REPORT OF THE
JOINT SUBCOMMITTEE OF THE VIRGINIA STATE BAR
AND THE VIRGINIA BAR ASSOCIATION STUDYING

Court-Annexed Arbitration

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 34

COMMONWEALTH OF VIRGINIA
RICHMOND
1992

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REPORT OF THE
JOINT COMMITTEE OF THE VIRGINIA STATE BAR
AND THE VIRGINIA BAR ASSOCIATION
STUDYING COURT-ANNEXED ARBITRATION
PURSUANT TO THE REQUEST CONTAINED IN
HOUSE JOINT RESOLUTION 435
OF THE 1991 SESSION OF THE VIRGINIA LEGISLATURE
TO
THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA
RICHMOND, VIRGINIA
JANUARY 1992

To: The Honorable L. Douglas Wilder, Governor,
and
the General Assembly of Virginia

I. AUTHORITY FOR THE STUDY

Adopted by the 1991 Session of the General Assembly, Joint House Resolution No. 435 (HJR 435) requested that the Joint Committee of the Virginia State Bar and Virginia Bar Association ("Joint Committee") study the feasibility of mandatory, non-binding arbitration which would be annexed to the courts of the Commonwealth. The Committee chairman appointed a subcommittee, which was assigned the task of performing the necessary research. The subcommittee chairman and one other member began this research and proposed a timetable and an application for a three thousand dollar ($3,000) grant from the Law Foundation of the Virginia State Bar/Virginia Bar Association. The $3,000 grant with which the subcommittee chairman was able to hire research assistants was approved, and research began on July 1, 1991. Also, the Chairman of the Joint Committee and two other members of the Joint Committee joined the subcommittee in its subsequent deliberations.

II. ALTERNATE DISPUTE RESOLUTION: INTRODUCTION & DEFINITIONS

"Resolving disputes in a peaceful manner is a paramount obligation of government to its people. To offer the most effective responsive and appropriate methods for resolving disputes our judicial system must be able to offer alternative dispute resolution programs along with adjudication."[1]

With that in mind, this report focuses on the feasibility, advisability, and cost-effectiveness of developing a mandatory, non-binding arbitration program in the Commonwealth. Guided by the objectives set out in HJR 435[2], we have studied similar programs in other states and researched the issues raised by their implementation. Other sources of information for this report include numerous articles, program evaluations and studies, cases and personal interviews.

Alternative Dispute Resolution (ADR): problem-solving processes that act as a substitute for, or adjunct to, the traditional method of resolving conflicts, namely, the court.

Arbitration: a process in which a dispute is submitted to a neutral third party who hears arguments, reviews evidence, and renders a decision.

Court-Annexed Arbitration (CAA): a court-run dispute resolution process to which cases that meet specified criteria are automatically assigned. Operating under special rules, arbitrators hear cases and render awards. Their awards, however, are not binding, as the parties may always appeal by requesting a trial de novo.

Non-binding: litigants have the right[3] to reject the arbitrator's award and request a trial de novo.

Mediation: conciliation of a dispute through the non-coercive intervention of a third party, with the final decision being made by the litigants themselves.
Mediation is defined here for comparison with arbitration to help dispel any confusion between the terms and their usage. Mediation is the most effective, responsive and appropriate method to resolve disputes when the parties' relationship is to continue after the

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[1]. Courts in Transition, The Report of the Commission on the Future of Virginia's Judicial System 30 (May 1, 1989).

[2] See appendix A.

[3] As defined in House Joint Resolution 435.

dispute.[4] Mediation also effectively solves the hidden problems underlying a dispute, while arbitration may only resolve an obvious claim.

III. WORK OF THE JOINT COMMITTEE

After the subcommittee members had provided guidance and suggested resource materials, two researchers, both third-year law students, read summaries of the successes and failures of court-annexed arbitration programs which exist in other states. A review of these materials included statistical analyses of the reduced delays, costs and enhanced litigant satisfaction resulting from court-annexed arbitration programs. Also considered were legal issues which have arisen in states where court-annexed arbitration programs existed.

Three working drafts of the study were developed before the Joint Committee meeting of August 30, 1991. During this meeting the subcommittee chairman and other subcommittee members briefed the Joint Committee during this meeting on the salient issues which arose during the research phase of HJR 435. As a result of this meeting, a fourth working draft included information concerning median case disposition periods within the Commonwealth.

The HJR 435 also called for input from judges, magistrates, and other legal experts within the Commonwealth. A special working meeting of the Joint Committee took place on September 19, 1991[5] at the Campus Center of Mary Washington College where the Committee solicited comments from representatives of groups referenced in HJR 435. The contributions of the special meeting participants were further incorporated into the research study document.

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[4] Cooley, Arbitration v. Mediation--Explaining the Differences, 69 Judicature 264, 264 (1986).

[5] Attending the September 19, 1991 meeting were as follows: The Honorable Edward S. Kidd, Jr.; the Honorable Robert K. Woltz; the Honorable John B. Preston; Stewart Pierce; F.M. Archer, Esq.; Mark Rubin, Esq.; J.B. Polson; Don Doherty; John S. Murray; A. Blanton Massey, Esq.; Phyllis E. Brown; Anne Brennan Carroll; Richard C. Sullivan, Esq.; Wendall L. Winn, Jr., Esq.; Charles B. Arrington, Jr., Esq.; Richard M. Price, Esq.; Charles D. Bennett, Jr., Esq.; Russell A. Roberts, Esq.; Marty Morrison; Will Miller; Garylee Cox; Eddie Bumbaugh; Lawrie Parker; Delegate James Almand; Lawrence H. Hoover, Jr., Esq.; Richard D. Balnave, Esq.; E. Wayne Powell, Esq.; Barbara Hulburt, Esq.

After the September 19, 1991 meeting, the subcommittee hired two more research assistants to work on the final legislative draft for consideration of the Joint Committee at its October 30, 1991 meeting. At this meeting the Joint Committee considered matters which arose in the course of the subcommittee's research on issues identified by the legislature. The results of the Joint Committee's deliberations are contained in the recommendations listed in part V, below.

IV. SUMMARY OF REPORTS, DISCUSSION, AND FINDINGS

A. PRESENT METHODS OF DISPUTE RESOLUTION IN VIRGINIA

1. Courts

The traditional method of resolving disputes in the Commonwealth continues to be our court system. During 1990, 205,943 cases were commenced in the circuit courts, but only 192,705 were concluded within the same year.[6] In the district courts, approximately 13,930 new cases were filed per day (about 3.4 million for the year), and 3.19 million were concluded.[7] Although these statistics indicate that citizens routinely choose the judicial system as their vehicle to justice, the figures also suggest that alternative paths to justice may be necessary in the future.

2. Arbitration and Mediation

(a) In General

Alternative methods of dispute resolution, particularly arbitration and mediation, are not new to the Commonwealth. With reference to "arbitration",[8] the Virginia Code mostly provides that where the parties have agreed to arbitrate their disputes, those

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[6] Virginia State of the Judiciary Report A-40 (1990).

[7] Id. at A-48.

[8] Virginia Code Ann. §§ 4-118.10; 4-118.50; 8.01-557 - 8.01-581.016 (Uniform Arbitration Act); 8.01-581.1 - 8.01-581.12:2 (Medical Malpractice Review Panels); 13.1-571; 15.1-23.2; 15.1-58.1-920 - 58.1-930 (Interstate Compromise and Arbitration of Death Taxes); 59.1-202; 59.1-358; 64.1-57.

agreements will be enforceable. The references to mediation[9] are similar in that most allow for voluntary mediation, although a few statutes pertaining to governments and agencies mandate mediation of certain conflicts.[10] Additionally, labor disputes are routinely resolved by methods other than the adjudicatory process which are prescribed in collective bargaining agreements.

