North Dakota Law Review

Volume 73 | Number 3 Article 2

1997

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DON'T RUSH TO JUSTICE: AN ARGUMENT AGAINST BINDING NORTH DAKOTA COURTS TO ARBITRATION

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I. INTRODUCTION

Ever since the mid 1980s, legal scholars, practitioners, and judges have debated the phenomenon known as the "litigation explosion."[1] Whether this problem is real or merely perceived, several proposals have been forwarded as a cure for the ailing litigation patient. One area which has often been discussed is alternative dispute resolution.[2] Alternative dispute resolution, or ADR, is a popular set of theories; ADR has become a buzzword during the last decade and has emerged as the possible savior of the over-crowded docket.[3] Many forms of ADR have been developed over the years, including mediation, arbitration, mini-trials, and summary jury trials. Each one of these different forms was used to speed up the litigation process and decrease costs. Some proponents of ADR looked to join the alternative dispute resolution process with existing courts as a new means of providing justice. In the narrower ADR field of arbitration, this melding of new and old saw the birth and growth of court-annexed arbitration.

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1. The literature discussing this debate is voluminous. It is unnecessary to discuss in detail the various sides of this debate; suffice it to say that in the last fifteen years, the number of civil filings in federal court has dramatically increased. For a discussion for the reasons behind these increases, *see* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5-11 (1983) and Harry T. Edwards, *Alterative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (1986). *See also* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 51 (3d ed. 1988) (discussing the litigation explosion); Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 83 (1991) (discussing how, from 1970 to 1986, civil filings in federal courts increased from 82,665 to 254,249, an increase of 208%) (citing Bator, *infra* at 51).

2. Sharon A. Jennings, Note, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or "Second Class" Justice*, 6 OHIO ST. J. ON DISP. RESOL. 313 (1991).

3. Edwards, *supra* note 1, at 668.

Arbitration provides, in many instances, a more readily accessible and financially feasible means of resolving disputes[4] while providing a system which is designed to shorten judicial proceedings.[5] In the 1980s, many federal and state courts[6] chose to implement court-annexed arbitration programs.[7] This system has mainly been used to alleviate overcrowded dockets[8] and quickly dispense with matters which do not involve the possibility of large monetary awards.[9] Although the system of court-annexed arbitration is hardly new, questions regarding its application to many state courts still remain.

This article will review the constitutionality of court-annexed arbitration, examine policy considerations for and against the procedure, and discuss the applicability of a court-annexed arbitration program in less-populated jurisdictions, where resources are limited and the jurisdiction's courts still operate with relative efficiency.

II. WHAT IS COURT-ANNEXED ARBITRATION AND WHY SHOULD IT BE UTILIZED?

A. HISTORY OF COURT-ANNEXED ARBITRATION

Generally, as a means of settling disputes, arbitration has long been an important element of the American legal system.[10] The use of arbitration as a dispute settlement tool started in earnest with the passage of arbitration acts in several important commercial states.[11] This led to the creation and passage of the Uniform Arbitration Statute by the

4. *See* Harold H. Bruff, *Public Programs, Private Deciders: the Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 443 (1989) (discussing the advantages of arbitration in areas such as labor relations and citing S. GOLDBERG ET AL., DISPUTE RESOLUTION 189-243 (1985) (discussing arbitration's informality and ease of access) and J. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 383-607 (1988) (discussing and commenting upon the application of arbitration to a broad range of legal considerations)).

5. *See* G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34, 36 (1991).

6. *See* Devine, supra note 1, at 85 (discussing various states which have legislatively adopted ADR programs) (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001 to .073 (Vernon Supp. 1991)).

7. *See* II MARTIN DOMKE, COMMERCIAL ARBITRATION § 1:03 (Gabriel M. Wilner, ed., rev. ed. 1984) (discussing the use of court-annexed arbitration in Pennsylvania, California, and New York).

8. *See id.* (citing Maurice Rosenberg & Myra Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961)).

9. *See* 42 PA. CONS. STAT. ANN. § 7361(b)(2) (West 1982). This is known more colloquially as the "Philadelphia Plan," and provided for arbitration of suits with less than $10,000 in controversy. *See* E.D. PA. R. CIV. P. 49 (1978) (currently codified as E.D. PA. R. CIV. P. 8 (1988)). The federal court has altered the original "Philadelphia Plan" to require arbitration for any dispute with less than $75,000 in controversy.

10. *See generally* Bruce Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 445 (1984) (discussing the use of arbitration as a common law form of dispute resolution during the seventeenth century).

11. *See* Domke, *supra* note 7, § 4:02.

Conference of Commissioners on Uniform Laws in 1924.[12] Thirty years later, the Uniform Arbitration Act was drafted and accepted by the American Bar Association.[13] This act, which was amended in 1956, has been adopted by twenty six states.[14]

The acceptance of the Uniform Arbitration Act and the use of arbitration as a means of settling disputes led Pennsylvania, in 1951, to enact a compulsory court-annexed arbitration program for all cases with less than $1,000 in controversy.[15] These steps in turn compelled the Department of Justice[16] in 1978 to direct an experiment to create a court-annexed arbitration program in three federal district courts.[17]

B. COURT-ANNEXED ARBITRATION PROCEDURES GENERALLY

Court-annexed arbitration is the procedure where a court in which a suit is filed compels the parties to enter into arbitration.[18] Initially, these programs were established through local rules of court,[19] but today, most programs have become creatures of statute.[20] Court-annexed arbitration programs are generally used as a condition precedent for a trial, particularly jury trials.[21] The arbitrator's award is accepted as a judgment and

12. *Id.* This draft was accepted by several states, including Nevada, North Carolina, and Wyoming. NEV. REV. STAT. ANN. §§ 38.015 to .205 (Michie 1996); N.C. GEN. STAT. §§ 1-567.1 to -567.20 (1996); WYO. STAT. ANN. §§ 1-36-101 to -36-119 (Michie 1997).

