and their belief that the process was efficient. 90.5 % of those attorneys who thought that the process was fair also thought that it was efficient. 89.5 % of those attorneys who thought that the process was not a fair way to resolve their case also thought that it was not efficient.

particularly impressive since the attorney respondents are well versed in traditional trials and would be quick to point out unfairness in the arbitration process.

Our survey also sought to determine the relationship between an attorney's perception that the arbitration process is fair and the degree to which that process mimicked the traditional trial process. We anticipated that attorneys would be more likely to believe the arbitration process to be fair if the result they received was similar to that which they would have expected had they opted for a trial instead.⁹⁹ To test this we asked the attorneys whether the result they received was similar or dissimilar to the result they would have expected had they proceeded to trial. Three quarters of the respondents answered that the arbitration decisions were similar to the decisions they would have expected at trial. A comparison of these responses with the attorneys' views on the fairness of arbitration confirmed the relationship we anticipated. Those attorneys who received decisions similar to the results they would have expected from a trial were more likely to believe the arbitration process was fair.¹⁰⁰

We anticipated that there would be a correlation between the clients' acceptance of an award and the attorneys' response that the process was fair in their case. We expected that the clients would be more likely to accept the award if the attorneys thought the process was fair. This relationship did exist. More than three quarters of those attorneys who responded that the process was fair in their cases also said their clients accepted the award. Only 42.1% of those who stated that the process was unfair in their case reported that their clients nevertheless accepted their award.¹⁰¹

2. Did Participants Have Confidence in the Arbitration Process?

In addition to the need for the general acceptance of awards among litigants and attorneys, a "legitimate" court-annexed arbitration program also requires that those who are subject to the arbitration rules have confidence that the arbitration process is itself likely to produce acceptable awards. Because the arbitrator is the focal point of the arbitration process, we asked both the litigants and the attorneys to evaluate their arbitrators' performances and abilities.

99. The authors' hypothesis assumes that the lawyers would expect to receive a "fair" result from a trial of their case.

100. ($\chi^2=14$, $df=1$, $p < .001$).

101. ($\chi^2=13$, $df=3$, $p < .01$).

The participants' responses indicated that both litigants and attorneys were satisfied with their arbitrators and the procedures that lead to the arbitration award.

a. *Arbitrator Understands the Facts*

We asked the litigants whether they believed the arbitrator understood the facts of their case. We asked this question because we believed that the arbitrator's accurate understanding of the case affects the litigants' perception of the "legitimacy" of the entire arbitration process. If the arbitrator's function is to act as a surrogate for a trial court, a necessary condition for the success of the process is the arbitrator's ability to perform those judicial functions competently.

The largest percentage of litigants said the arbitrator understood the facts in their case either "very well" (49.6%) or "somewhat well" (24.8%). Only 25.5% said the arbitrator did not understand the particular facts in their case. The data also indicate that the stronger the litigant believed that the arbitrator accurately understood their facts, the more likely the litigants were to be satisfied with the arbitration award.¹⁰² Of the 102 litigants who said the arbitrator understood the facts in their case either "very accurately" or "somewhat accurately," nearly two-thirds also said they were either "very satisfied" or "somewhat satisfied" with their arbitration award. We found a similar correlation between the litigants' belief that the arbitrator accurately understood the case and their belief that the award was fair.¹⁰³

b. *Arbitrator Concern*

We next asked whether the arbitrator appeared to be concerned with understanding the litigants' side of the case. We assumed that arbitrators who appeared concerned would make the process appear less impersonal and make the litigants believe they were an integral part of the process. Forty-three percent of the litigants believed the arbitrator in their case was very concerned and 34% believed that the arbitrator was somewhat concerned.

Litigants who said the arbitrators were concerned with understanding the litigant's side of the case were much more likely to be satisfied with the arbitration award than were those litigants who

102. ($\chi^2=87$, $df=9$, $p < .001$).

103. ($\chi^2=81$, $df=9$, $p < .001$).

said the arbitrators were not concerned.¹⁰⁴ More than 84% of the litigants who said the arbitrators were very concerned that they understand their side of the case said they were either very satisfied or somewhat satisfied with the arbitration award. This compares with the less than 10% of the litigants who said the arbitrators were not concerned that they understand the litigant's side of the case and who were nevertheless satisfied with the award.

