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Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation

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Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.*

**INTRODUCTION**

In 1982, Chief Justice Warren E. Burger expressed deep concern over the explosion of litigation in this country¹ and suggested that arbitration² may be a better way to handle "the mushrooming caseloads of the courts."³ There is little dispute

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* Abraham Lincoln (1850), *reprinted in Court-Annexed Dispute Resolution in Kentucky, Report to the Supreme Court of Kentucky by the CDR Task Force on Court-Annexed Dispute Resolution (March 1989).

¹ One commentator says the litigation explosion resulted "from a marked imbalance between the number of cases filed and the limited and relatively fixed judicial resources available to process these cases." Simoni, *Court-Annexed Arbitration In Oregon: One Step Forward and Two Steps Back*, 22 WILLAMETTE L. REV 237, 241 (1986).

² Arbitration can be defined as "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." BLACK'S LAW DICTIONARY 96 (5th ed. 1983) (citations omitted). For a discussion of the history and procedure of arbitration, see Note, *The New Jersey Alternative Procedure For Dispute Resolution Act: Vanguard of a "Better Way"?,* 136 U. PA. L. REV 1723, 1727-31 (1988) (authored by John V O'Hara). See also Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1987-88).


The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.
among members of the legal community that litigation delays and court backlogs⁴ have become an enormous problem in this country.⁵ In some court systems, it takes years for a case to be resolved,⁶ causing frustration among attorneys, judges, and litigants and, more important, "reducing public confidence in the judicial system."⁷ A remedy must be found to solve this problem because litigants desire fast, efficient, and inexpensive justice.

State legislatures and courts alike have considered several alternatives to remedy the growing problem facing our judicial system.⁸ One remedy that has recently emerged is court-annexed

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The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. We should be alert to the need for better tools to serve our purposes.

Against this background, I focus today on arbitration, not as the answer or cure-all for the mushrooming caseloads of the courts, but as one example of "a better way to do it."

Id. at 274-76; see also Note, On Behalf of Mandatory Arbitration, 57 S. Cal. L. Rev 1039, 1039 (1984) (authored by Daoud A. Awad) ("[T]he hope behind arbitration systems is finally to resolve many disputes—either by the parties' acceptance of the arbitrator's decision or by their using that decision as a basis for further settlement negotiations—without resort to further legal proceedings.").

⁴ "Litigation delay increases and case backlogs grow when the number of case filings exceeds the number of case dispositions. Seen from this perspective, the problem of litigation delay is primarily one of resources. [The] solution is formed in an increase in resources." Simoni, supra note 1, at 242.

⁵ "Without exception, the courts that turn to arbitration have done so to deal more effectively with increasing congestion on their trial calendars. Congestion creates a problem when a backlog of cases increases, thereby lengthening the time it takes to dispose of a typical case, and this prolonged disposition time offends a community's sense of justice." E. Rolph, INTRODUCING COURT-ANNEXED ARBITRATION 6 (1984). "Excessive delay has serious consequences: it prolongs the anxiety of the litigants, undermines the value of judgments, and results in the loss or deterioration of evidence." Simoni, supra note 1, at 239 n.8.

⁶ Snow and Abramson, Alternative to Litigation: Court-Annexed Arbitration, 20 Cal. W.L. Rev. 43, 43 (1983). "For example, the time for civil cases to come to trial in Los Angeles county, California, currently stands at forty months and is continually growing with time." Id. at 43 n.1 (citing JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF CALIFORNIA COURTS 89 (1982)).

⁷ Simoni, supra note 1, at 238-39 (citation omitted).

⁸ Some of these alternatives include negotiation, mediation, summary jury trial, and arbitration. While this Note will focus only upon the alternative of court-annexed arbitration, the recent controversy surrounding the use of summary jury trials as an alternative dispute method may have implications upon court-annexed arbitration programs. In Strandell v. Jackson County, Illinois, 838 F.2d 884 (7th Cir. 1988), the Seventh Circuit held that federal district courts do not have the power to require parties
arbitration. By 1987, at least twenty-two states had implemented some form of court-annexed arbitration, a number that continues to increase each year. There are several ways this program

to participate in nonbinding summary jury trials. Id. at 888. This decision is important to an analysis of court-annexed arbitration because it could inhibit the adoption of a mandatory court-annexed arbitration program. The Strandell decision was recently challenged, however, by the Eastern District of Kentucky in McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988). In McKay, District Judge Bertlesman disagreed with the Seventh Circuit's decision in Strandell, holding that federal district courts do have power to require parties to participate in summary jury trials. Id. at 44. While the McKay court's disagreement with the Strandell holding involved, to some extent, distinctions between local court rules, the court supported its contention on other grounds as well. The court cited favorably several cases that have upheld mandatory nonbinding arbitration, and stated that "[a] summary jury trial is essentially nonbinding arbitration with an advisory jury instead of arbitrators." Id. at 45. Thus, one could easily conclude that since the court upheld the use of nonbinding summary jury trials, it would likewise view mandatory court-annexed arbitration as a valid dispute alternative as long as the litigants are granted the right to appeal for a jury trial. For an excellent discussion of the Strandell and McKay decisions and their effect on summary jury trials, see Comment, Compelled Participation in Summary Jury Trials: A Tale of Two Cases, 77 Ky. L.J. 421 (1988-89) (authored by Paul Mattingly).

Court-annexed arbitration can be briefly described as follows: Court-annexed arbitration is a court-run dispute resolution process to which cases that meet some specified criteria are involuntarily assigned. Operating under special rules, arbitrators hear the case and render awards. However, their awards are not binding. To avoid the possibility of abridging constitutional or statutory protections granting litigants the right to a jury trial, parties may always appeal an arbitrator's award by requesting and receiving a trial de novo (a new trial, without regard to the prior arbitration hearing or outcome) back on the traditional adjudicative track.


can become part of any state court system. Regardless of the method used, "[t]he general goal of court-annexed arbitration is to create an efficient, economical alternative to traditional civil litigation for prompt resolution of cases." This Note will address all aspects of court-annexed arbitration and its effect on the judicial system. Part I provides a general discussion of the reasons for court-annexed arbitration. Part II gives a complete analysis of court-annexed arbitration programs, focusing on general descriptions of the programs and the differences between mandatory and permissive programs. Part III considers the perceived advantages and disadvantages

MANDATORY ARB. R. 1.1-8.5.

Court-annexed arbitration has also become a part of the federal judicial system. Presently, there are ten U.S. district courts with court-annexed arbitration programs: Eastern District of Pennsylvania; Northern District of California; Middle District of Florida; Middle District of North Carolina; District of New Jersey; Western District of Oklahoma; Western District of Missouri; Western District of Texas; Western District of Michigan; and Eastern District of New York. Broderick, Court-Annexed Compulsory Arbitration: It Works, 72 JUDICATURE 217.222 (Dec.-Jan. 1989). On November 19, 1988, President Reagan signed into law the Judicial Improvements and Access to Justice Act. Title IX of this new Act amends Title 28 of the United States Code by inserting a new chapter, "Chapter 44 Arbitration." Id. at 224. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 907. The Act authorizes court-annexed arbitration programs in twenty U.S. district courts. Broderick, supra, at 217. This new legislation signifies the increased awareness of court-annexed arbitration as an alternative to litigation.

There are three ways court-annexed arbitration becomes involved in the local court judicial system:

[a] state legislature may enact a statute that specifies the structure of the program it wants, and then it either requires or permits the local courts to put such a program in place. Alternatively, some state supreme courts may, by court rule, adopt a program, outlining its structure and either mandating or permitting local courts to use it if they wish. Finally, where legal rules permit local innovation of this type, local courts may institute court-annexed arbitration on their own initiative.

Constitutional authority permitting the adoption of arbitration procedures varies greatly from state to state. Which route is used often depends upon the relative authority of judicial and legislative branches as set forth in the constitution that governs the jurisdiction.

E. ROLPH, supra note 5, at 7.

The procedure to be used by Kentucky in adopting arbitration procedures is beyond the scope of this Note. As mentioned above, it depends upon an interpretation of the Kentucky Constitution.

Walker, supra note 10, at 904.

See infra notes 19-24 and accompanying text.

See infra notes 25-77 and accompanying text.
of court-annexed arbitration as it relates to traditional litigation.\textsuperscript{15} Part IV addresses the prominent concerns that accompany court-annexed arbitration programs, emphasizing the constitutional implications.\textsuperscript{16} Part V discusses the various options available to Kentucky in adopting a court-annexed arbitration program as an alternative to litigation.\textsuperscript{17} Ultimately, this Note concludes that Kentucky should adopt a mandatory court-annexed arbitration program.\textsuperscript{18}

I. ALTERNATIVE DISPUTE RESOLUTION

Historically, when backlogs in the court system grew too large, additional judicial positions were created to handle the increased congestion. Today, however, fiscal constraints are forcing courts to consider other alternatives, known as alternative dispute resolution (ADR), to solve the problem of court congestion. These programs are designed to encourage judicial efficiency without eroding the quality of justice.\textsuperscript{19} Of the various types of alternative dispute resolution methods,\textsuperscript{20} court-annexed arbitration has the most widespread support and approval as an alternative to traditional litigation.\textsuperscript{21} Supporters of court-annexed arbitration include Edward B. McConnell, former director of the National Center for State Courts, who explained the function of alternative dispute resolution as follows:

The task of providing final and binding resolution of civil disputes in our nation has historically been the responsibility of the judicial system. While our judicial system has not shirked this growing burden, there is an increasing awareness among those interested in the administration of justice that alternative procedures of forums might be developed to handle portions of this civil dispute resolution function, to simplify and expedite the process, and perhaps to provide relief without the necessity of formally deciding the issues involved.


