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THE NEW WAVE: SPEEDY ARBITRATION HEARINGS —
BUT ARE THEY FAIR?*

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I. INTRODUCTION

IT is often said that justice delayed is justice denied. Even more often it is said that our civil court dockets are backlogged with cases that are somewhere between the initial complaint and the final disposition. As former practicing attorneys, we had been impressed in our experiences with the speed with which cases were processed in the Philadelphia County Court of Common Pleas under the arbitration system.

Even more impressive, in our opinion, was the creation of a central physical location where arbitrators, counsel, litigants and witnesses could assemble for arbitration hearings. Prior to the creation of the Arbitration Center, hearings might be held, in the discretion of the panel chairperson, in various locations such as a law library, a residence, or a law office, with varying degrees of space and privacy. Furthermore, plaintiffs' lawyers used to suggest that many arbitration panel awards were unfairly low; conversely, defense lawyers would indicate that arbitrations were frequently held before plaintiff-oriented panels, which would render unduly high awards.

Accordingly, we decided to conduct a study of the arbitration system of the Philadelphia County Court of Common Pleas,¹ in order

* The authors gratefully acknowledge the assistance and cooperation of the Honorable Ethan Allan Doty, supervising judge of the Philadelphia County Court of Common Pleas' arbitration system. We would also like to thank his staff for their cooperation in the distribution and collection of survey forms, especially Beverly Selnick, Arbitration Attorney of the Philadelphia County Court of Common Pleas; and the attorneys who voluntarily gave of their time to complete and return the questionnaires. We would also like to thank Michael E. Kunz, Clerk of the United States District Court for the Eastern District of Pennsylvania, for his courtesy in supplying information about the federal arbitration system.

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1. The Philadelphia courts use arbitration panels consisting of three attorneys. R. RUBENS, PENNSYLVANIA ARBITRATION GUIDE §§ 1-3, at 35 (1974). Cases where the amount in controversy is less than \$20,000 are automatically submitted to arbitration. PHILA. C.P. CT. R. 180, Rule I (as amended November 15, 1982), *reprinted in* R. RUBENS, *supra*, at 9 (Supp. 1984). A decision of the arbitration panel may be

to compare past myths with present realities. This article is a report of the findings of this study. The study collected information about the attorneys who serve as arbitrators, their prior legal experience, the types of cases they heard at the Arbitration Center, the decision-making process and the case results. The study was designed to obtain data indicating whether litigants could expect fairness and a high level of competency from arbitration panels, or whether personal prejudices or inexperience of the arbitrators might prevent them from making fair and competent decisions.

The study gathered information through questionnaires which were distributed to each attorney who served as an arbitrator. The forms were to be completed and returned on the day of the arbitration hearings.² The survey sought information only from the attorneys who sat on arbitration panels; it did not seek information from the parties or their representatives.

The respondents were asked, immediately before the arbitration hearing, to answer the questionnaire with respect to either the first case or the third case which they heard during the day.³ To ensure randomness, the attorneys were not given a choice of cases. Instead, there were two sets of instructions — one requesting that they answer with respect to the first case of the day; the other requesting that they answer with respect to the third case of the day.

The survey forms were distributed to arbitrators during July, August, September, October, November and December of 1983. The survey results were compiled from 293 completed questionnaires. The responses represented 185 different cases.⁴ In 30 cases, responses were received from two of the three arbitrators of the case, and in 39 cases, responses were received from all three arbitrators of the case. The study did not obtain data indicating how many different attorneys responded, since the participants were not asked for their names or any other information which would identify them.

appealed, and is given a trial de novo in the court of common pleas. 42 PA. CONS. STAT. ANN. § 7361(d) (Purdon 1982).

2. The arbitrators were instructed that participation in the survey was totally voluntary.

3. Since January 2, 1982, arbitrators in the Philadelphia county courts sit on panels for either one-half day or a whole day. See Doty, *Philadelphia's Compulsory Arbitration System*, 29 VILL. L. REV. 1449 (1984).

4. The arbitrators were asked to indicate the court term and case number which had been decided in order to identify those situations where two or three members of the same panel had responded regarding the same case. In such situations, the study sought to analyze the composition of panels and its impact, if any, on case decisions.