(b) Administrative Agency Hearing Officers

Persons challenging actions or decisions of most of Virginia's administrative agencies must first have their disputes decided in conferences or hearings when the substantive law so requires. Such conferences or hearings are conducted according to the provisions of Virginia's Administrative Process Act.[11] When "the basic laws provide expressly for decisions upon or after hearing," the aggrieved party is afforded a hearing conducted by a hearing officer[12] in which evidence is formally taken.[13] Court review of

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[9] Virginia Code Ann. §§ 8.01-581.21 - 8.01-581.23 (Confidentiality in Mediation Act); 10.1-1434; 15.1-23.2; 15.1-945.7; 16.1-69.35; 40.1-70 - 40.1-75 (Mediation and Conciliation Act); 51.5-37; 55-248.3.

[10] Virginia Code Ann. §§ 2.1-700 et. seq. (Interagency Coordinating Committee on Delivery of Related Services to Handicapped Children), 56-38 (mediation between public service companies and their employees); 59.1-21.26 (mediation of complaints of discrimination in credit transactions).

[11] Virginia Code Ann. §§ 9-6.14:1 - 9-6.14:25 (1989).

[12] The hearing officer is selected from a list compiled by the Executive Secretary of the Supreme Court. In order to qualify as a hearing officer, a person must be an active member in good standing in the Virginia State Bar, have actively practiced law for at least five years, and have completed a course of training approved by the Executive Secretary. The hearing officers are usually selected on a rotation basis; however, lists according to geographic preference and specialization are kept. Hearing officers are to disqualify themselves if they cannot afford a fair and impartial hearing. Virginia Code Ann. § 9-6.14:14.1 (Supp. 1990).

[13] Virginia Code Ann. § 9-6.14:12. In administrative agency hearings, the parties have the right to be represented by counsel, to submit oral and documentary evidence, and to conduct cross-examination. Id. The presiding officers at such hearings are empowered to administer oaths, hold settlement conferences, dispose of procedural requests, and "regulate and expedite" the course of the hearing. Id. In contrast to CAA awards, all decisions or recommendations of the hearing officers must

agency hearing decisions is, unlike the awards in CAA, not de novo; the reviewing court is bound by the record developed below.[14]

(c) Medical Malpractice Review Panels

Under Virginia Code Section 8.01-581 et seq., persons bringing malpractice claims against health care providers may first submit their claims to a panel for a preliminary hearing. Although the hearing is not an arbitration hearing[15], it becomes mandatory at the request of one of the parties. The processes of the MMRP share many key characteristics with court-annexed arbitration programs around the country.[16]

"briefly state" the basis therefor. Id.

[14] Va. Code Ann. § 9-6.14:16. If the aggrieved party prevails in the civil case against the agency, he or she is entitled to reasonable costs and attorney fees. § 9-6.14:21.

[15] The parties may, however, voluntarily submit their dispute to binding arbitration under the statute. Va. Code Ann. § 8.01-581.12 (Supp. 1990).

[16] Medical malpractice review panels are composed of five members: two attorneys chosen at random from a list of voluntary participants compiled by the Virginia State Bar, two health care providers chosen with regard to the nature of their practice from a list of voluntary participants compiled by the State Board of Medicine, and one sitting or retired circuit court judge, who serves as chair. Va. Code Ann. § 8.01-581.3:1. Panelists are permitted to apply their expertise in evaluating the evidence. Id. As might be expected, coordinating the schedules of all the parties and the five panelists has presented problems. Interview with the Executive Secretary of the Supreme Court of Virginia, in Richmond (July 29, 1991). In addition, since any panelist who has a conflict of interest as defined in the statute must be disqualified, the number of potential panelists in smaller jurisdictions is limited.

Except for good cause, the parties must complete discovery within ninety (90) days of the designation of the panel chair. Va. Code Ann. § 8.01-581.3:1. The hearing follows no sooner than ten days after completion of discovery. Id; compare infra note 49. At the hearing, the parties are entitled to be heard and to cross-examine witnesses. Id. In almost all cases reviewed by panels, at least one of the parties has requested a hearing in addition to having the panel review each party's documentary evidence. Interview, supra. This suggests that litigants have a desire to be heard and that oral testimony is a satisfying and essential part of the process. The relaxed rules of evidence used in panel hearings complement the desire to be heard because

(d) Industrial Commission

The Commission is a legislatively quasi-judicial entity established to resolve workers' compensation disputes between employers and employees.[17] The Act, in effect, provides a system where the employer and the employee are required to submit disputes regarding injuries or occupational diseases to the Workers' Compensation Commissioner or Deputy Commissioner. CAA and the workers' compensation system are similar in that claims are presented to a neutral third party, rules of evidence are relaxed, and the setting is usually informal. The Deputy Commissioner renders a decision based upon the evidence presented which may be appealed, first before three legislatively appointed Commissioners, then to the Court of Appeals by right.[18]

B. DESIGNING A CAA PROGRAM[19]

1. Mandatory or Voluntary?

Voluntary CAA programs are designed to give the litigants the freedom of choosing arbitration as their form of dispute

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the parties are free to convey information without much restriction.

At the hearing, panelists, once sworn, have the power to administer oaths as well as the power to issue subpoenas for the attendance of witnesses and the production of documents. Va. Code Ann. § 8.01-581.6. All subpoenas issued are enforced in the same manner as in other civil actions. Id.

Finally, the opinion of the panel, limited to one of four brief statements, is allowed as an item of evidence if there is a subsequent trial. §§ 8.01-581.7 - 8.01-581.8. Panelists may be called as witnesses in such trials, but are immune from civil liability for all communications made in the scope of their duties as panelists. § 8.01-581.8. Panelists are paid a fee of $50 dollars per day, these fees being borne by the parties in such proportions as determined by the chair.

[17]Virginia Code Ann. §§ 65.1-1 - 65.1-163 (1987) (Workers' Compensation Act).

[18]Virginia Code Ann. § 65.1-12 gives the Deputy Commissioner the power to subpoena witnesses, administer oaths, hear testimony, render a decision, and make an award. If the decision is not appealed within thirty (30) days of the award, it is then conclusive and binding as to all questions of fact. § 65.1-98.

[19]For an accurate list of issues to be addressed in designing a CAA program, see Keilitz, A Court Manager's Guide to the Alternative Dispute Resolution Database, State Ct. J. (Fall 1990).

resolution. This approach avoids the constitutional problems that are characteristic of a mandatory program. Historically, however, voluntary ADR programs have elicited low participation rates.[20]

A mandatory CAA program requires participation but allows litigants to reject the outcome and try their case in court. Mandatory CAA may sweep more cases into the program, thus helping to alleviate growing problems facing the court system: congestion, delays, and frustration. Statutes or local court rules providing for mandatory arbitration, however, have been subjected to many constitutional challenges.[21]

Constitutional challenges to mandatory CAA programs have generally fallen into one or more of four categories: denial of right to jury trial, unlawful delegation of judicial power, denial of access to courts and violation of equal protection. Most of the modern statutes have survived these challenges. Drafters of CAA legislation should be alert to the key factors allowing such statutes to survive constitutional attack.

First, CAA has been frequently challenged as denying a litigant's right to a jury trial. In Capital Traction v. Hof[22], the Supreme Court clarified the meaning of the Seventh Amendment, stating that "[I]t does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand. . . ".[23] Although the Seventh Amendment right to a jury trial applies only in federal cases, the Virginia Constitution contains an analogous provision. Article I, Section 11 reads "[I]n controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."[24]

To ensure the right to a jury trial, most CAA statutes allow the litigants to reject the results of the arbitration and to

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[20]Explanations for non-use include: many do not even know ADR exists, its use may be perceived as a sign of a weak case, the nature of it is misunderstood, and sometimes it is simply impossible for adversaries to agree. See Golann, Making Alternative Dispute Resolution Mandatory: The Constitutional Issues, 68 Or. L. Rev. 487, 491 (1989).