\textsuperscript{15} See infra notes 78-94 and accompanying text.
\textsuperscript{16} See infra notes 95-177 and accompanying text.
\textsuperscript{17} See infra notes 178-92 and accompanying text.
\textsuperscript{18} See infra notes 193-99 and accompanying text.
\textsuperscript{19} See infra notes 78-94 and accompanying text.
\textsuperscript{20} There exist four primary ADR models—negotiation, mediation, arbitration, and adjudication. For an excellent discussion of these ADR models, see Note, "No Frills" Justice: North Carolina Experiments With Court-Ordered Arbitration, 66 N.C.L. REV 395, 397-98 (1988) (authored by William Kinsland Edwards).
\textsuperscript{21} Id. at 396.
arbitration view the program as "promising simple, fast, and inexpensive adjudication [for] litigants and a means of reducing judicial workloads and controlling public expenditures for civil court administrators." Therem lies the rationale behind the popularity of court-annexed arbitration and its acceptance as a viable alternative to litigation.

As mentioned above, alternative dispute resolution, court-annexed arbitration in particular, is designed to promote judicial efficiency without losing sight of the need to maintain or enhance the quality of justice provided to potential litigants. More specifically, an effective court-annexed arbitration program seeks to accomplish three distinct goals: (1) to provide a fast, economically efficient, equitable, and informal resolution of civil disputes; (2) to keep intact the procedural and substantive due process rights of a litigant; and (3) to ensure litigants, attorneys, and the courts of satisfactory adjudication. While all three goals are important, the latter two are imperative to a successful court-annexed arbitration program. Thus, while a court-annexed arbitration program should strive to attain these goals, it is critical to maintain a high quality of justice for the litigants, or the program risks failure.

II. COURT-ANNEXED ARBITRATION PROGRAMS

A. General Description

Court-annexed arbitration, also known as court-ordered arbitration, judicial arbitration, or court-administered arbitration, is becoming an increasingly popular form of alternative dispute resolution. Court-annexed arbitration can best be described as a court-run dispute resolution process to which cases that meet some specified criteria are involuntarily assigned. Operating

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22 Id. (quoting J. ADLER, D. HENSLER & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FAKE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 60, at 1 (1983) [hereinafter SIMPLE JUSTICE]).
23 Id. at 409.
24 Id. at 410.
25 See E. ROLPH, supra note 5, at 3; see supra note 9 for a brief description of court-annexed arbitration.
under special rules, arbitrators hear the case and render awards. However, their awards are not binding. To avoid the possibility of abridging constitutional or statutory protections granting litigants the right to a jury trial, parties may always appeal an arbitrator's award by requesting and receiving a trial *de novo* (a new trial, without regard to the prior arbitration hearing or outcome) back on the traditional adjudicative track.\(^{26}\)

Whether created by state legislation or by court rule, court-annexed arbitration programs share certain basic characteristics: (1) value limitations; (2) prehearing activities; (3) arbitration hearings and awards; (4) trial *de novo*; and (5) disincentives to appeal for a trial de novo. The following discussion of these basic characteristics will explain more fully how such programs are operated.

1. *Value Limitations*

The monetary value of a particular case is a consideration in subjecting cases to court-annexed arbitration. Usually, states will propose a dollar limitation on the value of the cases that may be assigned to arbitration.\(^{27}\) The dollar limitations range from $3,000 to $150,000, depending on the jurisdiction.\(^{28}\) The

\(^{26}\) *Rolph & Hensler*, supra note 9, at 2. Court-annexed arbitration is different from private arbitration in two respects. First, court-annexed arbitration is a court-imposed, public hearing conducted under complete court supervision and guidance. Whereas, in private arbitration, the parties agree to arbitrate by contract, which is signed before a cause of action occurs, and the hearings are generally private in nature with no court supervision. Second, if a party is not satisfied with the outcome in the court-annexed arbitration hearing, he or she may appeal for a trial by jury. By contrast, in private arbitration, an appeal trial on the merits is prohibited, thus, the arbitrator's decision is binding on the parties. *See* Walker, *supra* note 10, at 905.

\(^{27}\) *E. Rolph*, *supra* note 5, at 12. In general, all civil actions for monetary relief which do not exceed some dollar limit are subject to arbitration.

rationale behind a dollar limitation is twofold. First, "[a] dollar restriction is used because the purpose of arbitration is to enable persons with small or moderately sized claims to assert their rights." Second, a dollar limitation allows the state to determine the number of cases they wish to refer to arbitration—the higher the dollar limitation, the greater the number of cases to be arbitrated. For example, if a state wants to submit a large number of cases to arbitration, it will affix a high dollar limitation (e.g., $150,000). Whereas, if a state feels that a small number of cases should be arbitrated, it will install a low dollar limitation (e.g., $3,000).

Much debate has arisen over how cases should be valued to determine eligibility for court-annexed arbitration. There are three possibilities: (1) the litigants value their own case; (2) the litigants can value their own cases in several ways. States that require plaintiffs to file ad damnum statements when filing suit simply use that valuation as the basis for assigning the case to arbitration. Pennsylvania adopted this model in 1952, and other states now use it. Courts that do not require ad damnum statements may require plaintiffs and parties filing counterclaims to value their claims or file a statement of arbitrability. Parties can file these valuations when they initially file suit. But typically the court requests this statement when parties note their case is ready for trial, at which point the parties have a better appreciation of the case's worth. If the litigants' valuations indicate the case falls within the jurisdictional limits of arbitration, then the case is diverted to the arbitration track immediately. In a third approach to litigant valuation, the California enabling statute permits a plaintiff to submit his case directly to arbitration once he has filed his at-issue memorandum, regardless of the defendant's preferences. By so doing, the plaintiff declares the value of his case to be less than $15,000 and implicitly accepts a cap of that amount on his award. The District Court of Eastern Pennsylvania offers yet another variation. In that court, all cases are presumed to fall within the program's jurisdictional limits. To be exempted, a party must file an affidavit with the court stating that the value of the case exceeds the limit.

All of these approaches offer a simple, cheap, and fast procedure for moving cases on to the arbitration track. However, the program becomes
court makes the valuation;\textsuperscript{33} or (3) the court sets an objective case characteristic to serve as a proxy for value.\textsuperscript{34} None of these

somewhat voluntary, because litigants can escape it, at least initially, simply by placing a high value on their cases. It might be an appropriate procedure for a court whose users supported the idea of arbitration, but not for a court whose users opposed introduction of the program. Moreover, plaintiffs who value their claims at close to the jurisdictional limit might well not want to foreclose the possibility that they be awarded more than the limit, even though they would happily submit to arbitration. To eliminate this obstacle to accurate valuing, courts should not preclude arbitrators from making awards that exceed the jurisdictional limit.

\textit{Id.} at 15-16.

\textsuperscript{33} \textit{Id.} at 15.

Numerous programs direct the court to value each potentially eligible case. For example, California's arbitration statute requires courts to value each eligible case at some point after the plaintiff has filed an at-issue memo and before the case is set for trial.

California law requires the courts to value cases, but courts have interpreted this requirement differently. In many, judges value the cases, either in early screening/settlement conferences or in the later trial setting conferences. In at least one court, however, the arbitration staff values cases, and litigants have the right to appeal the valuations to a judge. In another court, a commissioner values the case. Clearly, the innovative efforts to substitute parajudicial for judicial time are intended to reduce the costs and demands of the program, while still controlling the disposition of cases. Courts experimenting with these alternatives say they work well, and attorneys have not reported any dissatisfaction.

California courts vary considerably in the exact procedures they have adopted for the screening. Some courts do not screen their civil cases until shortly before they would otherwise go to trial. Late screening, these courts argue, gives most cases time to settle and thus reduces the number to be screened. A court can combine its screening conference with a settlement conference, thereby reviewing a case only once and saving itself time and money. Other courts argue that screening cases at early conferences removes many cases from the calendar before the court has spent much time on them; therefore early screening more than pays for itself. Early screening allows cases going to arbitration to be heard sooner and disposed of faster. Although this debate continues, some courts are switching from late to early assignment conferences, but none seem to be switching from early to late assignment.

\textit{Id.} at 16.

\textsuperscript{34} \textit{Id.} at 15.

Courts can also value cases by using some objective characteristic of the case as a proxy for the value. For example, a case would be objectively valued if, say, in a personal injury suit when the claimed medical expenses fall under $1,000, the court automatically presumes the case should be valued at less than $10,000 and assigns it to arbitration. Although this kind of screening mechanism is fast and reasonably cheap to implement,
alternatives are flawless, and the final decision will have a definite impact on the economic efficiency of the program and the ability of the court to divert cases to arbitration expeditiously. Therefore, the valuation of cases for arbitration is of major importance to a court-annexed arbitration program.

2. Prehearing Determinations

There are numerous determinations that occur before the arbitration hearing is conducted. First, many cases will be excluded from the arbitration process at the prehearing stage because the valuation of cases for arbitration is of major importance to a court-annexed arbitration program. However, the valuation of cases for arbitration is of major importance to a court-annexed arbitration program. In New Jersey, where arbitration applies only to motor vehicle cases, two courts are now experimenting with objective valuing procedures. In Union County Court, local rules provide that a case is presumed to have less in controversy than the jurisdictional limit of $15,000 if the plaintiff's medical expenses are less than $2,500. The rules go on to define medical expenses as the amount reported to the court by the plaintiff's counsel on the court's case management form. Burlington County Court, however, uses the type of claim as the value criterion. If the claim is only for property damage or for soft tissue personal injury, then the claim is presumed to fall within the jurisdictional limit. In both courts, parties may be removed from the arbitration roster if they successfully argue that their particular cases have a higher value. Conversely, if the parties fail to provide the court with the necessary information on type of injury or medical expenses, the case is automatically assigned to arbitration. Although New Jersey has only recently pioneered the use of objective valuation, the two courts there report it shows great promise as an inexpensive but effective technique for diverting cases to arbitration.

*Id.* at 16-17

35 *Id.* at 15. Rolph explains further:

For example, if litigants value their own cases, court costs will be low; but many litigants may overvalue their cases, thereby reducing the diversion capability of the program. If the court values each case, the program may realize its full potential. However, the program will cost more to run, because courts must use their personnel to do the screening. If a court chooses to use a proxy—say, the type of injury sustained by the plaintiff or the plaintiff's medical expenses—it can control costs, as cases require no special court review. Using a proxy can divert many reluctant participants to arbitration, because the characteristics of their cases identify them as eligible. However, proxies are imprecise. Some share of the eligible cases will continue to slip through, and another portion will be improperly assigned to the program.