Similarly, of the 106 litigants who said the arbitrator was concerned that she fully understand the litigants' side of the case, seventy-one (66.9%) were either very or somewhat satisfied with their award. Conversely, of the thirty-one litigants who said the arbitrator was *not* concerned that she fully understand the litigants' side of the case, less than 10% were even "somewhat" satisfied with their award. The litigants' perceptions that the arbitrator was concerned are also related to their belief that their award was fair.¹⁰⁵ More than 93% of the litigants who said that the arbitrators were "very concerned" that they understand the litigant's side of the case believed their award was either "very fair" or "somewhat fair," while less than a quarter of the litigants who believed the arbitrators were "somewhat unconcerned" believed their award to be fair. None of the litigants who said the arbitrators appeared "very unconcerned" believed their awards were fair.

The responses from the attorneys reinforce the answers of the litigants. A very large majority of the attorneys believed their arbitrators understood both the facts and the applicable law in their cases. More than 75% of the attorneys believed the arbitrators understood the law well; 18.1% said the arbitrator understood some of the law; and only 3.4% said the arbitrator did not understand the law at all. Approximately 85% stated that the arbitrator understood the facts of the case well; 12.8% said the arbitrator understood some of the facts; and 2% said the arbitrator did not understand the facts at all. The attorneys' evaluations of their arbitrators' understandings represent a strong endorsement of a key element of the arbitration process by a group that would be expected to be its most perceptive critics.

c. Arbitration Rules Do Not Disadvantage Client Interests

There are a number of differences between the legal rules and

104. ($\chi^2=70$, $df=9$, $p < .001$).

105. ($\chi^2=70$, $df=9$, $p < .001$).

procedures of court-annexed arbitration and court trials. If attorneys believe these differences prejudice the interests of their clients, they will not regard court-annexed arbitration as a legitimate process. The data strongly indicate, however, that the attorneys do not find the differences between court-annexed arbitration and trial practice to be unfair to their clients.

It is generally asserted that one feature associated with the informality of the arbitration process is the less than rigorous application of the formal rules of evidence. The attorney survey indicates that this assertion is accurate: arbitrators do apply the rules of evidence more leniently. Ninety-eight of the attorneys (68%) believed that the arbitrators applied the rules of evidence less strictly than a judge would have, and only three attorneys (2%) believed that the arbitrators applied the evidence rules more strictly in their case than a judge would have. More than 92.8% of the attorneys stated that the arbitrator's evidentiary rulings did not affect the outcome of their cases.¹⁰⁶ This finding is particularly significant since it indicates that the application of the rules of evidence in arbitration hearings does not affect the outcomes of cases, even though the majority of attorneys believe they would have encountered a stricter application at trial.

Our survey also investigated the effect of court-annexed arbitration on discovery. During the period studied, Lane County did not refer eligible cases to arbitration until the parties had completed discovery and filed a Certificate of Readiness for trial.¹⁰⁷ In the Multnomah and Linn-Benton programs, cases were referred to arbitration as soon as all the parties had appeared and before discovery had begun.¹⁰⁸ In these two programs, the arbitrator controls discovery and the arbitration rules require that discovery be completed within the time limits set for holding the arbitration hearing.¹⁰⁹ In the Multnomah and Linn-Benton programs, where discovery is on an expedited schedule in arbitration cases, the arbitrator may limit discovery under the arbitration rules in ways that are not permitted a trial judge under the Oregon Rules of Civil Procedure. For example,

106. As would be expected, those attorneys who answered that the arbitrators evidentiary ruling had affected the result in their case were much less likely to think that arbitration was a fair way to resolve their case than were those attorneys who answered that the arbitrator's evidentiary rulings did not affect their case's outcome. Only five of ten respondents who felt that the rulings affected the outcome also felt that the arbitration process had been fair.