[21]Note, Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation, 77 Ky. L.J. 881, 897 (1988-1989).

[22]174 U.S. 1 (1899).

[23]Id. at 23.

[24]Va. Const. art. I, 11.

proceed to a trial de novo.[25] Often, however, requirements are imposed on an appellant who seeks a trial de novo in order to encourage the parties to accept the result of the arbitration and to discourage frivolous appeals. Examples of such requirements include payment of various costs, introduction of the arbitration award at trial and a monetary penalty imposed if the appellant does not improve his or her position at trial by a certain percentage. These types of requirements have been found to be unconstitutional when they are too onerous or burdensome, making the right to a jury trial practically unavailable.[26] One Pennsylvania CAA scheme was found to unconstitutionally delay a litigant's right to a jury trial.[27] Under the Pennsylvania statute, the arbitration panel consisted of seven members selected by "strike-list" method. Each party had six peremptory challenges and an extended amount of time to file a certificate of readiness.[28] Under the Colorado CAA statute, however, the requirement that the appellant pay the costs of arbitration if it did not improve its position by 10 percent was found to be a constitutionally permissible burden on the appellant's right to a jury trial.[29]

Second, CAA has been challenged as placing judicial power in the hands of decision-makers who are not members of the judiciary. The Virginia Constitution dictates that "[t]he judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court. . .".[30] Courts which have considered whether CAA allows for unlawful delegation or usurpation of judicial power have held nearly unanimously that in cases of non-binding arbitration there is no constitutional violation.[31] Because arbitrators "do not possess the final authority to render and enforce a judgment," they have not been found to perform a judicial function in violation of the Constitution.[32]

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[25]See appendix G.

[26]Mattos v. Thompson, 421 A.2d 190, 192 (1980) (citing Smith's Case, 112 A.2d 625, 629 (1955)).

[27]Id.

[28]Id. at 198 (Roberts, J. dissenting).

[29]Firelock v. 20th Judicial District, 776 P.2d 1090, 1097 (1989).

[30]Va. Const. art. VI, 1.

[31]E.g. Firelock, 776 P.2d at 1094.

[32]Id.

Third, CAA has been challenged as barring litigants' access to the courts. Although the Virginia Constitution does not specifically address access to courts, the Due Process clause of the United States Constitution governs state court litigation via the Fourteenth Amendment.[33] As with the right to a jury trial, the issue here involves the barriers CAA imposes on a litigant's right of access to the courts. The Colorado Supreme Court held in Firelock v. 20th Judicial District[34] that when an arbitration scheme provides for a trial de novo, no litigant is denied access to the courts entirely. The court also held that the litigant's right of access was not impermissibly burdened by the imposition of arbitration costs up to $1,000 if the appellant did not improve its position at trial by at least ten percent.[35] However, in certain cases, conditions on the right to a trial de novo could cause severe prejudice without actually barring the right of access. For example, a statute might require an appellant to post security as a requirement of appealing. Under such a statute, an indigent litigant should have this requirement waived in order that his or her right of access not be denied.[36]

Finally, CAA has often been subjected to equal protection challenges. Litigants have claimed violations of equal protection based on dollar limits, nature of the case, or on geographical differences in the case of pilot programs. Applying the rational basis test, most courts have upheld CAA statutes when they have been challenged on equal protection grounds. In addressing an equal protection challenge to Virginia's Medical Malpractice Review statute, the Fourth Circuit wrote, "the [state equal protection] provision does not prohibit legislative classification, and a law may apply to a small class so long as the classification is reasonable and the law applies equally to all persons within the class."[37] The Colorado Supreme Court in Firelock stated that, "'[t]he fact that some inequity may result is not enough to invalidate a legislative classification based on rational distinctions.'"[38] It is possible that, because of the dollar limits, a disproportionate number of suits in CAA would be brought by lower- and middle-income litigants. This does not seem to

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[33]Golann, supra note 19, at 531.

[34]776 P.2d 1090 (1989).

[35]Id. at 1096.

[36]See generally, Golann, supra note 19, at 512-13.

[37]DiAntonio v. Northhampton-Accomack Memorial Hosp., 628 F.2d 287, 292 (4th Cir. 1980).

[38]776 P.2d at 1099 (citing Bushnell v. Sapp, 571 P.2d 110 (1977)).

increase the chance, however, that courts would apply strict scrutiny in those cases because the Supreme Court has repeatedly refused to treat wealth as a suspect classification.[39]

2. Should Mandatory CAA be Implemented?

Court-annexed arbitration is the method of ADR which has the most widespread support and approval as an alternative to traditional litigation.[40] In order to implement a CAA program, state legislatures and courts must evaluate the needs and goals of the system for resolving civil disputes. An effective CAA program attempts to accomplish four goals:

(a) Increasing Citizen Access to the Legal System[41]:

There are many individuals with legitimate claims and defenses who may never "tell their story" but for a program such as CAA.[42] Many lawyers would agree that the public is often frustrated with the high costs, delays, and unequal bargaining power which results from litigation. Critics have referred to CAA as "second class" justice[43], but in reality, it is nothing more than an alternate method to solving a conflict which may otherwise never be resolved.

(b) Provide More Effective Dispute Resolution[44]:

The quality of the traditional process of dispute resolution is a concern. It has been suggested that the system's complexity creates openings for abusive, dilatory tactics that force settlements too far removed from the merits.[45] CAA is a method which affords litigants the opportunity to have their disputes resolved on the merits in an adjudicative forum by a neutral third party.

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[39]Golann, supra note 19, at 552.

[40]Note, supra note 20, at 885.

[41]Increasing citizen access to the legal system is listed in House Joint Resolution 435 as a "high priority in the Commonwealth".

[42]See MacCoun et al., infra note 49, at 243.

[43]Note, supra note 20, at 901.

[44]Id.

[45]Rowe, American Law Institute Study on the Paths to a Better Way: Background Paper, 825 Duke L.J. 1989.

(c) Relieve Court Congestion, Undue Cost, and Delay:

Review of the caseload statistics by the Futures Commission and the Judicial Council leads to the conclusion that delay problems do exist in Virginia.[46] From 1980-1990, there was a 50 percent increase in new case filings in the circuit courts. More than 3.4 million cases were filed in the district courts in 1990, an increase from 1980 of 62 percent. In the same decade, there was a major increase in appeals from the district to the circuit courts (186 percent).[47] Cases pending[48] in Virginia's circuit courts have increased 50 percent in the last five years alone.[49] The 1990 State of the Judiciary Report shows that while 67.1 percent of the Circuit Court cases are resolved within one year of filing, almost 15 percent take up to two years. Another one-fifth of all Circuit Court cases are concluded after being on the court docket at least two years. Unless caseloads begin to level off or some other change occurs in the resolution process, the situation could worsen.

For a summary of the time between filing and disposition in Virginia's Circuit Courts, see accompanying chart.

Age of Civil Cases Concluded in 1990
(Figures are percentages of total cases concluded)

Circuit	Number of months since filing:					
	00-12	13-24	25-36	37-48	49-60	60+
1st	70.0%	18.4%	7.0%	2.1%	0.4%	1.6%
2nd	64.1%	13.6%	15.5%	2.7%	1.6%	2.4%
3rd	32.4%	32.7%	9.7%	4.4%	2.7%	18.0%
4th	71.1%	14.5%	5.1%	2.5%	5.1%	1.8%
5th	65.9%	11.0%	4.5%	1.4%	0.8%	16.3%
6th	67.9%	12.7%	6.1%	2.9%	1.6%	8.8%

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[46]Supreme Court of Virginia, Office of the Executive Secretary, Caseflow Management in the Circuit Courts, 1-12 (1990) [hereinafter Caseflow Management].

