Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes

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Our administration of justice is not decadent. It is simply behind the times. . . . [W]e may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.¹

Roscoe Pound, 1906

[W]e did not heed [Roscoe Pound's] warning, and today, in the final third of this century, we are still trying to operate the courts with fundamentally the same basic methods, the same procedures, and the same machinery he said were not good enough in 1906.²

Chief Justice Warren Burger, 1970

The U.S. has created the most sophisticated — and the fairest — legal process in the world. But the burdens are becoming intolerable.³

Footlick, Too Much Law?
Newsweek Cover Story, January 10, 1977

Introduction: The Severity of Judicial Inefficiency

Disputes among people are inevitable. For this reason civil courts have evolved to adjudicate these private disagreements according to law. As society has become more urbanized and complex, the substantive law has changed to reflect new values. Nonetheless, the primary objective of the civil legal system has remained constant: the provision of effective justice.

For justice to be effective, not only must the law be fair, but also the machinery developed to administer the law must dispense justice inexpensively and quickly without sacrificing fairness.⁴ In uncompli-

3. Newsweek, January 10, 1977, at 47.
cated civil cases, inefficient judicial machinery often results in a denial of effective justice. This denial occurs when litigants must pay disproportionately high costs and withstand inordinate delays to litigate valid claims. Effective justice is also denied if litigants compromise valid claims when confronted with the use of the expensive and congested civil justice system as a bargaining tool in the settlement process. Critics of the administration of justice have concluded that such denial of effective justice has led to a general popular dissatisfaction with the administration of the civil justice system.

In July 1976, the California legislature, recognizing the inefficiency of current judicial administration, enacted a voluntary judicial arbitration procedure based on the key elements of judicial arbitration that have been developed in jurisdictions outside California. Under this procedure, a pending civil case is arbitrated by volunteer attorney-arbitrators if the plaintiff elects or both parties stipulate; if either party is dissatisfied with the arbitration award there is an automatic right to trial de novo. The success of this statute depends principally on two factors: first, the bar must act aggressively to initiate election and stipulation so that arbitration can significantly reduce congestion and delay; and second, a sufficient number of volunteer attorney-arbitrators upon whom the procedure exclusively relies must be available. In short, if judicial arbitration is to aid in alleviating the high cost and protracted delay of the congested civil justice system, it will be as an accomplishment of the practicing bar.

5. For purposes of this Note an “uncomplicated civil case” is defined as one involving no complex legal or factual issues. Such cases are typically personal injury or property damage cases not involving death or severe injury. These cases, if contested, generally involve juries and therefore place the greatest demand on judicial resources. See notes 20-22 & accompanying text infra.


7. In 1975-76, only about 7% of personal injury cases on the civil active list were resolved by trial. CALIFORNIA JUDICIAL COUNCIL, ANNUAL REPORT 209 (1977) [hereinafter cited as 1977 JUDICIAL COUNCIL REPORT].


9. “There is presently an excessive burden of litigation in the courts in California; . . . [t]he entire judicial process in California is overloaded causing extensive delay to citizens who are entitled to speedy justice; . . . [t]his overloading of the courts also seriously increases the costs of civil litigation; and . . . court procedures must be studied and streamlined . . . .” S. Res. 139, 1971 Reg. Sess., JOURNAL OF THE SENATE 2766.

10. CAL. CIV. PROC. CODE § 1141.10 (West Supp. 1977) [hereinafter cited as California Judicial Arbitration Statute].

The purpose of this Note is to stimulate an early positive response to the new Judicial Arbitration Statute in California by examining the nature and effectiveness of judicial arbitration. The first section will describe the nature and scope of inefficiencies in the civil judicial machinery in California. The next section will propose standards for measuring the effectiveness of judicial arbitration in reducing judicial inefficiency. The most recent experiences of several jurisdictions with judicial arbitration, both voluntary and compulsory, will then be reviewed and measured against the standards established. It will be contended that compulsory judicial arbitration is superior to the voluntary form. Finally, it will be argued that the legislature should replace the voluntary Judicial Arbitration Statute with a compulsory form and that, in the absence of legislation, local courts in California possess the authority to adopt a compulsory procedure as a supplement to statutory voluntary judicial arbitration.

Need for Alternatives to Traditional Civil Litigation

Delay and Backlog in California Superior Courts

The problem of delay and backlog can be viewed as one of supply and demand. Delay and backlog result when the demand on the courts consistently exceeds the supply of available judicial resources. Delay has been called the most important "root problem" in poorly administered justice.12 It is both lawyer13 and court caused. Prior to the time a lawyer requests a trial date with an at-issue memorandum, delay is lawyer caused.14 For this reason the Judicial Council of California measures court caused delay from the date of at-issue memorandum to trial.15 Backlog represents the number of cases at-issue awaiting a trial date.

Delay in most California superior courts is severe.16 In 1975-76 only three superior courts were within the six month interval from

14. Statutes of limitation apply to the complaint filing date. See, e.g., CAL. CIV. PROC. CODE §§ 312, 350 (West 1958). Once filed, there is little statutory incentive for lawyers to seek a trial date by filing an at-issue memorandum.
15. 1977 JUDICIAL COUNCIL REPORT, supra note 7, at 12.
16. "[R]apid or sustained increases in inventories of cases awaiting trial are cause for concern. The 17.5% increase in 1975-76 over the previous year is troubling." Id. at 209. Court conditions are deteriorating because this 17.5% increase followed a 10% increase in 1974-75. Id. at 208.

Because only 2% of municipal court filings involve non-small claims court civil matters, superior court delay affects nearly all civil cases, small and large. Id. at 220.
at-issue to trial considered desirable by the California Rules of Court.\textsuperscript{17} By contrast, in the San Francisco and Los Angeles superior courts, the interval was twenty months in 1975-76.\textsuperscript{18} This already prolonged delay is expected to become worse because the state-wide backlog in the number of civil cases increased by 17.5 percent in 1975-76.\textsuperscript{19} This severe delay is caused by jury trials: although the number of such cases is relatively small,\textsuperscript{20} they are the most time consuming the expensive method of disposition.\textsuperscript{21} Criminal and personal injury cases require 88 percent of juries empaneled.\textsuperscript{22} Even though juries are empaneled in only 4.9 percent of all personal injury cases, these cases place the most substantial demand on available civil judicial manpower.\textsuperscript{23}

Backlog and delay have a dynamic effect on congestion by further postponing disposition of those cases normally settled on the eve of trial. As a result these cases, many of which neither party intends to litigate, remain on the civil trial list, thereby artificially delaying major cases more likely to be tried.\textsuperscript{24} Faster disposition of cases destined to settle therefore will produce speedier resolution of more complicated trial bound cases.

Increasing the municipal court jurisdictional amount without a concomitant improvement in procedure is not a solution to superior court congestion. This alternative would simply shift the problem to municipal courts.


18. The delay in San Diego and Alameda county superior courts in 1975-76 was also approximately 20 months. \textit{Id.}

19. \textit{Id.} at 210. The number of backlogged cases, 91,978, was higher than any previous year and triple the number of backlogged cases in 1966-67, 28,088. \textit{Id.} at 208.

20. For example, out of 57,348 personal injury, death, and property damage cases disposed of in California superior courts in 1974-75, only 4,641 (8\%) even started trial. Because some cases are settled during trial, over 92\% of these types of cases are settled without complete trial. \textit{California Judicial Council, Annual Report} 156-57 (1976) [hereinafter cited as \textit{1976 Judicial Council Report}].


22. \textit{Id.}

23. Seventy-three percent of all civil actions involving juries are personal injury cases. \textit{Id.} A jury was sworn in 93\% of all contested personal injury cases in 1974-75. \textit{See id.} at 107-08.

24. One author asserts that this tendency to settle on the courthouse steps is the equivalent of “congestion by lawyer consent.” Milwid, \textit{Arbitration as a Supplement to Judicial Proceedings in Personal Injury Cases}, U. Ill. L.F. 208, 209 (1962). See also Rosenberg & Sovern, \textit{Delay and the Dynamics of Personal Injury Litigation}, 59 Colum. L. Rev. 1115, 1125 n.41 (1959) (quoting A. Levin & A. Woolley, \textit{Dispatch and Delay} (1964)), “In Allegheny County [Pittsburgh], Pennsylvania, 'there is evidence that a significantly large number of cases . . . are settled only after a jury is sworn, in order to allow the attorney to collect his fee for a day in court.'” \textit{Id.}
Excessive Costs

Litigants in relatively low value cases may often be pressured into unwise settlements because of the cost burdens of the traditional procedure. Lawyers may experience profit pressures. Low value cases undertaken on a contingency basis require much the same pre-trial preparation, number of court appearances, and trial time as higher value cases, thereby resulting in a much lower attorney profit. Attorneys for plaintiffs may therefore be inclined to press for settlement as quickly as possible. Similarly, defendants may be forced to settle or run the risk of incurring disproportionately high costs in defense. Under these circumstances, by insisting on the entire panoply of pre-trial and trial procedural devices, including a judge or jury trial, the litigant may be protected in theory but economically doomed in practice. Invocation of these procedures may be especially unjustifiable because they may be unwarranted in an uncomplicated low value case.

Effective Justice Denied

For most litigants the formal machinery of justice has become little more than a lever used to gain a settlement advantage. Because dispute resolution is an unpleasant experience for most people, their natural reaction is a desire to end it as quickly as possible. The bargaining weapon represented by the cost and congestion of the judicial system is therefore a needlessly unfair influence. Plaintiffs with severe injuries, burdensome medical expenses, and wage losses who are faced with the unfair threat of protracted delay and high cost of trial preparation, frequently settle for less than their out-of-pocket expenses. Lesser actions, some of which are only nuisance claims, on the other hand, are settled promptly at a relatively higher proportion of alleged or real out-of-pocket expenses.

25. The California Legislature, in adopting as a pilot project radically simplified rules of civil procedure for nonjury cases involving less than $25,000, stated: "The legislature finds and declares that the costs of civil litigation have risen sharply in recent years. This increase in litigation costs makes it more difficult to enforce smaller claims even though the claim is valid or makes it economically disadvantageous to defend against an invalid claim." CAL. CIV. PROC. CODE § 1823 (West Supp. 1977).

26. A jury trial can lead to higher costs in at least three ways: 1) greater evidentiary and procedural safeguards, as well as jury selection and deliberation, add to the length of the trial; 2) abuse and overuse of discovery can result from the apparent belief that juries are unpredictable and can produce runaway verdicts; and 3) the duplicate use of expert witnesses may occur because neither party wants to rely on the jury's reaction to the other's expert witness.

27. See H. Ross, SETTLED OUT OF COURT 204-10 (1970). In this empirical study of the settlement process, the author indicates that in smaller cases insurance claims adjusters use the uncertainty of high cost and delay of the judicial process as a tool to secure a discount from the full value of a claim. The study suggests that the higher
Even if this unfair pressure to settle is successfully resisted, delay and backlog may continue to have an adverse effect on the quality of justice administered. If three to five years have passed since the time of the incident, parties and witnesses suffer fading memories and may even become unavailable for trial.\textsuperscript{28}

Standards for Measuring Effectiveness of Judicial Arbitration

The following standards are suggested as a method of evaluating the relative effectiveness of existing judicial arbitration procedures in reducing procedural inefficiency:

1. Speed — The 92,000 case backlog existing in 1975-76\textsuperscript{29} must be eliminated and all new at-issue filings should be resolved within the six month period prescribed by the California Rules of Court.\textsuperscript{30}

2. Economy — The cost to resolve uncomplicated civil cases must be reduced to maintain the economic feasibility of enforcing and defending valid claims.

3. Fairness — Determinations of fact and law must be accurate to safeguard fairness in reaching decisions.

The objectives of speed and economy are self-explanatory and lend themselves to accurate measurement. Fairness, however, is an element which resists quantification; nevertheless, simply streamlining the administration of justice without ensuring continued fairness would be a step back from the delivery of effective justice. Appeal rates, which can be computed, may be one index of fairness. Dissatisfied litigants may choose not to take appeals for a variety of reasons.\textsuperscript{31} Nonetheless, a procedural innovation that produces appeal rates comparable to those of the present civil justice system, other factors being equal, would appear to generate no greater dissatisfaction with the fairness of dispute resolution than current procedures. The appeal rate to courts of appeal from California superior courts for civil dispositions has ranged from eleven to fourteen percent since 1967-68.\textsuperscript{32} Consequently, substantial fairness would probably be suggested if appeals to trial de novo from judicial arbitration were equal to the

\begin{itemize}
  \item the value of the case the lower the ratio of settlement payments to actual out-of-pocket expenses.
\end{itemize}

\textsuperscript{28} As a means of minimizing the problems of lengthy delays, pretrial discovery becomes more extensive and enhances still further the expense of trying uncomplicated cases.

\textsuperscript{29} See note 19 \textit{supra}.

\textsuperscript{30} See note 17 & accompanying text \textit{supra}.