*Id.*
cause of the subject matter of the suit. Common exclusions from the court-annexed arbitration program include class actions, criminal actions, claims for equitable, injunctive or declaratory relief, questions involving family law or probate issues, and real estate actions.\textsuperscript{36} Most states typically apply the program to suits seeking money damages or to civil actions.\textsuperscript{37} A case may also be excluded from the arbitration program if it presents "primarily legal, as opposed to factual, issues, or in which a case presents novel legal or factual matters."\textsuperscript{38} Also, several states have excluded cases for "control" purposes in connection with evaluation programs to assess the success of court-annexed arbitration.\textsuperscript{39}

Second, a determination must be made regarding the number of arbitrators sitting on a hearing panel and the method of selecting these arbitrators. Trade-offs must be made when deciding how many arbitrators will sit on the panel. Some programs use three arbitrators,\textsuperscript{40} whereas other programs use only one arbitrator.\textsuperscript{41} Each alternative has its advantages:\textsuperscript{42}

\textsuperscript{36} Walker, supra note 10, at 919.
\textsuperscript{37} E. Rolph, supra note 5, at 12.
\textsuperscript{38} Walker, supra note 10, at 920-21.
\textsuperscript{39} Id. at 921.
\textsuperscript{40} See Ill. Rev Stat. at ch. 110, para. 2-1003A, N.Y.R. of C.J. at § 28.4(b); Ohio R. Superintend. Ct. C.P.R. 15(B) (Implemented by, for example, Cuyahoga County, Ohio C.P.R. 29(II)(A)-(C); Franklin County, Ohio C.P.R. 65.03; Hamilton County, Ohio C.P.R. 24(C)-24(E); Stark County, Ohio C.P.R. 16.03-16.05.
\textsuperscript{42} The advantages of a single arbitrator panel are two-fold. First, scheduling difficulties inherent in trying to accommodate the schedules of two litigants, their attorneys, and three arbitrators are reduced if only one arbitrator is involved. Second, a program that uses one arbitrator is less expensive than a program that uses three arbitrators.

The advantages that attend a three-person panel, however, are significant. A three-person panel reduces the possibility that the arbitration award will be a product of bias or incompetence. Jurisdictions that use three-person arbitration panels strive for a balanced representation with attorneys from the plaintiffs' and defense bar as well as a third attorney who is a neutral. The balanced composition of the panel reduces the likelihood that arbitration awards will be biased because of a single arbitrator's predilections. Moreover, a three-person panel will, in general, bring a greater range of experience and expertise to a case than will a single arbitrator.

Simoni, supra note 1, at 261 (citations omitted).
A program using one arbitrator is cheaper, easier to schedule, and imposes less of a burden on the arbitrator pool than a program using more. However, many courts believe that a panel of three arbitrators is likely to render fairer decisions and give litigants more confidence in the arbitration process. A state should use the approach that will best achieve its goals. There are various ways to select arbitrators. Whichever procedure is ultimately adopted, the parties are given some opportunity to determine the composition of the arbitration panel. The litigants have the opportunity to disqualify an arbitrator if good cause is shown. Also, litigants may wish to stipulate to a panel of arbitrators that they have chosen. Many court-annexed arbitration programs allow the parties to choose among several possible arbitrators. In this process, a slate of candidates is sent to the attorneys who may strike names or rank arbitrators by preference. Based on these rankings, the arbitrators are assigned to the suit.

Another issue at the prehearing stage involves the compensation of arbitrators. Although an arbitrator's fee is usually small in amount, a source for this compensation must be found. Compensation for arbitrators usually comes from county or state revenue programs. Many programs, however, place this cost on the party appealing for a trial de novo or failing to improve its position on the appeal.

The discovery process during court-annexed arbitration creates an interesting conflict. To meet the objectives of a simple,
efficient, and expedient adjudicative forum, it seems logical to constrain discovery during arbitration hearings.\textsuperscript{49} The trial bar, however, feels that rushed discovery procedures do not allow enough time to provide adequate representation for their clients.\textsuperscript{50} Nevertheless, in many state programs, discovery is restricted by time limitations.\textsuperscript{51} Furthermore, there is the issue of whether parties can "obtain further discovery if the action continues for a trial de novo."\textsuperscript{52} These discovery issues are complex and must be considered when adopting a court-annexed arbitration program.

3. \textit{Arbitration Hearing and Award}

The arbitration hearing is typically held within a short time after the case is assigned to an arbitrator. In California, for instance, the "hearings are to be scheduled no sooner than thirty-five days, but no later than sixty days, from the date the case is assigned to an arbitrator."\textsuperscript{53} This promptness is consistent with the objective of expedient adjudication.

Although the rules of evidence are generally used to control the hearing, most programs do not require strict compliance.\textsuperscript{54} This is consistent with the theory that "arbitration proceedings are typically designed to afford each side the opportunity to present its story without being shut off by the formal operation of rules."\textsuperscript{55}

The powers given to arbitrators in hearings vary. Most court-annexed arbitration programs give arbitrators quasi-judicial pow-

\textsuperscript{49} E. Rolph, \textit{supra} note 5, at 23. Obviously, limited discovery provides quicker and less expensive adjudication for parties which, in turn, promotes the objectives behind court-annexed arbitration.

\textsuperscript{50} Id. It must be noted, however, that expedient adjudication will not likely override adequate representation.


\textsuperscript{52} Note, \textit{supra} note 3, at 1041. "California's program prohibits discovery after the arbitration award has been rendered, except on permission of the court," \textit{Id.} at n.10.

\textsuperscript{53} Snow and Abramson, \textit{supra} note 6, at 50; see Cal. R. Ct. 16.11.

\textsuperscript{54} See N.D. Cal. R. 500-5(c) (conformity to evidence rules not required); M.D. Fla. R. 8.04(d) (not required to follow formal rules of evidence); E.D. Pa. Civ R. (5)(3) (rules of evidence used as a guide).

\textsuperscript{55} Note, \textit{supra} note 3, at 1043.
ers, such as "the right to subpoena witnesses, give oaths, rule on evidence, and so on." Arbitrators, however, are usually limited in their power to grant continuances in hearings. A delicate balance must be struck so that the arbitrator's powers do not circumvent those explicitly reserved to the courts.

The arbitrator's award is usually filed shortly after the hearing is concluded. One of the reasons parties choose arbitration is for quick results, and an expeditious arbitration award achieves this result. Rules require the award to be in writing, and the award may exceed the maximum allowed by law.

4. *Trial De Novo*

Several options are available for litigants after the arbitrator has rendered the award. First, the award can become a judgment if the parties elect not to appeal for a jury trial. Second, the parties may take the award and use it as a basis for settlement.

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6 E. Rolph, *supra* note 5, at 23. In California, the arbitrator's powers are as follows:

1. to administer oaths to witnesses;
2. to take adjournments on the request of a party or on his or her own initiative when deemed necessary;
3. to permit testimony to be offered by deposition;
4. to permit evidence to be offered and introduced as provided in the rules;
5. to rule on the admissibility and relevancy of evidence offered;
6. to invite the parties, on reasonable notice, to submit trial briefs;
7. to decide the laws and facts of the case and to make an award accordingly;
8. to award costs, not to exceed the statutory cost of the suit; and
9. to examine any site or object relevant to the case.

Snow and Abramson, *supra* note 6, at 51; see Cal. R. Ct. 1614(a).

57 E. Rolph, *supra* note 5, at 23. Walker, *supra* note 10, at 930. Walker states further, "[s]ome rules permit a lengthy interval between the hearing and the award, perhaps as long as four months. Some rules provide only that the award shall be filed 'promptly.' A few rules provide for motions to correct the award or for a rehearing." *Id.*


61 Walker, *supra* note 10, at 932. A non-contested judgment is the ultimate objective of court-annexed arbitration because it indicates that both parties are satisfied with the arbitrator's award and feel as if they had their "day in court."

62 *Id.* Again, a settlement rendered after an arbitrator's award shows that the parties have confidence in the program and are content with the way it is operated.
Finally, if the jurisdiction allows, the losing litigant may appeal for a trial de novo.\textsuperscript{63} The party who is not satisfied with the arbitration award must file a written demand for a trial de novo to be granted.\textsuperscript{64} The demand must be made before the award becomes a final judgment. This period is commonly referred to as the "cooling-off" period,\textsuperscript{65} and allows the parties a chance to assess their positions and chances for improving their award with a trial de novo. A trial de novo may be necessary "to protect a person's right to jury trial or to prevent the unlawful delegation of judicial power."\textsuperscript{66} Therefore, a trial de novo appeal has an important function in court-annexed arbitration.

5. Disincentives to Appeal for Trial De Novo

Usually, there is a financial disincentive for litigants to appeal for trial de novo. This disincentive typically arises in one of three ways: (1) the appellant pays a filing fee for his appeal; (2) the appellant pays the arbitrator's cost of hearing the matter originally; or (3) the appellant pays his adversary's court costs.\textsuperscript{67} Many courts require penalties to be imposed on the appellant if he fails to improve his position at trial, while other courts impose them whenever an appeal is filed.\textsuperscript{68} It is argued, however, that these financial disincentives may become unduly burdensome on the right to jury trial.\textsuperscript{69}

\textsuperscript{63} Id.
\textsuperscript{64} Id. at 933.
\textsuperscript{65} Id. at 932. Walker states:
This period runs from fifteen to thirty days, which is long enough for possible resolution by settlement negotiations short of trial but brief enough so that the prevailing party is not unduly prejudiced and the goal of relatively speedy dispute resolution is furthered. In reality, this is the second opportunity for resolution by settlement during a grace period if the arbitrator does not make a decision immediately at the close of the hearing and takes the matter under advisement, as most rules permit. As in traditional litigation, counsel or parties may be able to assess the case based on the progress of the hearing as a form of mini-trial.
\textsuperscript{66} Id. at 933 (footnotes omitted).
\textsuperscript{67} Note, supra note 3, at 1044. For a full discussion of the constitutional issues involved in court-annexed arbitration, see infra notes 101-77 and accompanying text.
\textsuperscript{68} E. Rolph, supra note 5, at 27.
\textsuperscript{69} Note, supra note 3, at 1044.
\textsuperscript{69} For further discussion on the issue of whether disincentives violate the right to jury trial, see infra notes 112-27 and accompanying text.
In many situations there is also a non-financial disincentive to appeal which arises from the arbitration program itself. It has been shown that in many instances court-annexed arbitration awards are equivalent to awards obtained through traditional litigation. As such, any incentive to appeal is diminished as the litigants view the arbitration award as equivalent to what could be won at trial.\(^{70}\)

Disincentives to appeal for a trial de novo serve two main purposes. First, disincentives reduce court backlogs and decrease litigation delays because "[c]ourt-[annexed] arbitration will succeed in reducing backlog and delay only if a substantial proportion of the cases diverted to the arbitration do not return to litigation. If a substantial proportion of the cases diverted to arbitration return to the litigation track, court-[annexed] arbitration will have done nothing to decrease litigation delay"\(^{71}\) Therefore, disincentives keep cases from returning to litigation. Second, disincentives to appeal discourage the frivolous exercise of appeals because "if litigants can appeal at no cost, they will often file as part of their negotiating strategy or simply to keep their options open."\(^{72}\) Disincentives to appeal, therefore, help promote the disposition of the case at arbitration and discourage frivolous appeals. Thus, court-annexed arbitration does not become "a meaningless preamble to a regular trial."\(^{73}\)

Disincentives to appeal play an important role in any court-annexed arbitration program. Thus, when implementing a program, the rationale behind disincentives must be considered along with the constitutional implications resulting from their use.