II. DAMAGES

Each participating attorney was asked to indicate the total amount of the award and the respective amounts of special damages, delay damages and punitive damages in his or her case. As expected, the amount of the award and its various components differed according to the type of case.

Punitive damages were awarded in only 4 of the cases: 3 of these involved motor vehicle accidents. The total number of motor vehicle accident cases in the study was 98. Consequently, punitive damages were only awarded in 3% of the motor vehicle accident cases in the sample group. The amounts of punitive damages awarded in these cases, however, constituted a significant portion of the total award in each case. In the first case, the award of punitive damages was \$3,000 of a \$7,838 total award. In the second case, the award of punitive damages was \$1,755 of a \$3,065 total award. In the third case, punitive damages constituted \$2,000 of a \$2,592 award. Punitive damages, therefore, comprised between 39% and 78% of the total award, in those motor vehicle accident cases in which they appeared.

The fourth and last case in which punitive damages were awarded was a contract dispute in which punitive damages constituted \$3,000 of a total award of \$13,000, or 23% of the award. The total number of contract cases in the study was 41. Therefore, punitive damages were awarded in only 2.4% of the contract cases.

The findings on special damages were relatively unremarkable, and few patterns emerged. An average of the amounts of special damages according to case types, however, produced the following results:

<u>Case type</u>	<u>Average amount of damages in dollars</u>
Contracts	\$ 4,798
Real Estate	\$10,714
Motor Vehicle	\$ 5,254
Intentional Tort	\$ 3,024
Other Personal Injury	\$ 2,186

Note that the highest amounts of special damages were awarded in real estate cases and the lowest in personal injury cases other than motor vehicle accidents.

Delay damages only appeared in the three categories of tort

cases: motor vehicle, other personal injury and intentional torts.⁵ The average amounts of delay damages awarded were \$434 in motor vehicle cases, \$417 in intentional tort cases, and \$119 in other personal injury cases. The three highest awards of delay damages, \$3,167, \$3,000 and \$2,150, respectively, were granted in motor vehicle accident cases. Delay damages were awarded in 73 of the 127 tort cases, or 57% of the tort cases.

III. THE PANELISTS

The study also focused on the composition of the arbitration panels. In the arbitration system in the United States District Court for the Eastern District of Pennsylvania, the panels consist of one neutral, one plaintiff-oriented, and one defendant-oriented arbitrator.⁶ In the Philadelphia County Court of Common Pleas' arbitration system, however, panel members are randomly selected from a pool of arbitrators who have fulfilled the court's criteria, without reference to their practices or preferences.⁷ The study sought to determine the effects of this random selection process. Are the resulting panels composed of plaintiff-oriented attorneys, defendant-oriented attorneys, or a blend of the two? Also, how, if at all, does the random selection process affect the decisionmaking process and the resulting decisions?

5. PA. R. CIV. P. 238(a) (1983). This rule, which authorizes an award of delay damages, provides:

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1836, P.L. 715, as amended, [42 PA. CONS. STAT. ANN. §§ 7361-7362 (Purdon 1982)], or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, [PA. STAT. ANN. tit. 40, §§ 1301.101-.1006 (Purdon Supp. 1984)] shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

Id.

6. See Michael E. Kunz, *Arbitration: An Alternative for the Resolution of Disputes in the Federal Courts*, at 8 (unpublished manuscript).

7. See Doty, *supra* note 3, at 1458. To be included in the list of court-approved arbitrators, an individual must have been a member of the bar for at least one year, have his principal office in Philadelphia, have tried at least one civil case in Pennsylvania and have attended the court-sponsored arbitration seminar. PHILA. C.P. CT. R. 180, Rule II (1983), reprinted in R. RUBENS, *supra* note 1, at 89 (Supp 1984). Chairpersons are required to have practiced law for three years. *Id.*

Consequently, the participants were asked whether their practices were plaintiff-oriented, defendant-oriented, or neither (neutral).