\textsuperscript{31} For example, the litigant may believe that the additional expense of taking an appeal is unjustified under the circumstances or may simply desire to forget the entire incident.

eleven to fourteen percent rate of appeal from traditional judicial litigation.

A comparison of jury verdicts arrived at within the traditional civil justice system with results obtained under an alternative procedure may provide another quantifiable measurement of fairness. An innovative procedure that produces verdicts and damage awards comparable to jury results in comparable cases is likely to be viewed by litigants as fair.

Following a general description of judicial arbitration, several jurisdictions will be independently evaluated to determine the success of each procedure in satisfying the objectives of speed, economy, and fairness.

Judicial Arbitration Plans

In general, judicial arbitration involves the transfer of pending civil cases from the court to a volunteer attorney or panel of attorneys who determine the facts and the law according to relaxed rules of evidence and procedure. The decision of the attorney-arbitrator or panel is entered as a judgment if neither party requests a trial de novo within a specified period after the award, usually twenty days.

Contrast to Traditional Arbitration

Arbitration as a form of dispute resolution existed before the beginning of English Common Law, whereas judicial arbitration


34. California Law Revision Commission, Recommendation and Study Relating to Arbitration 27 (1960). But the “[e]arly common law developed a distaste for the concept and . . . rendered agreements to arbitrate virtually unenforceable.” RESTATEMENT OF CONTRACTS §§ 550, 551(1) (1932). See also 6 WILLISTON ON CONTRACTS §§ 1919, 5360-62 (rev. ed. 1938). The arbitration award was final and enforceable only if completed. Id. at § 1927. In contrast, “California, many other states and the federal government have provided that agreements to arbitrate existing or future disputes are specifically enforceable.” Halperin, Arbitration of Superior Court Cases: A
is an innovation of relatively recent vintage. Under traditional arbitration, the arbitrator has jurisdiction over the dispute pursuant to a contractual agreement between the parties. There are three basic elements: the process is voluntary, the award is final, and the arbitrator is chosen by the parties. By contrast, the term "judicial arbitration" is a misnomer because most of the new judicial arbitration procedures adopted outside of California have abandoned all three traditional elements. First, the courts have jurisdiction over judicial arbitration by virtue of the pendency of a civil suit. Judicial arbitration is compulsory on parties to pending litigation if the dispute falls within a specified category. Second, the results of arbitration may not be final because a litigant may request a trial de novo within a limited period following the arbitrator's decision. Finally, the parties


35. Traditional arbitration laws were recodified by the legislature in 1961 in Cal. Civ. Proc. Code §§ 1280-1294.2 (West 1972), which prescribed a detailed scheme for resolving disputes subject to traditional written arbitration agreements. Pursuant to these statutes, the courts are given authority to supervise the arbitral process only when their aid is invoked by one of the parties to the arbitration agreement. The aid of the court can be invoked in several areas: 1) enforcing the right to arbitration (Cal. Civ. Proc. Code § 1281.2 (West 1972)); 2) staying or restraining court proceedings when the subject matter of such proceedings falls within the scope of an arbitration clause or staying arbitration proceedings until the resolution of court proceedings (Cal. Civ. Proc. Code §§ 1281.2, 1284.4 (West 1972)); 3) correcting or modifying arbitration awards (Cal. Civ. Proc. Code §§ 1286.6, 1286.8 (West 1972)); 4) confirming awards (Cal. Civ. Proc. Code § 1285 (West 1972)); and 5) vacating awards (Cal. Civ. Proc. Code §§ 1286.2, 1286.4 (West 1972)). Also, there are statutory guidelines for the conduct of arbitration hearings (Cal. Civ. Proc. Code §§ 1282-1284.2 (West 1972)) and for the appointment of arbitrators when the parties fail to provide for one in the agreement (Cal. Civ. Proc. Code § 1281.6 (West 1973)).


39. See Cal. Civ. Proc. Code § 1281 (West 1972): "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid,
Judicial Arbitration Outside of California

Pennsylvania/Philadelphia Plan

The compulsory arbitration program in Pennsylvania has been described as "the oldest, most refined, most utilized and most copied of any arbitration program . . . in the United States." Drawing upon and amending an 1836 arbitration statute, the Pennsylvania legislature authorized the courts of common pleas (trial courts) to enact by rule of court a compulsory arbitration program for all cases with an amount in controversy below an established level.

Although almost all Pennsylvania counties have enacted compulsory arbitration rules pursuant to this statute, the best available information exists for Philadelphia County, Pennsylvania's largest. Under the Philadelphia local rules, with certain exceptions, arbitration is compulsory in all cases with an amount in controversy below a specified figure, currently $10,000. Flexibility is introduced through a provision that cases may be removed by the calendar judge and placed on the jury calendar by petition of a party.
A case is set for hearing approximately forty days after a certificate of readiness is filed. It is heard by a board of three arbitrators appointed at random from a list of almost 6,000 volunteer Philadelphia attorneys. Established rules of evidence apply; however, they are generally to "be liberally construed to promote justice." In practice this has effected a considerable simplification in the presentation of evidence. The arbitrators may exercise the general powers of the court in conducting the hearing, but the judge for arbitration retains full supervisory powers over questions related to the rules of evidence and the conduct of the proceedings in general.

note 43, at 6. "A favorable decision on such a petition is dependent upon two considerations. The first is that the special damages, medical expenses and wage losses, as outlined in the complaint, are in excess of $2,500 or that the case involves a serious injury such as wrongful death, permanent or serious disfigurement, dismemberment. The second consideration is that the Calendar Judge is convinced by the attorneys in the case that an appeal will result regardless of the arbitrator's award. The latter is a rare occurrence. When the Calendar Judge is convinced of the conviction of the attorneys, however, he does not hesitate to exercise his discretion in removing the case from arbitration, even though the amount in controversy might fall under the $10,000 compulsory arbitration limit." Id.

47. Id. at 7. "This built-in delay allows the opposing attorney ample opportunity to file motions to have the case placed on the major case calendar, and also opportunity for negotiations and preparation to be completed." Id.

48. PHILADELPHIA CT. C.P. COMPULSORY ARBITRATION R. II(C) (1971), provides "The Board of Arbitrators shall consist of three members, unless the parties in the case shall agree upon a lesser number."

49. Remarks of Mayer Horwitz, Philadelphia Arbitration Committee Chairman, at San Francisco Bay Regional Conference on Court Modernization, Hastings College of The Law (June 5, 1975) (transcript on file with Hastings Law Journal) [hereinafter cited as Horwitz speech].

Over a 10 year period between 1958-1968 each volunteer attorney participated in 51 arbitration hearings for an average of 5 hearings per year. Because the hearings were normally consolidated this amounted to less than 5 days of volunteer time per year. The fees earned by volunteering are small and the average attorney received $122 per year during this period. Compiled Materials on the Philadelphia Compulsory Arbitration Program, note 43 supra, at 53.


51. Testimony may be offered by deposition. In actions involving personal injury or damage to property, medical bills and reports may be offered into evidence by giving the adverse party one week's written notice, accompanied by a copy of the document to be placed into evidence. All medical evidence must be in written form. Id. Medical testimony is admissible only upon receiving the permission of the court; in any event, the number of such requests has been minimal. See Compiled Materials on the Philadelphia Compulsory Arbitration Plan, note 43 supra, at 8. Police, weather, and salary loss reports are admissible without formal proof of authenticity. Id.; PHILADELPHIA CT. C.P. COMPULSORY ARBITRATION R. III(E) 4(e) (1971).

52. PHILADELPHIA CT. C.P. COMPULSORY ARBITRATION R. III(E) (1971).

The board of arbitrators arrives at its decision by majority vote and files a report within fifteen days;\textsuperscript{54} the decision has the effect of a final judgment absent an appeal by one of the parties,\textsuperscript{55} which is to trial de novo.\textsuperscript{56} The appellant must pay all costs incurred to the date of appeal,\textsuperscript{57} and reimburse the county a sum to cover the arbitrator's fees.\textsuperscript{58} The arbitration proceedings are inadmissible as evidence at the trial.\textsuperscript{59}

**Performance** — After twenty years judicial arbitration has become the predominant procedure for disposition of civil cases in the court of common pleas, 71 percent of all civil dispositions being arbitrated in 1975.\textsuperscript{60} Compulsory arbitration has eliminated the backlog of cases involving claims within the jurisdictional amount. By freeing the courts to resolve major cases, compulsory arbitration has helped reduce major case delay from 84 months in 1971 to 48 months in 1975.\textsuperscript{61}

This improvement in efficiency has not only benefited the courts, but appears to have met the objective standards for evaluating the delivery of effective justice.\textsuperscript{62} In 1975, roughly three out of four litigants in civil actions resolved their disputes within ninety days from filing a certificate of readiness.\textsuperscript{63} Additionally, the simplification of evidentiary procedures was a major factor in substantially reducing the cost of dispute resolution to both the litigants and the courts.\textsuperscript{64}

\textsuperscript{56} Id. at R. VI.
\textsuperscript{58} This sum may not exceed one-half of the amount in controversy. Philadelphia Ct. C.P. Compulsory Arbitration R. VI. The appeal costs are approximately $165, consisting of arbitrator's fees ($110), appeal bond ($20), and reimbursement of appellee's record costs ($35). Letter from Mayer Horwitz, Philadelphia Arbitration Committee Chairman to R. J. Heher (Jan. 31, 1977) (on file with Hastings Law Journal) [hereinafter cited as Horwitz letter].
\textsuperscript{59} Philadelphia Ct. C.P. Compulsory Arbitration R. VI(B) (1971).
\textsuperscript{61} Compare Horwitz speech, note 49 supra, at 4, with Horwitz letter, note 58 supra. The 84 month delay existed at the time the legislature increased the jurisdictional amount for compulsory arbitration from $3,000 to $10,000. See note 45 supra.
\textsuperscript{62} See text accompanying notes 29-32 supra.
\textsuperscript{63} Horwitz speech, note 49 supra, at 4.
\textsuperscript{64} See Horwitz speech, note 49 supra. See also, Smith Case, 381 Pa. 223, 112 A.2d 625 (1955), appeal dismissed, sub nom. Smith v. Wissler, 350 U.S. 858 (1955): "[T]here will be a saving to claimants of both time and expense by reason of greater flexibility in fixing the exact day and hour for hearings before the arbitrators as compared with the more cumbersome and less adaptable arrangements of court calendars." A Philadelphia arbitration commissioner estimated that the public cost of arbitrating
Therefore, the criteria of both speed and economy have been satisfied.

Litigant satisfaction with the fairness of compulsory arbitration has been indicated by both appeal rates and comparison with jury verdicts. Appeals to trial de novo have averaged between eight and twelve percent, with less than five percent actually going to trial rather than settling. A comparison of arbitration awards with judge or jury verdicts in those cases appealed to trial is further evidence of substantial fairness. A study conducted over a sixteen month period in 1971-72 concluded that "the distribution pattern of awards by arbitrators correlates quite closely, both on questions of liability and assessment of damage, with verdicts rendered by judges and juries for similar cases on appeal." Of the 296 cases appealed to a verdict, 71 percent resulted in verdicts for the plaintiff and 29 percent for the defendant. The comparable figures for all arbitration awards during the same time period were 80 percent and 20 percent.

Achievement of effective justice is also demonstrated by the comparability of jury and arbitration-awarded damages during the sixteen month period after the jurisdictional amount for arbitration was increased to $10,000. The majority of both arbitrator awards and jury verdicts was below $3,000; 80 percent of arbitrator awards and 88 percent of jury verdicts were below $5,000. The study concluded that "[t]his correlation and the low rate of appeal indicate a high level of quality decisions under the Philadelphia Arbitration Program." Most commentators who have analyzed the Philadelphia program over the years have concluded that compulsory arbitration should be adopted in other jurisdictions.

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66. Most cases requesting trial de novo settle before trial. Horwitz letter, note 58 supra.
68. Id.
69. Id.
70. See note 45 supra.
72. Id. at 33.
73. See, e.g., LaBrum, Congested Trial Calendars: It's About Time to Do Something About Them, 43 A.B.A.J. 311 (1957); Leibold, Has Binding Arbitration Become Unbound? 31 SHINGLE 123 (1968); Milwid, Arbitration as a Supplement to Judicial Proceedings in Personal Injury Cases, U. ILL. L.F. 208 (1962); Sarpy, Arbitration as a Means of Reducing Court Congestion, 41 NOTRE DAME L. 188 (1965); Walker, Compulsory Arbitration Revisited, 38 PA. B.A.Q. 36 (1966); Institute of Judicial Administration, Compulsory Arbitration and Court Congestion — The Pennsylvania...
New York Pilot Program

New York adopted compulsory arbitration as a pilot project\(^74\) in the city court of Monroe County (Rochester) in September 1970.\(^75\) The compulsory arbitration rules are in essence similar to the Philadelphia procedures, with minor variations.\(^76\)

**Performance** — Compulsory arbitration has eliminated civil case congestion. At the outset of the program there were 1,500 civil cases backlogged, and there was a two year wait from at-issue filing to trial.\(^77\) As of January 1977, there was no backlog of civil cases, and the elapsed time from at-issue filing to trial was between forty-five and sixty days.\(^78\) Further, by transferring cases to the city court the supreme court has also reduced its backlog substantially. The Rochester area Seventh Judicial District State Supreme Court had a backlog of 5,275 cases in November 1970 but, as of March 1975, had only 715 cases pending.\(^79\)

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**Compulsory Arbitration Statute** I (Supp. 1959); [JUDICIAL COUNCIL ARBITRATION STUDY, note 41 supra. A study of this plan giving it mixed reviews, predicted that differences in arbitration awards versus jury verdicts would preclude increasing the jurisdiction amount above the $3,000 level which was in effect when the study was conducted. The study, a Columbia Project investigation of the Philadelphia experience covering its first 22 months of operation, concluded that “it may work in lesser courts, [but it] does not warrant adoption as an antidote for delay in major courts.” Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in *REPORT OF THE 27TH AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 29, 51 (1965). The greatest beneficial impact, however, occurred after the increase in jurisdictional amount to $10,000. See note 61 supra.