B. *Mandatory vs. Permissive Court-Annexed Arbitration*

Court-annexed arbitration programs consist of two types—mandatory and permissive. Under mandatory court-annexed arbitration, state law requires the matter in dispute be resolved by

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\(^{70}\) See Snow and Abramson, *supra* note 6, at 48.

\(^{71}\) Simoni, *supra* note 1, at 263-64 n.128. Simoni cautions, "[i]n fact, diverting cases to arbitration may succeed only in increasing litigation delay and cost by inserting an additional procedural obstacle the parties must surmount before proceeding to trial." *Id.*

\(^{72}\) E. Rolph, *supra* note 5, at 27.

\(^{73}\) Note, *supra* note 3, at 1044.
arbitration. That is, assuming the statutory qualifications (subject matter and dollar limitation) are met, the parties must proceed to arbitration, and are usually prohibited from a judicial trial until they do so. On the other hand, under permissive court-annexed arbitration, parties have the option of foregoing the arbitration hearing. While an organized court-annexed arbitration program is implemented, the parties are not required to proceed to arbitration. When drafting and constructing legislation and court rules, court-annexed arbitration designers must decide whether to make the program mandatory or permissive in scope. Both mandatory and permissive programs have advantages and disadvantages.

The advantages of a mandatory program are as follows:

1. It will reduce case backlogs in the judicial system because parties will be required to arbitrate their claims if they meet the qualifications.
2. It will reduce litigation delays in the judicial system because fewer cases will go to trial as a result of the arbitration program.
3. The right to jury trial is available to dissatisfied disputants after the arbitration hearing.

One disadvantage of a mandatory program is that it may not pass constitutional muster. Although the litigants have the opportunity to appeal for a trial de novo if dissatisfied with the arbitrator's award, important constitutional issues nevertheless permeate the concept of mandatory court-annexed arbitration.74

The advantages of a permissive program are:

1. There are no constitutional problems. By allowing the parties to elect between arbitration and conventional litigation, the constitutional issues that haunt mandatory court-annexed arbitration are nonexistent.
2. It gives disputants the opportunity to take advantage of a fast, efficient, fair, and economical alternative to litigation without being required to do so.

74 See infra notes 101-77 and accompanying text.
One disadvantage of permissive court-annexed arbitration, however, is that disputants may choose litigation over arbitration. This creates two problems. First, it circumvents the very purpose of implementing a court-annexed arbitration program. Docket backlogs will be reduced only slightly and litigation delays will likely continue. Second, the administrative expenses of implementing and maintaining court-annexed arbitration will still be incurred, regardless of the number of participants in the program. Thus, because of the disadvantages, the implementation of a permissive program may prove futile.

Before implementing a court-annexed arbitration program, state legislatures and courts must evaluate the needs and goals to be accomplished by the program. Standards must be evaluated in light of the advantages and disadvantages of a mandatory or permissive program. All factors must be considered and the state should choose the program that meets constitutional standards, attains economic goals, and satisfies judicial objectives.

III. CONFLICTING VIEWS

When states are confronted with the adoption of court-annexed arbitration, it is important to understand the perceived advantages and disadvantages vis-a-vis traditional litigation. These advantages and disadvantages must be carefully weighed against the virtues and drawbacks of traditional litigation.

A. Perceived Advantages of Court-Annexed Arbitration

There are numerous perceived advantages for the implementation of court-annexed arbitration in a judicial system. The

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75 From discussions with several attorneys throughout Kentucky, the author has learned that litigants will almost always choose litigation over arbitration. Litigants feel more comfortable with a jury than an arbitrator. Many attorneys expressed, however, that in small civil cases litigants may be more willing to arbitrate and forego the cost of litigation.

76 In the early 1970's, the Los Angeles bar created a voluntary binding arbitration program that quickly spread to other large trial court jurisdictions. Despite its popularity, the voluntary program was never able to draw more than a few thousand cases per year. Under the new mandatory arbitration program, more than 24,000 cases were diverted to arbitration in the first year.

Snow and Abramson, supra note 6, at 55 n.105.

77 See infra notes 178-86 and accompanying text for the author's recommendations on the type of program Kentucky should implement.
advantages of such a program may best be implied from the objectives which it seeks to achieve. The objectives are to:

1. Reduce congestion on the civil trial calendar by diverting and disposing of cases through arbitration;
2. Reduce (or stabilize) court costs by reducing judicial time spent on the civil caseload;
3. Reduce time to disposition by providing an expedited process for arbitration-eligible cases and by removing these cases from the trial queue, thereby reducing time to trial for other cases;
4. Reduce litigation costs for parties; and
5. Improve court access for diverse users by reducing the time and expense required and by providing a simpler and, perhaps, fairer form of dispute resolution.\(^7\)

Indeed, these objectives set forth the unique advantages of court-annexed arbitration and provide a guideline for the adoption of such a program.

As mentioned above, court-annexed arbitration is fast, effective, fair, and economical when compared with traditional litigation.\(^7\) Arbitration awards are obtained much quicker than court awards due to the informal nature of the proceedings. It is also less expensive to reach judgments through court-annexed arbitration than the judicial system "since costs consist primarily of administrative and arbitration fees."\(^8\) This is important because "[a]t a time when expenditure control is critical to tight budgets, court-annexed arbitration has proven inviting to state and local governments."\(^9\) As such, it is supported by state legislatures and courts as a means to solve the growing problems of court congestion and budgeting because "by diverting smaller civil cases to a presumably faster and cheaper dispute resolution process, courts can handle their remaining cases more expeditiously, and spend less money overall."\(^10\) Therein lies one of the

\(^7\) Note, supra note 20, at 396 n.16 (citing Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 JUDICATURE 270, 275 (1986)).
\(^8\) Snow and Abramson, supra note 6, at 53.
\(^9\) Id. at 54. "Large capital expenditures for buildings, as well as high overhead for maintenance and judicial personnel, are not required because court-annexed arbitration hearings are generally held in the arbitrator's office." Id.
\(^10\) Id.
\(^1\) E. ROLPH, supra note 5, at v.
great advantages of court-annexed arbitration—through the implementation of one program, two growing problems, court congestion and litigation costs, could be alleviated.

Another advantage of court-annexed arbitration is that the program will likely have a positive impact on the public's attitude and perception of the judicial system. Court-annexed arbitration may "reduce the popular dissatisfaction with existing dispute resolution methods. A system designed to speed the resolution of disputes by minimizing the time spent arguing about procedure and maximizing the time spent arguing the merits should increase the public's satisfaction with the system."  

Furthermore, court-annexed arbitration awards may help promote the settlement of cases for two reasons. First, "[e]ven if the parties reject the arbitration award and request a trial de novo, the arbitration award may stimulate settlement before trial because it provides the parties with a neutral evaluation of the case's value." The parties may view the arbitration award as a sensible, rational evaluation, thus promoting realistic settlement negotiations. Second, appealing for a trial de novo after an arbitration hearing will likely lead to increased expenses for the parties (i.e. legal fees). Rather than incur these additional expenses and take the added risk of an unfavorable verdict from a jury, many parties may opt to settle the case.

Court-annexed arbitration may also be advantageous to indigent and pro se litigants who cannot afford an attorney or whose claims are "too small to justify the costs of litigation." This program would give these litigants their "day in court" which they might not be able to obtain otherwise. This result will likely have a positive impact on the public's attitude and perception of the judicial system in this country.

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83 Note, supra note 3, at 1060. See Walker, Lind, & Thibaut, The Relation Between Procedural and Distributive Justice, 65 VA. L. Rev 1401, 1419-20 (1983) (improving judicial procedures is an "effective way to improve the public perception of the justice system"); see also Simom, supra note 1, at 246 ("The primary goal of court-annexed arbitration is to reduce litigation delays in ordinary civil cases without diminishing the actual or apparent quality of justice.").

84 Id. at 250.

85 Note, supra note 3, at 1040 (the author argues that court-annexed arbitration gives those with small claims the opportunity to gain more easily the benefits derived from the ability to litigate claims).
B. Perceived Disadvantages of Court-Annexed Arbitration

While the advantages of court-annexed arbitration are numerous, several perceived disadvantages do exist.

First and foremost, there are several problematic constitutional issues. Court-annexed arbitration could infringe upon the right to a jury trial, create an unlawful delegation of judicial power, and contravene the due process and equal protection clauses of a particular jurisdiction's constitution. These constitutional concerns must be addressed before implementing court-annexed arbitration.

Also, the common law principle of stare decisis is lost in court-annexed arbitration, since the decisions "are specific to one dispute and have no precedential value." It is argued that the lack of stare decisis could cause arbitrators' awards to be arbitrary and capricious. This, in turn, may cause court-annexed arbitration to be viewed as an inconsistent way to resolve disputes.