13. Domke, *supra* note 7, § 4:02 (citing Maynard E. Pirsig, *The New Uniform Arbitration Act*, 11 BUS. LAW 44 (1956), and Maynard E. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 VAND. L. REV. 685 (1957)).

14. *See id.*

15. Paul Nejelski & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 793-94 (1983) (citing Act of June 14, 1952, 1951 P.A. Laws 590 (codified at 42 PA. CONS. STATS. ANN. § 7361(b)(2) (West 1982)). The amount in controversy has been subsequently raised to $10,000. *Id.*

16. A. Leo Levin & Deidre Golash, *Alternative Dispute Resolution in Federal District Court*, 37 U. FLA. L. REV. 29, 32 (1985).

17. *Id.* at 32 (citing Paul Nejelski & Andrew S. Zeldin, *supra* note 15, at 799). The program was expanded in 1984 to eight more district courts. *Id.*

18. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 7361(b)(2) (West 1982) (requiring arbitration for any suit of less than $10,000 in controversy); E.D. PA. R. CIV. P. 8 (1988) (requiring arbitration for any suit of less than $75,000 in controversy); *see also* BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 134-37 (1990) (detailing the court-annexed arbitration procedures and the parties for which the plan is available for the ten federal district courts which have adopted plans).

19. E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS xii (rev. ed. 1983).

20. *See* Jennings, *supra* note 2, at n.6 (discussing the methods in which court-annexed arbitration programs have been established in several federal district courts and by several state legislatures).

21. Devine, *supra* note 1, at 91.

following a period of time which allows for filing an appeal, the judgment is entered and the suit ceases.[22]

Court-annexed arbitration systems are generally created with three goals in mind: 1) to alleviate over-crowded court dockets;[23] 2) reduce the costs of litigation;[24] and 3) reduce the number of cases that ultimately go to trial.[25] To achieve these three goals, specific criteria are often used to determine if a case should be sent to arbitration.[26] Criteria often used are the subject matter of the suit, complexity of the litigation, and the monetary value of the case.[27] Most mandatory programs require any suit falling into a specified category to be submitted to arbitration before the suit can go to trial.[28]

Once a case is selected for arbitration,[29] a hearing is generally held within a few days,[30] involving one or a panel of arbitrators.[31] Often, time for presentation of cases is strictly limited, due to the goal of eliminating

22. *Id.* In the federal district for the Eastern District of Pennsylvania, the party requesting the arbitration must post a deposit in the amount of the arbitrator's fee.. E.D. PA. R. CIV. P. § 2. If the party requesting the trial *de novo* does not succeed in improving the arbitrators award, the fee is forfeited to the government. *Id.* However, because the arbitrator's fee is generally around $225, it does not amount to a great fine, especially in cases involving large monetary amounts. *See* Levin & Golash, *supra* note 16, at 33 (discussing the procedural details of the Federal District Court of the Eastern District of Pennsylvania).

23. Domke, *supra* note 7, § 1:03.

24. Levin and Golash, *supra* note 16, at 33.

25. *Id.* (citing E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 5 (rev. ed. 1983)); *see also* Lynn A. Kerbeshian, *ADR: To Be Or . . . ?*, 70 N.D. L. REV. 381, 402 (1994) (discussing the goals of court-annexed arbitration programs).

26. Jennings, *supra* note 2, at 314 (citing K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN 8 (1984); D. HENSLER ET AL., JUDICIAL ARBITRATION IN CALIFORNIA 12-13 (1981); Levin & Golash, *supra* note 17, at 32-33; A. Leo Levin, *Court-Annexed Arbitration*, 16 MICH. J. L. REF. 537, 538 (1983)).

27. *See* 28 U.S.C. § 652(a)(1)(B) (1994) (providing that only cases involving $100,000 or less in damages can be submitted to arbitration in federal courts).

28. Jennings, *supra* note 2, at 314 (citing CAL. CIV. PROC. CODE § 1141.16(1) (West 1992); N.D. CAL. R. 500-3(a); D.N.J.R. 47 (C)(1); N.C. CT. ORD. ARB. R. 8(e)).

29. Generally speaking, the clerk of court or court administrator selects cases to be scheduled for arbitration and notifies the parties. *See id.* (discussing the local rules of several federal district courts). By having the court establish criteria and select the cases which are entered into the arbitration process, no particular advantage is created for either party. This can be contrasted with traditional settlement negotiations, where one party initiates the negotiations and such an initiation is often considered a sign of weakness. *Id.* Such a process serves both the interests of the parties and the judicial system. *Id.*

30. *See* 28 U.S.C. § 653(b) (1994) (providing that a hearing must be held within 180 days after the answer is filed).