74. The Administrative Board of the Judicial Conference was authorized to “promulgate rules for the compulsory arbitration of claims for the recovery of a sum of money not exceeding $3,000 exclusive of interest, pending in any court or courts.” 1970 N.Y. LAWS c. 1004 (currently, N.Y. Jud. LAW ANN. § 213(8) (McKinney Supp. 1977)). In September, 1971 the jurisdictional amount was increased to $4,000. 1971 N.Y. LAWS c. 1056.


76. Compare *PHILADELPHIA CT. C.P. COMPULSORY ARBITRATION R.* (1971) with 22 N.Y.C. R.R. 28.1.-15. Except for cases commenced in small claims court, all cases for money damages involving $4,000 or less must be decided by a panel of three arbitrators. A single arbitrator is used in cases involving $500 or less (22 N.Y.C. R.R. 28.2). In addition, cases transferred to the city court from the supreme court, the highest state court of original jurisdiction must also be arbitrated. 22 N.Y.C. R.R. 28.2.


78. *Id.*

In addition to increased speed, there is also evidence that arbitration reduces expense to litigants. The arbitration commissioner estimates that the average time for a trial in arbitration is one hour and a half as compared to a minimum of two days to try the same case in court, and there are no calendar calls or court appearances to be made.

Litigants appear to be satisfied with the fairness of arbitration proceedings. Only 11 percent of the arbitrated cases result in appeal to a trial de novo, and of these, only one percent actually went to trial. Attorney interest is evidenced by the fact that over 95 percent of the active practicing bar in Rochester is currently acting as arbitrators. Expansion of the program to include small claims court, child support and alimony cases is contemplated.

_Cuyahoga County, Ohio Local Rule_

Unlike Pennsylvania and New York, the Cuyahoga County Common Pleas Court in Cleveland adopted compulsory arbitration by local rule of court, not pursuant to a statewide statute. The Cleveland local rule is patterned after the Philadelphia plan. All civil cases are placed upon the arbitration list when the judge at pre-trial conference determines the amount in controversy to be $5,000 or less. When the amount in controversy exceeds $5,000, the case may be placed on the arbitration list if both parties stipulate to arbitration.

The most significant departure from the Philadelphia plan is that the normal rules of evidence do not apply. Arbitrators are to be guided in accepting evidence only by considerations of materiality.

80. Memorandum of New York Arbitration Commissioner, note 75 supra.
81. Id.
82. Id. The only disincentive to appeal is that a request for trial de novo must be accompanied by a reimbursement of the arbitrators' fees ($45 for a single arbitrator and $115 for a panel). Memorandum of New York Arbitration Commissioner, note 75 supra.
83. Id. A resolution of the board of trustees of the Monroe County Bar Association issued on January 11, 1977 (on file with Hastings Law Journal) states that "the Program of Compulsory Arbitration in the County of Monroe, since inception, has and continues to produce enormous beneficial consequences . . . and continues to be enthusiastically supported by the members of the Bar . . . ." This resolution also recommended extension of compulsory arbitration to other New York state courts and recommended that the monetary and compulsory arbitration jurisdiction of the City Court of Rochester be increased to $6,000. Id.
84. Memorandum of New York Arbitration Commissioner, note 75 supra.
88. Id.
89. See id. at (III)(F).
Arbitrators are to give all evidence "such weight as they deem it is entitled to after consideration of any objections made to its admission." As with the Philadelphia plan the arbitrators have the general powers of the court. Awards must be filed within 30 days, and litigants have 30 days after filing to appeal to a trial de novo.

Performance — The effectiveness of the Cuyahoga County plan is more difficult to ascertain than either the Philadelphia or Rochester programs. The time limits imposed on arbitration proceedings, as well as relaxed rules of evidence, would seem to indicate improvements in speed and economy similar to those achieved elsewhere. The number of decisions for the plaintiff were comparable to the Philadelphia experience. A possible problem with litigant satisfaction may exist because Cleveland's overall appeal rate to trial de novo is 26 percent, which is significantly higher than either Philadelphia's or Rochester's. Since 1970, however, only three percent of appealed awards have actually completed trial, a figure comparable to the Philadelphia experience. Thus it is possible that the high appeal rate may reflect

90. Id. Medical and property damage bills may be received in evidence without further proof if one week's written notice and copies of the bills are provided to the adverse party. Id. at (III)(G)(4). Evidence may be taken by affidavit or written report, and hearsay evidence is admissible. Id. at (III)(F). "A further example of the suspension of normal rules of evidence is that most testimony before a Board of Arbitration is taken in narrative form, rather than question and answer form. These departures from normal courtroom procedures result in a substantial saving of time. An average case is heard in one and a half hours, and even complex cases generally take only three or four hours." JUDICIAL COUNCIL ARBITRATION STUDY, note 41 supra, at 39.

91. Id. at (III)(F).
92. Id. at (III)(G).
93. Id. at (IV)(A).
94. Id. at (VI)(B),(C).
95. Arbitrators found for the plaintiff in 67% of the cases compared to the 71% rate experienced in Philadelphia. An interesting statistic, unavailable from other jurisdictions studied, is that the appeal rate for plaintiffs and defendants is identical (50%). Compare Cuyahoga County Ct. C.P. Arbitration Report, note 96 infra with JUDICIAL COUNCIL ARBITRATION STUDY, note 41 supra, at 33.
97. See note 65 & accompanying text supra.
98. See note 82 & accompanying text supra.
100. See note 66 and accompanying text supra. In Cleveland the high appeal rate of arbitrated cases compared to the few actually tried de novo may indicate that appeal is often taken to force negotiation of the arbitration award. Just as in Philadelphia and Rochester, there are minor disincentives to appeal. See OHIO REV. CODE ANN., CUYAHOGA COUNTY Ct. C.P.R. 29(VI) (Page 1974).
attempts by litigants to coerce more favorable settlements by a threat of prolonged court litigation. More serious dissatisfaction with the general trend of decisions would be demonstrated by a higher rate of appealed decisions actually moving to trial.

Although usage of the Cuyahoga County program has been significantly more limited than the comparable compulsory arbitration programs in Philadelphia and Rochester,\textsuperscript{101} this limited usage may be attributed to the relatively low jurisdictional amount of $5,000 in Cleveland,\textsuperscript{102} as opposed to $10,000 in Philadelphia.\textsuperscript{103} Nevertheless, the program has generated sufficient support to produce a proposal in January 1977 that the compulsory arbitration jurisdiction be increased to $10,000, in an effort to expand its beneficial impact.\textsuperscript{104}

**Judicial Arbitration in California**

In California, judicial arbitration exists in three forms: voluntary, in which the parties voluntarily stipulate to arbitration of a pending suit; compulsory, in which arbitration is imposed on the parties in pending litigation within certain categories similar to the Philadelphia procedure; and hybrid, in which, if the plaintiff elects arbitration, the defendant is compelled to arbitrate.

**Voluntary Form: The Los Angeles Plan**

Many local California bar associations have adopted voluntary judicial arbitration procedures. The Los Angeles Attorneys’ Special Arbitration Plan, initiated in 1971, is the oldest and most widely copied.\textsuperscript{105}

The Los Angeles program, and voluntary arbitration plans in general, are much closer in form to traditional arbitration than are the compulsory judicial arbitration plans. Under the Los Angeles voluntary plan submission of a case to arbitration is by stipulation of the parties and is entirely their responsibility.\textsuperscript{106} As a result, there is only a limited right of appeal, which, unlike the compulsory plans,

\textsuperscript{101} 14% of the civil docket was referred to arbitration during 1976, compared to 66% in Philadelphia during the January-November 1976 period. Cuyahoga County Ct. C.P. Arbitration Report, \textit{supra} note 96.

\textsuperscript{102} See note 87 & accompanying text \textit{supra}.

\textsuperscript{103} See note 45 & accompanying text \textit{supra}.

\textsuperscript{104} Civil Court Committee's proposed modification of Cuyahoga County Ct. C.P.R. 29 (Jan. 4, 1977) (on file with Hastings Law Journal).

\textsuperscript{105} See \textit{JUDICIAL COUNCIL ARBITRATION STUDY}, note 41 \textit{supra}; Halperin, note 34 \textit{supra}, at 473. The plan was initiated by a Joint Committee of the Southern California Trial Lawyers Association and the Association of Southern California Defense Counsel. \textit{Id.} at 18.

\textsuperscript{106} \textit{JUDICIAL COUNCIL ARBITRATION STUDY}, note 41 \textit{supra}, at 18.
is outside normal civil justice channels.\textsuperscript{107} The voluntary program, therefore, closely resembles traditional arbitration in two of its three basic elements.\textsuperscript{108} The primary difference is that the arbitrator is chosen randomly by the local superior court administrator from a list of volunteer attorneys active in the trial bar\textsuperscript{109} instead of by the parties.\textsuperscript{110} This selection is the extent of the superior court's involvement.

The arbitrator is required to set a hearing no sooner than twenty days nor later than eighty days from the date of notification.\textsuperscript{111} The conduct of the hearing is determined by the arbitrator,\textsuperscript{112} and the rules of evidence are observed but are relaxed.\textsuperscript{113} The arbitrator has thirty days to render an award.\textsuperscript{114} Appeal is limited to a petition for reconsideration, and upon agreement by the arbitrator and a grievance committee, a decision or award may be reduced, increased, changed, or set aside to be heard by another arbitrator.\textsuperscript{115} Most decisions by the arbitrator are final because such petitions are rare.\textsuperscript{116}

\textit{Performance} — The Los Angeles voluntary arbitration plan has produced positive results on a small scale. From the results of a 1972 study, this procedure appears to achieve the objectives of speed,\textsuperscript{117} economy,\textsuperscript{118} and fairness. Litigant satisfaction appears high. During the period of this 1972 study, grievances were filed in only two cases, or one percent of arbitrated cases.\textsuperscript{119} In addition, the study found

\begin{itemize}
\item \textsuperscript{107} See note 115 & accompanying text \textit{infra}.
\item \textsuperscript{108} See notes 35-36 & accompanying text \textit{supra}.
\item \textsuperscript{109} \textit{JUDICIAL COUNCIL ARBITRATION STUDY}, note 41 \textit{supra}, at 18-19. "The arbitrator selected cannot be challenged peremptorily." \textit{Id.} The administrator also notifies the party of the arbitration hearing, handles requests for continuances, and provides the arbitrator with the necessary documents for the hearing. \textit{Id}.
\item \textsuperscript{110} See notes 35-36 & accompanying text \textit{supra}.
\item \textsuperscript{111} \textit{JUDICIAL COUNCIL ARBITRATION STUDY}, note 41 \textit{supra}, at 19.
\item \textsuperscript{112} \textit{Id}.
\item \textsuperscript{113} \textit{Id}. As is the case with other judicial arbitration plans to be discussed, medical records are admissible if furnished to opposing counsel one week prior to the hearing. The author of the document may be called as a witness and examined as if under cross-examination. Similarly police accident reports may be offered into evidence without foundation. \textit{Id}.
\item \textsuperscript{114} \textit{Id}.
\item \textsuperscript{115} The grievance committee is composed of two attorneys, a plaintiff's attorney and a defense attorney, who serve one year without fee. Petition for reconsideration may be made only on very narrow grounds: 1) conflict of interest, 2) fraud, or 3) an error on a clearly defined question of law which affects the ultimate decision on liability or amount of damages. \textit{JUDICIAL COUNCIL ARBITRATION STUDY}, note 41 \textit{supra}, at 19-21.
\item \textsuperscript{116} \textit{Id}. at 21.
\item \textsuperscript{117} "The arbitration program has no backlog . . . ." \textit{Id}.
\item \textsuperscript{118} \textit{Id}. at 22, 78.
\item \textsuperscript{119} \textit{Id}. at 21.
\end{itemize}
a high correlation between the distribution pattern of awards under
the voluntary arbitration plan and the verdict pattern found in similar
cases tried to a jury in the first half of 1972.  