107. Simoni, *supra* note 3, at 271.

108. Simoni, *supra* note 3, at 270.

109. Simoni, *supra* note 3, at 272. MULTNOMAH COUNTY ARBITRATION RULE 14.14.

in contrast to Oregon Rule of Civil Procedure 36, the arbitration rules authorize the arbitrator to consider the nature and complexity of the case and the amount in controversy in deciding whether to limit discovery.¹¹⁰ The hypothesis has developed that these discovery rules might decrease the efficiency of the arbitration process. That is, if the period for discovery is too short, or if arbitrators place limitations on discovery which the attorneys believe to be too strict, then the efficiency of arbitration might be lost since attorneys might request a trial de novo to ensure adequate discovery.

Our data does not support this hypothesis. We asked whether the arbitrator imposed discovery restrictions. No attorney reported the application of any restrictions on discovery. Therefore, arbitrator control of discovery was not a factor affecting the trial de novo rate. Furthermore, our data also demonstrate that the short time lines established under the arbitration rules did not contribute to the trial de novo rate because 97.4% of the attorneys said the arbitration rules provided enough time to prepare the case properly before the arbitration hearing.

B. *Efficiency*

1. *Case Complexity*

Many proponents of court-annexed arbitration believe it works most efficiently with cases that are not complex. If this is correct, and only less complex cases are referred to arbitration, then the rate of appeal to trial de novo should be low. To the extent such appeals are minimized, the arbitration process will be efficient.

The attorneys we sampled believed their cases were not complex. Three questions in the survey asked whether the procedural, legal, and factual issues involved in the case were "very," "somewhat," or "not complex." Most respondents characterized the issues in their cases as not very complex on any of the issues. More attorneys found a higher degree of factual complexity in their cases than legal or procedural complexity. Only 2.1% found their cases to be procedurally complex.¹¹¹

110. Simoni, *supra* note 3, at 272-74. MULTNOMAH COUNTY ARBITRATION RULE 14.14 directs that in ruling on a discovery motion the arbitrator is to "consider the nature and complexity of the case, the amount in controversy and the possibility of unfair surprise which may result if discovery is restricted." This provision is similar to the 1983 amendments to FED. R. Civ. P. 26(b)(1)(iii). The Federal Rules changes have not been incorporated in the Oregon Rules of Civil Procedure.

111. Case Complexity:

We hypothesized that there would be an inverse relationship between the degree of complexity and the degree to which an attorney believed arbitration to be an efficient method of resolving his or her case. Although we hoped to examine this relationship, the very small number of complex cases in our sample made this analysis difficult. The data did indicate a modest relationship between procedural complexity and the attorneys' perceptions of arbitration efficiency. Those attorneys who stated that their cases were not procedurally complex were also more likely to answer that arbitration was an efficient way to handle their case than those who said their case was somewhat procedurally complex.¹¹²

2. Attorneys and Discovery

One of the arguments in support of court-annexed arbitration is that it is efficient.¹¹³ If arbitration can resolve a case more quickly and at less cost and result in an award that is accepted by the parties, then the process will substantially reduce the delay otherwise present on the trial docket. We examined the extent to which the attorneys' opinions agreed with this proposition.

In general, the attorneys found that the arbitration process was efficient in their cases. When asked the question, "Do you believe that court-annexed arbitration was an efficient way to resolve this case?," eighty percent of the attorneys responded "yes." The proportion of attorneys answering "yes" was consistent for each type of case, with two exceptions. First, attorneys who were questioned about contract cases were more likely to answer that the process was efficient (87.9%). We speculate that this may be due to the nature of contract actions. Such actions are often more dependent upon documentary proof than are tort actions, and the measure of contract damages is often simple to ascertain. Second, attorneys who were asked about dissolution cases were less likely to answer that the process was efficient (63.2%). Some attorneys suggested in narrative

Table 10

Type of Complexity	Very Complex	Somewhat Complex	Not Complex	Total
Procedural	3 (2.1%)	13 (9.2%)	125 (89%)	141 (100%)
Legal	7 (5.0%)	48 (34.3%)	85 (61%)	140 (100%)
Factual	12 (8.5%)	57 (40.4%)	72 (51%)	141 (100%)

112. ($\chi^2=6$, $df=2$, $p < .05$).

113. See *supra* note 8.

comments that special knowledge of Oregon property settlement standards is necessary to the structuring of appropriate dissolution awards. We speculate that the lower efficiency evaluation by attorneys in dissolution cases may result from the fact that arbitrators may not have the particularized domestic relations experience necessary to structure such an award.

