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Court-Annexed Arbitration--The Northern Kentucky Experience

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I. BACKGROUND

A. A Statement of the Problem

In 1989, the Northern Kentucky Bar Association appointed a committee to investigate ways to alleviate a backlog of cases awaiting trial in the Boone Circuit Court. Boone County, Kentucky, is the fastest growing county in the Commonwealth of Kentucky. As home for the Greater Cincinnati Airport and one of Greater Cincinnati's largest shopping malls, it is a major center of activity. However, despite its continued growth, the Boone County Circuit Court is served by only one judge, who also serves Gallatin County. Beginning in the late 1970s, the county experienced a litigation explosion, which could not be handled by one circuit judge.[1] The caseload for the circuit judge was shown by statistics to be one of the highest in the Commonwealth. The goal of the committee was to find an efficient and equitable method by which the mounting caseload could be processed.

B. Choosing a System

In late 1989 and early 1990, the committee began to formulate a proposal for court annexed arbitration in the Boone Circuit Court. The motivation for such a system was twofold: (1) to help alleviate the trial docket and (2) to lower the expense of litigation for the participants. In order to simplify and streamline the process, the committee decided at the

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[1] *See Supreme Court Announces Pilot Arbitration Project*, UPI, July 9, 1990 (LEXIS, Nexis library, Archs file).

outset that the program would be geared to smaller cases, i.e., cases in which the potential verdict would be $25,000 or less.

The committee began exploring alternatives, keeping in mind several key factors:

(1) *Satisfaction of the parties.* Even though the committee wanted to move cases quickly, the parties had to be comfortable with the process. Litigants should always feel that they had their day in court.

(2) *Simplicity of the structure.* Given that one of the chief goals of the program was to abate the cost of civil litigation, any system that had a high administrative cost would be unworkable. Additionally, the committee felt that this alternative structure should not have the expenses of litigation, such as expert witness and deposition fees.

(3) *The system had to be implemented quickly.* The case log was continually expanding; any plan that would take a significant length of time to initiate would only exacerbate the time problem. The system needed to be able to take cases immediately, and it had to be manned by individuals who were knowledgeable in the handling of civil cases.

(4) *The program needed to produce a decision even where parties could not agree.* Since a major goal was to alleviate the trial docket, disputes needed to reach finality as quickly as possible. This eliminated mediation as an alternative, since the goal of mediation is to get the parties to reach an agreement, and the committee wanted to produce a decision even where such agreement was not possible.

Given these necessary components, the committee decided that arbitration best served the needs of the Northern Kentucky courts and those who use them.

C. *The Ohio Model*

Once a method had been chosen, the next step was getting something in writing–designing the specifics of the process. Hamilton County, Ohio, directly north of Boone County, had been practicing arbitration since 1972 in its Court of Common Pleas.[2] Since many members of the northern Kentucky bar also practice in Ohio courts, several attorneys were already familiar with the process. Given the time-tested success of the Ohio program,[3] the

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[2] See OH. R. HAMILTON 24.

[3] Between 1972 and 1991, 12,696 cases were assigned to the Hamilton County Arbitration Program.

Awards filed:	6,607
Settlements:	5,157
Recertified to judge:	362

committee decided to use that system as a model for the Northern Kentucky plan.

The committee prepared a draft of the arbitration rule and recommended it to the Boone Circuit Judge, who endorsed the proposal and forwarded it to the Kentucky Supreme Court. The Supreme Court accepted the proposal and approved an amendment to the Boone Circuit Court Rules on July 6, 1990.[4] Since that time, the rule has been amended only once, increasing the potential jurisdictional amount of cases to $50,000,[5] and increasing arbitrator's fees.[6]

II. GENERAL OVERVIEW OF THE SYSTEM

A. Referral to Arbitration

Most of the cases that come to arbitration are referred by an order of the Boone Circuit Court. The circuit judge may refer any civil case to arbitration, provided the amount in controversy does not exceed $50,000. Parties may block the referral by filing a written objection within ten days of the filing of the referral order. If an objection is filed, the case will not go to arbitration. This process is known as "opting out."[7]