31. Arbitrators are often selected by the parties and the particular arbitrator is generally selected because he or she possesses particular expertise in the area of law involved in the arbitration. N.D. CAL. R. 500-4(a). The ability to select the arbitrators is often seen as a great advantage for court-annexed arbitration because it allows for greater party involvement in the process and thus increasing satisfaction in the result. *See* Devine, *supra* note 2, at 83 (discussing the benefits of party involvement in ADR). However, if the parties are unable to agree on an arbitrator or arbitrators, in the case of a panel arbitration, the court may appoint the arbitrators. *Id.*

lengthy proceedings.[32] Following presentation, the arbitrator enters an award as a judgment and this award stands unless a party moves to vacate the award within a set period of days.[33] If a party chooses to reject the arbitration award and proceed to a trial *de novo*,[34] the case is generally placed back on the court's docket as if it had never been submitted to arbitration.[35]

Proponents of court-annexed ADR often, as a criticism of the adversarial system, point out the greatest benefit of arbitration is that it is more of a conciliatory process.[36] Thus, personal relationships are not as damaged following an arbitration as they often are following a trial.[37] Because of flexibility, ADR generally and arbitration specifically provide for a resolution which restores and protects the parties' relationship.[38] Some have even gone so far as to say the use of ADR will benefit society, in that it will teach people to settle their disputes without involving third parties.[39] Despite such lofty expectations, it remains to be seen whether ADR is the miracle all peace-loving people have waited for. Nevertheless, it is often true that a court-annexed arbitration program can push parties into settlement negotiations in cases where the parties had previously been deadlocked.[40]

32. LIND & SHAPARD, *supra* note 19, at 103-04 (citing D. CONN. R. § 7(g), (k) (stating that all proceedings are limited to two days for presentation of witnesses, proof of claims, and all arguments)).

33. *See, e.g.*, 28 U.S.C. § 655(a) (1994) (requiring that all motions to vacate an arbitration award must be filed within 30 days of entry of judgment).

34. Once an arbitrator's award is refused, the arbitration proceedings can be of no evidentiary use to any party during trial. 28 U.S.C. § 655(c) (1988). This section states:

> (c) Limitation on Admission of Evidence. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding.

Id.

35. However, under most federal local rules, it is important to note a trial *de novo* must be requested within 30 days of the filing of the arbitrators award. 28 U.S.C. §§ 654(a), 655(a) (1988). This is done as an effort to eliminate, as much as possible, any delay which the arbitration causes. *See* 28 U.S.C. § 655(b) (1988); Jennings, *supra* note 2, at 313 (discussing why courts place arbitration cases in which the arbitrator's award is refused back on the docket in quick fashion).

36. *See* Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1091 (1990) (explaining that litigation may resolve legal disputes, but because of its very adversarial nature, litigation often cannot dissipate other problems which may damage the parties' relationship permanently).

37. *Id.*

38. *See* Devine, *supra* note 1, at 89 (discussing the flexibility of ADR); *see also* Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989).

39. Frank E. A. Sander, *Diversifying Legal Solutions*, 35 HARV. L. BULL. 3, 4 (1984).

40. *See* Department Trans. v. City of Atlanta, 380 S.E.2d 265, 267 (Ga. 1989) (stating that court managed ADR programs are often welcomed by all parties as a means of alleviating a hopeless stalemate); *see also* Jennings, *supra* note 2, at 314 (discussing ADR as a settlement tool).

C. CONSTITUTIONAL PROBLEMS

There have been a variety of constitutional challenges to arbitration statutes and court-annexed arbitration.[41] The constitutionality of arbitration, many commentators stated, was the most difficult issue to resolve when court-annexed arbitration was in its infantile stage.[42] Some argued the use of mandatory court-annexed arbitration was a deprivation of a litigant's fundamental rights.[43] First and foremost, a court-annexed arbitration program which binds the litigants to the arbitrator's decision and acts as a complete substitute for trial would be unconstitutional.[44] Such a system would effectively be a denial of the Seventh Amendment right to a jury trial. As a result, no court annexed arbitration program, either state or federal, has such a provision.

Because mandatory court-annexed arbitration can be used in a great diversity of cases, it is difficult to draft specific rules that pass constitutional muster to cover every conceivable situation.[45] Thus, a multitude of constitutional challenges were levied against court-annexed programs.

1. Challenges to a Court's Authority in Creating ADR Programs

Several federal statutes have permitted courts to implement arbitration schemes.[46] During the early stages of this process, the constitutional challenge presented was whether Congress could assign a

41. *See* R.D. Hursh, Annotation, *Constitutionality of Arbitration Statutes*, 55 A.L.R.2d 432 (1957).

42. Domke, *supra* note 7, § 4:02.

43. *See* Devine, *supra* note 1, at 92 (discussing the constitutional problems with arbitration); *see also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 39-40 (1987) (stating that alternative dispute resolution procedures do not provide the best means for dispute settlement because of the general lack of procedural safeguards); David A. Rammelt, Note, *"Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L. J. 965, 988 (1990).

44. *See* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 565 (discussing the different constitutional problems in creating and managing court annexed arbitration programs); *see also* Levin & Golash, *supra* note 16, at 45-46 (stating that no federal ADR program can completely deny a litigant the chance to have his or her case presented to a jury).

45. *See* Bruff, *supra* note 4, at 463 (discussing the problems associated with specific rules used to create constitutionality).

46. *See* Meierhoefer, *supra* note 18, at 1-2. This study details the type, number, and disposition of cases that have come before the ten federal district courts which have accepted court-annexed arbitration. *Id.*

private law dispute to a non-Article III court.[47] This issue was resolved in favor of the arbitration programs when the United States Supreme Court stated that a non-Article III court could adjudicate a private dispute, provided that several procedural safeguards were in place.[48] These procedural safeguards required consent by the litigants and a process for an "ordinary appellate review."[49]

Another particular "procedural" area in which federal court-annexed arbitration plans were attacked was on the basis of the rule making authority of the courts. Prior to the adoption of the Judicial Improvements Act,[50] federal court-annexed arbitration programs were created by local rule.[51] Local rules were challenged by contentions that the local rules were not the appropriate vehicle for such wide-sweeping changes and the courts were not granted the authority to order compulsory ADR.[52]

It must first be noted that a district court can make local rules for the management of its official business,[53] but no adopted rule can be in

47. *See, e.g.*, Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985) (discussing the constitutionality of a non-Article III court determining legal rights between private parties). An "Article III court" is a court established in Article III of the United States Constitution. *See* U.S. CONST. art. III.