[47]Id. at 1-8 through 1-10.

[48]"Pending" is defined as a combination of backlogged cases, cases in limbo due to procedural inactivity, cases abandoned by counsel, litigants, or both, and cases concluded but with no final order submitted by counsel. See Caseflow Management at 1-10.

[49]At the current trial rates, it would take Virginia's 131 circuit judges 12 months to dispose of cases reported by the courts as pending, even if no new cases were filed. Id. See appendix B.

	00-12	13-24	25-36	37-48	49-60	60+
7th	78.0%	13.0%	3.5%	4.7%	0.5%	0.2%
8th	54.8%	18.3%	11.4%	4.1%	2.8%	8.5%
9th	67.2%	14.1%	11.4%	4.3%	1.4%	1.7%
10th	78.0%	14.2%	3.8%	1.6%	0.2%	2.2%
11th	73.2%	13.1%	4.2%	1.8%	2.2%	5.5%
12th	74.2%	13.2%	5.9%	2.3%	1.9%	2.4%
13th	74.4%	12.1%	3.1%	4.8%	4.2%	1.4%
14th	50.3%	24.7%	8.5%	2.1%	1.8%	12.6%
15th	74.9%	10.8%	5.5%	1.7%	1.1%	5.9%
16th	68.4%	16.6%	5.1%	2.2%	2.1%	5.6%
17th	41.7%	26.9%	7.0%	1.9%	0.8%	21.7%
18th	63.8%	12.0%	14.5%	4.9%	2.4%	2.3%
19th	57.7%	16.2%	13.5%	3.6%	1.3%	7.8%
20th	72.2%	12.9%	4.5%	3.4%	2.9%	4.0%
21st	72.6%	13.7%	5.6%	3.8%	1.9%	2.5%
22nd	81.3%	6.7%	3.9%	2.6%	1.8%	3.7%
23rd	68.5%	12.0%	9.8%	7.8%	1.2%	.7%
24th	76.9%	12.9%	5.3%	2.4%	0.7%	1.8%
25th	70.9%	10.6%	5.1%	2.2%	1.0%	10.2%
26th	73.3%	11.6%	7.7%	3.9%	1.6%	1.8%
27th	70.0%	18.3%	8.3%	1.9%	0.6%	0.9%
28th	77.5%	13.1%	4.7%	1.7%	1.4%	1.6%
29th	63.6%	12.9%	4.1%	5.2%	2.4%	11.9%
30th	66.6%	12.4%	7.6%	4.3%	2.6%	6.5%
31st	78.4%	14.6%	3.2%	0.9%	0.3%	2.7%
State Totals						
	67.1%	14.7%	7.9%	3.2%	1.8%	5.2%

Source: 1990 State of the Judiciary Report, pages F-7 through F-69.

While it is not guaranteed that CAA decreases trial rates and increases the pace of case disposition[50], most CAA

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[50]A Rand Institute study of New Jersey's Automobile Arbitration program found that arbitration actually terminated suits more slowly. R. MacCoun, E. Lind, D. Hensler, D. Bryant & P. Ebener, Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program, Rand Institute for Civil Justice (1989). However, the study was quick to point out that such inefficiency could be cured by scheduling earlier hearings. Id. at 241-42. Under New Jersey law, the arbitration hearing could take place no earlier than 160 days after service on the defendant. Id. at 231. In addition, the study suggested that litigants might even be willing to accept the cost of such inefficiency in order to benefit from the third-party adjudication on the merits of the facts and law which arbitration

programs[51] report success in terms of reduced time to disposition, at about the same cost.

(d) Enhance Litigant Involvement and Satisfaction:

Perhaps the most detrimental effect that high cost and undue delay have on litigants is the dissatisfaction they foster with the judicial system. In a recent study[52], litigants were questioned about their perceptions of the justice involved in such processes as trials, CAA, and judicial settlement conferences. The study suggested that litigant satisfaction with the system is strongly correlated with evaluations of counsel, the perceived dignity of the procedure, comfort with the procedure, perceptions that the procedures are unbiased, perceived control and the perceived carefulness of the process.[53]

3. Under What Authority Should the Program Operate?

There are two ways in which a CAA program could become involved in the Virginia judicial system: (1) the state legislature could enact a statute that specifies the structure of the program, and then requires or permits local courts to adopt it; or (2) the state supreme court could, by court rule, adopt a program, outlining its structure and either mandating or permitting local courts to use it.[54] Regardless of how CAA is implemented,

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provides. Id. at 243.

[51]E.g., J. Adler, D. Hensler & C. Nelson, Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program, Rand Institute of Civil Justice (1983); S. Clarke, L. Donnelly & S. Grove, North Carolina's Experiment With Court Ordered Arbitration, University of North Carolina at Chapel Hill Institute of Government (1989).

[52]E. Lind, R. MacCoun, P. Ebener, W. Felstiner, D. Hensler, J. Resnik & T. Tyler, The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences, Rand Institute for Civil Justice (1990).

[53]Id. at 70.

[54]In certain jurisdictions, local courts may institute a CAA program on their own initiative pursuant to local court rule. In Ohio, alternative dispute resolution programs (which vary by county) have been authorized by Local Rules since as early as 1970. See Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 Judicature 270, 272 (Feb.-Mar. 1986).

the goal is to create an efficient, economical alternative for the prompt resolution of cases.[55]

4. Degree of Court Supervision

The closer the relationship of the court to the program, the more control the court must exercise over the procedures. Generally, CAA programs are operated and funded by the courts. There do exist, however, programs that operate outside the direct control of the court but which are institutionally linked by referrals or funding.[56]

5. Costs

CAA programs could be funded in one of three ways. First, the state could pay for the expenses via the legislative budget-making process. However, as noted above, CAA funding is normally a responsibility of the court. Another suggestion is to have the litigants pay for it, but then a constitutional "access to courts" issue could arise if the fee for arbitration were higher than the fee for a trial-bound case. Another option would be a court-imposed fee on all civil actions in the jurisdiction.

Critics of CAA point to the costs involved in implementing a CAA program: salaries of administrative personnel, arbitrators' fees, etc. They also stress that costs essentially double upon appeal for a trial de novo as attorneys' fees increase, the cost of expert witnesses increases, and administrative costs multiply.[57]

6. Which Cases Subject and Which Exempted?

The cases most often mandated to CAA are civil cases which raise primarily factual issues or suits for moderate amounts of money damages in which the issues are not extremely complex.[58] Of course, there could be relatively simple cases in which the amount at stake is high. These "high stakes" cases, however, tend to be

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[55]Note, supra note 20, at 882.

[56]Conference of State Court Administrators, Committee on Alternative Dispute Resolution, Report to the Membership 3 (1990).

[57]Note, supra note 20, at 902.

[58]See Kimbrough v. Holiday Inn, 478 F. Supp. 566, 567 n. 4 (1979).

appealed.[59] Thus, mandating CAA in such cases may add another needless layer of litigation. The states are relatively uniform in automatically exempting certain types of cases from arbitration, regardless of the amount in controversy: class actions, criminal actions, domestic cases, suits in equity, cases involving public rights and duties, cases involving novel issues in the law, and landlord/tenant cases.

The states vary greatly, however, in the maximum dollar limit under which eligible cases are referred automatically. Dollar limits range from $3,000 to $150,000.[60] The dollar limit a state chooses is of major importance for two reasons. First of all, one of the purposes of arbitration is to enable litigants with small or moderate-size claims to assert their rights. If the limit is too high, the current congestion in the court system might simply be transferred to the arbitration system. However, this problem should not occur since there would likely be more arbitrators than judges in any given jurisdiction. Second, the dollar limit determines how many cases are mandated to arbitration.