Of the 275 responses to the question, 92 panelists (33%) described themselves as having a plaintiff-oriented practice, 80 (29%) as defendant-oriented and 103 (38%) as neutral. Thus, the largest group of arbitrators who participated in the survey described their practices as neutral. The second largest group were plaintiff-oriented practitioners, and the smallest group were the arbitrators with defendant-oriented practices. Since the Administration of the Arbitration Center required that participation in the survey be totally voluntary, there were many instances in which only one or two of the three arbitrators on a panel chose to return questionnaires. There were 32 cases, however, in which all three of the arbitrators on the panel responded. Of these 96 arbitrators, 33 responded (34%) that their practices were plaintiff-oriented, 28 responded (30%) that they were defendant-oriented and the remaining 35 responded (36%) that they were neutral.

We sought to determine whether panelists whose practices were of a particular type (e.g., plaintiff-oriented) would be likely to have biases that would affect their arbitration decisions. Consequently, the survey results were separated into three categories according to the composition of panel. The first category was a plaintiff-dominated panel. These panels consisted of either three plaintiff-oriented arbitrators, or two plaintiff-oriented arbitrators and a third arbitrator who was either defendant-oriented or neutral. This type of panel occurred 28% of the time (9 times).

The second category was a defendant-dominated panel. This panel consisted of either three defendant-oriented arbitrators, or two defendant-oriented arbitrators and a third arbitrator who was either plaintiff-oriented or neutral. This panel occurred 22% of the time (7 times).

The third category was a neutral or neutrally-dominated panel. This panel occurred 16 times or 50% of the time. A neutrally-dominated panel consisted of either three neutral arbitrators, or two neutral arbitrators and a third arbitrator who was either plaintiff-oriented or defendant-oriented. A subcategory of this third category was the true neutral combination of arbitrators (one plaintiff-oriented, one defendant-oriented and one neutral). This type of panel occurred 19% of the time (6 times).

In summary, a "plaintiff's panel" occurred 28% of the time, a "defendant's panel" occurred 22% of the time and a "neutral or neutrally-dominated panel" occurred 50% of the time. It would appear

by these numbers alone that the random selection process yields a truly fair and random distribution of panels.

We also analyzed the data with an eye to determining to what degree and in which direction an arbitrator's disagreement with the result in any case might have been influenced by the nature of his or her own civil law practice. First, we measured the degree of disagreement. Among the 277 responses to the question on this topic, 56 (20%) responded that they would have granted a higher award, 35 (13%) responded that they favored a lower award, and 186 (67%) responded that the award and decision would have been the same had they decided the case alone. Thus, when arbitrators were viewed in the aggregate, without reference to their types of practice, 67% were satisfied with the amount of the award.

Then, we sought to determine the extent to which the arbitrator's type of practice was related to his or her opinion as to the propriety of the amount of the award. For example, we considered whether an attorney with a plaintiff-oriented practice was more likely to be at odds with the decision because the award was, in his or her opinion, too low. In the 32 cases where all three panel members responded, 33 arbitrators were identified as plaintiff-oriented, 28 were defendant-oriented, and 35 were neutral. Plaintiff-oriented panelists voted for higher awards 21% of the time (7 occasions) and agreed with the result 64% of the time (21 occasions).

Defendant-oriented panelists voted for lower awards on 10 occasions or 36% of the time, and for higher awards on two occasions or 7% of the time. Defendant-oriented arbitrators agreed with the award on 16 occasions or 57% of the time.

Neutral panelists voted for a lower award on 3 occasions or 9% of the time, and for a higher award on 5 occasions or 14% of the time. Neutral arbitrators agreed with the award on 27 occasions or 77% of the time. The great majority of arbitrators, whether taken in the aggregate or categorized by type of practice, agreed with the amount of the award in the case which they decided. In the aggregate, 67% of the arbitrators agreed with the award: 64% of the plaintiff-oriented arbitrators, 57% of the defendant-oriented arbitrators and 77% of the neutral arbitrators were satisfied with the award. Interestingly, it should also be noted that plaintiff-oriented arbitrators voted for lower awards 15% of the time and that defendant-oriented arbitrators voted for higher awards 7% of the time.

IV. THE WITNESSES

Since arbitration hearings are typically conducted by presenting

witnesses who give oral testimony, the questionnaire included an item regarding the effect, if any, that witness credibility had on the arbitrator's decision. The question "To which of the following degrees did witness credibility play a part in the decision?" had four possible answers: not at all, less than half, more than half, or virtually all. Of 293 responses, 60 (20%) answered "not at all," 46 (16%) answered "less than half;" 90 (31%) answered "more than half;" and 95 (32%) answered "virtually all." Two respondents (1%) did not answer the question. Thus, in the opinion of 63% of the arbitrators, witness credibility was the most significant factor in the decision.