While the rule does not have a provision for judicial referral from outside Boone or Gallatin Counties, cases may come from those counties provided that both parties consent to the process. In fact, more than one-fourth of the cases brought before arbitration panels to date have come from outside Boone and Gallatin Counties.[8]

B. Selection of Arbitrators

Once the referral is made, the parties are required to submit their filing fees within thirty days.[9] Upon receipt of the fees, the Northern

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These statistics reflect a 95% disposal rate of all cases. Of those cases assigned, only 19% were appealed. *See* ARBITRATION REPORT OF THE HAMILTON COUNTY COURT OF COMMON PLEAS (1991) (on file with the author).

[4] The Order was signed by Chief Justice Robert Stephens. A copy is on file with the author.

[5] Under § A(1)(b) of the arbitration rule, cases exceeding the jurisdictional amount may also be referred to arbitration, provided that all parties agree to the process.

[6] Arbitrator's fees increased from $210 to $240. The amending order, dated January 4, 1993, was also signed by Chief Justice Robert Stephens (on file with the author).

[7] It is worth noting that, to date, no party has ever filed an objection to block a referral–i.e., no one has "opted out" of the process.

[8] *See infra* note 19 and accompanying text.

[9] The fee for arbitration, as of January 1993, is $240, which includes fees for three arbitrators and administrative costs. The expense is shared equally by the parties.

Kentucky Bar Association appoints a panel of three arbitrators.[10] The arbitrators come from three separate, confidential lists maintained by the Bar Association. One list is the chair list, which contains the names of attorneys with more than five years of practice and litigation experience, chosen and approved by an order of the Boone Circuit Court. The list is in random order and the next name on the list is chosen for the case, unless there is a conflict. Two other lists are maintained for the additional arbitrators and they are selected in the same manner as the chair.[11]

C. The Arbitration Process

Once the chair is assigned, the chair sets a date and time for the hearing. The date must be within forty-five days of the chair's appointment, and may be held at the chair's office, a courthouse or some other location. No later than fourteen days before the hearing, the parties are to exchange any documents that they intend to use at the arbitration hearing. No document may be used if it was not exchanged pursuant to this rule. The parties must also supply to the arbitrators any pleadings that they wish the arbitrators to review before the hearing. The parties may also provide panel members with copies of the exhibits and memoranda. Ex parte contact with the arbitrators, other than supplying these pleadings, is prohibited.

The most important impact of the arbitration rule is its modifications to the Kentucky Rules of Evidence. Expert reports and property damage estimates are admissible into evidence at an arbitration hearing.[12] Sworn statements may also be submitted, and the arbitrators may give them whatever weight they deem appropriate.

The hearing itself normally should take two to three hours. Although the hearing is less formal in nature than a jury trial, all the aspects of a jury trial are included so that the litigants will feel as if they have had a full and fair hearing of their matter. Therefore, procedures such as opening statements, swearing in of witnesses and closing arguments are

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and administrative costs. The expense is shared equally by the parties.

Prior to 1993, the fee had been $210, because administrative costs were initially paid by a grant from the IOLTA (Interest on Lawyers' Trust Accounts) Foundation. When that grant expired, the fee was raised to cover those costs.

[10] All cases are heard before a panel of three arbitrators unless the parties agree, prior to assignment, to use only one.

[11] The chair of the panel is paid $90. The other two panelists are paid $60 each. These fees are covered by the filing fee.