Problems also existed in early cases involving the United States Arbitration Act and federal cases brought under diversity jurisdiction. *See* Domke, *supra* note 7, § 4:04. The concern was over the result of an action brought in federal court under diversity when the federal court recognized the Uniform Arbitration Act but the state substantive law did not. *Id.* Early questions focused on whether the diversity action was one involving interstate commerce. *Id.* § 4:02. However, despite these concerns, most constitutional challenges have generally failed. In a ruling that was affirmed by the Supreme Court, the Second Circuit Court of Appeals held the United States Arbitration Act created federal substantive law which was clearly constitutional under the commerce clause. Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 406 (2d Cir. 1959).

48. *Thomas*, 473 U.S. at 594.

49. *Id.* at 584.

50. 28 U.S.C. §§ 651 to 658 (1994).

51. *See* Levin & Golash, *supra* note 16, at 32 n.15 (discussing the local rules which established the first three court-annexed arbitration programs in the federal judiciary). Federal courts, pursuant to 28 U.S.C. § 2701, "may from time to time prescribe rules for the conduct of their business" provided these rules are consistent with the Federal Rules of Civil Procedure. Levin & Golash, *supra* note 16, at 49.

52. Jennings, *supra* note 2, at 313.

53. *See* FED. R. CIV. P. 83 (1995). Rule 83 provides:

> (a) Local Rules
>
> (1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with-but not duplicative of-Acts of Congress and rules adopted under 28 U.S.C. § 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.
>
> (2) A local rule imposing a requirement form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure

conflict with the federal rules of civil procedure.[54] Although there is some disagreement among commentators,[55] the former argument is generally a non-issue today because of the adoption of Rule 16 of the Federal Rules of Civil Procedure, which allows courts to adopt procedures which aid in the disposition of cases.[56] The latter argument has

to comply with the requirement.

(b) Procedures When There is No Controlling Law. A judge may regulate practice in any other manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Id.

54. *See* Jennings, *supra* note 2, at 320 (discussing the authority granted courts to establish local rules).

55. The basis of disagreement, it appears, is on the necessity for uniformity in the federal courts. *Compare* 12 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2d § 3152 (1982) (discussing the importance of uniformity in the federal courts, and as a necessary means, advocating the abrogation of several special local rules), *with* Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation or Information?*, 14 LOY. L.A. L. REV. 213, 218-19 (1981) (stating the use of local rules increases the effective management of each court).

56. Rule 16 provides:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation, and;
(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to file motions; and
(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosure under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and
(6) any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate actions, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;
(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the courts on the admissibility of evidence.
(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;
(5) the appropriateness and timing of summary adjudication under Rule 56;
(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rule 29 through 37;
(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
(8) the advisability of referring matters to a magistrate judge or master;
(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;
(10) the form and substance of the pretrial order;
(11) the disposition of pending motions;
(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;
(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and
(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representation be present or reasonably available by telephone in order to consider possible settlement of the dispute.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitation the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.
(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.
(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own good initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C),(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 16.

also been widely dispensed with because of the sweeping powers Rule 16 has granted to the courts. Thus, it has been consistently held that courts with court-annexed arbitration programs have not created a system which conflicts with the federal rules of civil procedure.[57]

2. *Right to Jury Trial, Equal Protection, and Due Process Challenges*

The areas of greatest constitutional concern for court-annexed arbitration focus on the right to a jury trial, equal protection, and due process. The Seventh Amendment grants the right of a jury trial.[58] Furthermore, most state constitutions provide for a similar right in state court.[59] Under the federal system of court-annexed arbitration, no party is ultimately denied the opportunity to have his or her case decided by a jury.[60] To alleviate any problems, most plans designate the arbitration proceeding as a precursor to an actual trial.[61] Following the arbitration, a party may request a trial *de novo*, ensuring constitutionality because the litigant has not been completely denied the right to a jury trial.[62]

57. *See* Tiedel v. Northwestern Michigan College, 865 F.2d 88, 92 (6th Cir. 1988) (holding Local Rule 42, a pretrial mediation program for the Federal District Court for the Western District of Michigan does not conflict with the Federal Rules of Civil Procedure); Kimbrough v. Holiday Inn, 478 F. Supp. 566, 573 (E.D. Pa. 1979) (determining Local Rule 49, Eastern District of Pennsylvania does not conflict with Rules 38 and 39 of the Federal Rules of Civil Procedure).

58. U.S. CONST. amend. VII. The Seventh Amendment reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

59. *See, e.g.*, N.D. CONST. art. I, § 13. Section 13 reads:

> The right of trial by jury shall be secured to all, and remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases, provided that the jury consists of at least six members. All verdicts must be unanimous.

Id.

60. *See* Levin & Golash, *supra* note 16, at 45 (discussing the constitutional concerns of federal court-annexed arbitration).

61. *Id.*

62. *Id.* This procedure of having a trial *de novo* has passed constitutional muster in both state and federal courts. *See, e.g., In re* Smith, 112 A.2d 625, 629 (Pa. 1955). In *Smith*, the Pennsylvania court rejected the claim that the court-annexed arbitration denied the right to a jury trial because the award granted by the arbitrators was not final and the party's right to a jury trial was preserved. *Id; see also* Hursh, *supra* note 41, at 440-42 (discussing the Pennsylvania court-annexed arbitration program and *Smith*); Paul Nejelski & Andrew S. Zeldin, *supra* note 15, at 794 n.38 (detailing the court's holding in *Smith*).