7. When Should the Case Go to Arbitration?

Theoretically, a case could be referred to CAA at any stage of the litigation process, i.e., at filing, after a pretrial conference, upon review by a judge, or just before trial. Early referral to CAA would reduce delay. Limited discovery would allow the parties to present their evidence and address the issues early in the litigation, possibly precipitating an early settlement. Further discovery should be allowed, however, if the case goes to trial.

8. Location of Hearing

Although holding CAA hearings in a courthouse (courtrooms or conference rooms) would certainly give the litigants their "day in court" as well as give the court more control over the process, problems of space might dictate that they be held elsewhere. On the other hand, if hearings were held outside the courthouse, the litigants would be spared the emotional strain of going to court. Outside the courthouse, the court would not need to create space, but the process might be more difficult to monitor and the litigants may be more likely to appeal to a "real" court.[61]

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[59] See Hanson & Keilitz, Arbitration and Case Processing Time: Lessons From Fulton County, 14 Just. Sys. J. 203, 226 (1991).

[60] See appendix C.

[61] Hensler, supra note 53, at 278.

A recent Rand Institute for Civil Justice study indicated that while litigants are highly concerned with the perceived dignity of hearings, they are not as concerned with the formality of the procedures.[62] This suggests that holding hearings outside of the courthouse might satisfy litigants as long as the procedure retains a dignified appearance.

9. Arbitrators

In most states, arbitrators must be members of the bar or bench.[63] In others, lay persons, i.e., experts, may serve as arbitrators if the parties so stipulate[64]. Since two of the goals of CAA are increased litigant satisfaction and reduced backlog in the courts, awards decided by a neutral panel selected by the parties themselves should be encouraged because they are less likely to be appealed.

States vary on the issue of the number of arbitrators.[65] Use of one arbitrator costs less, is easier to schedule, and imposes less of a burden on the arbitrator pool. With one arbitrator, however, the attorneys may be more likely to appeal the award. Use of three arbitrators clearly costs more, yet the award may be perceived as fairer and be less likely to be appealed.[66]

In most states, arbitrators are paid fees, ranging from $75 per hearing to $350 per day.[67] The arbitrators' fees are usually paid by the parties. They can either be split evenly between the parties, imposed in amounts determined at the discretion of the arbitrator, imposed by statute as a requirement to appealing, or

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[62]Perception of Justice, supra note 51, at 62-64.

[63]See appendix D. Canon 5 of the Canons of Judicial Conduct from the State of Virginia, however, forbids active judges from serving as arbitrators. Rules of the Supreme Court of Virginia Part Six, Section III, Canon 5 (1990).

[64]In Colorado, the only qualification for being an arbitrator is that one be a registered voter within the state. CRCP 109.1 explicitly states "[a]n arbitrator need not be an attorney." See L. Burton, J. McIver and L. Stinson, Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program, 14 Just. Sys. J. 183, 186, n. 4 (1991).

[65]See appendix E.

[66]Hensler, supra note 53, at 277; Keilitz, supra note 18, at 31.

[67]See appendix E.

included as costs of trial if the case terminates with trial. Provisions might exist allowing indigent litigants to have these fees waived.

States also vary on the powers which they grant arbitrators. Generally, the arbitrator's function is quasi-judicial, meaning that he or she has the power to subpoena witnesses and documents, administer oaths, and rule on evidence. The arbitrator usually has limited power, however, to grant continuances beyond the statutory deadlines.[68]

Arbitrators can be selected by different methods. The parties can stipulate to them, they can be selected by "strike-list" method, or they can be selected at random from a list kept by the State Bar or the CAA administrator. The strike-list method, however, proved to be time-consuming in at least one case.[69]

10. Requirements of Appellants

Several CAA statutes impose one or more of the following requirements on litigants who appeal the result of arbitration: payment of costs, posting of security, or admission of the arbitration award as an item of evidence at trial.[70] These requirements seek to encourage disposition of cases by arbitration as well as to deter frivolous appeals.[71] Cost-shifting provisions in arbitration statutes require the appellant to pay either the filing fee for the appeal, the cost of the arbitration panel, or the costs of subsequent litigation if the appellant does not improve his or her position at trial by a certain percent. Security requirements demand that the appellant post a bond in an amount equal to either the entire potential liability or a percentage thereof.[72]

11. Pro Se Litigants

With respect to pro se litigants in CAA programs, the results have been mixed. In the Pittsburgh arbitration program, pro se litigants fared worse than represented litigants: unrepresented plaintiffs recovered less and unrepresented defendants paid out more than those who were represented by counsel. Pro se litigants

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[68]Note, supra note 20, at 893.

[69]See Mattos v. Thompson, 421 A.2d 190, 198 (Roberts, J., dissenting).

[70]Golann, supra note 19, at 510.

[71]Note, supra note 20, at 895.

[72]Golann, supra note 19, at 511-13.

in Pittsburgh felt frustrated with the process and were dissatisfied because they felt the hearings were unfair.[73]

On the other hand, pro se litigants in the North Carolina pilot CAA programs reported having less difficulty in preparing and presenting their cases in CAA than those who followed the traditional adjudication route.[74]

12. Litigant Satisfaction

Nearly all litigants who have participated in CAA programs have reported moderate to high levels of satisfaction with the process.[75] The arbitration hearing gives litigants an opportunity to be heard in an adjudicative forum by a neutral third party. Increased participation in the proceedings as well as increased control over the process are two major factors contributing to litigant satisfaction.[76]

One criticism often voiced about CAA is that the program predominantly decides disputes between litigants with smaller civil claims. The prediction is that those whose cases are mandated to CAA will feel inferior, causing dissatisfaction with the arbitrators' awards and, consequently, a higher appeal rate. The studies of litigant satisfaction with CAA in several jurisdictions, however, show that litigants are generally pleased with the process.[77]

13. Case Outcomes

CAA does not seek to alter the distribution of case outcomes found in traditional adjudication. One sign of a CAA program which is functioning properly is a distribution of case outcomes which closely mirrors that found in traditional adjudication.[78] Neither

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[73]Alfini & Moore, Court-Annexed Arbitration: A Review of the Rand Institute for Civil Justice Publications, 12 Just. Sys. J. 260, 264-65 (1987).

[74]Clarke et. al., supra note 50, at summary p. v.

[75]See generally appendix F.

[76]See Perception of Justice, supra note 51, at 61-66.

[77]See supra text accompanying note 51.

[78]Hensler, supra note 53 at 272; see Arbitration in the Middle District of North Carolina, Rand Institute for Civil Justice, executive summary, at xvi.

in North Carolina nor in Colorado did CAA perceptibly alter the distribution of case outcomes.[79]

14. Privacy

One aspect of most CAA programs[80] considered advantageous to the parties is that the hearings are held in private. As a rule, however, any person having a direct interest in the case is entitled to attend.[81]

15. The Inapplicability of Stare Decisis

Since the decisions in CAA are specific to one dispute and have no precedential value, it has been suggested by critics that the arbitrators' awards may become arbitrary and capricious, leading to an inconsistent dispute-resolution process.[82] It is important to keep in mind, however, that cases decided in CAA may not involve novel issues in which stare decisis is needed. They might involve only those claims on which the law is very clear and established.

In addition, awards which include a rationale tend to encourage appeals.[83] As stated in Sobel v. Hertz, Warner & Co.[84], "forcing arbitrators to explain their awards....will unjustifiably diminish whatever efficiency the process now achieves."

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[79]See appendix F.

[80]Cooley, supra note 4, at 265. In some jurisdictions (i.e., Illinois), however, the arbitration hearing is open to the public. See Byrne, Woodward & Lapinski, Court-Annexed Mandatory Arbitration Practice and Procedure in Illinois, CBA Record 14, 19 (May 1990).