Attorneys in cases where the arbitration award was accepted were much more likely to regard the process as efficient (89.1%) than were attorneys whose cases had gone through arbitration, appeal, and trial de novo (30.8%).¹¹⁴ Our survey also found that a relationship exists between certain other factors and the attorneys' views on the efficiency of court-annexed arbitration. These factors include the procedural complexity of the case,¹¹⁵ the relative amount of time the attorney reported spending on the case,¹¹⁶ the length of time needed for resolution by arbitration relative to the delay expected outside arbitration,¹¹⁷ the degree of savings in attorney's fees,¹¹⁸ and the arbitrator's understanding of the law and facts.¹¹⁹

Supporters of court-annexed arbitration have suggested that its expedited procedures result in attorneys undertaking less discov-

114. ($\chi^2=30$, $df=3$, $p < .001$).

115. See *supra* notes 109-11 and accompanying text.

116. Of those attorneys reporting that they spent less of their own professional time on the case than they would have had it not been subject to arbitration, 95.5% believed that the arbitration process was efficient. Among attorneys who reported spending as much time on the case as they would have without arbitration, 75% stated that the process was efficient. Only 31.6% of attorneys who reported that they spent more time because of arbitration stated that the process was efficient. ($\chi^2=5$, $df=2$, $p < .001$).

117. The relationships between the attorneys' responses to the question of what effect court-annexed arbitration had on the time needed to resolve their case and those responses to the question about efficiency were similar to responses described in the preceding footnote. Attorneys who believed that arbitration shortened the total period of time needed to dispose of the case were much more likely to believe that it was efficient. ($\chi^2=29$, $df=2$, $p < .001$).

118. It was anticipated that attorneys who believed that their client paid less in attorney's fees because of arbitration would be more likely to believe that arbitration was efficient than would be those attorneys who believed that their client paid more fees because of arbitration. As expected, attorneys who believed that their clients paid less in attorney's fees because of arbitration were more likely to believe that the arbitration process was efficient. Of those reporting that their clients paid less in attorney's fees because of arbitration, 98.5% thought that the process was efficient; of those answering that there was no difference in fees, 73.7% felt arbitration was efficient; and of those answering that their client paid more in attorney's fees because of arbitration, only 27.8% thought that the process was efficient in their case. ($\chi^2=47$, $df=3$, $p < .001$).

119. Those attorneys who thought that the arbitrator understood the law ($\chi^2=7$, $df=2$, $p < .03$) and those who thought that the arbitrator understood the facts ($\chi^2=7$, $df=2$, $p < .03$) were much more likely to believe that the process was efficient than the attorneys who did not think that the arbitrator understood either factor.

ery.¹²⁰ This in turn might contribute to the efficiency of court-annexed arbitration. However, 69.6% of the attorneys with cases that had gone to an arbitration hearing reported that they spent as much time in discovery in their case as they would have had the case not been referred to arbitration. Only 28.4% reported that they spent less time in discovery than they would have had the case not been referred to arbitration. Two percent reported that they spent more time in discovery. Many of the attorneys who indicated that they spent as much time in discovery commented that they did so because they prepared the case as if it were going to trial. Several attorneys indicated that their cases involved disputes that were so simple that there was no need for discovery.¹²¹ Those attorneys who spent less time on discovery were much more likely to respond that court-annexed arbitration was an efficient method of resolving their case.¹²²

3. *Saves Time and Attorney Fees*

One assumption behind court-annexed arbitration is that non-complex cases can be handled effectively with simplified and expedited procedures. Another assumption is that a successful program will provide a more efficient disposition of cases subject to arbitration, saving the litigants both time and money.

These are difficult assumptions to either prove or disprove. No two cases are precisely the same and an assortment of non-quantifiable factors can affect both the amount of time necessary for disposition of a case and the amount of attorney's fees litigants must pay. In the absence of a control group of similar cases not subject to arbitration,¹²³ one cannot objectively determine whether litigants save time and attorney's fees by having their cases referred to arbitration. However, our survey was able to measure the litigants' *perceptions* of the amount of time and money saved, and these perceptions provide some measure of the efficiency of the arbitration programs.

a. *Litigants*

We asked the litigants whether they believed they "saved time having their case heard by an arbitrator rather than in court by a judge." Sixty-two percent of the litigants said they believed they

120. See *supra* note 10 and accompanying text.

121. The attorneys in the survey overwhelmingly characterized their cases as not being procedurally, legally, or factually complex.