Furthermore, in most federal districts, the arbitration proceedings cannot be submitted as evidence in trial.[63]

Court-annexed arbitration has also been attacked constitutionally on equal protection grounds.[64] The vast majority of these challenges, however, were unsuccessful.[65] In most cases, the courts have been unable to find a suspect classification or restricted fundamental rights, and thus apply a rational basis standard.[66]

Due process challenges have faced similar difficulties.[67] The challenges most often raised have focused on the delays and additional costs that court-annexed arbitration causes in federal court.[68] These challenges failed because there is no fundamental right, in the civil context, to a speedy trial; nor has the United States Supreme Court been favorable to challenges based on the right of access to the courts.[69]

Thus, the constitutionality of mandatory court-annexed arbitration programs has been upheld despite a variety of challenges. However, several commentators have voiced concern on several policy considerations regarding the applicability of court-annexed programs.

D. POLICY CONSIDERATIONS

Arbitration has been accepted by many federal judges as a valid method of dispute resolution.[70] A report from the American Arbitration Association stated civil filings by the year 2020 could reach nearly one million, while in contrast, civil filings in 1993 numbered only 230,000.[71] Moreover, criminal filings, the report states, could possibly reach

63. *See* Levin & Golash, *supra* note 16, at 43. Levin and Golash point out, however, that the District Court for the Eastern District of Pennsylvania allows the use of arbitration proceedings for impeachment purposes. *Id.* Also, the District Court for the Southern District of Ohio allows the use of arbitration proceeding testimony as it would from a pretrial deposition, but does not allow any findings of the arbitrators to be admitted. *Id.*

64. *See* Woods v. Holy Cross Hosp., 591 F.2d 1164, 1172-73 (5th Cir. 1979) (holding that mandatory arbitration does not violate equal protection); Kimbrough v. Holiday Inn, 478 F. Supp. 556, 574-75 (E.D. Pa. 1979) (holding that mandatory arbitration does not treat similarly situated litigants differently); Eastin v. Broomfield, 570 P.2d 744, 751 (Ariz. 1977) (stating that a rational basis exists for the creation of mandatory court-annexed arbitration, and thus the Equal Protection Clause is not violated); Prendergast v. Nelson, 256 N.W.2d 657, 668 (Neb. 1977) (finding that equal protection is not violated by using court-annexed arbitration).

65. *See Woods*, 591 F.2d at 1175 (holding that equal protection was not violated by the application of court-annexed arbitration procedures).

66. *See, e.g., id.* at 1173 (holding that the rational basis standard is the proper level of review for determining the constitutionality of court-annexed arbitration procedures).

67. Levin & Golash, *supra* note 16, at 48.

68. *Id.*

69. *See* Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (holding that a $25 filing fee for appellate review of an agency's decision to reduce a pension was not a denial of access to the courts); United States v. Kras, 409 U.S. 434, 449 (1973) (holding that the federal bankruptcy filing fee of $50 did not amount to a denial of access, even when the claimant was indigent).

70. *See* Kerbeshian, *supra* note 25, at 415 (discussing the use of alternative dispute resolution in federal courts).

71. William K. Slate II, *Arbitration Comes of Age*, AM. LAW., May Supp. 1995, at 7, 12.

100,000 in comparison to the 47,000 filed in 1993.[72] Based on the statistics, it is clear arbitration and other forms of ADR will be a necessary means for resolving disputes in the future.[73] In preparation for this onslaught, twenty-two federal district courts have adopted court-annexed arbitration programs.[74]

A study by the Federal Judicial Center, moreover, found many litigants felt the court-annexed arbitration proceedings provided a beneficial starting point for settlement negotiations and offered realistic views on the value of the suits.[75] The study also found participants did not feel they had received "second-class justice," a common criticism of court-annexed programs.[76] Attorneys and judges also have generally approved of court-annexed arbitration programs.[77] Judges reported a reduction in workloads and voiced overall support for court-annexed programs.[78] Arbitration plans in state courts have also been found to reduce time and costs for various suits.[79]

Despite this general acceptance, there is cause for concern with court-annexed arbitration's application.[80] Because the presentations are generally shorter, it is argued court-annexed arbitration considers fault a lesser issue and de-emphasizes the importance of evidence.[81] Moreover,

72. *Id.*

73. *Id.*

74. *Id.* These district courts are: Northern Alabama, Arizona, Northern California, Southern California, Middle Florida, Middle Georgia, Idaho, Western Michigan, Western Missouri, New Jersey, Eastern New York, Northern New York, Southern New York, Northern Ohio, Western Oklahoma, Eastern Pennsylvania, Western Pennsylvania, Western Texas, Eastern Washington, and Western Washington. *Id.*

75. Meierhoefer, *supra* note 18, at 61-62. However, the study also revealed that less than half of the arbitrated awards were accepted. *Id.* at 62.

76. *Id.* at 82. Eighty-four percent of the attorneys and 80% of all participants approved of the arbitration program. *Id.* Moreover, 80% found the program to be fair. *Id.* at 63.

77. Kerbeshian, *supra* note 25, at 408-411. Kerbeshian cites to studies in Georgia, which showed over all attorney satisfaction in both process and result. *Id.* at 408 (citing Craig Boersema et al., *State Court-Annexed Arbitration: What Do Attorney's Think?*, 75 JUDICATURE 28, 30 (1991)). Also, studies from the Eastern District of Pennsylvania, where 600 attorneys were surveyed, showed that 93% approved of the program. *Id.* (citing Raymond J. Broderick, *Court-Annexed Compulsory Arbitration Providing Litigants with a Speedier and Less Expensive Alternative to the Traditional Courtroom Trial*, 75 JUDICATURE 41, 41 (1991)).