The Los Angeles plan, however, has had little impact on civil case
backlog as the number of voluntary stipulations to arbitrate has re-
mained relatively low. Despite the apparent satisfaction of those par-
ticipating, the number of voluntary stipulations to arbitrate never
has grown beyond 500 cases per year. At this level there will be no
impact on backlog because 500 cases per year represents only one
percent of pending cases in Los Angeles County superior court. In
other California counties having a similar voluntary arbitration pro-
cedure, utilization was even lower than in Los Angeles County.
Because the delivery of effective justice through the voluntary plan
appears to be comparable to that achieved through compulsory judicial
arbitration elsewhere, it seems reasonable to conclude that the low
utilization of the program results almost entirely from its voluntary
nature.

Compulsory Form: Santa Clara County Superior Court

In March 1976 Santa Clara County adopted compulsory arbitra-
tion by local rule of court. The Santa Clara County Court Ordered
Arbitration Plan is part of a process involving a series of local innova-
tions that were designed to make the superior court more efficient.

120. Id. at 21 (citing 15 JURY VERDICTS WEEKLY, nos. 1-26 (1971)). The plain-
tiff prevailed in 58% and the defendant in 42% of the arbitrated cases compared to a
63% to 37% pattern found in similar cases tried to a jury.

121. The overwhelming majority (94%) of those attorneys aware of the procedure
but not participating also indicated they favored the principle of judicial arbitration
for resolution of small personal injury disputes. JUDICIAL COUNCIL ARBITRATION STUDY,
note 41 supra, at 74.

122. Halperin, note 34 supra, at 473 n.12.

123. 1977 JUDICIAL COUNCIL REPORT, note 7 supra, at 208.


125. SANTA CLARA COUNTY SUPERIOR CT. R. 23. “This rule is adopted pursuant
to the inherent power of the Court to regulate its trial calendar and in accordance with
Rule 5.3(9) [Mandatory Settlement Conference in all jury cases] of the Local Rules
of this Court.” Id.

Arbitration is also available to litigants under this local rule on a voluntary basis
in two ways. First, the parties may stipulate to binding arbitration under the pro-
cedures administered by the local bar association with rules similar to the Los Angeles
Attorneys Special Arbitration Plan. Second, the parties may stipulate to binding ar-
bitration and waive the right to trial de novo. SANTA CLARA SUPER. CT. R. 23 § 1.3
(B)(2). However, virtually all cases arbitrated under this new procedure in Santa
Clara were court ordered in 1976. Interview with Judge John E. Longinotti, Presiding
Judge of Santa Clara County Superior Court, in San Jose (Nov. 4, 1976) [hereinafter
cited as 1976 Longinotti interview].

126. 1976 Longinotti interview, note 125 supra.
As part of this process, mandatory settlement conferences are required in all jury-bound cases. In the conference attorneys act as judges pro tempore to assist counsel for the litigants in arriving at a realistic case value. If a traditional settlement is not accomplished during the mandatory settlement conference, the judges pro tem put a value on the case and recommend whether it is appropriate for arbitration under the new compulsory arbitration rule. Assessing a number of factors, the presiding judge then makes the decision whether to order arbitration. Thus, judicial arbitration jurisdiction in Santa Clara County, unlike the compulsory plans previously discussed, does not depend upon a specific amount in controversy.

The Santa Clara rules provide for the random selection of a single arbitrator with no opportunity for the parties to challenge the selection. There is no provision for discovery. The rules of evidence governing civil actions apply to the conduct of the arbitration hearing, with certain variations in the interest of simplicity.

127. SANTA CLARA COUNTY SUPER. CT. R. 5.3.
128. 1976 Longinotti interview, note 125 supra.
129. Id.
130. Id. On a case evaluation form provided the presiding judge the attorneys pro tem indicate: 1) the plaintiff's present demand and his lowest demand as well as the defendant's present offer and his highest offer; 2) the probability of a settlement before or during trial; and 3) the reasons why the case is appropriate or inappropriate for arbitration. The criteria utilized by the presiding judge to determine whether or not a case is suitable for arbitration is not spelled out in the rules. The presiding judge, however, considers the recommendation of the pro tem judges, and independently evaluates the seriousness, degree of injury, and complexity of the case. If there is no serious injury, it is the "usual" personal injury case where there is simply a difference of opinion as to the valuation of the case, and the parties are not more than $2,000 to $3,000 apart, the judge will order arbitration. The order to arbitrate cases meeting these criteria rests on the theory that this type of case will typically settle during trial after consuming valuable judicial resources. In actual practice the presiding judge orders arbitration in virtually all personal injury cases demanding less than $10,000. 1976 Longinotti interview, supra note 125; interview with Judge John E. Longinotti, Presiding Judge of Santa Clara County Superior Court, in San Jose (Feb. 7, 1977) [hereinafter cited as 1977 Longinotti interview].
131. SANTA CLARA COUNTY SUPER. CT. R. 23 § 1.5.
132. Id. at § 1.5.
133. Id. at § 1.10.
134. Id. at § 1.11(B). Written medical and hospital reports, documentary evidence of loss of income, and property damage repair bills may be introduced if copies have been delivered to all the opposing parties at least ten days prior to the hearing. Id. Any adverse party may subpoena the author of a report and examine him or her as if under cross examination, unlike the Philadelphia rule, which requires court approval. Compare SANTA CLARA COUNTY SUPER. CT. R. 23 § 1.11(B)(1) with PHILADELPHIA CT. C.P. COMPULSORY ARBITRATION R. III(E)(4)(a). The depositions of any witness, including statements of opinion, may be offered and received in evidence if the statement is made by affidavit or by declaration under the penalty of perjury and copies are
general the arbitrator has most of the powers of the court, although, unlike the Philadelphia rules, the powers of the arbitrator are limited to those enumerated in the rules. The arbitrator has ten days to file an award following the hearing, and the clerk of the court is empowered to enter the award as a judgment if no party has filed a motion to restore the case to the civil trial list within twenty days after the award. Any subsequent trial de novo must proceed as if the arbitration proceedings had not occurred. The appellant is not required to make any reimbursement for the cost of the arbitration proceedings, nor is the court at trial de novo empowered to award costs.

Performance — Because the Santa Clara compulsory arbitration plan did not become effective until March 1976, drawing firm conclusions would be premature. Thus far, however, available information correlates closely with the good results achieved in other jurisdictions discussed. Judge Longinotti, Presiding Judge of the Santa Clara County Superior Court during 1976, concludes that compulsory arbitration was responsible for the court's ability to meet its goal of maintaining its relatively current elapsed time interval of six months from at-issue to trial. The court was able to maintain its excellent record by ordering only 270 cases to arbitration in 1976 because the Santa Clara procedure focuses on time consuming jury-bound cases.

delivered to all opposing parties at least 10 days prior to hearing. The statement is not admissible when an opposing party has, at least 5 days before the hearing, delivered to the proponent of the evidence a written demand that the witness be produced in person to testify at the hearing. SANTA CLARA COUNTY SUPER. CT. R. 23 § 1.11(B)(2). The rules also provide that the deposition of any witness may be offered by any party notwithstanding that the deponent is not “unavailable as a witness.” Id. § 1.11(B)(3). See CAL. EVID. CODE § 240 (West 1966) (defining unavailability of a witness).

135. SANTA CLARA COUNTY SUPER. CT. R. 23 § 1.9(E).
136. Id. § 1.12(B).
137. Id. § 1.13.
138. Id. § 1.15(C).
139. Id. § 1.15. Under Santa Clara's plan, the arbitrator serves without fee. Compare SANTA CLARA COUNTY SUPER. CT. R. 23 § 1.5 with CAL. R. CT. 1608 (West Supp. 1977).
140. Compare SANTA CLARA COUNTY SUPER. CT. R. 23 § 1.15 with CAL. R. CT. 1616 (West Supp. 1977). Under CAL. R. CT. 1616(d) (West Supp. 1977), a trial court shall deem the arbitration award to have been an offer within CAL. CIV. PROC. CODE § 998 (West Supp. 1977), not accepted by the party who requested trial de novo.
141. 1977 Longinotti interview, note 130 supra. This objective was accomplished even though three judges were transferred from civil departments to handle the significantly increased criminal caseload during 1976. Id.
142. Memorandum from Judge John E. Longinotti to Santa Clara County Superior Court Judges (Feb. 4, 1977) (on file with Hastings Law Journal) [hereinafter cited as Longinotti memorandum].
Of the 270 cases, only 24 were still pending as of January 27, 1977. Consequently, 246 cases, each within one week of trial, were permanently removed from the courts in 1976. Because approximately half of these cases would ordinarily have settled before or during trial, it is a fair estimate that arbitration saved the judicial resources necessary for 123 full trials. The impact and scope of these 123 deflected jury-bound cases becomes even more significant when compared to the number of contested personal injury and property damage cases in Santa Clara County Superior Court. These 123 arbitrated cases in 1976 were double the total number of contested personal injury and property damage cases in the entire year of 1975-76.

Given that the Santa Clara Superior Court had already established a record of relative efficiency in disposing of civil cases, the most important factor in evaluating whether the new arbitration procedure has succeeded in providing effective justice is whether the litigants involved perceived it as being fair. Of the 246 arbitrated cases, only 13 percent (32) requested return to the trial calendar. This low percentage takes on added significance in that the arbitrator's award may be appealed without payment of any fee or threat of an award of costs. Further, 20 of these 32 cases settled without trial, with only three going to trial and nine remaining on the trial calendar as of January 31, 1977. Even if all nine pending cases eventually reached trial, the result would be that only five percent of the arbitrated cases were tried de novo. Although the appeal rates for nine months, considered independently, would not be very meaningful, they gain in significance by their correlation with the twenty year appeal rate experienced under the Philadelphia compulsory arbitration rules.

The impact of these statistics is cogently summarized by Judge Longinotti:

[I]t can be validly stated that the court-administered arbitration program initiated by the court in 1976 and conducted pursuant to local rule 23 has been quite successful, and that those members of the bar who have made the program function by accepting the burden and responsibility of acting as arbitrators have performed remarkably well.

143. Id.
144. Id.
145. 1977 Longinotti interview, note 130 supra.
146. See 1977 JUDICIAL COUNCIL REPORT, note 7 supra, at 258 (Table XIV).
147. See notes 17-18 & accompanying text supra.
148. Longinotti memorandum note 142 supra.
149. See notes 139-40 & accompanying text supra.
150. Longinotti memorandum, note 142 supra.
151. See notes 65-66 & accompanying text supra.
152. Longinotti memorandum, note 142 supra.
To members of the bar, the comments of the immediate past president of the Santa Clara Bar Association, Anthony J. Trepel, are instructive: "[L]awyers were well satisfied with the arbitrator's decision . . . and I would recommend adoption of the court ordered arbitration by other California Superior Courts . . . ."153 After less than a year there are strong positive quantitative and qualitative indications that the Santa Clara Compulsory Arbitration rule has achieved the objective of effective justice through fair and expeditious results.

**Hybrid Form: Judicial Arbitration Statute**

Although the concept of compulsory arbitration subject to retrial has been adopted with demonstrable success in several other jurisdictions, proposals for statewide adoption of a comparable program in California have met with considerable resistance.154 California has adopted a hybrid form of judicial arbitration distinct from both the compulsory and voluntary types of judicial arbitration already discussed. The adoption of the hybrid form came as a result of legislative compromise following the introduction of a bill sponsored by the California Judicial Council that would have provided for a compulsory form of arbitration.155

As originally sponsored, this legislation (S.B. 1211) would have authorized local rules providing for compulsory arbitration in all personal injury cases in which special damages for medical expenses and lost wages did not exceed $1,000, subject to trial de novo upon the request of any litigant.156 This proposal of the Judicial Council was

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153. Letter from Anthony J. Trepel, immediate past President of the Santa Clara County Bar Association to R. J. Heher (Feb. 18, 1977) (on file with Hastings Law Journal). Mr. Trepel also states "I believe in the cases involved, the arbitration was satisfactory because the plaintiff and defendant could not reach agreement either through client's failure to accept an appropriate amount or the failure to properly evaluate the case. As we all know, there are a number of cases in which it is impossible for the litigants or their counsel to resolve the issues and amounts and therefore it is necessary that a disinterested third party make the decision." Id.


156. Halperin, note 34 supra, at 474, referring to S.B. 1211 (1973), as amended June 27, 1973. The bill would also have provided for voluntary arbitration of any pending action upon stipulation of the parties and for the hybrid form of arbitration where the plaintiff by electing compels the defendant to arbitrate.
based on an exhaustive study of compulsory arbitration in other states conducted pursuant to a 1971 Senate Resolution authorizing the Judicial Council to investigate the possible role of arbitration procedures in the judicial process.