Another perceived disadvantage is that "litigants with smaller civil disputes may be relegated to 'second-class' justice." Since court-annexed arbitration programs are typically geared to small civil disputes, it may cause small-claim litigants to feel they are

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86 For a discussion of the infringement upon the litigant's right to jury trial, see infra notes 102-34 and accompanying text.
87 For a discussion on the constitutional issue of unlawful delegation of judicial power, see infra notes 135-46 and accompanying text.
88 For a discussion of due process and equal protection clause issues, see infra notes 147-77 and accompanying text.
89 Note, supra note 2, at 1745.
Arbitration, therefore, lacks the legal rules developed incrementally through relevant cases that, in traditional adjudication, legitimize past decisions and render future decisions more predictable. Contracting parties can better plan their behavior according to clear and consistent legal rules as long as the parties are aware of the decisions and understand the rationale behind the ruling.

If enough cases are diverted to arbitration, this rulemaking power exercised by the courts may be hindered. Besides functioning to resolve disputes, which arbitration also accomplishes quite well, litigation facilitates the development of a body of law and related rules that 'serve to guide society.'

Id. (footnotes omitted).

90 Note, supra note 20, at 411.
inferior to large-claim litigants, thus causing dissatisfaction with arbitrators' awards.

It is also argued that court-annexed arbitration may not be an economically efficient alternative to litigation. Substantial costs arise in the implementation of a court-annexed arbitration program. States generally pay the arbitrators' fees. Administrative personnel are needed to "assign arbitrators, issue notices, and monitor compliance with established timetables." Since the arbitration alternative will likely result in a large arbitration docket, additional administrative complexities will arise, making the need for competent personnel very important. These potential costs could become overwhelming if a program is not properly organized and implemented. Furthermore, court-annexed arbitration may actually increase litigation costs to disputants. The parties will incur expenses to prepare for the arbitration hearing. If dissatisfied with the award, they may appeal for a jury trial, thus incurring the additional expense of traditional litigation. Therefore, it is possible for a party to fall victim to "double expenses," arbitration costs and litigation costs.

Another perceived disadvantage is the belief that court-annexed arbitration may not reduce the backlogs facing our court systems. But rather it would become an additional step or hurdle to overcome before litigation. Also, many feel court-annexed arbitration programs have the potential for abuse by disputants. For example, since court-annexed arbitration programs typically set monetary limitations (usually $10,000 or less) on the cases to be arbitrated, a party may inflate the value of his or her claim to avoid arbitration. Finally, many litigants may feel arbitrators are not as skilled as judges to rule on issues of law and fact.

92 Id.
93 "In cases seen to be very important to the litigants—whether for monetary reasons or otherwise—losing parties are rarely willing to accept the result of arbitration as long as trial de novo remains available and they have so little to lose by resorting to full-blown litigation." Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 674 (1986).
94 "Although the arbitration rules permit the court to look behind the pleadings and determine whether exaggerated claims have been made to avoid arbitration, the courts do not do so; in practice, courts determine eligibility solely on the basis of the parties' pleadings." Simoni, supra note 1, at 266.
This could potentially create a lack of confidence among disputants in the arbitrator's decision and award.

IV EVALUATING PROMINENT CONCERNS

The perceived disadvantages of court-annexed arbitration set out above must be carefully considered before implementing a program. An analysis of the practical concerns and problematic constitutional questions surrounding court-annexed arbitration follows. Emphasis will be placed on how to deal with these concerns when structuring a court-annexed arbitration program.

A. Practical Concerns

One practical concern involves the loss of stare decisis in court-annexed arbitration. Arbitrators typically are not required to elaborate on the rationale behind an award, nor are they required to write judicial opinions. In Sobel v Hertz, Warner & Co.,95 the Second Circuit stated that "forcing arbitrators to explain their award will unjustifiably diminish whatever efficiency the process now achieves." Therefore, efficiency outweighs the concern for lack of precedential value in arbitration awards. Furthermore, the arbitrators consider all relevant substantive law when rendering their decisions so that arbitration awards are issued with the guidance of well-defined legal principles. Arbitrators' awards, therefore, will not be arbitrary and capricious if they are well-grounded in legal reasoning.

Another concern is the belief that small-claim litigants will fall victim to "second-class" justice if subjected to court-annexed arbitration. Studies conducted by the Institute for Civil Justice, however, show that litigants are satisfied with court-annexed arbitration and do not perceive themselves as being relegated to second-class status.97

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95 469 F.2d 1211 (2d Cir. 1972).
96 Id. at 1215. This rationale was upheld in Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir. 1986), cert. denied, 476 U.S. 1141 (1986), where the Eighth Circuit held that "to allow a court to conclude that it may substitute its own judgment for the arbitrator's whenever the arbitrator chooses not to explain the award would improperly subvert the proper functioning of the arbitral process." Id. at 750.
97 Individual litigants who bring cases to arbitration in Pittsburgh have very
There is also the concern that the economic costs of court-annexed arbitration are too high to justify its adoption. First, there is the issue of compensating the arbitrator. This is not a great concern, however, as most arbitrator's fees are minimal. Further, it has been suggested that perhaps attorneys could act as arbitrators on a pro bono basis. There is also some concern about additional costs that will result from hiring needed administrative personnel. These costs, however, can easily be held to a minimum with a properly organized program. Furthermore, if court-annexed arbitration were not implemented, these additional costs would likely occur in the traditional judicial system because administrative expenses would rise due to increased court congestion and case backlogs. Finally, many are concerned that litigants will fall victim to both arbitration costs and litigation costs since most dissatisfied parties will appeal their arbitration award, seeing arbitration as an additional step before litigation. This argument assumes, however, that parties will not agree with the arbitrator's award and will appeal for a trial de novo. Studies have shown that such an assumption is not valid. Also, many litigants settle their disputes based on the arbitrator's award, simple requirements: They want a speedy, inexpensive procedure that provides a full hearing of their dispute before an impartial third party, and an opportunity to challenge if the outcome proves unacceptable. They are generally indifferent to the qualifications of the third-party adjudicators as long as they are neutral, and to the setting in which the hearing is held. But they appreciate the informality and privacy of the arbitration process. Most of those we interviewed found that their requirements were met.

Institutional litigants who depend upon the arbitration program for routine resolution of large numbers of civil suits also have rather simple requirements. They too want a speedy, inexpensive procedure, but they are less sensitive than individual litigants to the qualitative aspects of the hearing process. They judge arbitration primarily on the basis of the outcomes it delivers. They attribute unfavorable outcomes to the judgment of the arbitrators, not to the lack of opportunity for discovery or for cross-examining witnesses, or to the absence of other attributes of the trial process.

Note, supra note 20, at 411 (quoting SIMPLE JUSTICE, supra note 22, at 83).

*9 See supra note 46 and accompanying text. In Illinois, the arbitrator's fee is $200 per day or $100 per half day. Lerner, Mandatory Arbitration: Welcome to Illinois, 76 ILL. B.J. 418, 422 (Apr. 1988).

99 In Pennsylvania, "Only nine percent of the cases subject to court-annexed arbitration are appealed to a trial de novo and only forty percent of these ultimately proceed to a full trial." Snow and Abramson, supra note 6, at 54.
thus no appeal is necessary. Furthermore, since most states implement disincentives to appeal into their program, litigants will be less likely to appeal for a trial de novo. For these reasons, court-annexed arbitration will not likely create double expenses for litigants, nor will it act as a mere additional step before litigation.

A final concern facing proponents of court-annexed arbitration is the perception that arbitrators are not as skilled as judges. To solve this problem, a program should be implemented to "train potential neutrals to ensure their expertise in both substantive areas of the law and in dispute resolution techniques."\(^{100}\)

B. Constitutional Concerns

The concept of court-annexed arbitration raises the constitutional issues of infringement of right to trial by jury, unlawful delegation of judicial power, and violations of procedural due process and equal protection.\(^{101}\) An analysis of these issues is necessary when considering whether Kentucky, or any other jurisdiction, should adopt court-annexed arbitration as an alternative to litigation.

1. Right to Jury Trial

One of the most protected rights given to citizens of this country is the seventh amendment right to trial by jury.\(^{102}\) Although there are many advantages and disadvantages to a trial by jury,\(^{103}\) this right has been an extremely important part of

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\(^{100}\) Edwards, supra note 93, at 683 (emphasis added).

\(^{101}\) Note, supra note 3, at 1045. For a discussion of the constitutional issues involving right to jury trial, see infra notes 102-34 and accompanying text; unlawful delegation of judicial power, see infra notes 135-46 and accompanying text; procedural due process, see infra notes 147-61 and accompanying text; and equal protection, see infra notes 162-77 and accompanying text.

\(^{102}\) U.S. Const. amend. VII. The seventh amendment provides in full: "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 jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Id.

the American judicial system since its inception in 1791. With mandatory court-annexed arbitration, however, this right could be in jeopardy because a party is required to arbitrate.\(^{104}\) If the program is permissive in scope,\(^{105}\) the right is not affected since the parties may elect to arbitrate or go to trial. Therefore, for the purposes of discussion, this section will assume that a jurisdiction has adopted a mandatory court-annexed program.

There are two issues surrounding mandatory court-annexed arbitration and its possible encroachment on the right to trial by jury: "Since mandatory arbitration programs typically provide for the right to a de novo rehearing with a jury, the issues are whether a mandatory arbitration requirement prior to a de novo trial and the financial disincentives to seeking a de novo trial violate a party's right to a jury trial."\(^{106}\) Does mandatorily subjecting parties to arbitration before affording them the right to a jury trial, in itself, violate this constitutional right? If not, does placing financial disincentives upon parties wishing to appeal for a jury trial create such a burden as to violate the constitution? These questions have been the subject of much litigation in jurisdictions that have adopted mandatory programs.

These issues were discussed in the landmark case of Application of Smith.\(^{107}\) In that case, the Supreme Court of Pennsylvania decided whether the state's mandatory arbitration program violated a litigant's constitutional right to trial by jury.\(^{108}\) The court held that only where the arbitrators' decision is the "final

\(^{104}\) See supra notes 74-77 and accompanying text.