122. ($\chi^2=16$, $df=2$, $p < .001$).

123. See generally LIND & SHAPARD, *supra* note 25, at 18-19.

saved time. Twenty-four percent said they did not save time; the remainder were uncertain of the effect arbitration had on the time necessary to resolve their case. These results are similar to the responses of the attorneys, a majority of whom also answered that their clients saved time by having their case resolved by an arbitrator.¹²⁴

When we asked the litigants whether they believed they "paid a smaller or larger sum in attorney's fees because of court-annexed arbitration," 44% said they believed they paid less in attorney's fees,¹²⁵ 13% said they paid more in attorney's fees, 17% said they paid the same amount in attorney's fees, and 25% said they were uncertain of the effect arbitration had on their attorney's fees.¹²⁶ Again, we found that the litigants and the attorneys were consistent in their evaluation of the effect court-annexed arbitration had on attorney's fees.¹²⁷

The difference between the percentage of litigants who said they saved time (62%) and those who said they paid a smaller sum in attorney's fees (44%) appears anomalous because of the assumed relationship between the length of time necessary to terminate a case and the amount of attorney's fees a litigant pays. This apparent anomaly can be explained by the fact that an arbitration hearing had taken place in each of the cases surveyed. In comparison, only 5.4% of all civil cases filed in circuit court in the three judicial districts¹²⁸ proceeded to trial. The large percentage of cases proceeding to hearing can be explained by the arbitration program's scheduling requirements.¹²⁹ Because the arbitration rules require the hearing to

124. See *infra* note 138 and accompanying text.

125. Confidence intervals ranged from $\pm 05\%$ to $\pm 07\%$.

126. When the litigants' answers to the questions about time and attorney's fees were correlated with their answers about how their cases terminated, it was determined that litigants in cases in which the award was not appealed or in which there was no trial de novo were much more likely to answer that they saved time and attorney's fees than were litigants in other cases.

127. The response frequency is as follows:

Table 11

Response	Litigants	Attorneys
Litigant paid a smaller sum in attorney fees	44%	45%
Litigant paid a larger sum in attorney fees	13%	12%
No difference in the attorney fees	17%	40%
Uncertain	25%	3%

128. This figure includes cases subject to arbitration which proceeded to trial de novo as well as cases exempted from arbitration.

129. See LIND & SHAPARD, *supra* note 25.

take place approximately seven weeks after the case has been transferred to arbitration and an arbitrator appointed,¹³⁰ the quick scheduling of the hearing may not give the cases enough time to mature for fruitful settlement discussions to take place. Thus, the quick scheduling of the hearing may promote a speedy resolution of the case at the expense of requiring attorneys to present their clients' cases at arbitration hearings. The hearing process apparently generates additional attorney's fees because the attorneys view the arbitration hearing as an analogue to trial and prepare for it in the same manner that they prepare for trial.¹³¹

By a large percentage, the attorneys we surveyed said they prepared as much for an arbitration hearing as they would have for a trial. More than two-thirds of the attorneys said they conducted as much discovery before the hearing as they would have for a trial,¹³² and 66% said they prepared for the hearing in the same manner they would have prepared for a trial.¹³³ Because the arbitration hearing occurs more frequently in arbitration cases than does a trial in cases not subject to arbitration, and because many of the attorneys prepared for the hearing in much the same manner they would have prepared for trial, it is not surprising to find that the percentage of litigants who believed they paid less in attorney's fees is smaller than the percentage who believed that their cases were resolved more quickly because they were subject to arbitration.