The sources of resistance to S.B. 1211 as originally proposed are unclear, because there is no legislative history of the bill nor any official documentation of the objections to it. The Senate Committee on Judiciary Digest and Comment on S.B. 1211 indicates that there was no known opposition. The Assembly Committee on Judiciary Digest and Comment indicates that the Los Angeles Trial Lawyers Association opposed it, whereas the California Trial Lawyers Association took no position regarding the bill. Whatever the source of resistance, the bill, as amended, eliminated the form of compulsory arbitration of smaller personal injury cases proposed by the Judicial Council. The amended bill was eventually vetoed by Governor Reagan on September 27, 1974. The same bill was reintroduced as S.B. 983 on April 15, 1975, and ultimately signed into law by Governor Brown on September 23, 1975.

As finally enacted, the Judicial Arbitration Statute does not provide for statewide compulsory arbitration. Instead, it authorizes the Judicial Council to promulgate rules providing for a unique hybrid form of arbitration either by voluntary stipulation of the parties or via plaintiff's election of arbitration, which thereby compels the defendant to arbitrate cases below $7,500 in value. Thus it can be seen that the Judicial Arbitration Statute is in character essentially a voluntary

158. S. Res. 139, 1971 Reg. Sess., Journal of the Senate 2766. See note 9 supra. The study conducted pursuant to this resolution made the following findings: "1) the courts of California are congested; 2) [m]ost civil matters pending are personal injury actions; 3) [t]he use of arbitration for smaller personal injury cases is acceptable to the personal injury bar and the insurance industry; 4) [a] shift to arbitration of smaller personal injury claims would substantially relieve court congestion in California as it has in other jurisdictions; 5) [a]rbitration is able to produce a decision more quickly than the superior courts in their present condition; 6) [a]rbitration functions at a low cost to the public and to the litigants; 7) [a]rbitration as a system to resolve personal injury disputes is equal in quality to the courts, in that it is as reliable and fair." Judicial Council Arbitration Study, note 41 supra, at 5. See also Senate Committee on Judiciary, Bill Analysis of S.B. 1211, (on file with Hastings Law Journal).
164. Id.
program. Unlike voluntary arbitration procedures such as the Los Angeles program, which are administered by local bar associations according to rules governing arbitration by agreement, however, this voluntary procedure is administered by the courts according to rules adopted by the Judicial Council pursuant to the statute.\textsuperscript{166}

The Rules of Court\textsuperscript{166} normally require that arbitration should be elected or agreed to by stipulation after an at-issue memorandum has been filed but before a trial date has been set.\textsuperscript{167} A single arbitrator is selected at random from a pool of volunteer attorneys,\textsuperscript{168} although the rules encourage the parties to designate an arbitrator of their own choosing.\textsuperscript{169} Unlike other jurisdictions outside California the pool of volunteer arbitrators is composed of attorneys experienced in personal injury litigation with additional panels for general practice as the case volume warrants.\textsuperscript{170} Another key difference is that the parties have an opportunity to make a peremptory challenge to the selection of the arbitrator.\textsuperscript{171}

Under the Judicial Council rules, as under the Philadelphia compulsory arbitration procedure, the rules of evidence governing civil actions apply but are relaxed to encourage the use of documentary evidence.\textsuperscript{172} The arbitrator is to determine all issues properly raised by the pleadings and file an award within ten days of the hearing.\textsuperscript{173} If no party files a request for trial de novo within twenty days, the arbitrator’s award is entered as a judgment.\textsuperscript{174} This judgment has the same effect as any other superior court judgment except that it is not subject to appeal and may not be attacked or set aside except on the express narrow grounds provided in the rules.\textsuperscript{175}

\textsuperscript{165} CAL. R. CT. 1601-17 (West Supp. 1977). These rules are very similar to Santa Clara County Superior Court Rule 23. See notes 125-40 & accompanying text supra.

\textsuperscript{166} For a more complete discussion and a preliminary guide to the California rules, see Halperin, note 34 supra.

\textsuperscript{167} CAL. R. CT. 1602 (West Supp. 1977).

\textsuperscript{168} \textit{Id.} at R. 1605(C).

\textsuperscript{169} \textit{Id.} at R. 1602(b).

\textsuperscript{170} \textit{Id.} at R. 1604.

\textsuperscript{171} \textit{Id.} at R. 1605.

\textsuperscript{172} \textit{Compare} CAL. R. CT. 1613(b) (West Supp. 1977) \textit{with} PHILADELPHIA CT. C.P. COMPULSORY ARBITRATION R. III(E)(1971).

\textsuperscript{173} CAL. R. CT. 1615 (West Supp. 1977).

\textsuperscript{174} \textit{Id.} at R. 1615(C).

\textsuperscript{175} \textit{Id.} Rule 1615(D) provides: "A party against whom a judgment is entered pursuant to an arbitration award may, within six months after its entry, move to vacate the judgment on the ground that the arbitrator was subject to a disqualification not disclosed before the hearing and of which the arbitrator was then aware, or upon one of the grounds set forth in subdivisions (a), (b), and (c) of Section 1286.2 of the Code of Civil Procedure, and upon no other grounds. The motion shall be heard
If a trial is requested and held following arbitration, no evidentiary use may be made of any aspect of the arbitration proceedings. The rules specifically incorporate Code of Civil Procedure section 998, pursuant to which the arbitration award is deemed to be an offer to accept judgment by the nonappealing parties. Therefore, after the trial the court may consider the amount of the arbitration award, if any was made, and assess the additionally incurred costs against a requesting party whose position has not improved at trial.

Performance — Because the California Judicial Arbitration Statute has been in effect only since July 1976, it is too early to draw meaningful conclusions regarding the effectiveness of this procedure. If stipulation or election is made promptly and if the arbitrator is settled upon quickly, the built-in time limits of the arbitration process should result in speedier dispute resolution in those cases going to arbitration. The reduction in time, produced in part by simplified rules of evidence, should lead to considerably lower costs.

Statistics compiled for the first six months of the program's operation appear to indicate a positive initial response on the part of litigants to the fairness of the proceedings. The rate of appeal to trial de novo following arbitration hearings has been low; in only 13 percent of cases in which arbitrator's awards were filed during the six month period was there an appeal to trial de novo. This rate is comparable to the appeal rates obtained in Philadelphia (8 percent to 12 percent), Rochester (8 percent), and Santa Clara (13 percent). The correlation to the Santa Clara appeal rate is particularly significant because the Santa Clara plan does not require the payment of any fee upon notice to the adverse parties and to the arbitrator, and may be granted only upon clear and convincing evidence that the grounds alleged are true, and that the motion was made as soon as practicable after the moving party learned of the existence of those grounds.

176. Id. at R. 1616(c).
177. Id. at R. 1616(d).
178. Id.
179. CAL. CIV. PROC. CODE § 998 (West Supp. 1977). At the discretion of the court these costs could include expert witness fees in the preparation of the case for trial. Id. See Halperin, supra note 34, at 521-22. These costs, if significant, could become an impediment to requests for a trial de novo.
180. California Judicial Council Special Report on Arbitration Proceedings (July-December 1976) (on file with Hastings Law Journal). During the first six months plaintiffs elected and thus compelled defendants to arbitrate under the California Judicial Arbitration Statute in 81% of the total number of cases placed on the arbitration hearing list under the hybrid form of judicial arbitration. The balance (19%) was comprised of voluntary stipulations. Id.
181. See note 65 & accompanying text supra.
182. See note 82 & accompanying text supra.
183. See note 148 & accompanying text supra.
nor allow the assessment of costs upon appeal to trial de novo.\textsuperscript{184} The similarity of appeal rates tends to discount the possible influence that the threat of an assessment of costs at trial may have in discouraging requests for trial following arbitration under the Judicial Arbitration Statute.\textsuperscript{185}

With regard to the effect the program has had in improving the efficiency of the civil justice system generally, the results to date must be considered minimal. Approximately 2,200 cases were arbitrated in all California superior courts from July to December 1976.\textsuperscript{186} Not unexpectedly, the number of arbitrations during the first six months amounted to a small percentage of contested civil matters statewide.

Familiarity with judicial arbitration, however, appears to be a factor in its acceptance. The procedure under the Judicial Arbitration Statute became more widely used each successive month for the first six months under this plan.\textsuperscript{187} The proposition that familiarity will produce greater usage is supported by another statistic from the first six month period: over half of all the arbitrated cases were in one court system, Los Angeles County Superior Court,\textsuperscript{188} where the bar had for some time prior to the enactment of the Judicial Arbitration Statute maintained a successful, if only moderately utilized, voluntary judicial arbitration system.\textsuperscript{189}

The signs that arbitration under the California Judicial Arbitration Statute will be capable of delivering effective justice, combined with the increasing familiarity and utilization of the program by the practicing bar, are encouraging portents for the eventual success of the statute. Nevertheless, it appears probable that such success will be tempered by the essentially voluntary nature of the program. It would seem unrealistic to expect that a procedure relying on the initiative of litigants will achieve the level of usage attained by compulsory judicial arbitration.

**Benefits of Judicial Arbitration — A Summary**

The primary objective of an effective judicial system is to dispense justice inexpensively and fairly without delay.\textsuperscript{190} Judicial arbitration

\begin{itemize}
\item \textsuperscript{184} See notes 139-40 & accompanying text *supra*.
\item \textsuperscript{185} See note 179 & accompanying text *supra*.
\item \textsuperscript{187} Telephone interview with Alexander B. Yakutis, Judicial Council of California Attorney (Feb. 4, 1977).
\item \textsuperscript{188} See note 186 & accompanying text *supra*.
\item \textsuperscript{189} See notes 117-24 & accompanying text *supra*.
\item \textsuperscript{190} See note 4 *supra*.
\end{itemize}
is capable of delivering effective justice through satisfaction of these goals.

Speed — In the jurisdictions discussed, the time limits imposed directly upon the various steps in the arbitration process keep the average elapsed time from at-issue memorandum filing to arbitration decision well below the six month target objective. In the jurisdictions keeping such records, the average elapsed time from at-issue memorandum filing to decision has been between sixty and ninety days. Moreover, by reducing civil case backlog through the removal of less complicated cases, judicial arbitration hastens the movement of major cases remaining on the civil active list to trial and resolution. The rising number of backlogged cases in California superior courts, three times the number of backlogged cases ten years ago, would appear to militate in favor of adoption of a procedure with ability to reduce this backlog.

Economy — Judicial arbitration lowers expenses to private litigants through reduced pre-trial preparation, simplified evidentiary procedures, and elimination of certain stages of the traditional jury trial procedure. Reduced expense makes it economically more feasible for parties to enforce justified claims and defend against both legitimate and nuisance actions in relatively uncomplicated cases. Reduced cost may also help explain the low rate of appeal from arbitrated decisions demonstrated in most jurisdictions utilizing the procedure. As long as litigants find the proceedings essentially fair, they may view slightly higher or lower awards than they believe a jury would have returned as representing a net gain owing to the lower costs involved.

The savings to the public is also potentially significant. For example, one study estimated the public cost per trial in 1970 to be $2,194 without jury fees, while at approximately the same time the cost per award under the Philadelphia compulsory arbitration system was $106. If the Philadelphia experience over twenty years is indicative, these savings will not be confined to the implementation stage but can be expected in each succeeding year.

191. See notes 63 & 78 supra.
192. See note 19 supra.
193. A survey conducted by the Judicial Council found that attorneys in the Los Angeles Attorneys' Special Arbitration Plan estimated that they spent 6.5 hours preparing for arbitration versus 13.4 hours preparing for a jury trial, and spent 2.5 hours in arbitration versus 3.3 days conducting a jury trial. Judicial Council Arbitration Study, note 41 supra at 78-79.
194. But see note 179 & accompanying text supra.
Fairness — Litigant satisfaction with the fairness of arbitration has been indicated by the comparability of appeal rates from arbitration awards with the rate of appeal from all California superior courts in civil cases.\textsuperscript{197} Appeal rates from arbitration awards to trial de novo have ranged from 8 percent to 25 percent with most jurisdictions averaging between 11 and 13 percent,\textsuperscript{198} as compared with the 11 to 14 percent rate of appeal from all contested civil cases in California superior court.\textsuperscript{199} Moreover, the majority of the appeals to trial de novo settle before trial so that in most jurisdictions only 5 to 6 percent of arbitrated cases are retried de novo.\textsuperscript{200} Although fees charged upon appeal in some jurisdictions might deter appeal by some litigants, because such fees are typically nominal, low appeal rates from judicial arbitration awards would seem to indicate that over 90 percent of arbitrated cases produce results acceptable to the parties.

An additional index of fairness is that arbitration awards have been comparable to the results a judge or jury would deliver upon similar facts. The experiences in Philadelphia and Los Angeles indicates that arbitrators find for the plaintiff slightly more frequently than juries and that damage awards are substantially the same as jury verdicts in similar kinds of cases.\textsuperscript{201} An independent experimental study has strikingly confirmed that this similarity in results is in all likelihood typical rather than exceptional.\textsuperscript{202} The widespread participation of attorneys in the programs discussed, as well as the predominant use of compulsory arbitration in Philadelphia after almost twenty years,\textsuperscript{203} are signs that both bench and bar are also convinced of the substantial fairness of arbitration procedures.