\(^{105}\) Id.

\(^{106}\) Note, supra note 3, at 1045.


\(^{108}\) Note, supra note 3, at 1045. Briefly, the facts of Application of Smith are as follows:

Lancaster County, Pennsylvania had adopted a local rule of court requiring all actions involving $500 or less, with certain exceptions, to go to compulsory arbitration. Arbitrators' fees were set at $25 each (for a total of $75), except in protracted cases. Smith, who had a $249.19 claim, petitioned for a writ of prohibition in the Supreme Court of Pennsylvania claiming the act as amended and the implementing rules unreasonably burdened his right to jury trial.

Walker, supra note 10, at 915.
determination of the rights of the parties” is the right to jury trial violated by mandatory court-annexed arbitration.\textsuperscript{109} If the parties are allowed to appeal the decision of the arbitrator, “there is no denial of the right of trial by jury”\textsuperscript{110} Therefore, in Smith, the court ruled that mandatory court-annexed arbitration programs granting parties the right to appeal for a jury trial are constitutional. Courts throughout the United States have uniformly upheld this view\textsuperscript{111}

A litigant’s right to trial by jury may also be violated by imposing financial disincentives on his demand for a trial de novo.\textsuperscript{112} These disincentives may create an “impermissible burden” on the right to trial by jury\textsuperscript{113} There are differing interpretations as to what constitutes an impermissible burden: “(1) any and all financial disincentives constitute an impermissible burden; (2) only excessive financial disincentives constitute such a burden; and (3) such financial disincentives never constitute an impermissible burden.”\textsuperscript{114} In Smith, the court suggested a “test” to be used when determining what restrictions on the right to appeal for trial de novo might be unconstitutional. The court suggested that “the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.”\textsuperscript{115} The question

\textsuperscript{109} Smith, 112 A.2d at 629. “The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are finally determined.” \textit{Id.} (emphasis in original).

\textsuperscript{110} \textit{Id.}


\textsuperscript{112} Note, supra note 3, at 1046. For a discussion of the types of financial disincentives that may be placed on parties, see supra note 67 and accompanying text.

\textsuperscript{113} Note, supra note 3, at 1046.

\textsuperscript{114} \textit{Id.} at 1046-47.

\textsuperscript{115} Smith, 112 A.2d at 629 (emphasis added). The court held the following were
then becomes what constitutes an "onerous condition, restriction or regulation" that is an unconstitutional burden on the right to appeal for a trial by jury. Although the answer to this question is not simple, there are several factors to be considered in its resolution. These factors include "the amount at issue in the dispute, the particular costs assessed, and the financial status of the would-be appellant." To resolve this issue, "[t]he question is not strictly a matter of choosing an amount, but rather one of striking a balance between preventing arbitration from becoming merely a preamble to a jury trial, and effectively preserving that right." In other words, the disincentives must be onerous enough to deter frivolous appeals for jury trial, yet not so burdensome to prevent legitimate appeals. Striking a balance between the interests of the litigants' right to a jury trial and the interests of the state in administering a less burdensome, cost-effective judicial system "compels an assessment of the desirability of enacting laws designed to discourage people from exercising their constitutionally protected rights." Before a jurisdiction adopts a mandatory court-annexed arbitration program, it must "strike a balance" between these two competing interests or the program could be held unconstitutional.

Several courts have specifically addressed this issue since the Smith decision. In Kimbrough v Holiday Inn, the Eastern

not "onerous conditions" - (1) requirement of the payment of costs before the entry of an appeal in order to obtain a jury trial; and (2) requirement of the payment of a jury fee in advance of trial. The court noted, however, that the problem "is one of degree rather than kind." Therefore, the question is not really the type of financial disincentive placed upon these parties, but the amount of the disincentive. The disincentive should be in proportion to the size of the claim. The court in Smith made note of this fact when it held that arbitration programs "should provide for a lower rate of compensation where only a comparatively small claim is involved." Justice Bell, in his dissent, states that "[s]mall, reasonable, unburdensome fees and costs are valid and may be imposed by statute or rules of Court." It seems that these types of financial disincentives would not create an "onerous condition" on the right to jury trial, and thus would be constitutional.

116 Note, supra note 3, at 1047
117 Id. As mentioned supra in note 115, these factors all concern the degree or proportion of the financial disincentive. This seems to be the most important factor, and not the kind of disincentive.
118 Note, supra note 3, at 1047.
119 Id.
District of Pennsylvania upheld the constitutionality of a local mandatory arbitration rule that required a party to pay arbitration fees and interest on the award if he or she appeals for jury trial and fails to improve his or her position.\textsuperscript{121} The court held this disincentive to appeal did not impose such an onerous condition as to violate the right to jury trial.\textsuperscript{122} The court, therefore, "struck a balance" that was constitutionally valid. In \textit{Christie-Lambert Van & Storage Co. v McLeod},\textsuperscript{123} the Washington Court of Appeals held that "the assessment of attorney fees against an appellant who does not improve his position in the trial de novo does not unconstitutionally restrict his jury trial right."\textsuperscript{124} Consistent with the \textit{Smith} court, the \textit{McLeod} court cautioned that "the problem is one of degree rather than kind."\textsuperscript{125} The disincentive should be in proportion to the size of the claim if the proper balance is to be struck. In \textit{Opinion of the Justices}\textsuperscript{126} the disincentive was burdensome and unconstitutionally infringed upon the party's right to jury trial. In that case the New Hampshire Supreme Court held unconstitutional a statutory disincentive requiring the payment of $750 or $1,125 in arbitrators' fees as a prerequisite to a jury trial appeal of a case involving $3,000 or less.\textsuperscript{127} Again, the size of the claim involved was a determining factor in holding the disincentive unconstitutional. These cases present instances where courts have analyzed the issue of financial disincentives and "struck the balance" required in determining the constitutionality of a court-annexed arbitration program.

It is important to understand that since the seventh amendment right to trial by jury in civil actions is not incorporated into the fourteenth amendments\textsuperscript{128} state constitutional law gov-

\textsuperscript{121} \textit{Id.} at 571. "[T]he arbitration system created by Local Rule 49 does not impose conditions so burdensome or so onerous that it interferes with the rights guaranteed by the Seventh Amendment." \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{693 P.2d} 161 (Wash. App. 1984).

\textsuperscript{124} \textit{Id.} at 167.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{304 A.2d} 881 (N.H. 1973).

\textsuperscript{127} \textit{Id.} at 887.

erns this issue. Most states, however, have a provision in their constitution preserving a person’s right to trial by jury. Thus, it becomes a matter of state constitutional interpretation to determine whether mandatory court-annexed arbitration violates a person’s right to jury trial.

Section 7 of the Kentucky Constitution provides that a trial by jury “shall be held sacred.” In Kentucky Commission on Human Rights v Fraser, the Supreme Court of Kentucky interpreted this section as “simply preserving [the jury trial right] as it already existed under the common law,” and not creating a jury trial right. Thus, if the right to a jury trial existed at common law for a particular cause of action, then that right is preserved by section 7 of the Kentucky Constitution.

The court provided a “test” to determine when section 7 of the Kentucky Constitution applies. Its applicability, the court reasoned, “depends on the nature of the right and the nature of the forum.” While the court said that common-law actions were of the right “nature,” it failed to indicate what types of forums would be of the right “nature” to require application of section 7. Because of the court’s ambiguity regarding this matter, it is unresolved whether arbitration is the type of forum to which the court was referring.

2. Unlawful Delegation of Judicial Power

Court-annexed arbitration also raises the constitutional issue of whether these programs are an unlawful delegation of judicial power. Like the right to jury trial, this involves an interpretation of state constitutional law. It applies to both mandatory

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129 Note, supra note 3, at 1045.
130 Id.
131 Ky. Const. § 7. Section seven provides in full: “The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.” Id.
132 625 S.W.2d 852 (Ky. 1981).
133 Id. at 854. “Neither the seventh amendment nor Section 7 of the Kentucky Constitution creates a jury trial right. Both, by their terms, simply preserve that right as it already existed under the common law.” Id., see also Mays v. Dept. For Human Resources, 656 S.W.2d 252, 253 (Ky. App. 1983).
134 Fraser, 625 S.W.2d at 854.
135 Note, supra note 3, at 1048.
and permissive arbitration programs, however, because "[t]he issue is whether requiring parties to have a nonjudge determine issues of fact and law in the resolution of disputes violates state constitutional provisions vesting judicial power in the judiciary". The threshold question is whether arbitrators in court-annexed arbitration proceedings are performing a "judicial function" in violation of the state constitution. At first glance, one could rationally conclude that arbitrators are performing judicial functions. They have the power to render judgments that are binding on the parties if an appeal is not requested. The arbitrators are not given final judicial power, however, since a trial de novo can be obtained by dissatisfied litigants. Therefore, the final judicial power lies in the judiciary, and court-annexed arbitration programs providing an appeal for trial by jury probably do not create an unlawful delegation of judicial power.

This issue was recently addressed by the Supreme Court of Alaska in *Keyes v Humana Hospital Alaska, Inc.* The Alaska court declined to invalidate a state statute vesting judicial power in nonjudicial personnel. While *Keyes* involved medical malpractice pretrial advisory panel decisions, the court's rationale easily applies to court-annexed arbitration programs.

Section 109 of the Kentucky Constitution establishes the court system of the state of Kentucky. This provision vests

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136 Id. "Article III of the United States Constitution, which vests the judicial power of the United States in the judiciary, applies only to the judicial power of the United States and does not address the judicial power of the states." Id.

137 Id.

138 Id.

139 The holding in *Smith*, 112 A.2d 625, seems to uphold this view. The court states, "[t]he only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are finally determined." Id. at 629 (emphasis in original).

140 See, e.g., *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 357 (Alaska 1988) (declining to invalidate a state statute on the ground that it contravenes the separation of powers principles by vesting judicial power in nonjudicial personnel); *Attorney Gen. of Md.*, 385 A.2d at 65 (Md. 1978) (holding that the decision of an arbitration panel is not a final determination of the case since either party may appeal for jury trial).


142 Id. at 357.

143 KY. CONST. § 109.
exclusive judicial power "in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court, and a trial court of limited jurisdiction known as the District Court."