[12] Allowing expert opinion by written statement serves both of the goals of the process: (1) it saves time, because the witnesses need not be brought in to testify; and (2) expert witness fees do not have to be paid.

utilized. Once the hearing is concluded, the panel arrives at a decision and enters that decision in writing with the court and with the bar association. Copies are sent to the attorneys and any aggrieved party has thirty days to file a notice of appeal and an affidavit of non-delay. If a timely appeal is filed, the case will be tried de novo before the circuit court.[13]

III. SUPPORT FOR THE PROGRAM

The committee knew from the outset that the program would only be successful if local attorneys were willing to utilize the system.[14] Therefore, the system was advertised through the Northern Kentucky Bar Association Newsletter. Bar members were encouraged to volunteer to serve as arbitrators,[15] and potential chairs were solicited after selection by the Boone Circuit Judge. Educational programs were allowed to be taken for CLE credit in the three Northern Kentucky counties. The purposes of these programs were to educate members of the bar about the process and to train potential arbitrators. The programs were well attended and two subsequent CLE sessions have been held. The entire text of the arbitration rule and the forms used have been printed in the Bar Association Newsletter.

Public support was fostered by newspaper coverage. In addition to informational articles, the local newspaper also ran an editorial endorsing the program.[16]

Judicial support has also been key. Circuit Judge Sam Neace and his successor, Judge Jay Bamberger, have been very supportive of the system. At motion docket, the judge will often ask attorneys who have filed motions to set for trial whether they have considered arbitration and whether the case might be appropriate for arbitration. Circuit judges in neighboring counties have encouraged litigants in appropriate cases to consider entering agreements to have the case arbitrated under the system. Such judicial encouragement is probably the greatest source of participation in the program.

IV. TYPES OF CASES

Under the arbitration rule, almost any civil case can be handled by arbitration. The arbitrators do not have equity power and, therefore, equity cases are excluded. Divorce cases, which are handled by a local domestic

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[13] To date, less than one-fourth of the awards entered have been appealed. *See infra* note 19 and accompanying text.

[14] So far, 110 attorneys have brought cases to arbitration.

[15] To date, 120 attorneys have served as arbitrators. *See infra* note 19 and accompanying text.

[16] *See A Quicker Justice*, KY. POST, Jul. 11, 1990, at 4K.

relations commissioner, are likewise excepted. However, all other civil suits that are filed in the circuit court are arbitrable. There need not be a jury demand filed to make a case eligible for arbitration; the only limitation is that the panel's award cannot exceed $50,000 per case.[17]

Two types of cases have been predominant in the system. The first is personal injury cases. These are primarily automobile cases, though many involve other factual situations. In these cases, the report of the treating and the independent examining doctors are normally submitted to the panel along with the medical bills and lost wage documentation.[18] Another popular type of case for arbitration has been the "bad house" case. These cases generally involve purchasers suing sellers for fraud, misrepresentation or breach of contract. In fact, the very first case tried in the system was a bad house case, and the hearing took one day. The decision reached by the panel was accepted by the parties and the case was concluded. Both Circuit Judge Neace, who had monitored the hearing, and the other individuals involved concluded that if the case had been tried to a jury, it would have taken a minimum of three days.

V. PARTICIPATION TO DATE

As of October 8, 1992, the following statistics were available:[19]

Cases Referred to Date	49
Cases Completed	37
Cases Appealed	8
Awaiting Hearing	12
Percentage of Cases Completed Without Necessity of Jury Trial	79%
Source of Cases by County	
Boone	36
Kenton	3
Campbell	9
Gallatin	1

[17] In multiple plaintiff litigation, this provision has been interpreted to mean that the award cannot exceed $50,000 per plaintiff.

[18] These cases are logically the most popular for arbitration because of the admissibility of written expert testimony. *See supra* note 12 and accompanying text.

[19] These statistics were provided by the Northern Kentucky Bar Association (copy on file with the author).

Number of Attorneys Who Have Served as Arbitrators	120
Number of Attorneys Who Have Participated as Attorney for Litigants	110
Average Time, Referral Order to Decision	4 months

The current disposal rate of the Northern Kentucky system of seventy-nine percent is considered good, but it is hoped the rate will improve over time. Presently pending before the bench and bar in northern Kentucky is a proposal to expand the arbitration rule to Kenton and Campbell Counties. If this proposal is adopted, it is expected that the number of cases involved will greatly increase in number. It is significant, however, that almost twenty-seven percent of the cases handled to date have come from outside of Boone County through mutual agreement of the parties. As the bar becomes comfortable with the system, the participation numbers will continue to increase. It should be noted, however, that with a conclusion rate of seventy-nine percent to date, a vast majority of the litigants participating in the system have been satisfied with the outcome. To date, not one dispute has arisen regarding the operation of the system or the conducting of the hearings. No motions have been filed to set aside arbitration findings on the basis of an unfair hearing being conducted. No one has exercised their right to opt out.