78. Meierhoefer, *supra* note 18, at 111. Ninety-seven percent of the judges surveyed reported a reduction in case load. *Id.*

79. Kerbeshian, *supra* note 25, at 405. Kerbeshian cites a study from Hawaii that found that a precise timetable speeds up time and reduces costs in any arbitration proceeding. *Id.* (citing John Barkai & Gene Kassebaum, *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133, 137 (1991)). Conversely, Kerbeshian references a study in Georgia which reports no dramatic decrease in time and savings. *Id.*

80. *See* Edwards, *supra* note 1, at 674; *see also* The Honorable Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. REV. 229 (1994). Judge Webb states that court-annexed arbitration programs are far from adequate in settling disputes where there are power imbalances, such as suits involving racial minorities. *Id.* at 232. Furthermore, Judge Webb opines that the use of *compulsory* court-annexed arbitration may amount to a deprivation of the litigant's right to a jury trial. *Id.* at 230.

81. Eisele, *supra* note 5, at 36.

it is questionable whether real evidence exists illustrating that court-annexed arbitration applies to all legal issues.[82] Court-annexed arbitration programs are often criticized as an overly-oppressive tool for encouraging settlement.[83] Because over ninety percent of all cases in federal court reach a settlement without going to trial, court-annexed arbitration and other ADR programs are often seen as merely providing the inevitable.[84] In addition, it has been argued court-annexed arbitration should not be used in areas where the law is not fully developed.[85] Some have contended court-annexed arbitration programs succeed best only in family law cases, while others maintained the programs provide a sound settlement tool in many other areas, including cases involving business disputes.[86]

Also, there are genuine concerns over the ability of court-annexed arbitration to reach its stated goal of reduced litigation costs.[87] A study commissioned by the American Bar Association on innovations created as time saving devices had mixed results.[88] The study, published in 1984, showed time saving innovations did reduce the fees of the attorney hired at an hourly rate,[89] but attorneys working on contingent fees did not see a similar reduction.[90] Thus, it appears that defendants, who usually hire attorneys at an hourly rate, receive a reduction in litigation costs,

82. Meierhoefer, *supra* note 18, at 123. This work discusses data generated by the ten federal district courts which have accepted court-annexed arbitration programs. *Id.* at 1. These ten courts are: Eastern Pennsylvania, Middle Florida, Western Missouri, Western Oklahoma, Middle North Carolina, Northern California, Western Michigan, New Jersey, Eastern New York, and Western Texas. *Id.* The data discussed reveals no evidence that arbitration is applicable to all types of cases. *Id.* at 123; *see also* Kerbeshian, *supra* note 25, at 412-13 (stating that the success of arbitration is not yet determined in all legal areas); Webb, *supra* note 80, at 231. However, in the Southern District of New York, that Federal court's mediation program has seen a general success rate of 80% since the program's inception in 1992. Telephone Interview with George O'Malley, United States District Court for the Southern District of New York, in New York, New York (May 21, 1997). This success rate is not limited to one particular type of dispute, but exists as an across the board percentage. *Id.* It should be noted, however, that this statistic is for a mediation, not arbitration program and that Mr. O'Malley did not have statistics for arbitration programs. *Id.*

83. *See* Jennings, *supra* note 2, at 317 (discussing criticism that court-annexed arbitration programs encourage settlement, which is often the most readily achieved resolution, with or without a court-annexed arbitration plan).

84. Levin, *supra* note 26, at 545-57. Professor Levin discusses the settlement rate of civil cases in federal court during the mid 1980s and points out that nearly 93% of all civil cases filed never reach trial. *Id.* However, he does further point out that cases can be terminated in ways other than settlement, such as dismissal. *Id.*

85. Edwards, *supra* note 1, at 680.

86. Kenneth A. Ehrman, *ADR: Why Business Lawyers Should Use Mediation*, 75 A.B.A. J. 73-74 (June 1989).

87. Levin & Golash, *supra* note 16, at 34.

88. *Id.*

89. *Id.* (citing ABA ACTION COMM'N TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY: FINAL REPORT 62-64 (ABA 1984) [hereinafter ABA ACTION COMM'N FINAL REPORT]; ABA ACTION COMM'N TO REDUCE COURTS COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY: PROJECT REPORTS AND RESEARCH FINDINGS, 19, 56, 240-41 (ABA 1984) [hereinafter ABA ACTION COMM'N PROJECT REPORTS]).

90. Levin & Golash, *supra* note 16, at 34-35.

while plaintiffs, particularly personal injury plaintiffs, do not receive the same benefit from court-annexed arbitration. Therefore, it is questionable whether the goal of reduced litigation costs is met because the result does not favor both defendants and plaintiffs equally.

Furthermore, there should be concern about the overtime involved to litigate an action. A stated goal of court-annexed arbitration is an overall reduction in time spent on the action.[91] In order to be constitutional, many court-annexed arbitration programs must allow a trial *de novo*, if requested, following the arbitration.[92] Therefore, if one party is not pleased with the result of the arbitration and files for a trial *de novo*, the time involved would be greater than if the mandatory arbitration was not required. The end result would create a greater commitment of time not only from the attorneys and litigants, but from the court administration as well. Such a result could possibly only further any existing backlog of cases that may exist in the court's system.[93]

Furthermore, there are mixed results from studies that have looked into the ability of court-annexed arbitration to reduce the time of litigation.[94] One study has shown that there is a feeling among most attorneys who have participated in the federal court-annexed arbitration system that the procedure only has marginal results in time reduction.[95] Finally, the evidence is inconclusive as to whether court-annexed arbitration does in fact reduce the number of cases which actually go to trial.[96]

Despite these concerns, however, most federal district judges using a court-annexed arbitration procedure state it is a program which should receive widespread adoption.[97] In addition, most participants, including both litigants and attorneys, have provided favorable statements for the use of court-annexed arbitration.[98] Thus, despite conflicting data, court-

91. *See id.* at 33 (discussing the goals of court-annexed arbitration).