This section would seem to indicate that any type of judicial power vested in another administrative body would violate the Kentucky Constitution. The Kentucky Supreme Court, however, held in Reeves v. Simons\textsuperscript{145} that an act does not violate section 109 because it vests quasi-judicial power in an administrative board, provided judicial review is allowed in the action.\textsuperscript{146} A court-annexed arbitration program, therefore, would not be violative of this section, provided that the parties are given the right to appeal to a jury trial.

3. Procedural Due Process

Court-annexed arbitration raises the procedural due process issue of "whether a procedural system that forces people to go through arbitration before proceeding, as a matter of right, to de novo rehearing satisfies the requirements for a full and fair opportunity to litigate."\textsuperscript{147} In Keyes, the Alaska Supreme Court found "[d]ue process is satisfied if the statutory procedures provide an opportunity to be heard in court at a meaningful time and in a meaningful manner."\textsuperscript{148} Thus, with both parties having the right to an attorney, the right to notice, the opportunity to submit evidence, and the right to appeal for a trial de novo, it seems that court-annexed arbitration would meet the minimum requirements of procedural due process. This is a logical conclusion considering the number of states with court-

\textsuperscript{144} Id.

\textsuperscript{145} 160 S.W.2d 149 (Ky. 1942).

\textsuperscript{146} In the Keller case, it was written there is no constitutional objection to an administrative board ascertaining facts and administering the law; that although it acts in a quasi-judicial capacity, it is not exercising judicial power within the meaning of the Constitution forbidding one branch of government from usurping the functions of another. Section 2554b-147 makes a provision for a judicial review of the Board's action. Id. at 150; see Keller v. Ky. Alcoholic Beverage Control Bd., 130 S.W.2d 821 (Ky. 1939).

\textsuperscript{147} Note, supra note 3, at 1049.

\textsuperscript{148} Keyes, 750 P.2d at 353 (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).
annexed arbitration programs that have been held constitutional. The Pennsylvania Supreme Court, in *Application of Smith*,\(^{149}\) stated that there is a conflict between court-annexed arbitration and due process, but this conflict is dissipated when the right to appeal for jury trial is preserved to litigants.\(^{150}\)

However, this is only half of the picture. Litigants' opportunity to be heard may be foreclosed if the arbitration hearing has exhausted their financial resources.\(^{151}\) A dissatisfied litigant may not be able to afford an appeal for trial de novo, which in effect denies the party a right to a jury trial. In turn, this denies the litigant a full and fair opportunity to litigate and could be a violation of due process. The United States Supreme Court, in *Boddie v Connecticut*,\(^{152}\) held "that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."\(^{153}\) Thus, a statute or rule providing for mandatory court-annexed arbitration may deprive an indigent litigant of his right to jury trial. The litigant simply cannot afford to appeal, thus foreclosing the opportunity to be heard. This situation can be easily remedied, however, by waiving the costs of an appeal for indigent parties as Illinois' program does.\(^{154}\)

Procedural due process is provided to the citizens of Kentucky in Section 2 of the Kentucky Constitution\(^{155}\) which "prohibits the exercise of arbitrary power over the 'lives, liberty and

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\(^{149}\) 112 A.2d 625.

\(^{150}\) *Smith*, 112 A.2d at 629; see also *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). The United States Supreme Court held that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Id.* at 483. The Court further stated that "[w]e have no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause." *Id.* at 484.

\(^{151}\) Note, *supra* note 3, at 1050 n. 74.

\(^{152}\) 401 U.S. 371 (1971).

\(^{153}\) *Id.* at 379.

\(^{154}\) ILL. REV. STAT. ch. 110A, para. 93(a) (1987); ILL. REV. STAT. at ch. 110, para. 2-1004A.

\(^{155}\) KY. CONST. § 2. Section 2 provides in full: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." *Id.*
property' of the citizens of the Commonwealth." In *Kaelin v City of Louisville,* the Supreme Court of Kentucky stated that "constitutional due process requires a trial type hearing for the purpose of determining the adjudicative facts necessary to decide the issue." While holding that "the right of cross-examination is required by due process of law," the court listed other procedural elements that must be part of a proceeding. The requisite elements include "a hearing, the taking and weighing of evidence, a finding of fact based upon an evaluation of the evidence and conclusions supported by substantial evidence." If all of these procedural elements are available in a court-annexed arbitration program, it would probably be consistent with the procedural due process requirement of Section 2.

4. Equal Protection

The equal protection clause of the fourteenth amendment of the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause was enacted to prevent states from practicing unjustifiable discrimination against people within a state. The equal protection analysis usually involves a two-tier scheme, with courts applying one of two standards—strict scrutiny or rational basis. Strict scrutiny is used whenever a state statute applies to a "suspect classification" or limits a "fundamental right." Otherwise, the

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156 Kaelin v. City of Louisville, 643 S.W.2d 590, 591 (Ky. 1983) (quoting KY. Const. § 2).
157 643 S.W.2d 590 (Ky. 1983).
158 Id. at 591 (citing City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971)).
159 Id. at 592. "We hold that, in a trial-type adjudicatory hearing before an administrative body, the right of cross-examination is required by due process of law." Id.
160 Id. at 591.
161 Of course, if a court-annexed arbitration program provides for the right of appeal for a jury trial, these procedural elements will be available to litigants on appeal.
162 U.S. Const. amend. XIV, § 1.
163 Woods v. Holy Cross Hosp., 591 F.2d 1164, 1172 (5th Cir. 1979). Suspect classes include race, alienage, and ancestry, just to name a few. Fundamental rights are those rights "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). Such rights include privacy, marriage, and the right to vote. While the Supreme Court has not held the right to a
rational basis test is the appropriate standard of review. A state statute adopting mandatory court-annexed arbitration could be discriminatory if litigants of small civil claims are required to arbitrate, whereas litigants of large civil claims are not subject to mandatory arbitration. Thus, a litigant is receiving unequal treatment due to a classification made by a state law. This unequal treatment could violate the equal protection clause. The question then becomes which standard of review should be applied to a state law requiring arbitration of certain claims: strict scrutiny or rational basis?

It is argued that a state law implementing a mandatory court-annexed arbitration program infringes on the exercise of the right to trial by jury. Since the right to jury trial is a fundamental right, this state law should be subjected to the strict scrutiny test. Statutes subjected to strict scrutiny have frequently been found to violate equal protection. Therefore, if a mandatory court-annexed arbitration jury trial to be a fundamental right, when confronted with this issue it certainly would hold that it is among those rights. The right to jury trial is "explicitly guaranteed by the Constitution" in the Seventh Amendment. Therefore, under the reasoning of San Antonio, it is a fundamental right. Maryland held the right to jury trial was fundamental in Davidson v. Miller, 344 A.2d 422, 431-32 (Md. 1975).

While the Supreme Court has formally adopted only the strict scrutiny and rational basis tests, the Court has openly taken an intermediate approach to reviewing a limited group of classifications. In cases involving discrimination based on gender or legitimacy, a mid-level or intermediate scrutiny is used. In 1988, in a unanimous opinion, the Court stated that illegitimacy classifications, like gender classifications, were subject to intermediate scrutiny and, therefore, such classifications "must be substantially related to an important governmental objective." Clark v. Jeter, 108 S. Ct. 1910 (1988).

See Attorney Gen. of Md., 385 A.2d at 77. In this case, the Bar Association argued that a health care malpractice claims statute, which required submission of certain medical malpractice claims to arbitration panel, was an infringement on the right to jury trial.

See supra note 163 and accompanying text.

The strict scrutiny test has been described as follows: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Zablocki v. Redhail, 434 U.S. 374, 388 (1978). In Roe v. Wade, 410 U.S. 113 (1973), the test was set forth as follows: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Id. at 155 (citations omitted). Thus, the classification must be necessary to promote a compelling state interest before it will be valid under the strict scrutiny test.

Woods, 591 F.2d at 1172.
statute were subjected to the strict scrutiny test, it could be held unconstitutional. This analysis assumes, of course, that mandatory court-annexed arbitration infringes upon the right to trial by jury. As discussed above, this assumption may be unfounded.169

Mandatory court-annexed arbitration programs provide the right to appeal for a jury trial. This right to appeal, however, will not in itself avoid a possible infringement on a right to jury trial. If financial disincentives on the right to appeal become "onerous conditions," then the right to jury trial may be infringed upon.170 If these disincentives are reasonable and not "onerous conditions," then there is no infringement on the right to jury trial.171 Therefore, a mandatory court-annexed arbitration program providing the right to appeal for a jury trial and invoking disincentives that are reasonable and unburdensome does not infringe upon the right to trial by jury. A state statute implementing such a program would not be subject to strict scrutiny, but rather would be evaluated under a rational basis test.172 In Attorney General of Maryland v. Johnson,173 the Maryland Court of Appeals addressed this issue and held that once you have "established that the statutory classification in no way deprives, infringes, or interferes with the free exercise of the right to a civil jury trial," then the statute is subject to a rational basis standard.174

In applying the traditional rational basis test to a state law implementing mandatory court-annexed arbitration, it is appar-

169 See supra notes 102-34 and accompanying text.
170 See Smith, 112 A.2d at 629. "All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." Id.
171 Id. at 633. "Small, reasonable, unburdensome fees and costs are valid and may be imposed by statute or rules of Court." Id.
172 "Under the rational basis test, the question is whether the classification established by mandatory arbitration laws rationally furthers a legitimate state interest." Note, supra note 3, at 1051-52. Courts in every jurisdiction "have uniformly declined to apply a 'strict scrutiny' standard of review, most finding explicitly that the statute's classification neither implicates a suspect class nor impinges upon any fundamental right which would justify this higher standard." Keyes, 750 P.2d at 357.
173 385 A.2d 57 (Md. 1978).
174 Id. at 77.
ent that the distinction between small-claim and large-claim lit-
gants is reasonably related to the legitimate purpose of the state
law, namely to provide fast, effective, fair, and economical
adjudication while reducing court backlogs and litigation delays.
A state law providing such a program, therefore, does not violate
the equal protection clause.