The data also demonstrate, however, that in some instances arbitration is inefficient because it imposes an additional procedural requirement on litigants whose cases end up being tried in court. If a large percentage of arbitration cases were to routinely proceed to trial, there would be little reason to recommend court-annexed arbitration. Trial *de novo*, however, is not a common occurrence among cases subject to arbitration, and the effectiveness of the arbitration process must be judged by the way it handles the typical cases, not the atypical ones.

b. Attorneys

We asked the attorneys if they spent more or less of their own professional time on their case than they would have had it not been subject to arbitration. Forty-six percent of the attorneys reported that

130. See Simoni, *supra* note 3, at 270 n.161.

131. See *supra* note 106 and accompanying text.

132. See *supra* note 120 and accompanying text.

133. See *supra* note 120 and accompanying text.

they spent less time on the case, 40% reported that they spent as much time, and only 14% reported that they spent more time on the case.¹³⁴

When asked what effect court-annexed arbitration had on the overall time needed to resolve the case, 49.7%¹³⁵ reported that it would have taken more time to resolve the case had it not been subject to arbitration,¹³⁶ 28.6% reported that it would have taken the same amount of time, and 21.8% reported that it would have taken less time to resolve the case had it not been subject to arbitration.

The survey asked attorneys whether they believed their clients paid smaller or larger attorney's fees because of court-annexed arbitration. While 45% believed their clients paid a smaller attorney's fee, 40% believed there was no difference in the sum their client paid, 12% believed their clients paid more in attorney's fees as a result of arbitration and 3% were uncertain. Our finding that only 45% of the respondents stated their clients paid less in attorney's fees is not particularly surprising because a majority of the respondents answered that they conducted discovery and prepared for arbitration in the same manner they would have for a trial.¹³⁷ The attorneys' evaluations of the effect court-annexed arbitration had on attorney's fees are similar to those of the litigants.¹³⁸

4. *Comfort Level for the Litigants*

Court-annexed arbitration does not mirror a traditional trial in all respects. As we have seen, the rules of evidence are often relaxed. There are many other differences between the two processes, and these differences may affect the litigants' satisfaction with arbitration. We attempted to gain some sense of the importance of these factors by asking the litigants several open-ended questions.

134. Note that the confidence interval here is ± 07 . (90% confidence level). This means that we are 90% confident that the percentage of attorneys in the population who felt that they spent less time on the case is no lower than 39% and no higher than 53% ($46\% \pm 07\%$). We are 90% confident that the percentage of attorneys in the population who feel they spent the same amount of time ranges from 33% to 47%. Therefore, we are fairly secure in suggesting that most attorneys in the population feel they spent less time or at least no greater amount of time on an arbitration case as other cases.

135. Confidence interval would range from 43% to 57%.

136. Confidence interval is $\pm 7\%$ (90% confidence level).

137. The attorneys' response that they spent as much time on discovery and prepared for the hearing in the same way as if the case had not been subject to court-annexed arbitration is perhaps explained by the attorneys' observations that these cases were not complex. They would have engaged in little discovery in these simple cases in any event. *See supra* notes 120-21 and accompanying text.

138. *See supra* note 127 and accompanying text.

Most of the litigants appeared to be satisfied with the way in which the arbitration hearing had taken place. Their narrative answers to the question "[w]hat, if anything, did you like about the hearing" indicate that the largest number of litigants answering this question focused on the "environment" of the hearing. Forty-one percent of the litigants said they were pleased with the relaxed, non-threatening nature of the hearing, as well as its "business-like" atmosphere. Seventeen litigants stressed the arbitrators' competency, while twenty-one liked the brevity of the hearing.

We also asked the litigants "[w]hat, if anything, didn't you like about the hearing?" Five litigants said they believed their hearings were too informal, while twenty-one expressed varying degrees of dissatisfaction with the arbitrator. A number of litigants disapproved of the hearing's setting in the arbitrators' offices rather than in the court house. One litigant was dissatisfied with the physical proximity of the other party.

In this section, we demonstrated that many perceptions of litigants and attorneys in court-annexed arbitration support the assumptions that led to its development. Most litigants and attorneys believed that their cases were resolved more quickly and informally through arbitration.

C. *Evaluation of Court-Annexed Arbitration by the Litigants*

One question in the survey asked the litigants to provide their general evaluation of court-annexed arbitration. We asked them whether, based "on your experience with court-annexed arbitration, do you believe it is a good way to resolve cases like yours?" Eighty percent of the litigants said arbitration would be a good way to resolve cases like theirs. This strong response makes two statements about arbitration. First, and most obviously, it is an endorsement of court-annexed arbitration by those most directly affected by it. Second, and perhaps more importantly, it establishes that litigants approve of court-annexed arbitration whether or not they are satisfied with their own arbitration awards.