VI. PROGRAM ADVANTAGES

A. Costs

The financial advantages of arbitration for litigants can be demonstrated by comparing the costs of an arbitration to the costs of litigation. Taken as an example is a case recently tried to a jury in a northern Kentucky circuit court. The verdict result in the case would have been within the jurisdictional limits of the arbitration system. Costs for the plaintiff, trying the matter before a jury, were as follows:

Expert witness fees for testimony	$ 750.00
Stenographic costs	458.50
Videographer charges	347.75
TOTAL:	$1556.25

Costs for the Defendant were:

Expert witness fees for testimony	$ 750.00
Stenographic costs	900.00
Videographer charges	300.00
Attorney fees–two-day jury trial and preparation	$5000.00
TOTAL:	$6950.00

If this case had been tried in arbitration, costs for the plaintiff would have been:

Filing fee	$ 120.00
Expert reports	200.00
TOTAL:	$ 320.00

Costs for the defendant would have been:

Filing fee	$ 120.00
Expert exam and report	150.00
Attorney fees–3-hour hearing and preparation	800.00
TOTAL:	$1070.00

Not only do litigants save witness fees, but they may also save substantial attorneys' fees, since the time spent in hearing is also greatly reduced. It is extremely difficult to try a jury trial in less than one day. Added to this is the additional time the attorney must spend in preparation for the trial. The average arbitration case should take two to three hours to hear. Since lawyers are being used as arbitrators, the need to call multiple witnesses to drive home points as one would before a jury is greatly reduced. For parties paying counsel by the hour, the difference in preparation and hearing time may be quite significant. There are also savings for the taxpayers: juror fees, stenographer fees, and court time that could be used on other matters.

B. Speed

Cases referred to arbitration will not have a panel appointed until thirty days after the arbitration order is entered. That time limit can be

shortened, however, by agreement of the parties. A hearing must be scheduled within forty-five days after the Board of Arbitration is appointed, and the arbitration panel must enter its report and award within fifteen days after the hearing. Realistically, a case will generally be concluded within ninety to 100 days after the referral order is entered. While three months may seem like a great deal of time, any practicing attorney knows that ninety days is a very brief period on a court calendar.

VII. FUTURE RECOMMENDATIONS

The program to date has been successful and has resulted in a net savings to all participants. The recent change of raising the potential award limit from $25,000 to $50,000 will further broaden the scope of cases that can come into arbitration.

To make the program more effective, consideration should be given to eliminating the opt out provision of the rule, which allows any objecting party to file an objection within ten days of the referral order and thus prevent the case from going to arbitration. A similar system is used in Hamilton and Clermont Counties, Ohio, without any opt out provision.[20] Since any dissatisfied party can file an appeal and obtain a trial de novo, there is no loss of a party's right to a jury trial. By not allowing parties to opt out, the court can have better control over its docket. Furthermore, most parties, once they experience the system, agree that arbitration is advantageous.

The second area of recommendation is that those members of the bar who are not familiar with such a program become familiar with it. All attorneys have an ultimate responsibility to act in the best interest of their clients. Every litigant wants to achieve the best financial conclusion that is possible. For a plaintiff, that means obtaining as large a remedy as is feasible; for a defendant, that means keeping the ultimate payment as low as possible. But minimizing the cost of the litigation itself is in the best interest of all parties and should therefore be a common goal. Attorneys on both sides need to focus on the net payment to their client or net cost to their client in each and every matter. It is submitted here that invariably the net result for plaintiffs and defendants is better under the arbitration system.

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[20] *See* OH. R. HAMILTON 24.