[81]Cooley, supra note 4, at 265.

[82]Note, supra note 20, at 901.

[83]"In general, an arbitrator should not write a formal opinion but should issue an award in the form of a money damage amount as to each issue submitted to him. The object of arbitration is to resolve the dispute quickly and with finality. A written opinion merely opens the door for appeal." Wright, Arbitration: A Matter of Contract, 22 Md. Bar. J. 7, 8 (1989).

[84]469 F.2d 1211 (2d. Cir.) 1972).

V. CONCLUSION AND RECOMMENDATIONS:

As this report shows, there are many issues to be addressed before implementing a CAA program in the Commonwealth. As indicated by the success of other programs across the country, a properly designed and implemented program could be an effective, alternative method of decreasing court congestion and delay, increasing litigant satisfaction with the system, and promoting early settlement of cases.

Although not specifically a part of this study, the Joint Committee would like to note for the General Assembly that many of the kinds of cases that would fall within the parameters of a mandatory, non-binding, court-annexed arbitration program would also be appropriate for mediation. Thus, the Joint Committee would suggest that any arbitration program be considered in conjunction with proposed legislation that makes it clear that judges have the authority to refer cases to whatever ADR process the court deems appropriate.

THE JOINT COMMITTEE'S RECOMMENDATIONS TO THE JANUARY 1992 GENERAL ASSEMBLY ARE:

1. That the legislature establish a pilot program of court-annexed arbitration ("CAA") in at least two judicial circuits.

2. That non-binding, CAA diversion be required for qualifying civil actions at law seeking money damages up to and including $150,000.

    a. That all cases at law filed in General District Court may be referred to CAA at the discretion of the court.

    b. That those cases at law filed in Circuit Court, with ad damnum up to and including $150,000 shall be diverted to CAA according to the formula set forth in c, below.

    c. That the designated court shall refer to CAA not less than 20 percent nor more than 50 percent of all qualifying cases filed.

3. That the CAA pilot program be financed by the Commonwealth.

4. That the Supreme Court of Virginia establish and maintain a list of arbitrators who will be attorneys authorized to practice in Virginia, and who have practiced for at least three years, and who have either (i) successfully completed an eight hour arbitration training program prior to applying to be included on the list of arbitrators; or (ii) arbitrated at least five disputes. The list of arbitrators will be maintained by the Office of the Executive Secretary of the Supreme Court of Virginia.

   a. That one arbitrator be assigned by the Court to cases referred under the proposed statute.

   b. That the requirements for qualification as an arbitrator may be waived based on the agreement of the parties. The parties also may agree to increase the number of arbitrators assigned to a case. In this event the parties will be responsible to pay, pro rata, any arbitrator's fee in excess of that of the single arbitrator authorized by statute.

   c. That arbitrators receive compensation in the amount of $100 for hearings lasting a day or any portion of a day.

5. Members of the bar are encouraged to participate as arbitrators in order to improve public access to the legal system. (See EC 8-1).

Respectfully submitted,

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The Honorable Robert K. Woltz (Ret.)
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STATUTES

Code of Virginia Sections 2.1-700 et. seq.; 4-118.10; 4-118.50; 8.01-577 - 8.01-581.016; 8.01-581.1 - 8.01-581.12:2; 8.01-581.21 - 8.01-581.23; 9-6.14:1 - 9-6.14:25 (1989); 9-6.14:14.1 (Supp. 1990); 10.1-1434; 13.1-571; 15.1-23.2; 15.1-508; 15.1-554; 15.1-945.7; 15.1-1357.2; 16.1-69.35; 38.2-510; 38.2-2206; 40.1-7 - 40.1-75; 50-9; 51.5-37; 54.1-519; 55-248.3; 56-38; 58.1-920 - 58.1-930; 59.1-21.26; 59.1-202; 59.1-358; 64.1-57; 65.1-1 - 65.1-163 (1987).

APPENDICES

Enabling resolution - 1991
House Joint Resolution N. 435

Statistical Findings
Circuit & General District Courts: Historical Summary Data
Court-Annexed Arbitration: Jurisdictional Boundaries
Arbitrator Qualifications
Arbitrator Selection and Compensation
Comparison of Five States
Trial de novo

Sample Legislation

APPENDIX A

GENERAL ASSEMBLY OF VIRGINIA--1991 SESSION

HOUSE JOINT RESOLUTION NO. 435

Requesting the Joint Committee on Alternative Dispute Resolution of the Virginia State Bar and the Virginia Bar Association to study mandatory nonbinding arbitration within the justice system of the Commonwealth as an alternative method of resolving disputes.

Agreed to by the House of Delegates, February 22, 1991
Agreed to by the Senate, February 21, 1991

WHEREAS, increasing citizen access to the legal system to resolve disputes peacefully is a high priority in the Commonwealth; and

WHEREAS, such access may be reduced by the complexity of legal procedures, the high cost of litigation, court delays, and inadequate court facilities; and

WHEREAS, many disputes differ widely in nature, and adjudication is not always the best means of resolving all cases; and

WHEREAS, to offer the most effective, responsive, and appropriate methods for resolving disputes, our justice system must be able to offer alternative dispute resolution programs along with adjudication; and

WHEREAS, our courts are widely perceived as our principal channel of justice, and alternative dispute resolution must be part of the court system; and

WHEREAS, when the court identifies a form of alternative dispute resolution appropriate for a pending case, it should be empowered to order the parties to try the alternative mechanism; and

WHEREAS, a mandatory nonbinding arbitration option would offer the parties the right to return to court if the alternative procedure failed to resolve the dispute; and

WHEREAS, the Commission on the Future of Virginia's Judicial System has recommended that the administration of justice would be served by alternate dispute resolution; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Committee on Alternative Dispute Resolution of the Virginia State Bar and the Virginia Bar Association be requested to examine the feasibility, advisability and cost-effectiveness of developing mandatory nonbinding arbitration in the court system of the Commonwealth. In its study, the joint committee is encouraged to (i) examine the types of disputes that may be best served by this form of arbitration; (ii) develop plans for the structuring and evaluating of experimental or pilot arbitration programs; and (iii) develop proposed statutes regarding arbitration if necessary. The joint committee should seek the input and expertise of judges, clerks of court, magistrates, bar representatives and other authorities on the legal profession to assist in the conduct of this study.

The joint committee is requested to complete its work in time to submit its findings and recommendations to the Governor and the 1992 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

APPENDIX B

CIRCUIT COURTS: HISTORICAL SUMMARY DATA

Year	Authorized Judgeships	Cases Commenced	Cases Concluded	Cases Pending	Commenced Cases Per Judge
1961	73	57,527	54,436	59,612	788
1962	75	60,472	57,155	62,969	806
1963	75	65,467	61,581	68,842	873
1964	79	66,435	63,459	71,760	841
1965	79	66,694	64,754	73,738	844
1966	85	65,255	66,685	70,249	768
1967	87	68,130	65,423	71,389	783
1968	96	69,604	67,993	72,125	725
1969	96	73,614	71,587	74,850	767
1970	99	79,400	74,842	78,809	802
1971	99	83,154	81,047	80,805	840
1972	99	85,851	81,995	81,715	865
1973	99	88,751	85,314	82,832	896
1974	100	98,249	91,810	87,694	982
1975	103	104,582	101,193	93,867	1,015
1976	104	106,819	105,324	96,448	1,027
1977	107	117,351	111,693	101,574	1,097
1978	107	125,058	115,244	114,888	1,169
1979	109	130,461	122,100	123,249	1,208
1980	111	138,986	129,358	132,877	1,252
1981	113	144,580	138,370	139,087	1,279
1982	116	149,017	142,427	145,677	1,285
1983	120	149,583	141,636	119,427*	1,247
1984**	121	146,407	137,504	128,330	1,220
1985	122	147,191	137,591	137,737	1,216
1986	122	155,691	147,820	147,820	1,276
1987	122	164,853	150,541	162,206	1,351
1988	122	177,107	169,557	169,925	1,452
1989	127	189,120	178,473	181,429	1,489
1990	131	205,943	192,705	191,564	1,572