\textsuperscript{197} See note 31 & accompanying text supra.
\textsuperscript{198} Philadelphia (8-12%); Rochester (11%); Cleveland (25%); Santa Clara (13%); California Judicial Arbitration Statute (13%). See notes 65, 82, 96, 148 & 180, supra.
\textsuperscript{199} See note 32 & accompanying text supra.
\textsuperscript{200} Philadelphia (5%); Rochester (1%); Cleveland (3%) and Santa Clara (5%). See notes 66, 82, 99 & 150 supra.
\textsuperscript{201} See JUDICIAL COUNCIL ARBITRATION STUDY, note 41 supra, at 21, 33.
\textsuperscript{202} Aksen, Arbitration of Automobile Accident Cases, 1 CONN. L. REV. 70, 89-91 (1968). This study was conducted by the Columbia University Project for Effective Justice. As part of this study, a motion picture of an arbitration hearing was prepared and shown to 32 New York civil court judges, 160 attorneys, and 32 mock juries. 100% of the judges, 84% of the juries, and 87% of the attorneys found for the plaintiff. The judges delivered an average award of $2,907 and the attorneys and juries delivered identical average awards ($2,178). Because the attorneys would normally serve as arbitrators, this study concludes that the arbitration results in smaller personal injury cases would be the same as if the case were tried before a jury.
\textsuperscript{203} 71% of all civil cases in Philadelphia Court of Common Pleas were arbitrated in 1975. PHILADELPHIA COMMON PLEAS & MUNICIPAL COURTS, ANNUAL REPORT 1 (1975).
In addition to meeting the objective standards proposed for measuring the ability of judicial arbitration to deliver effective justice, reasonable speculation discloses other likely, but difficult to quantify, benefits to the administration of justice. First, there should be substantial improvement in the quality of judicial decisionmaking with the reduced pressure afforded by a more current calendar. Second, producing faster, less expensive dispute resolution should eliminate some of the protracted anxiety felt by many litigants today. Faster resolution will enable litigants to end more quickly a traumatic incident and to plan for their future with greater certainty, especially in personal injury cases. Third, factfinding accuracy will be improved because dispute resolution will occur closer to the incident involved. Fourth, the fairness of the settlement climate will be augmented because high costs and court congestion could no longer be used as a bargaining tool. This consideration takes on great importance in a civil justice system in which most cases settle prior to trial.

Judicial arbitration also commends itself to the bar on the basis of pure self interest. First, it presents an opportunity to improve the public's image of the legal community. The success of judicial arbitration is largely made possible by the interest and energy of volunteer attorney arbitrators. Attorney action of this kind could make a positive impact on a public highly frustrated by the congestion and cost of current civil litigation.

Second, as a matter of law office economics, the substantially reduced preparation and hearing time, as compared with a typical jury trial, will allow attorneys to be more efficient and enable them to represent litigants more profitably and expeditiously in cases in which the amount in controversy is low.

In sum, it is submitted that increased utilization of judicial arbitration in low value, uncomplicated cases would represent a positive step toward increasing public satisfaction with the administration of justice. Judicial arbitration is not the only innovation capable of improving the administration of justice. It is a particularly desirable

204. See e.g., note 193 & accompanying text supra.

205. One of the most recent important and comprehensive alternatives to current civil litigation procedures is the adoption of a pilot program by the California legislature whereby courts would use extremely simplified rules of procedure in non-jury cases valued below $25,000. In recognition of the inordinately high cost of litigating smaller civil cases in California, the legislature provided the following guidelines for the Judicial Council in developing rules for the pilot program: 1) the elimination of all discovery except for the requirement that each party file a statement of witnesses to be called and physical evidence to be introduced; 2) elimination of pre-trial conferences; 3) elimination of most demurrers and pre-trial motions; 4) the permissive rather than required use of trial briefs; and 5) provision for narrative testimony and written submission. Cal. Civ. Proc. Code § 1823 (West Supp. 1977).
alternative, however, because it is capable of attaining speed, economy, and fairness without requiring radical innovations in either substantive or procedural law. The substantive law upon which arbitration decisions are based remains unchanged. Traditional trial procedures are retained in a greatly streamlined form; judicial arbitration is not competitive with, but supplemental to court procedure. It preserves the right to a trial de novo by jury and is ultimately subject to supervision by the courts. It is open to question whether other alternatives to traditional civil litigation have the capacity simultaneously to meet the objective requirements for the delivery of effective justice and maintain substantive and procedural continuity with the law as it currently stands.

While these revised procedures would reduce costs, the long-term impact on court congestion may not be substantial because these procedures are limited to non-jury cases. If there is a positive impact on congestion, most California courts will not benefit in the near future because this pilot test is limited to two superior and two municipal courts for a three year period. Nevertheless it illustrates the legislative concern over the high cost and protracted delay of civil litigation in California and an awareness that it may not only be unnecessary but illogical to utilize the same rules of civil procedure for uncomplicated cases as for major, complex ones.

Among the other major alternatives are the following: 1) additional judicial resources. See, e.g., Interview with Chief Justice Warren Burger, U.S. NEWS & WORLD REP., Dec. 14, 1970, at 32; American Bar Association Special Committee on Automobile Accident Reparations Report (Jan. 1969) (reprinted in 2 CALIFORNIA GOVERNOR'S AUTOMOBILE ACCIDENT STUDY COMMISSION REPORT part 2, at 68 (Dec. 1970)); Keeton, Resolving Negligence Claims in Non-Judicial Forums, 10 Forum 771, 783-92 (1975); 2) the pretrial conference; see, e.g., AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON COURT CONGESTION, TEN CURES FOR COURT CONGESTION, (1959); Kincaid, Pre-trial Conference Procedure in California, 4 U.C.L.A. L. REV. 377 (1957); 3) 1 F. Klein, THE ADMINISTRATION OF JUSTICE IN THE COURTS 529-33 (1976); state automobile compensation boards, see, e.g., French, THE AUTOMOBILE COMPENSATION PLAN (1933); L. Green, TRAFFIC VICTIMS (1959); Bentley, Commission Trials, 34 CAL. ST. B.J. 413 (1959); Coie, Is Compulsory Insurance a Remedy?, 1 DUKE B.A.J. 23 (1933); Compensation for Automobile Accidents: A Symposium, 32 COLUM. L. REV. 785 (1932); James, The Columbia Study of Compensation for Automobile Accidents, 59 COLUM. L. Rev. 408 (1959); James & Law, Compensation for Automobile Accident Victims, 26 CONN. B. J. 70 (1952); Lewis, The Merits of the Automobile Accident Compensation Plan, 3 L. & CONTEMPT. PROB. 583 (1936); Marks, The Curse of the Personal Injury Suit and a Remedy, 10 A.B.A.J. 493 (1924); 4) no fault automobile insurance. The variations on the best known Keeton-O'Connell Plan are innumerable. For a detailed discussion of the plan, see, INSTITUTE OF CONTINUING LEGAL EDUCATION, PROTECTION FOR THE TRAFFIC VICTIM (1967). For the California Variation on the Keeton-O'Connell no-fault plan, see A.B. 500 (1975) introduced January 16, 1975 during the regular session of the legislature (unenacted); and 5) the abolition of civil jury trials see, e.g., L. Green, TRAFFIC VICTIMS (1958); J. Franke, COURTS ON TRIAL (1949); Sarpy, Civil Juries: Their Decline and Eventual Fall, 11 Loy. L. REV. 243 (1963).

206. Adding judicial manpower is still only a partial solution because it does not address the objectives of reducing the expense and simplifying procedures in lower value civil cases. In any case, precedent indicates that any increase is unlikely to be sufficient
Adoption of Compulsory Arbitration by Local Rule of Court in California

California's adoption of the essentially voluntary judicial Arbitration Statute is a clear recognition of and a significant step toward the foreseeable benefits offered by judicial arbitration. Voluntary arbitration, however, will most likely have a less positive impact on judicial efficiency than the compulsory judicial arbitration procedures in other jurisdictions. Although California's new essentially voluntary statutory form of judicial arbitration has demonstrated encouraging results in its first six months, there are compelling reasons why the legislature should replace voluntary with compulsory arbitration. For these reasons, in the absence of legislation, local courts should follow the lead of the Santa Clara Superior Court and adopt compulsory arbitration by local rule.

to overcome rising demand. The Administrative Office of the California Courts indicates that the worsening condition of the civil calendar in 1974-75 "appears to have resulted primarily from the abnormal number of judicial vacancies and from delays in creating new judicial positions as they are needed." See note 20 supra, at 109. An extensive study of the pre-trial conference concluded that it does achieve fairer results by improving preparation and narrowing issues for trial but that it also actually prolongs total time involved in most civil cases. See Rosenberg, Court Congestion: Status, Causes and Proposed Remedies, in Report of the 27th American Assembly, The Courts, the Public, and the Law Explosion 29, 50 (1965). The State Automobile Compensation Board is a radical innovation in which the traditional law of negligence would be replaced by absolute liability covered by a compulsory insurance scheme and removed from the courts entirely. Not surprisingly, such a dramatic change in substantive and procedural law has met with stiff resistance. See Wergel, Preliminary Report on Plans for Inquiry into the Wisdom of a California Accident Commission, 34 Cal. St. B.J. 393 (1959). Although it is difficult to generalize about proposals for no-fault automobile accident insurance, it has undergone much criticism. See, e.g., Green, Basic Protection and Court Congestion, 52 A.B.A.J. 926 (1966); Knepper, Alimony for Accident Victims?, 15 Def. L.J. 513 (1966); Marryott, The Tort System and Automobile Claims, 52 A.B.A.J. 639 (1966); Cone, The Keeton-O'Connell Monstrosity, reprinted in Protection for the Traffic Victim 161 (1967). The most pertinent criticism is that even the most popular variation of no-fault insurance would in fact tend to increase congestion in the courts. Green, Basic Protection and Court Congestion, 52 A.B.A.J. 926, 931 (1968). The proposed abolition of the civil jury is the most radical innovation of all and appears to have only negligible support.

207. See note 186 & accompanying text supra. The legislature is currently considering a bill that would repeal the voluntary Judicial Arbitration Statute (Cal. Civ. Proc. Code § 1141.0 (West Supp. 1977). See note 245 & accompanying text supra. S.B. 1362 (1978), introduced on January 3, 1978, would also require compulsory judicial arbitration of all civil cases involving less than $15,000. S.B. 1362 (1978) is patterned after the compulsory plans discussed in this Note. This proposed legislation would, however, provide for stronger disincentives to appeal from an arbitration award to trial de novo than other compulsory procedures. See notes 57, 58, 82, 100, 140 & accompanying text supra. S.B. 1362 (1978) would require the party electing trial de novo to pay the costs of arbitration, including compensation of the arbitrator. These costs would not be recoverable by the prevailing party at a trial
Superiority of Compulsory Form

Compulsory judicial arbitration is superior to the voluntary form. First, the most practical benefit of a compulsory arbitration procedure is that it would circumvent the predictable caution of some members of the bar toward an innovation that promises to deflect a substantial number of cases from the courts.\textsuperscript{208} Despite the demonstrated success of judicial arbitration, many members of the bar are likely to take a "wait and see" attitude. Unless the bar is compelled to arbitrate, past experience indicates that the bar will require a prolonged period to become convinced of the benefits of judicial arbitration. There is evidence of this behavior in both the Pennsylvania and Los Angeles experiences with judicial arbitration. In Pennsylvania some members of the bar initially resisted compulsory arbitration and challenged it in the Pennsylvania Supreme Court.\textsuperscript{209} Today, after almost twenty years of experience, 6,000 attorneys in Philadelphia alone now belong to the pool of volunteer arbitrators.\textsuperscript{210} The Los Angeles Attorneys Special Arbitration Plan, completely voluntary in nature, generated only limited usage in the initial four years prior to the adoption of the Judicial Arbitration Statute. Despite the strong favorable reaction among those attorneys participating in the program,\textsuperscript{211} only about 500 cases per year went to arbitration in Los Angeles prior to the adoption of the Judicial Arbitration Statute.\textsuperscript{212} Attempts to promote a comparable program in San Francisco fared notably less well.\textsuperscript{213}

denovo: "In addition to the costs of arbitration, if the judgment upon the trial de novo is not more favorable to the party electing the trial de novo than the arbitration award by at least 20 percent of the award, the party electing the trial de novo shall pay actual costs to the other party. Actual costs shall include all costs and fees taxable in any civil action, plus reasonable witness fees and attorney's fees not otherwise taxable unless the court finds that the award of attorney's fees and witness fees would create a substantial hardship upon the party electing the trial de novo or is not in the interest of justice. Costs shall accrue from the time of the election for the trial de novo." The proposed legislation would not become operative until January 1, 1980.