92. *Id.*; *see also* 42 PA. CONS. STAT. ANN. § 7361 (West 1982) (discussing the creation and details of Pennsylvania's court-annexed arbitration procedure).

93. *See* Webb, *supra* note 80, at 230 (stating that court-annexed arbitration would increase litigation time, not decrease it).

94. Meierhoefer, *supra* note 18, at 7-8.

95. *Id.* at 7.

96. *Id.* at 9. The study shows that in the federal district courts using an arbitration proceeding, the reported data was inconclusive as to actual reduction figures. *Id.*

97. *Id.* at 7.

98. Levin & Golash, *supra* note 16, at 33.

annexed arbitration has achieved an adequate success rate.[99] However, a question remains as to whether court-annexed arbitration can achieve similar success in all jurisdictions.

III. IS COURT-ANNEXED ARBITRATION NECESSARY FOR NORTH DAKOTA STATE COURTS?

Currently, North Dakota district courts do not have a formal court-annexed arbitration program.[100] It appears the state wisely chose not to develop a specific plan in the early 1980s when many other court-annexed arbitration programs were developing. By waiting, the courts and the legislature now have the luxury of analyzing the development and success of different programs and determining if such programs would be successful in North Dakota courts.

In fulfilling its goals of alleviating over-crowded dockets, reducing the costs of litigation, and reducing the number of cases that ultimately go to trial, it appears that court-annexed arbitration has been a mild success in many jurisdictions.[101] However, it is important to keep this success in perspective. Consideration must be given to location where the program is instituted. In Philadelphia County in 1951, there were 7,000 cases backlogged when the county instituted its Philadelphia Plan.[102] With those numbers in mind, a review of civil filings in North Dakota demonstrates the difference between North Dakota courts and those in more metropolitan areas. In the North East Central Judicial District for North Dakota, the statistics from 1990 to 1995 show that 1,556 cases were filed in 1990, 1,544 in 1991, 1,484 in 1992, 1,440 in

99. *Id.* For example, during the first few years that the Eastern District of Pennsylvania operated its court-annexed arbitration program, 18% of all cases that were filed were terminated within one year. *Id.* (citing E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 1-5 (rev. ed. 1983)). The study cited by Levin and Golash also noted that the 18% figure was misleading, because on a monthly basis the number of early terminations was not determined as the plan progressed. *Id.* at 34. As the program grew over time, the number of early terminations greatly increased. *Id.* There were 7,881 cases placed in the system between 1978 and 1984. *Id.* at n.31. Of these, 7,088 had been terminated by arbitration and 142 were terminated by a trial *de novo*. *Id.* Furthermore, the overall juror costs for the Eastern District of Pennsylvania dropped from $2.4 million in 1979 to $1.24 million in 1984, thus reducing the overall operating costs of the court. *Id.* at 31.

100. The issue of creating a court-annexed arbitration program has been discussed by the North Dakota Joint Dispute Resolution Study Committee, but no action has been taken. Telephone Interview with Justice Mary Muehlen Maring, North Dakota Supreme Court, in Bismarck, North Dakota (April 8, 1996). Justice Maring also stated that consideration is being given to creating a voluntary court-annexed mediation program. *Id.* The constitutionality of such a program would be analyzed similarly to that of compulsory court-annexed arbitration. However, such a discussion is outside the scope of this paper.

101. Levin & Golash, *supra* note 16, at 33.

102. *See* Nejelski & Zeldin, *supra* note 15, at 795 (discussing the events surrounding the implementation of the Philadelphia Plan).

1993, 2,143 in 1994,[103] and 1,769 in 1995.[104] Moreover, in the East Central Judicial District there were 3,878 and 3,816 civil suits filed in 1994 and 1995, respectively.[105] Lastly, in the South Central Judicial District there were 2,022 cases filed in 1994 and 2,057 in 1995.[106] These statistics represent the civil filings from the three busiest district courts in North Dakota. These are not backlogged cases, and currently, no North Dakota district court has a backlog of cases.[107] There currently is no waiting period to have a case tried similar to the seven year wait to get a jury trial in Philadelphia. Such docket loads are hardly like the overcrowding that larger metropolitan areas are faced with.

Perhaps the most important statistic is a review of the federal districts which have adopted court-annexed ADR plans.[108] Of those districts, only two, the Federal District Court for the District of Idaho, and the Federal District Court for the Western District of Oklahoma have populations below two million people.[109] The vast majority of the districts which have court-annexed arbitration plans include, if they are not completely encompassed by, highly populated, metropolitan areas.[110] Moreover, in the District of Idaho, no filed case has gone to arbitration.[111] In contrast, those federal districts with large metropolitan areas have more cases which go to arbitration or other forms of court-annexed ADR. For example, in the Southern District of New York, which operates a mediation program, 1,652 cases have entered the program since its inception in 1992.[112] Of these cases, 862 have been

103. The large increase in filings was created by the consolidation of North Dakota's District and County Courts. Telephone Interview with Lori Troyer, Deputy Clerk of Court for the Northeast Central Judicial District, in Grand Forks, North Dakota (April 6, 1996).