* Manual Recount

**Implementation of the Revised Caseload Reporting System

GENERAL DISTRICT COURTS: HISTORICAL SUMMARY DATA

Year	Authorized Judgeships	New Cases	Hearings	Cases Concluded
1977*	93.70	1,481,055	1,894,270	1,403,438
1978	94.90	1,596,654	1,879,035	1,526,444
1979	96.60	1,699,919	1,997,001	1,629,706
1980	97.75	1,860,060	2,190,549	1,777,696
1981	98.75	1,969,921	2,319,415	1,885,552
1982	98.75	2,020,613	2,393,399	1,933,773
1983	99.75	2,099,806	2,398,873	1,990,997
1984	99.75	2,193,182	2,450,098	2,074,685
1985**	102.75	2,310,211	2,263,537	2,276,158
1986	102.75	2,456,886	2,423,149	2,418,186
1987	103.75	2,552,203	2,596,452	2,557,172
1988	107.75	2,772,276	2,829,431	2,778,920
1989	110.75	2,878,608	3,022,526	2,909,214
1990	114.75	3,130,802	3,215,122	3,186,938

* Implementation of the Uniform Docketing and Caseload Reporting System

**Revision of Uniform Docketing and Caseload Reporting System

Source: Virginia State of the Judiciary Report 1990, pages A-44 and A-52.

APPENDIX C

Court-Annexed Arbitration: Jurisdictional Boundaries

	First Initiated?	Dollar Limits	Statewide Program?
Alaska	1972(NI)	$ 3,000	yes
Arizona	1971	50,000	yes
California	1983	50,000	no
Colorado	1988	50,000	no
Connecticut	1981	15,000	yes
Delaware	1984	50,000	yes
Wash., D.C.	1987	50,000	yes
Florida	1988	None	no
Georgia	1984	25,000	no
Hawaii	1985	150,000	yes
Illinois	1987	15,000	yes
Michigan	1971	None	yes
Minnesota	1985	50,000	no
Missouri	1989(NI)	50,000	yes
Nevada	1971/1983	15,000	yes
New Hampshire	1987	50,000	no
New Jersey	1983	20,000	yes
New Mexico	1988	15,000	no
New York	1970	6,000	no
North Carolina	1987	15,000	no
Ohio	1970	15,000	no
Oregon	1983	25,000	no
Pennsylvania	1952	20,000	yes
Rhode Island	1988	50,000	no
Washington	1979	15,000	no

NI = Not implemented yet

Source: McIver and Keilitz, Court-Annexed Arbitration: An Introduction, 14 Just. Sys. J. 123, 125 (1991).

APPENDIX D

Arbitrator Qualifications

	Member of Local, State or Federal Bar	Years of Trial Court or Subject Experience	Layperson Arbitrator Permitted
Alaska	Yes	-	No
Arizona	Yes	5	Yes
California	Yes		Stip
Colorado	No	0	Yes
Connecticut	Yes	5	No
Delaware	Yes	5	Stip
Washington, DC	Yes	5	No
Florida	Yes	5	Stip
Georgia	Yes	2	No
Hawaii	Yes		No
Illinois	Yes	3	No
Michigan	Yes	5	No
Minnesota	Yes	5	No
Missouri	No		Yes
Nevada			
New Hampshire	-	-	No
New Jersey	Yes	7	Stip
New Mexico	Yes	5	No
New York	Yes		No
North Carolina	Yes	5	No
Ohio	Yes	1	No
Oregon	Yes	5	Stip
Pennsylvania	Yes	3	No
Rhode Island	Yes	10	No
Washington	Yes	5	Stip

Source: McIver and Keilitz, Court Annexed Arbitration: An Introduction, 14 Just. Sys. J. 123, 125 (1991).

APPENDIX E

Arbitrator Selection and Compensation

	Number of Arbitrators	Selection Method 1st	2nd	Are Arbitrators Compensated?	Paid by State?	Per Hearing or Day Fees
Alaska	1	-	-	—	—	—
Arizona	1 or 3	L	S	Yes	Yes	$ 75 (D)
California	1	L	S	Yes	Yes	$150 (D)
Colorado	1 or 3	L,A	C	Yes	No	$300 (H)
Connecticut	1	C		Yes	Yes	$100 (D)
Delaware	1	L	C	Yes	No	$250 (H)
Washington, DC	1 or 3	S		Yes	Yes(1)	$100 (H)
Florida	1 or 3	L	C	Yes	Yes	$ 75 (D)
Georgia	3			Yes	Yes	$100 (D)
Hawaii	1	S		No	No	None
Illinois	1, 2 or 3	C		Yes	Yes	$200 (D)
Michigan	3	C		Yes	No	$150-210 (H)
Minnesota	1	C		Yes	Yes	$150 (D)
Missouri	1	L				
Nevada	1			Yes		
New Hampshire	1	C		No	Yes	
New Jersey	1 or 2			Yes	Yes	$225 150 (D)
New Mexico	1	S	L	Yes	Yes	$ 75 (H)
New York	1 or 3			Yes	Yes	$ 35-45
North Carolina	1	L	C	Yes	Yes	$ 75 (H)
Ohio	1 or 3			Yes	Yes	$ 30-60
Oregon	1	L	S	Yes	No	$150 (H)
Pennsylvania	3	C		Yes	Yes	$200 (D)
Rhode Island	1	L	S	Yes	Yes	$300 (H)
Washington	1			Yes		

Selection Method:

L - Litigants
A - Arbitrators
C-Court
S-Strike List

Source: McIver and Keilitz, Court-Annexed Arbitration: An Introduction, 14 Just. Sys. J. 123, 128 (1991).

APPENDIX F

Comparison of Five States on Seventeen Criteria

Evaluation Criteria	Georgia	North Carolina	New Jersey	Hawaii	Colorado
Judicial Administration Criteria					
1. Overall changes in outcomes		No observed changes			As in regular litigation, plaintiffs' win larger %
2. Pace of arbitrated cases	Quicker	Quicker	Slower for auto cases (curable)	Quicker	
3. Displaces trials or settlements?	Both	Settlements	Settlements		
4. Overall pace of caseload	Slightly quicker (weak evidence)				
5. Proportion of cases tried	Decrease	Decrease	No change		
6. Other use of judge time, effort		Some impact			
7. System costs		No reduction			
Attorney Satisfaction Criteria					
8. Use of discovery				Reduced	Reduced
9. Attorney estimate of hearing fairness				High	High
10. Attorney satisfaction with outcomes				Less than for regular litigation. Defense lawyers less satisfied than plaintiff	70% satisfied
11. Attorney satisfaction with process		Same as with regular litigation	High		High
Arbitrator-Related Criteria					
12. Arbitrator satisfaction with system					High
13. Involvement of 3rd parties in resolving disputes	More frequent	More frequent	More frequent		
Litigant Satisfaction Criteria					
14. Litigant costs				Reduced	
15. Litigant estimate of hearing fairness					High
16. Litigant satisfaction with outcomes					Mixed: losers less satisfied than winners
17. Litigant satisfaction with system		Higher than for regular litigation	High		High

Source: Botum, Afterward: Does Court-Annexed Arbitration Work?, 14 Just. Sys. J. 244, 246-247 (1991).