208. Illustrations of this cautiousness include the relatively slow adoption of the Federal Rules of Civil Procedure in the states and opposition to such other changes as arbitration by contractual agreement, uninsured motorist arbitration, pretrial practice rules, and medical malpractice arbitration. This resistance may also explain why the Federal Rules of Civil Procedure, promulgated in 1938, were the last significant change in judicial procedure. See note 2 and accompanying text supra.

209. See note 263 & accompanying text infra.

210. Horwitz speech, note 49 supra, at 5.

211. In addition, the overwhelming majority (94%) of those attorneys aware of the procedure but not participating indicated they favored the principle of judicial arbitration for resolution of small personal injury disputes. Judicial Council Arbitration Study, note 41 supra, at 74.

212. Halperin, note 34 supra, at 473 n.12.

213. "For example, in calendar 1975 only 10 stipulations for arbitration were filed in San Francisco . . . ." Halperin, note 34 supra, at 473 n.12.
Second, it is only to be expected that the disputants themselves may tend to resist using procedures different from those they expect to encounter upon becoming involved in civil litigation. The litigant's image of judge and jury may be difficult to replace by the idea of a volunteer attorney serving as arbitrator. Furthermore, unlike members of the bar, individual litigants will not be able to sample judicial arbitration and thereafter engage in arbitration with confidence in its capabilities. For most litigants, the particular dispute involved will be their only contact with the civil justice system. Compulsory arbitration in many cases may be the most practical way to introduce litigants to the superiority of judicial arbitration in uncomplicated civil cases.

Third, compulsory arbitration will produce an early and more dramatic reduction in court backlog and delay than an essentially voluntary procedure. An earlier reduction in civil case backlog is a significant benefit because the severe delay and backlog in the California superior courts is expected to increase in the future.

Fourth, adoption of compulsory arbitration by local rule would provide each superior court with a flexible procedure that could be tailored to the specific needs of an individual court and modified according to the dictates of experience.

In sum, experience from other jurisdictions demonstrates that compulsory judicial arbitration is capable of producing effective justice and alleviating crowded court calendars. Compulsory arbitration in California should be more effective in relieving court congestion than the essentially voluntary procedure promulgated under the Judicial Arbitration Statute. For these reasons all California superior courts with elapsed time from at-issue memorandum filing to trial

214. Compare notes 122 & accompanying text supra with notes 60 & 146 supra.
215. See note 19 & accompanying text supra.
216. See, for example, note 130 supra.
217. Federal legislation has been introduced that would create compulsory judicial arbitration of specified civil cases in five to eight United States district courts for a three year test period. (H.R. 9778, 95th Cong., 1st Sess., 123 Cong. Rec. H11,729 (1977)). H.R. 9778 (1977) would also authorize any district court to adopt voluntary judicial arbitration by local rule of court. As a means of generating data for Congress to review in considering H.R. 9778 (1977), three U.S. district courts (N.D. Cal., Conn., E.D. Pa.) plan to adopt a one year pilot plan of compulsory judicial arbitration. These plans have been adopted by rule of court to be in operation by April 1, 1978. Telephone interview with Jay Schaefer, Administrative Assistant Law Clerk, United States District Court N.D. Cal. (Feb. 8, 1978).

greater than the six month Judicial Council guideline\(^{218}\) should be encouraged to adopt compulsory arbitration by local rule.

**Possible Constitutional and Statutory Obstacles**

**Local Court Authority**

Ultimate procedural rulemaking authority in California resides in the legislature\(^{219}\) as derived from Article VI, section 6 of the California Constitution, which authorizes the Judicial Council to “adopt rules of court administration, practice and procedure not inconsistent with statute . . . .”\(^{220}\) In several instances the legislature has delegated rulemaking power to the Judicial Council\(^{221}\) so that these rules prevail notwithstanding any other provision of law.\(^{222}\) One such legislative delegation is California Code of Civil Procedure section 575, which authorizes the Judicial Council to “promulgate rules governing pre-trial conferences, and the time, manner and nature thereof . . . .”\(^{223}\) Pursuant to this authority, the Judicial Council has promulgated extensive pre-trial practice rules for California superior courts.\(^{224}\) This Note contends that these pre-trial rules provide California superior courts with the authority to adopt compulsory arbitration as part of mandatory settlement procedures.\(^{225}\)

\(^{218}\) See note 17 & accompanying text supra.


\(^{222}\) See, e.g., In re Marriage of McKim, 6 Cal. 3d 673, 678 n.4, 493 P.2d 868, 870, 100 Cal. Rptr. 140, 142 (1972) “The practical effect of section 4001, therefore, is to remove any restraints of statutory consistency on the Judicial Council’s rules of practice and procedure under the Family Law Act.” Id.

\(^{223}\) Cal. Civ. Proc. Code § 575 (West Supp. 1977) provides in its entirety that "The Judicial Council may promulgate rules governing pre-trial conferences, and the time, manner and nature thereof, in civil cases at-issue, or in one or more classes thereof, in the superior courts and in the municipal courts." (emphasis added).


\(^{225}\) Santa Clara County Superior Court followed this procedure. See note 125 & accompanying text supra.
Preemption

The threshold question that must be answered is whether the enactment by the legislature of the Judicial Arbitration Statute has preempted the field of judicial arbitration in California.\textsuperscript{226} If there has been such preemption, compulsory arbitration could not be implemented by either the Judicial Council or local rule. Absent preemption, and with an alternative source of authority, local courts could proceed in the direction of compulsory arbitration.

The Judicial Arbitration Statute should be construed as a statement of intent by the legislature, rather than an attempt to preempt the field of judicial arbitration. Although in the form of an authorization, it seems reasonable to view the statute as intended to encourage the Judicial Council to experiment with a judicial arbitration program. The restraint of the legislature from entering into specifics beyond the situations to which arbitration could be applied\textsuperscript{227} points to the suggestive rather than preemptive character of the statute. The legislature has delegated rulemaking power to the Judicial Council, along with full rights of implementation, as demonstrated by the extensive rules promulgated by the Judicial Council pursuant to the statute.\textsuperscript{228} There is nothing to indicate that the grant of power to the Judicial Council adds anything to the Council's already extensive rulemaking power or is in lieu of the implementation powers available to it under other statutes, in particular Code of Civil Procedure section 575.\textsuperscript{229}

The Judicial Council's rulemaking power over pre-trial procedures under section 575 appears to be plenary, because of the legislative authorization to issue rules governing not only the time and manner but also the "nature" of pre-trial procedures.\textsuperscript{230} If, as suggested, the Judicial Arbitration Statute was not intended by the legislature to preempt any powers already vested in the Judicial Council but merely to suggest use of those powers toward a specific end, the Judicial Council appears free to authorize compulsory arbitration as part of mandatory settlement procedures prior to trial.

Among the considerable number of pre-trial practice rules issued by the Judicial Council under section 575 is Rule of Court 207.5, which provides for the creation of a settlement calendar in superior

\textsuperscript{226} See Turlock Golf & Country Club v. Superior Court, 240 Cal. App. 2d 693, 700, 50 Cal. Rptr. 70, 75 (1966), where the court determined that "the Legislature . . . has prescribed the conditions under which a jury may be waived, and . . . the local courts have no power to adopt or enforce rules at variance with those of the state. This field has been preempted by the Legislature . . . ." See also Cantillon v. Superior Court, 150 Cal. App. 2d 184, 188-89, 309 P.2d 890, 893 (1957).

\textsuperscript{227} See note 164 & accompanying text \textit{supra}.

\textsuperscript{228} See \textit{Cal. R. Ct.} 1601-17 (West Supp. 1977).

\textsuperscript{229} See notes 221, 223 & accompanying text \textit{supra}.

\textsuperscript{230} \textit{Id}. 
court by invitation of the parties. Although Rule of Court 207.5 does not specifically authorize mandatory settlement conferences, the rule states that "[t]he settlement procedure provided in this rule is not intended to be exclusive, and local settlement procedures after the completion of pre-trial proceedings are expressly authorized if consistent with these rules."231 This rule should be read in conjunction with Rule of Court 244.5 which empowers the presiding judge to "prepare . . . such . . . local rules as are required to expedite and facilitate the business of the court . . . ."232 Considered together, these two rules provide authority for superior courts to initiate local settlement procedures for the purpose of alleviating backlog and delay.

The type of "local settlement procedures" referred to in Rule of Court 207.5 are indicated by the Judicial Council in its Recommended Standards of Judicial Administration.233 Issued pursuant to constitutional authority234 these recommended standards include mandatory settlement conferences.235 The standards not only require the active participation of the litigants in the settlement conference but also require an itemized list of special damages and, in a personal injury case, a settlement offer.236

Compulsory judicial arbitration fits within the definition of a mandatory settlement conference. It is, not only mandatory but also, in effect, a temporary settlement. This form of settlement is accomplished through the determination of a parajudicial officer, after a hearing under relaxed rules. Unlike a traditional settlement, a judicial arbitration award is temporary; if either party requests trial de novo, the award is vacated.

California Code of Civil Procedure section 575 authorizes the Judicial Council to promulgate rules governing the "nature" of pre-trial conferences.237 The conclusion that a compulsory arbitration procedure is a temporary settlement authorized by existing pre-trial rules is supported by the Judicial Council's interpretation of the "nature" of pre-trial conference procedures evidenced by Rules of Court 207.5 and 244.5, as well as by its recommendation of mandatory settlement conferences.238

234. See note 220 & accompanying text supra.
236. Id.
237. See note 223 & accompanying text supra.
238. See notes 232-35 & accompanying text supra. SANTA CLARA COUNTY SUPER. CT. R. 23, which adopted compulsory arbitration by local rule, has not been challenged to date. See note 125 & accompanying text supra.
Consistency With Statutes and Judicial Council Rules

Even if the legislature has not preempted the field of judicial arbitration and the Rules of Court authorize adoption of compulsory arbitration, the question still arises whether a local rule adopting compulsory arbitration would be in conflict with statutes or Judicial Council Rules. Under California Government Code section 68070, every local court may "make rules for its own government and government of its officers," limited only by the requirement that such rules not be "inconsistent with law or with the rules adopted and prescribed by the Judicial Council." The courts have not developed a concise rule of consistency. In general the courts compare the language of the local rule to the language of the relevant statute or rule of the Judicial Council. If plainly contrary the local rule will be found invalid under Government Code section 68070. In applying the plainly contrary test, courts seek to determine whether the comparison of language suggests that the statute or rule is the exclusive procedure or whether the local rule is a permissible supplement thereto.

239. CAL. GOV'T CODE § 68070 (West 1976). See, e.g., Turlock Golf & Country Club v. Superior Court, 240 Cal. App. 2d 693, 699-700, 50 Cal. Rptr. 70, 75 (1966) (local rule requiring deposit of jury fees and mileage in excess of statutory amount held invalid); Wisniewski v. Clary, 46 Cal. App. 3d 499, 504, 120 Cal. Rptr. 176, 180 (1975) (local rule requiring parties to be present at mandatory settlement conference valid and not inconsistent with statute providing that a party may not be forced to be personally present at trial); Cantillon v. Superior Court, 150 Cal. App. 2d 184, 187-88, 309 P.2d 890, 892-93 (1957) (local rule providing sanctions when attorney fails to attend or prepare for pre-trial conference valid in absence of specific statutory sanction in pre-trial procedures); 1 B. WITKIN, CALIFORNIA PROCEDURE, COURTS § 129 at 399-400 (2d ed. 1970).


242. See, e.g., Sousa v. Capital Co., 220 Cal. App. 2d 744, 34 Cal. Rptr. 71 (1963). "The court has an inherent power of control over its proceedings and may enforce any order it makes . . . . There is nothing in the [statute] that makes it the exclusive method . . . ." Id. at 755, 34 Cal. Rptr. at 77-78.

rule will be found invalid if it is inconsistent with a discoverable legislative purpose.244

On the one hand, even though the Judicial Arbitration Statute is silent on compulsory procedures, compulsory arbitration by local rule can be viewed as plainly contrary to the Judicial Arbitration Statute because it would compel plaintiffs to arbitrate without election. This argument is supported by the fact that the legislature considered and rejected one form of compulsory arbitration sponsored by the Judicial Council when enacting the final legislation.245 On the other hand, the statutory language provides no explicit indication that plaintiff's election or both parties' stipulation is the exclusive246 method of judicial arbitration in California. By considering and rejecting one form of compulsory arbitration, the legislature may not have intended to reject all forms in every California jurisdiction. Absent any definitive statement on this subject, a myriad of reasons are possible. For example, the legislature could have rejected the procedure proposed by the Judicial Council247 because it believed that the limitation to personal injury cases involving special damages of $1,000 or less was an improper or inflexible standard; or it may have considered statewide application of this compulsory procedure to be either unnecessary or unwarranted. The absence of a positive declaration, the brevity of the enactment and the legislative silence as to a compulsory procedure arguably permit the Judicial Council and local courts to adopt this type of plan as a supplementary procedure.