V. COUNSEL FOR THE PARTIES

Competent presentation of a case requires that counsel for the respective parties have a thorough grasp of the issues in order to be more efficient and effective in examining the witnesses. This is particularly important since the arbitrators normally receive the file shortly before the arbitration hearing, and may not be able to familiarize themselves with the facts and issues of the case. Consequently, the study asked the arbitrators two questions regarding their perceptions of the respective litigating attorneys:

1. To what degree was plaintiff's counsel prepared?
2. To what degree was defendant's counsel prepared?

For either question, the choices of answers were: poor, satisfactory, good or superior. The results of 54 responses to the question regarding the level of preparedness of plaintiff's counsel were the following: 5 rated plaintiff's counsel as poor (9%), 21 as satisfactory (39%), 24 as good (45%) and 4 as superior (7%).

Of 54 responses to the question regarding the preparedness of defense counsel, 2 responses (3.7%) rated the preparation as poor, 25 (46.2%) as satisfactory, 24 (44.4%) as good and 1 (1.8%) as superior. It is encouraging that 91.7% of the litigating attorneys were considered to be at least satisfactorily prepared for the case. It is unfortunate, however, that only 4.4% were considered prepared to a superior degree.

VI. THE COMMENTS

In addition to the specific themes on the questionnaire, we included a section marked "Comments" and space for any respondent to record any reaction that he or she might have to either the survey or to the arbitration system. Of the 293 questionnaires received, 66 contained comments. The comments primarily contained opinions as

to the quality, efficiency and effectiveness of the new arbitration system, comparisons between the new and old arbitration systems, and observations on the litigating attorneys involved.

Forty-nine of the sixty-six comments contained positive responses regarding the overall quality of the present arbitration system. Three comments described the system as "good," two as "good and getting better," and one as "improving." Two other comments described the system as "improving" and "smoother."

In terms of the arbitration system's operation, four respondents commented that it "works," four that it "works well," and two that it is "great." In addition, sixteen comments specifically used the word "excellent" in describing the system.

Four comments specifically addressed the fairness of the system. One said that it was "fair," one that it was "basically fair and equitable," one that it was "fair and efficient," and one that it was "fair, efficient and fast."

Another group of participants commented on the relationship between the arbitration system and the courts. Six comments recognized that the arbitration system reduced the civil court backlog. Two respondents commented on the efficiency of the system, and one called it a system which "provided a higher quality of justice."

Nine respondents commented on the arbitrators and counsel involved in the case. Some respondents expressed concern that the arbitrators should have prior trial and/or arbitration experience and a background in the area of law with which the case dealt. Two comments expressed opinions that counsel were unprepared. (However, as indicated earlier, the vast majority of respondents (91.7%) described the litigating attorneys as at least satisfactorily prepared).

Lastly, five comments criticized the arbitration system itself. Some respondents criticized the requirement that appellants pay a fee in order to appeal. In other cases, arbitrators were blamed for making compromise decisions rather than adjudicating a case on its merits. In the cases where compromise decisions were made, the responses indicated that they were due to personal bias or were made in order to discourage appeals.

VII. CONCLUSION

The survey has shown that, despite the myths that arbitration panels are imbalanced and produce inappropriate and unfair results, the present reality in the Philadelphia experience can be summarized as follows:

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- 1) The composition of panels is fair and equally distributed.
- 2) The overwhelming majority of panelists, whether they are plaintiff-oriented or defendant-oriented, agree with the decision and the amount awarded.
- 3) Plaintiff-oriented or defendant-oriented panels still yield statistically fair results.
- 4) The level of experience of arbitrators is high.
- 5) The arbitration system is perceived positively by the members of the bar who serve as arbitrators.
- 6) Witness credibility plays a substantial role in the decisionmaking process of most arbitration cases.
- 7) The overwhelming majority of counsel appearing at arbitration hearings are viewed by the arbitrators as at least adequately prepared.