APPENDIX G

Trial de novo

	Is a trial de novo guaranteed?	Time Limit for Appeal	Improvement needed to Avoid Penalties?
Alaska	Yes	—	—
Arizona	Yes	30 days	10%
California	Yes	20 days	
Colorado	Yes	30 days	10%
Connecticut	Yes	21 days	
Delaware	Yes	20 days	0%
Washington, DC	Yes	15 days	10%
Florida	Yes	20 days	0%
Georgia	Yes	30 days	15%
Hawaii	Yes	20 days	15%
Illinois	Yes	30 days	
Michigan	Yes	28 days	10%
Minnesota	Yes	20 days	
Missouri	Yes		10%
Nevada	Yes	20 days	
New Hampshire	Yes	15 days	0%
New Jersey	Yes	30 days	20%
New Mexico	Yes	15 days	0%
New York	Yes	30 days	0%
North Carolina	Yes	30 days	0%
Ohio	Yes	30 days	No Penalties
Oregon	Yes	20 days	0%
Pennsylvania	Yes	30 days	0%
Rhode Island	Yes	10 days	0%
Washington	Yes	20 days	0%

Source: McIver and Keilitz, Court-Annexed Arbitration: An Introduction, 14 Just. Sys. J. 123, 130 (1991).

APPENDIX H

SAMPLE LEGISLATION

The following sample legislation was drafted based on statutes of other jurisdictions, particularly Colorado and Texas, which have implemented alternative dispute resolution procedures. Underlined are the recommendations we have made based on our research and evaluation of such legislation. The recommendations represent those dates and amounts we project will best meet the objectives of House Joint Resolution 435.

Be it enacted by the General Assembly of Virginia:

That the Code of Virginia is amended by adding in Title 8.01 a chapter numbered [ ] consisting of sections numbered [ ], as follows:

Chapter 21.01
Court-Annexed Arbitration

s 8.01-xxx. Definitions-As used in this chapter:

"Award": a written decision made by the arbitrator(s) based on the facts and law which specifies the dollar amount and in whose favor the award is made. The award shall not state the rationale for the decision.

"Court": the circuit or general district court in which the case was filed.

"Court-annexed arbitration": a court-run dispute resolution process to which cases that meet specified criteria shall be assigned. Operating under special rules, arbitrators hear cases and render awards. Their awards, however, are not binding, as the parties may always appeal by requesting a trial <u>de novo</u>.

"Non-binding": the litigants have the right to reject the arbitrator's award and request a trial <u>de novo</u>; the award is considered binding unless an appeal is perfected.

s 8.01-xxx. Short title.

The short title of this Chapter shall be "The Court-Annexed Arbitration Act of <u>1992</u>".

s 8.01-xxx. Creation of Pilot Districts; Actions Assigned; Actions Exempted; Certification of Actions; Expenses.

1. There is hereby created a pilot project to assign certain cases to arbitration. The pilot project shall be

conducted in at least two (2) judicial circuits. The pilot project shall begin and take effect on January 1, 1993, shall apply to eligible cases filed on or after July 1, 1993.

2. The designated court shall refer to CAA not less than twenty percent (20%) nor more than fifty percent (50%) of all qualifying cases filed.

3. The court-annexed arbitration pilot program shall be financed by the Commonwealth.

4. The court-annexed arbitration program shall be non-binding for all civil actions at law seeking ad damnum up to and including $150,000.00.

a. All cases at law filed in the General District Court may be referred to CAA at the discretion of the court.

b. All of those cases at law filed in the Circuit Court, with ad damnum up to and including $150,000.00 shall be diverted to CAA, following the formula set forth herein.

4. Any party who can demonstrate to the court good cause why his or her action should not be assigned for arbitration may be granted a good cause exemption. Anyone seeking such an exemption shall make a motion within ten (10) days of the entry of the order of arbitration. This motion shall be expedited on the court's docket according to section xxx of Title xxx.

5. The complaint and any counterclaim or crossclaim made in a civil action shall contain a certification that the probable amount of recovery exceeds or does not exceed the amount limit imposed for arbitration. If such certification is found by the court to lack substantial justification, then the opposing party shall be awarded attorney's fees.

s 8.01-xxx. Arbitrators-Selection, Training, Qualification; Compensation.

1. One arbitrator shall be assigned by the Court to cases referred to arbitration under the proposed statute.

2. In order to be an arbitrator in Virginia's Court-Annexed Arbitration Program:

a) an attorney must have been an active member of the Virginia bar for at least three (3) years prior to being eligible to serve as an arbitrator, and;

b) must successfully complete a minimum of eight (8) classroom hours of training in arbitration techniques in a course conducted by an alternative dispute resolution center or other organization approved by the court, or;

c) must have served as an arbitrator in at least five (5) disputes.

3. Notwithstanding numbers one and two, above, the requirements for qualification as an arbitrator may be waived based on the agreement of all parties. The parties also may agree to increase the number of arbitrators assigned to a case. In this event the parties shall be responsible to pay, pro rata,

any arbitrator's fee in excess of that of the single arbitrator authorized by statute.

4. Arbitrators shall be compensated in the amount of one hundred dollars ($100) per day, or a portion thereof, within 21 days after they have rendered an award.

s 8.01-xxx. Evidence; Hearings; Procedure; Decision.

1. Hearings shall be conducted at a place determined by the court and at a time set by the arbitrator(s) with the mutual consent of the parties. The arbitration hearings shall be held within 90 days of the date on which the case is referred to arbitration.

2. Procedure at hearings shall be informal and strict rules of evidence shall not be applied except as necessitated in the opinion of the arbitrator(s) by the requirements of justice. All questions of law and fact shall be determined by the arbitrator(s).

3. The arbitrator(s) shall have the power to do the following:

a. administer oaths;

b. issue or cause to be issued subpoenas for the attendance of witnesses; and

c. issue or cause to be issued subpoenas for the production of books, records, documents, and other evidence.

Subpoenas so issued may be enforced in the manner provided by law for the service and enforcement of subpoenas in civil actions.

4. Any party shall be entitled to participate in the proceedings. Such participation by a party or parties includes, but is not limited to, live or videotaped testimony of such parties and relevant witnesses, and submission of affidavits.

5. No record of the proceedings is required. If any party desires to make a record of the hearing, that party shall incur the costs thereof.

6. Fees for attendance as a witness shall be the same as for a witness in the court wherein the action was filed.

7. The arbitrator(s) shall file the award with the court within ten (10) days of the hearing and mail or deliver a copy to each party or each party's attorney.

8. If neither party demands a trial de novo within 30 days after the filing of the award, then the award shall be final and enforceable as any other judgment in a civil action.

s 8.01-xxx. Trial de novo; Admission of Award into Evidence.

1. Any party dissatisfied with the award may elect to have a trial de novo, both as to law and facts. Demand for such a trial shall be filed with the court within 30 days after the filing of the award.

s 8.01-xxx. Immunity of Arbitrator.

An arbitrator shall be immune from civil process or civil liability arising from participation as an arbitrator and for all

communications, findings, opinions, and conclusions made in the course and scope of his or her duties as prescribed by this Chapter.

s 8.01-xxx. Further Interpretation of this Chapter by Supreme Court Rules.

Pursuant to its authority under Article VI, section 5 of the Virginia Constitution, the Supreme Court of Virginia shall be empowered to promulgate rules governing the arbitration proceedings in this Chapter.

s 8.01-xxx. Annual Report to the General Assembly.

On November 1, 1994 and January 1, 1995, a report evaluating the pilot court-annexed arbitration program(s) shall be submitted to the General Assembly so that it may determine whether to continue or to terminate the program(s) after July 1, 1995.

s 8.01-xxx. Nonapplicability.

The provisions of this Chapter shall be inapplicable to any proceeding under Chapter 21. The provisions of this Chapter shall also be inapplicable to any proceeding under Chapter xxx of Title xxx.