Local rules adopting compulsory arbitration as part of mandatory settlement procedures must also be consistent with Judicial Council rules248 governing judicial arbitration and pre-trial procedures. Judicial Council rules governing judicial arbitration are silent on the adoption of compulsory procedures. The Judicial Council rules expressly authorize the superior courts to enact local rules to expedite the business of the courts249 and to develop local settlement procedures. This silence, coupled with the express authorizations,250 suggests that a local rule adopting compulsory arbitration would not be held contrary to Judicial Council rules.

244. Cf. Butterfield v. Butterfield, 1 Cal. 2d 277, 34 P.2d 145 (1934) (requirement of points and authorities on motion for change of venue goes beyond the statutory provision but is not inconsistent); Helbush v. Helbush, 209 Cal. 758, 290 P. 18 (1930) (rule not inconsistent with statute and therefore valid).
245. See notes 156-61 & accompanying text supra.
246. See note 242 supra.
247. See note 156 & accompanying text supra.
248. See note 239 & accompanying text supra.
249. See note 232 & accompanying text supra.
Even if not plainly contrary to statute or Judicial Council rule, a local rule that goes beyond the specific authorization must further the legislative or Judicial Council purpose in adopting the relevant statute or rule. Otherwise, it will be treated as inconsistent and therefore void. In *Butterfield v. Butterfield*251 the California Supreme Court indicated that a local rule that goes beyond a statutory provision is not inconsistent if it is a reasonable provision in furtherance of the legislative purpose. The legislative purpose in adopting pre-trial conference procedures was to expedite litigation and overcome court congestion.252 Other pre-trial procedures have not succeeded in achieving this legislative purpose as congestion and delay have actually increased since adoption of these procedures in 1955.253 Consequently, compulsory arbitration with right to jury trial de novo is a reasonable provision in furtherance of the legislative purpose in adopting the pre-trial conference statute because it is a proven method of reducing court congestion that preserves the right to a jury trial.254

In addition, although compulsory arbitration would not be enacted under the terms of the Judicial Arbitration Statute, it finds additional support in the expressed legislative purpose behind the statute. Although the statute on its face is silent as to legislative purpose, the Senate resolution that spawned the bill eventually enacted indicates a concern for the delay and high cost of civil litigation.255 Because compulsory arbitration will more quickly reduce delay and high costs than an essentially voluntary procedure,256 it is consistent with the continuing legislative expression of concern over the congestion and expense of the civil justice system.257

Unreasonable Hardship

A local rule that is not plainly contrary to statute and that

251. 1 Cal. 2d 227, 228, 34 P.2d 145 (1934).
253. No statistics on backlog were published by the Administrative Office of the California Courts for the years 1955-65. Even if pretrial procedures assisted in reducing delay and backlog during that period, however, these procedures were not sufficient to offset the substantial demand on the courts between 1965 and 1975. Between those years there was a 44.5% increase in superior court complaint filings, a 43.2% increase in dispositions with a corresponding 330% increase in backlog from 23,436 cases awaiting trial in 1965 to 77,421 in 1975. 1976 JUDICIAL COUNCIL REPORT, supra note 20 at 100 (Table XVII), 104 (Table XVIII), 110 (Table XXII).
254. See note 263 & accompanying text infra.
255. See note 9 supra.
256. See notes 208-15 & accompanying text supra.
furthered the legislative purpose would still be found invalid if it caused unreasonable hardships.\textsuperscript{258} In adopting a compulsory procedure a local court imposes judicial arbitration on plaintiffs without their election as an intermediary procedural step before the right to a final adjudication at a trial de novo. There is a disadvantage to a plaintiff who must go through two hearings and experience a sixty to ninety day delay while the case is arbitrated before there is a right to appeal to a trial de novo. Consequently, litigants in the five percent of arbitrated cases subsequently tried to a verdict\textsuperscript{259} are at a disadvantage. The hardships, however, would not seem to be unreasonable.\textsuperscript{260} First, a local rule similar to Santa Clara's would impose no cost or other deterrent for taking an appeal.\textsuperscript{261} Second, a delay of another sixty to ninety days does not seem excessively burdensome in light of the current average delay of approximately twenty months to trial from at-issue filing in the civil courts and the expected increase in delay.\textsuperscript{262}

Right to Trial by Jury

The final hurdle for compulsory judicial arbitration is constitutional in nature. Is judicial arbitration with right to trial de novo an effective denial of a civil jury trial as guaranteed by Article I, Section 16 of the California Constitution? No California court has directly addressed this question. The Pennsylvania Supreme Court, however, upheld that state's compulsory arbitration statute in the Smith Case,\textsuperscript{263} finding that it was not violative of a constitutional provision similar to California's. The court found that compelling arbitration would be a denial of trial by jury and due process only if the arbitrator's award was a final determination of the rights of the parties: "[T]here is no denial of the right to trial by jury if the statute preserves the right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal."\textsuperscript{264} The court cited Capital Traction Co. v. Hof,\textsuperscript{265} which came to a similar conclusion under the seventh amendment of the United States Constitution. There, the United States Supreme Court held that

\textsuperscript{258} See Butterfield v. Butterfield, 1 Cal. 2d 227, 228, 34 P.2d 145 (1934).
\textsuperscript{259} See note 200 & accompanying text supra.
\textsuperscript{260} See Smith Case, 381 Pa. 223, 112 A.2d 625, appeal dismissed sub nom. Smith v. Wissler, 350 U.S. 858 (1955) (even the requirement of repaying arbitrators' fees, if not excessive, was not a burdensome condition to the right to a trial de novo).
\textsuperscript{261} See notes 139-40 & accompanying text supra.
\textsuperscript{262} See notes 16-19 & accompanying text supra.
\textsuperscript{264} 381 Pa. at 230, 112 A.2d at 629.
\textsuperscript{265} 174 U.S. 1 (1899).
denying a civil jury trial in cases before a justice of the peace does not violate the right to a common law jury trial if the parties have the right to appeal to a court of record in which a jury trial is available.

The Pennsylvania court went on to hold that a procedure that allowed an eventual trial by jury in theory but denied it in practice was as impermissible as a direct denial. Therefore, the right of appeal to a trial de novo following arbitration "must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable."\[266] The court, however, specifically found that a reimbursement of the arbitrator's fee as a "deterrent on the taking of frivolous and wholly unjustified appeals" was not a burdensome condition of appeal unless excessive.\[267]

Analogous California decisions involving the due process right to counsel in small claims court suggest that the California courts would not find arbitration with right to trial de novo an effective denial of a jury trial. In *Brooks v. Small Claims Court*\[268] the California Supreme Court held that denying the right to counsel in small claims court does not violate due process "as long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceeding . . . [that is, if the defendant] has a right to appeal to the superior court where he is entitled to a trial de novo . . . [and to] . . . appear by counsel."\[269] The language of this decision, however, suggests that

\[266\] 381 Pa. at 231, 112 A.2d at 629.
\[267\] 381 Pa. at 233, 112 A.2d at 630. Under the particular facts of the *Smith Case*, however, the $75 reimbursement of the arbitrator's fee was held to be excessive when the damage claimed was $250.
\[268\] 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973).
\[269\] Id. at 665-66, 504 P.2d at 1252, 105 Cal. Rptr. at 788, (quoting Prudential Ins. Co. v. Small Claims Court, 76 Cal. App. 2d 379, 382, 173 P.2d 38, 40 (1946)). See also former CAL. CIV. PROC. CODE § 117j (West 1972) (repealed 1976) which provided that: "[t]he judgment of said [small claims] court shall be conclusive upon the plaintiff. If the defendant is dissatisfied, he may . . . appeal to the superior court of the county in which said court is held. He shall pay, for filing the papers in the superior court, the same fee as is charged and collected on the appeal of a civil action from a justice court, and if final judgment is rendered against him in such superior court, then he shall pay, in addition to said judgment, an attorneys fee to the plaintiff in the sum of . . . $15. No fee shall be charged in the superior court upon the filing of any document or paper by the plaintiff in a small claims action." Subsequent to *Brooks* CAL. CIV. PROC. CODE § 117j was modified, 1975 Cal. Stats. c. 266 § 2, c. 990 § 2, and then repealed, 1976 Cal. Stats. c. 1289 § 1. The current statute is CAL. CIV. PROC. CODE §§ 117.8, 117.10 (West Supp. 1977) (added by 1976 Cal. Stats. c. 1289 § 2) (the defendant shall pay the same filing fee as for the appeal of a civil action from a justice court). See also, Comment, Application of Procedural Due Process Standards to Small Claims Courts' Judgment Appeal Bond Requirements, 62 CALIF. L. REV. 421 (1974).
the California courts might be more likely than the Pennsylvania courts to find appeal conditions unconstitutionally burdensome. The court found unconstitutional the statutory requirement that the defendant post a bond in the amount of the small claims court judgment as a condition of appeal. Such an undertaking "constitutes a taking of property prior to a due process hearing with right to counsel .... This deprivation is indeed a taking, in spite of its temporary nature.”

This reasoning may have helped shape the California Rules of Court and the Santa Clara local rules governing judicial arbitration. Neither contain provisions for appeal bonds or reimbursement of arbitrators’ fees as a condition to the right of a trial de novo. Because the procedure has dispensed with all such conditions, both the Judicial Arbitration Statute and local rules compelling arbitration in a form similar to that employed in Santa Clara would most likely be upheld in California.

In sum, local courts have the authority to adopt compulsory arbitration as part of mandatory settlement procedures pursuant to Code of Civil Procedure section 575 and Judicial Council Rules of Court 207.5 and 244.5. Furthermore, as required by Government Code section 68070, the adoption of compulsory arbitration by local rule of court is not inconsistent with the Judicial Arbitration Statute or the Pre-Trial Conference Statute, or the Judicial Council rules promulgated pursuant to these statutes. Finally, compulsory judicial arbitration is not an effective denial of a civil jury trial because the only burden on the right to a trial de novo following a judicial arbitration award is the slight delay involved.

270. 8 Cal. 3d at 667, 504 P.2d at 1253, 105 Cal. Rptr. at 789. See note 269 supra.
271. 8 Cal. 3d at 667, 504 P.2d at 1253, 105 Cal. Rptr. at 789 (1973).
272. But cf. notes 139-40 & accompanying text supra with notes 177-79 & accompanying text supra.
273. This conclusion is further supported by a 1976 United States Supreme Court decision, Ludwig v. Massachusetts, 427 U.S. 618 (1976), which upheld the Massachusetts two-tier court system in the face of an attack under the Sixth Amendment to the United States Constitution. Under that system, a person accused of certain crimes is tried in the first instance in a lower tier where no trial by jury is available and is thereafter entitled to a trial de novo by jury in a second tier. The Court held that this procedure does not deprive the accused of his Sixth Amendment right to jury trial nor unconstitutionally burden exercise of that right by imposing the financial cost of an additional trial.
274. See CAL. CIV. PROC. CODE § 1141.10 (West Supp. 1977) & text accompanying note 245 supra.
275. See CAL. CIV. PROC. CODE § 575, CAL. R. CT. 1600-17 & text accompanying notes 248-54 supra.
Conclusion

The trial bar should aggressively utilize California's new arbitration procedures as promulgated under the Judicial Arbitration Statute. Because these procedures are essentially voluntary, the initiative of the bar will be critical to the success of judicial arbitration in California. There is strong demonstrable and empirical evidence from several jurisdictions indicating that judicial arbitration is able to deliver effective justice in that it is fair, expeditious, and economical. It has also been shown to be a highly workable solution to the serious problems of delay and backlog in the civil justice system. Moreover, judicial arbitration is capable of producing these results without a radical change in either substantive or procedural law. By throwing its support to this new procedure, the bar will help to shape the disposition of uncomplicated, low value civil cases before a perhaps less desirable alternative is imposed on the legal community by the public through the legislature. In addition, the public image of the legal community can only be improved if a large number of attorneys agree to act as arbitrators.

Notwithstanding these strong reasons for the bar's support and use of these voluntary arbitration procedures, past experience indicates that the predictable caution of the bar toward a nontraditional program will most probably result in limited utilization of judicial arbitration. This cautiousness will seriously delay the full beneficial effects of judicial arbitration at a time when California superior courts are threatened with increased backlog and delay. For these reasons and because ample evidence exists that judicial arbitration achieves effective justice, the legislature should replace voluntary with compulsory judicial arbitration. In the absence of legislation local courts should adopt compulsory arbitration by local rule patterned to their specific needs, perhaps modeled after the Santa Clara Compulsory Arbitration Procedure. Most California superior courts should seriously consider adopting compulsory arbitration rules because all but three have an elapsed time from at-issue memorandum to trial greater than the six months guideline established by the California Judicial Council.276

The use of the compulsory form of judicial arbitration will ensure not only that effective justice is delivered to litigants who participate in arbitration but also that those disputants remaining within the traditional civil justice system will benefit from reduced congestion in the courts.

276. See note 17 & accompanying text supra.
Continued debate over comprehensive procedures to improve judicial administration in California appears inevitable. In the meantime, the public can demand no less than the bar’s enthusiastic support of the proven remedy: judicial arbitration with the right to trial de novo.

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