104. These statistics represent civil filings. However, the data is not entirely correct because the filings include paternity actions, which are confidential and could not be searched for purposes of this paper. *Id.*

105. Telephone Interview with Dana Pierson, Deputy Clerk of Court of the East Central Judicial District, in Fargo, North Dakota (April 12, 1996).

106. Telephone Interview with Sandy Tessier, Deputy Clerk of Court for the South Central Judicial District, in Bismarck, North Dakota (April 12, 1996).

107. *Id.*

108. *See supra* note 74 (listing the federal district courts which have adopted court-annexed ADR plans).

109. The Federal District Court for the District of Idaho encompasses the entire state of Idaho, whose population is reported as 1,133,034. 1996 WORLD ALMANAC 430. The Federal District Court for the Western District of Oklahoma is made of up 40 counties. 28 U.S.C. § 116 (1988). The population of this district, which includes Oklahoma City, is roughly 1,700,000. 1996 WORLD ALMANAC 439.

110. *See supra* note 74 (listing the federal district courts which have adopted court-annexed ADR plans).

111. Telephone Interview with Lee Parker, CJRA Administrative Analyst, Federal District Court for the District of Idaho, in Boise, Idaho (May 22, 1997). In 1995 and 1996, there were 570 and 604 civil cases filed, respectively, in the District Court for the District of Idaho. *Id.* Ms. Parker did say, however, that several cases had been placed in the court's mediation program. *Id.* The difference, she stated, was likely due to the arbitration program's non-binding, voluntary status, while the mediation program is semi-mandatory. *Id.*

112. Telephone Interview with George O'Malley, Federal District Court for the Southern District of New York, in New York, New York (May 21, 1997).

successfully resolved on all issues, 12 have been resolved on some but not all issues, 12 have been resolved by mutual submission to binding arbitration, and 197 have been concluded by settlement outside the program.[113]

This success rate of roughly eighty percent is consistent throughout the program and does not appear to be limited to one particular legal area or issue.[114] Statistics, however, were not kept as to the number of cases which entered the program and eventually moved to a trial *de novo*.[115] Although the statistical research does not give reasons why the success rate exists as it does, one possibility may be the concern over the time necessary to take a suit to a jury trial. Such statistics bear out the success of the court's arbitration plan, which achieves the three goals of arbitration; the reduction of the court's docket load, an overall reduction in costs, and an overall reduction in the number of cases which eventually go to trial.[116]

In reviewing these statistics, it is apparent that court-annexed arbitration programs seem to work best when there is a threat of a long wait before trial. Most often, these prolonged waits appear to happen in larger cities. It is doubtful that similar success may be achieved where such a threat does not exit. If a litigant does not need to be concerned about waiting several years until they have his or her proverbial "day in court," it is likely arbitration would not be as attractive a method of settling disputes.

Furthermore, if a court-annexed arbitration proceeding was created without the threat of a long wait for a trial date, the cost of litigation would likely rise. When the wait for a jury trial is long, a litigant is less likely to appeal.[117] However, if a party was unhappy with an arbitration award, and only had to wait for a few weeks to have the case heard by a jury, it is likely the litigant would go forward with the *de novo* appeal, thus adding an additional step in the process. Attorneys, seeking compensation for the additional step, would likely drive up litigation costs. Moreover, by adding another step to the litigation process, the programs would likely keep more cases on the court's docket. Thus, a court-annexed arbitration program in a state-court system with no case backlog and no long waiting period to receive a jury trial would fail to

113. *Id.*
114. *Id.*
115. *Id.*
116. Levin & Golash, *supra* note 16, at 33.
117. Meierhoefer, *supra* note 18, at 107-108.

achieve two of court-annexed arbitration program's stated goals: the reduction of time and costs.[118]

The success of court-annexed arbitration is often used as an enticing argument for its implementation. However, serious consideration must be given to whether the program is entirely necessary for North Dakota and whether a program of court-annexed arbitration would be able to achieve the goals of reduced litigation costs, decrease in delay, and reduction in numbers of cases that actually go to trial. It is likely that a compulsory court-annexed arbitration program in North Dakota would not achieve these three goals.[119]

IV. CONCLUSION

Court-annexed arbitration programs have gained greater acceptance and importance in recent years. This growth has given rise to questions of constitutionality for these programs, as well as questions regarding the adaptability of the programs to all jurisdictions. The constitutionality of court-annexed arbitration programs has generally been upheld, and most participants find the process to be an acceptable alternative to litigation.

However, such success may not be guaranteed for all jurisdictions. There must be thought given to applicability of a court-annexed arbitration program in the proposed setting. North Dakota courts are currently considering such applicability. If a court-annexed arbitration program is instituted, it is highly likely that such a compulsory procedure would increase, not decrease, overall litigation costs. A voluntary process may solve this issue, but consideration must still be given to the overall necessity of a program in a state with no real backlog of civil cases.[120] North Dakota courts would be wise to invest their time and money into creating a system not based on the success of others, but one that best serves the specific and unique needs of North Dakota's judicial system.

118. *See* Eisele, *supra* note 5, at 36 (discussing the problems of mandatory ADR programs as "coerced settlement" procedures while merely adding another layer to the litigation cycle, if the push for settlement proves unsuccessful).

119. *See supra* section I.(A) notes 23-25 and accompanying text (discussing the three goals of arbitration).

120. A voluntary ADR plan is currently under consideration by the North Dakota Joint Dispute Resolution Committee. Interview with Justice Mary Muehlen Maring, North Dakota Supreme Court, in Bismarck, North Dakota (May 15, 1997).