Of course, litigants who are satisfied with their arbitration awards are more likely to say that arbitration would be a good way to resolve cases like theirs than were dissatisfied litigants.¹³⁹ More than 96% of the litigants who were either "very satisfied" or "somewhat satisfied" with their arbitration awards said that arbitration

139. ($\chi^2=30$, $df=3$, $p < .001$).

would be a good way to resolve cases like theirs. But, a large percentage of the litigants who were not satisfied with their awards still believed that arbitration would be a good way to resolve cases like theirs. Of the sixty-one litigants who were not satisfied with their arbitration awards, nearly three-quarters of them still believed that arbitration would be a good way to resolve cases like theirs.

Nearly 95% of the litigants who thought their arbitration awards were fair also thought that arbitration would be a good way of resolving cases like theirs.¹⁴⁰ More than 56% of the litigants who did not think their awards were fair still believed arbitration would be a good way to resolve cases like theirs.

The answers to this general question also indicate that the litigants had few concerns about the "legitimacy" of court-annexed arbitration. The vast majority of the litigants surveyed did not express significant concerns about the "legitimacy" of the arbitration process as a dispute resolution mechanism. In fact, only one litigant said he wanted "to get the arbitration hearing over with so that I could go on to a court trial." The lack of additional similar responses indicates that the litigants viewed the arbitration process in the same way that they would have viewed a trial; that is, as a legitimate method of resolving legal disputes.

We found a relationship between the litigants' prior experience as a party and their evaluation of the arbitration award. The data reveal that 88.1% of the litigants with prior litigation experience believed that court-annexed arbitration would be a good way to resolve cases like theirs, whereas only 77.1% of the litigants without prior litigation experience held this belief. Thus, litigants with prior trial experience tended to evaluate court-annexed arbitration more favorably than did inexperienced litigants.

In many ways, the responses of those with prior experience represent a more informed evaluation of court-annexed arbitration because they do not evaluate court-annexed arbitration against an abstract yardstick, but rather against their experience with traditional litigation processes. For these reasons, the litigants who had prior experience were uniquely qualified to evaluate court-annexed arbitration.

V. CONCLUSION

The court-annexed arbitration program in Oregon is a success

140. ($\chi^2=38$, $df=3$, $p < .001$).

in the eyes of its primary consumers—the litigants and attorneys who use the system. Our survey of attorney and litigant participants in three Oregon judicial districts indicates that they do not believe they were relegated to a system of second-class justice. Rather, a majority of the respondents indicated that court-annexed arbitration is legitimate, efficient, and fair.

Of the litigants we surveyed in cases in which an award was entered, 77% accepted the arbitrator's award. In those cases in the attorney survey, the parties accepted the award more than 70% of the time. Nearly two-thirds of the litigants believed their awards were either "very fair" or "somewhat fair." Even among those litigants who were not satisfied with their arbitration awards, most believed that both the process and the awards were fair. Litigants with prior litigation experience were especially likely to believe that their arbitration awards were fair.

More than 87% of the attorneys surveyed believed the arbitration process to be fair. In addition, three-quarters of the attorneys believed their clients' arbitration awards were similar to the judgments they would have expected to receive at trial.

Litigants and attorneys alike were satisfied with both the arbitrator's performance and with the procedures that led to the arbitration awards. Both groups believed the arbitrators understood the facts in their cases. Further, the attorneys did not find the differences between court-annexed arbitration and court trial to be prejudicial to their clients.

Court-annexed arbitration is also viewed by the participants as an efficient way to settle disputes. Eighty-percent of the attorneys believed the system was an efficient way to resolve their cases. A majority of both the litigants and the attorneys agreed that the litigants saved time by having their cases heard before an arbitrator. However, only a minority of the respondents believed they saved attorney's fees. We conclude that this result may be explained by the fact that the attorneys generally prepared for arbitration in the same manner that they would have prepared for trial, and that they spent as much time in discovery.

Finally, 80% of the litigants stated that court-annexed arbitration was a good method for resolving their case. This response provides strong support for the legitimacy of the arbitration process.