Section 3 of the Kentucky Constitution provides equal pro-
tection to all citizens of the Commonwealth. In Fischer v
Grieb, the Kentucky Supreme Court held that section 3 does
"not forbid classification based on reasonable and natural dis-
tinctions, but the rule is otherwise where the classification is
manifestly so arbitrary and unreasonable as to impose a burden
upon, or exclude one or more of a class without reasonable
basis in fact." This is the standard of review applicable in
Kentucky to a state law creating a mandatory court-annexed
arbitration program. This standard should not pose a constitu-
tional barrier to the implementation of court-annexed arbitration
in Kentucky

V A Program for Kentucky

When making decisions about the adoption of court-annexed
arbitration in Kentucky, program designers must consider the
competing interests mentioned above and not lose sight of their
ultimate objectives: to speed disposition of cases so as to reduce
court congestion, to save money, and most importantly, to pro-
vide litigants with an equitable adjudicatory process while avoid-
ing the possibility of abridging constitutional rights and
protections. With this in mind, Kentucky must adopt its own
program of court-annexed arbitration, as there is no "cookbook
featuring a single recipe" to fit all jurisdictions. The single
most important objective, however, is to create a positive atti-
uide about the program throughout the legal and non-legal

173 KY. CONST. § 3. The relevant part of Section 3 provides that "[a]ll men, when
they form a social compact, are equal; and no grant of exclusive, separate public
emoluments or privileges shall be made to any man or set of men, except in consideration
of public services." Id.
174 113 S.W.2d 1139 (Ky. 1938).
175 Id. at 1140.
176 E. ROLPH, supra note 5, at iii.
If lawyers and litigants find the program beneficial, they will continue to use it, and this will enhance confidence in court-annexed arbitration.

A. Mandatory or Permissive Program?

A threshold question for Kentucky program designers is whether the state's court-annexed arbitration program should be mandatory or permissive. Adoption of a mandatory program will serve the goals of reducing case backlogs and litigation delays, thus providing expeditious adjudication and diminishing the cost of litigation for parties. Mandatory court-annexed arbitration, however, is faced with a major obstacle—constitutionality. Alternatively, if a permissive program is adopted, there is no constitutional impediment. Permissive court-annexed arbitration, however, will not likely serve the goals of court-annexed arbitration set out above.

Although the arguments regarding each type of program are meritorious, Kentucky should adopt a mandatory court-annexed arbitration program. Considering the growing problems of court congestion, litigation delays, and frustrations among attorneys, judges and litigants, Kentucky's interest in eliminating these problems through a mandatory program is substantial and legitimate. The advantages of a mandatory program far outweigh those of a permissive program. A mandatory program directly confronts and alleviates the problems facing this state's judicial system. It satisfies the needs of the state and promotes the goals of the judicial system.

179 "The keys to the ultimate success of court-annexed arbitration, or any alternative dispute resolution program are not the high-quality rules or institutions that administer the programs but the participants and the use they make of the programs." Walker, supra note 10, at 943.

180 The difference between mandatory and permissive court-annexed arbitration is simple. In a mandatory program the parties are required to arbitrate their dispute. Whereas, in a permissive program the parties elect whether or not to arbitrate.

181 See supra notes 101-77 and accompanying text.

182 To meet judicial objectives, a two-tier approach has been suggested, i.e., that "entry into court-annexed arbitration be mandated for most types of civil actions involving a claim for less than a statutory amount of damages, e.g. $15,000 and be permitted by voluntary election of the parties respecting claims exceeding the statutory limit." Snow and Abramson, supra note 6, at 57. Kentucky, however, should implement a completely mandatory program.
The major problem confronting a mandatory program is whether it will pass constitutional muster. The designers of a mandatory program must give this issue careful consideration. A mandatory program providing the right to appeal for a jury trial and placing unburdensome, reasonable financial disincentives on this right to appeal, will likely be held constitutional by Kentucky courts.\footnote{This would make the Kentucky program similar to the Pennsylvania program which was held constitutional in \textit{Application of Smith}, 112 A.2d.625 (Pa. 1955), \textit{appeal dismissed sub nom.} Smith \textit{v} Wissler, 350 U.S. 858 (1955).} The most important consideration in structuring the disincentive policy is “decid[ing] what disincentives to adopt, when to apply them, and how to ensure the disincentives are applied. They must make these decisions bearing in mind their objectives: limiting the appeal rate and conforming to constitutional requirements.”\footnote{E. \textsc{Rolph}, \textit{supra} note 5, at viii.} Kentucky should adopt a disincentive policy consistent with the requirements held constitutionally valid in \textit{Application of Smith},\footnote{112 A.2d 625.} and \textit{Kimbrough v Holiday Inn.}\footnote{478 F Supp. 566 (E.D. Pa. 1979).} The disincentive should be in proportion to the size of the claim involved because the question is not really the type of disincentive placed upon the parties, but the amount. After evaluating the needs and goals to be accomplished in light of the advantages and disadvantages of a mandatory program, Kentucky should adopt mandatory court-annexed arbitration because it satisfies the constitutional standards, attains the economic goals, and meets the judicial objectives of the state of Kentucky.

B. Content of the Program

Another question confronting Kentucky’s program designers is the content of the mandatory program.\footnote{A detailed analysis of what a mandatory program should consist of is beyond the scope of this Note. The following are some of the issues that must be addressed: the value limitation of claims, what actions should be excluded from arbitration, how arbitrators should be selected and the number to select, and what powers the arbitrator should have. This author suggests that program designers should look at mandatory programs in other states for an idea of the types of provisions to include.} Program designers must decide how detailed the specific provisions of the program

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will be. Generally speaking, if greater state control is the goal, then Kentucky should adopt detailed provisions. This will allow control over local programs for the furthering of broader state goals. It will also promote continuity in the program. If greater local control is the goal, however, then broadly drawn provisions should be adopted. This will allow local courts to "pursue the objectives of the program aggressively" and "tailor their programs to existing legal practices and court management structures." Additionally, by adopting broad provisions, local jurisdictions will be able to experiment with different alternatives, creating an invaluable testing ground for future programs.

C. Control-Group Evaluation Program

To determine whether Kentucky's mandatory court-annexed program is meeting the needs and goals of the state's judicial system, a control-group evaluation program should be adopted. An evaluation program is used to accomplish four objectives: (1) to determine if court-annexed arbitration is meeting its intended objectives; (2) to determine if the specific provisions of the program are effective; (3) to determine if changes previously made in the program are effective; and (4) to determine if the program is satisfactory to participants. Information needed to

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188 E. Rolph, supra note 5, at 9.
189 Id.
190 Id. at ix. North Carolina was the first state program to be evaluated by a control-group study. Note, supra note 20, at 409. The following factors were examined:
(1) The time from filing of a case to its disposition;
(2) The rate of termination of cases by other types of disposition, such as settlement or dismissal, before or after arbitration;
(3) Amount of recovery;
(4) Cost to court and litigants;
(5) Degree of satisfaction of attorneys and litigants;
(6) Costs and benefits to litigants; and
(7) The effect of attorney vs. non-attorney representation during arbitration.

Id. n.37 (quoting Letter from Larry B. Sitton, Chairman, Dispute Resolution Committee, and Allan B. Head, Executive Director, to the Judges and Lawyers of the Twenty-Ninth Judicial District (Dec. 14, 1986)).

Kentucky should use these factors, or a similar listing, when evaluating its court-annexed arbitration program.
evaluate court-annexed arbitration can be obtained from "four different sources: individual cases; court caseload statistics; court cost data; and attitudinal surveys."\footnote{E. Rolph, supra note 5, at x.}

Once the information needed for the evaluation is obtained, an effective evaluation can take place:

The "Acid Test" for court-annexed arbitration may be a comparison of the incidence of trial de novo with cases that regularly go to trial. To make this comparison, it is necessary to determine the incidence of trials of similar cases in the absence of the arbitration program. A finding that the incidence of trials de novo is equal to or greater than the incidence of actual trials of similar cases in the regular trial track would raise serious questions concerning the efficiency of a program.\footnote{Note, supra note 20, at 416.}

Kentucky should adopt a control-group evaluation program when it implements its court-annexed arbitration program. This "acid test" could prove beneficial by allowing program designers to obtain information for subsequent improvements in the program.

**CONCLUSION**

The explosion of litigation in this country has created numerous problems for our judicial system. The citizens of this country have indeed become disgruntled with the growing problems of litigation delays and case backlogs. "Justice delayed is justice denied,"\footnote{Note, supra note 3, at 1062.} and to prevent this denial of justice, alternatives to litigation must be adopted. Court-annexed arbitration is one form of alternative dispute resolution used to solve the problems confronting our courts.

This Note has addressed at length the concept of court-annexed arbitration.\footnote{See supra notes 25-77 and accompanying text.} The advantages of court-annexed arbitration are numerous,\footnote{See supra notes 78-85 and accompanying text.} whether mandatory or permissive.\footnote{For a discussion of mandatory and permissive court-annexed arbitration, see supra notes 74-77 and accompanying text.}
biggest obstacle facing these programs is the constitutional implications surrounding them.\textsuperscript{197} This obstacle, however, should not prevent Kentucky from adopting court-annexed arbitration.

Many states have already adopted court-annexed arbitration programs to help solve the problems of increasing litigation.\textsuperscript{198} Kentucky should join these states in reducing costs, delays, and frustrations caused by the state's court system. Kentucky should adopt a \textit{mandatory} program to better attain the goals and objectives accomplished through court-annexed arbitration. The need is here and Kentucky must accept the challenge.

Former Chief Justice Warren E. Burger has stated that the legal community "should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about."\textsuperscript{199} Court-annexed arbitration promotes this canon and provides a viable alternative to litigation in today's litigious world.

\textit{James C. Thornton**}

\textsuperscript{197} See \textit{supra} notes 101-77 and accompanying text.
\textsuperscript{198} "As of late 1985 eighteen states had adopted the device." Note, \textit{supra} note 20, at 401.
\textsuperscript{199} Burger, \textit{supra} note 3, at 274.
\textsuperscript{**} The author would like to express his appreciation to Thomas J. Stipanowich, Professor of Law at the University of Kentucky, for his insight, suggestions, and support.